TO ACT OR NOT TO ACT: VEXING ISSUES FACING TRUSTEES*

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I. THE REMOVAL, REPLACEMENT AND APPOINTMENT OF TRUSTEES AND EXECUTORS

Introduction

As professional estate planners, solicitors in this area are aware of the obvious importance and necessity of the proper choice for trustees under an inter vivos trust or for executors and trustees appointed under a will. Despite the critical significance of the role of trustees and executors, frequently little practical consideration is given to the mechanism by which trustees are appointed, removed or replaced. The failure to identify and deal at the outset with the practical considerations respecting the removal or replacement of a trustee can lead to unnecessary and expensive difficulties in the future.

This section will deal with some of the more practical matters pertaining to the removal, replacement and appointment of trustees. To this end, this part is divided into two sections. Section “A” will deal with issues pertaining to the removal, replacement and appointment of trustees in situations that do not require the intervention of the Court. Section “B” will deal with applications to the Court to permit trustees and personal representatives to resign, as well as contested applications to remove, replace or appoint executors and trustees. The two Sections are inter-related in that if the trust or will document does not adequately deal with the manner in which executors or trustees may be removed, resort to the Court by way of application will be necessary. Additionally, regardless of the terms of the trust or will document, it may be necessary in some instances for the trustees or beneficiaries to bring an application to remove a trustee. All applications to the Court, whether on consent or otherwise, will be the subject of Section “B”.

For the purposes of this Section, unless specified otherwise, all references to a “trustee” will include references to trustees under inter vivos or testamentary trusts as well as executors under a will. The use of the word “trust” will also be taken to refer to either a testamentary or inter vivos trusts unless the context suggests otherwise.

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Section “A”: Non-Judicial Removal, Replacement and Appointment of Trustees

For reasons of age, health, job commitments or a myriad of other reasons a trustee may desire to retire from office. The consequences of such a retirement on the continued management of the trust or in other areas (such as possible trust residency and income tax considerations) must be dealt with. In other cases it may be necessary to replace trustees who have died. Future events may make the addition of trustees desirable, for example, so as to provide for continuity of trustees over time if the incumbents, though not incapable, are of advanced age. In the case of mental incompetence, the removal and possible replacement of the trustee must be contended with. Legal or situational incapacity, such as the bankruptcy of a trustee or the trustee’s departure to a foreign jurisdiction may also require remedial action.

Many of the above situations are dealt with, to varying degrees of ease and suitability, by means of common law and statutory remedies. The prudent solicitor, however, will realize that over-reliance upon common law or statutory assistance can be misguided. The Trustee Act\(^3\) (the “Act”) is the basic statute which outlines the rights and obligations surrounding the office of trustee or executor and which provides a framework for the removal, replacement and addition of trustees. Depending on whether one is acting as a trustee, either under a will or an inter vivos trust, or as an executor, different sections of the Act come into play to provide varying degrees of assistance.

**Retirement and Replacement of Trustees**

It is not uncommon, especially during a long-term administration that a trustee will desire to retire from office. When this relatively simple situation occurs, unless the instrument creating the trust provides a mechanism to assist, sometimes cumbersome statutory paths must be followed. Additionally, although a mechanism may be in place, the instrument creating the trust may deal with some, but not all, possible future contingencies. In these cases, the Act must again be relied upon.

Before commencing a review of those sections of the Act which deal specifically with the retirement or replacement of trustees, attention should be given to the following provisions of the Act:

67. The powers, rights and immunities conferred by this Act are in addition to those conferred by the instrument creating the trust, and have effect subject to the terms thereof.

68. Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.

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\(^3\) R.S.O. 1990, C. T.37
It is evident that the Act contemplates that the provisions of the Act are in addition to those terms that may be specifically set out in the will or trust document. As a result, the trust document or will may oust the provisions of the Act, or conversely may supplement them. The latitude that the Act, gives to estate planners is significant. It is therefore important for solicitors to consider drafting provisions in a will or trust that deal with the possible future requirements for the removal, replacement or addition of a trustee.

The provisions of the *Trustee Act* specifically applicable to the retirement of trustees are the following:

**RETIREDMENT OF TRUSTEES**

2(1) Where there are more than two trustees, if one of them by deed declares a desire to be discharged from the trust, and if the co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee who desires to be discharged shall be deemed to have retired from the trust, and is, by the deed, discharged therefrom under this Act without any new trustee being appointed.

2(2) This section does not apply to executors or administrators.

**APPOINTMENT OF NEW TRUSTEES**

3(1) Where a trustee dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee, or refuses or is unfit to act therein, or is incapable of acting therein, or has been convicted of an indictable offence or is bankrupt or insolvent, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing, appoint another person or persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable.

3(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole
trustee, or where there were two or more trustees, of the last surviving or continuing trustee, are or is capable of exercising or performing any power or trust that was given to or capable of being exercised by the sole or last surviving trustee.

Other relevant sections are 4.6, 7, 8, 9 and 46 of the *Trustee Act* and they are annexed to this paper.

If a trust agreement is silent with respect to the retirement of trustees, subsection 2(1) of the Act provides a non-judicial retirement procedure. The following points should be noted with respect to section 2.4

- **Section 2(1) requires a deed.** This is to be contrasted to other provisions of the *Trustee Act* that deal with replacement of trustees by instrument. Instrument is defined in s. 1 of the *Trustee Act* to include “a deed, a will and a written document.”

- **Section 2 is only relevant where there are three or more trustees.** (Where there are fewer than three, one must resort to s. 3 discussed *infra.*) In addition, one of the trustees must “by deed declare a desire to be discharged from the trust” and the other co-trustees and any other person empowered to appoint trustees must consent by deed to the retirement.

- **It is not necessary to appoint a new trustee upon the retirement of a trustee under s. 2.**

- **Executors and administrators are specifically excepted from the operation of s. 2 by virtue of s. 2(2).** However, it may be that where a person is appointed as both executor and trustee he or she may retire as a trustee pursuant to s. 2 or may be replaced as a trustee under s. 2.” 5

“In the case of McLean, Re,” the court determined that one remains an executor until effective resignation or court approval. The trustee, who was an executor

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4 See Widdifield (2002 as updated) extracted from the chapter written by one of the authors entitled Resignation Removal and Appointment of Trustees page 15.2.

5 English courts have held that the statutory power to appoint trustees extends to the appointment of trustees in place of executors and administrators once they have administered the estate as they then become trustees. See Underhill and Hayton, Law Relating to Trusts and Trustees, 15th ed. (1995) p. 733, for a discussion of s. 36 of the English Act in this respect and p. 739 for a discussion of s. 41 of that Act on this matter).

6 (1982), 37 O.R. (2d) 164 (Ont. H.C.)
under the will and had discharged his executor’s duties, resigned by deed pursuant to s. 2(1) “as trustee only” with the consent of his co-trustees. This happened after the executors had completed the main duties as executors, having established the trusts created by the will and having transferred the net residue of the estate to the beneficiaries entitled thereto. Several years later, it became necessary to apply to court to officially remove the retired trustee as executor and confirm his resignation as a trustee. In the Re Heintzman case, the court found the destination between executor and trustee was, chronological and that once the trusts were established the executor’s position was finished. While the later case of Re McLean confirms the fact that once one is an executor, one retains that office, the Heintzman decision is helpful in establishing when the trustee role commences.”

If the criteria in section 2 of the Act are met, that section will provide a simple means by which a trustee may resign. If section 2 is not applicable, consideration must be given to the applicability of section 3.

One of the restrictions on the use of section 2 is that fact that by virtue of subsection 2(2), section 2 does not apply to executors or administrators under a will. Unfortunately, the application of s. 3 to executors and administrators under a will is not as clear. It has been noted that there appears to be a “...conviction among estates practitioners that subsection 3(1) does not apply to personal representatives.” There are persuasive arguments, however, that s. 3(1) should apply to executors as well as to trustees. It is noted that the definition of “trustee” in the Act extends to personal representatives. The term “personal representative” means an executor, administrator and an administrator with the will annexed. Furthermore, it is pointed out by M. C. Cullity Q.C. that a provision which expressly excluded the application of s. 3 to executors and administrators was repealed some time ago. Legislative amendment or clear direction from the Courts could eliminate this uncertainty.

In addition to applying only to trustees and not to personal representatives, subsection 2(1) of the Act is relevant only when there are three or more trustees. As a result, if one of only two co-trustees wishes to resign, this section cannot be relied upon and recourse must be had to section 3.

Section 3 of the Act can be of assistance if its specific criteria are met. While it is not clearly articulated, the wording of section 3(1) implies that the remaining trustees can accept the resignation of a trustee as incidental to their power to replace a retiring trustee and that the resigning trustee is discharged. Subject to subsection 6(c) which provides that, except where there was originally only one trustee appointed a

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7  (1981) 9 ETR 12 (Ont. H.C.)
8  M. C. Cullity, Q.C., page 9, of a paper entitled Executors presented at the Canadian Bar Association 1994 Institute of Continuing Legal Education programme “Estates: Are You Now or Have You Ever Been a Fiduciary? A Look at the Various Forms of Fiduciary Relationships and Their Effect”.
9  Ibid., p. 9
trustee shall not be discharged under section 3 unless there is a trust company and at least two individuals appointed.

The wording of subsection 3(1) is not clear with respect to whether a sole trustee or both of two trustees can replace the individuals, as section 3(1) seems to require that there be continuing trustees.

However, Tim Youdan has suggested the following possible procedure using a combination of s. 3(1) and 2(1):

Assume A and B are trustees and wish to be replaced by C and D. The steps would be as follows:

1. B replaces A with C and D (s. 3(1))
2. B resigns and leaves C and D as continuing trustees (s. 2(1))

In the case of trustees, as distinguished from executors and administrators, subsection 3(1) allows a trustee to be replaced by an instrument in writing if such trustee:

- has died;
- remains out of Ontario for more than twelve months;
- desires to be discharged from all or any of his or her trusts or powers;
- refuses or is unfit to act;
- is incapable of acting;
- has been convicted of an indictable offence; or
- is bankrupt or insolvent.

It is clear that where some of these grounds are clear-cut (e.g., a, c, f and g), others are more problematic. It is interesting to note that subsection 3(1) does not specify who has the authority to decide on matters of a trustee’s capability to act. Arguably, the remaining trustees could jointly decide to oust a trustee by declaring him or her incapable of acting and executing an instrument removing such trustee and replacing him. Such an action, which would appear to be contrary to the intent or spirit of the subsection, would likely result in an application to the Court by the aggrieved trustee for relief.

The *Trustee Act* does not address whether replacement trustees must be resident in Ontario, but a court for example would likely be reluctant to appoint a non-resident trustee if there is not at least one resident trustee to ensure that the Court has at least one trustee resident in Ontario to whom the Court could look to provide the rights of beneficiaries.
Removal

As noted above, Section 3 makes provision for the removal of a trustee without court intervention but it would appear that this cannot be done in isolation and must be accompanied by the appointment of a trustee to replace the one removed.

It would also appear that the provisions of s. 6(c) are applicable in the removal situation as well in that the removed trustee is not discharged where there is more than one original trustee unless at least two individuals or one trust company are in office after the removal.

Again as noted above, if there is doubt or disagreement as to whether the trustee proposed to be removed fits within Section 3, a court application may be necessary.

Replacement\(^\text{10}\)

Again Section 3 is the operative section. The issue can arise on the retirement, removal or death of a trustee or executor where there are surviving trustees or executors there may be no need for replacement.

However, there may be situations where the trust document contains provisions for replacement or there may be statutory requirement to replace. For example, where a surviving trustee has died without a replacement executor a replacement will be appointed.

Replacements can be appointed by the court in certain cases by written authority of the other trustees or the retiring trustee.

It has been held that a sole or sole surviving executor may retire and appoint his/her successor.\(^\text{11}\)

Additionally, Section 4 of the Trustee Act provides that the sole or sole surviving trustee may appoint a replacement by will, subject to express terms in the will. By virtue of ss. 1(k) and (q) of the Trustee Act, the term “trustee” includes “executor” and thus it appears an executor may appoint his or her replacement by will and that person may be someone other than his or her own executor.

However, as noted in Widdifield, the rule does not apply in the following circumstances:

\(^{10}\) Much of this section is extracted from Widdifield chapter 15 page 15-17 & 15-18.
\(^{11}\) McLachlin v. Usborn (1884) 7 or 297 (Ont. C.H.); Thompson v. Jenkins (1928) 63 OLR 33 (Ont. S.C.). but see National Trust Co. v McLaughlin (1925) 57 OR 319 (Ont. H.C.) to the contrary; and see Bruce (twp) v. Thornburn (1987)26 ETR 96 (Ont. H.C.)
where the deceased executor died before taking out probate: *Estates Act*, s. 25; *Sharon, Re* \(^{12}\)

where the personal representative of the deceased executor is an administrator: *Ingalls v. Reid* (1865), 15 U.C.C.P, 490 (U.C.C.P.);

where the first deceased’s personal representative was an administrator, whether such administrator died testate or intestate; *Ingalls v. Reid*, \(^{13}\); and

where the deceased executor was appointed by the court: s. 37(5) of the *Trustee Act*.

Reference should also be made to Section 3(2) and Section 46(2) which provides for who is to act until such time as new trustees or personal representatives are appointed.

**Vesting Instruments**

In drafting instruments (which include deeds) for the retirement or appointment of trustees it is important to consider the provisions of Section 9 of the *Trustee Act*. This section is often ignored but is very important. That section provides as follows:

**(1) Vesting of trust property in new or continuing trustees without conveyance** - Where an instrument, executed after the 1\(^{st}\) day of July, 1886, by which a new trustee is appointed to perform any trust, contains a declaration by the appointer to the effect that any estate or interest in any land subject to the trust, or in any personal estate so subject shall vest in the person or persons who, by virtue of such instrument, shall become and be the trustee or trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in the trustee, or in the trustees as joint tenants, and for the purposes of the trust, that estate, interest or right.

**(2) On retirement of a trustee** - Where such an instrument, by which a retiring trustee is discharged under this Act, contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that

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\(^{12}\) (1979) S ETR 48 (Sask. Surr. Ct.).

\(^{13}\) (1865) ISUCCP 490 (UCCP).
declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates.

(3) **Application to mortgages, stocks, shares, etc.** - This section does not extend land conveyed by way of mortgage for securing money subject to the trust, or to any share stock, annuity, or property transferable only in books kept by a company or other body, or in any manner prescribed by or under an Act of the Parliament of Canada or of the Legislature.

(4) **Interpretation for registration purposes** - For the purpose of registration the persons making the declaration shall be deemed the conveying parties, and the conveyance shall be deemed to be made by them under a power conferred by this Act.

Note should be taken of the following:

1. If the appointer makes a declaration to vest an interest, estate or right in land or personally in the person or persons who become or who are the trustees, then that declaration operates to vest in the trustee or trustees as joint tenants that estate, interest or right.

2. A similar provision operates on a discharge of a retiring trustee but in this case the declaration is to be “mentioned” by the retiring and the continuing trustee and by any person empowered to appoint trustees.

**Practical Considerations**

It is clear that while the Trustee Act provides some assistance in outlining a process for the removal, replacement or appointment of trustees, it is better that such situations be addressed in a will or trust instrument.

A draftsperson should consider the relevant possible contingencies when drafting terms in a trust or will regarding the removal and replacement of trustees. The following factors should be kept in mind:

(a) the minimum and maximum number of trustees required at any given time;

(b) the minimum number of trustees required to act or to decide such questions;
(c) whether the settlor wishes to designate himself or anyone else as having a veto power over decisions regarding the removal, replacement or addition of trustees;

(d) the manner and formalities involved to achieve the addition, replacement or removal of a trustee; and

(e) whether a person or group of persons should be named to appoint trustees. Possibilities could include the settlor of an inter vivos trust, the remaining trustees or adult beneficiaries.

It may be prudent that a trustee be given authority in the trust to resign or to provide for the removal of a trustee by instrument or deed in writing. This alleviates the potential problem that could be caused by having to call a meeting of trustees to effect one trustee’s retirement or removal. Failure to include such a term will necessitate reliance on the *Trustee Act*, which may not be suitably convenient in all circumstances.

Consideration should be given to the amount and manner of notice required, if any, and the persons to whom the notice must be given. Common provisions provide that if the continuing trustees agree in writing, they may waive a specific period of notice. The complexity and size of the trust should be taken into consideration when determining the appropriate period of notice.

The trust document should also specify upon whom a notice of retirement or removal is to be served. Ordinarily service would be on all other continuing or remaining trustees. The manner in which such notice is to be served should be considered. Personal service may not be practical in all cases. For example, in the case where a trustee cannot be found or is deliberately avoiding service in order to obstruct the administration of the trust, provision for service by registered mail to the last known address would be convenient. Allowing for delivery by registered mail will also reduce the chance that the validity of a resignation may be challenged on the basis of a failure to effect proper or personal service. If service of the notice of resignation or removal is to be made on all beneficiaries of the trust, it may be prudent to specify that only adult and competent beneficiaries need be served, with all others effectively served if notice is given to the remaining trustees.

The effective date of the resignation or removal should also be specified. Choices include the date of execution of the notice, the date of personal delivery of notice to the recipients, the date of mailing a copy of the notice to the recipients, the date of acknowledgment by the recipients of receipt of notice, or any number of other possibilities. In some situations, such as where questions arise as to which trustees have voting rights with respect to shares in a company, the effective date of resignation or removal may be critical. Ambiguity should be avoided. The selection of one manner or another will depend on the degree of control and formality considered advisable.

Another reason that the effective date of the resignation or removal may be of significance is that of determining the date upon which the departing trustee is no
longer responsible for the acts of the remaining trustees. An estate solicitor should ensure that this date can be determined with accuracy, so as to avoid potential disputes in the future. The retiring trustee may wish to consider obtaining a release and indemnity from the remaining trustees for any actions taken while he or she was a trustee and for future acts for the remaining trustees. In addition, it would be prudent to request a court passing of accounts as of the date or retirement or removal so as to conclusively exonerate the departing trustee from past and future liability.

Conclusion

Failure to address, in advance, the alternative scenarios that may arise with respect to continuity of trustees may cause the client undue difficulty. Estate planners know that, given the nature of the role of trustee, the appropriate selection of trustees can be critical to the success of the trust. It is equally essential, therefore, to ensure that the careful planning that goes into the process of selecting a trustee is not undone by unavoidable events such as the death, retirement or incapacity of the selected trustee. Ensuring that the trust or will itself provides for the most orderly and reasonable manner of replacement and continuity of trustees is a task that deserves the attention of the prudent estate solicitor. Otherwise, one must rely on the Trustee Act, with all of its various limitations.

II. EXERCISE OF DISCRETION

We are all accustomed to using words such as “absolute”, “uncontrolled”, and “unfettered” in describing the discretion given to trustees when attempting to give effect to the desire of a settlor or testator to provide trustees of trusts with the broadest possible powers. And many of us continue to have to address with our clients the common misconception that with these words, trustees are granted unlimited discretionary powers and total freedom of choice. In fact, it is clear from the case law that these and other similar types of adjectives will not protect trustees from scrutiny from the courts of their actions and from the obligation on trustees to act in the best interests of the beneficiaries of the trust and in accordance with their fiduciary obligations.

In this section of the paper, we will review briefly some recent decisions relating to judicial control of the exercise of discretion by trustees. What is of interest is the extent to which a court should or will question, interfere with or override decisions taken by trustees who have been given very broad authority and to review the tension between the rights of the testator or settlor to grant authority to trustees on the one hand and the principle of law that the court’s ultimate jurisdiction cannot be completely denied by a settlor or testator.

The starting point in these discussions is the case of Gisborne v. Gisbourne (1877)2App.Cas.300 (HL) where the trustees were given discretion to distribute income of a trust for the maintenance and comfort of the spouse of the testator. The court held that it would not express a view as to the decision taken by the trustees in the absence of mala fides. The question for subsequent courts has been to define the meaning and scope of ‘mala fides’
Some of the factors cited by the courts over the years in determining whether trustees have acted mala fides include the following (and often the courts will not use the term mala fides but will use words such as “wrongful” “improper” or “unfair”):

1. improper purpose
2. failure to consider
3. absence of reasons
4. irrelevant considerations
5. unreasonable decisions
6. lack of prudence
7. the even hand principle

In recent decisions the courts have focused more on the purpose of the trust gleaning this either from the words in the trust or from the circumstances surrounding the creation of the trust.

In the case of *Schipper v. Guaranty Trust Co of Canada* (1989) 33 ETR 149 (OCA) the trustees were given discretion to distribute capital of the trust for the “general welfare, benefit, comfort and enjoyment” of the beneficiary. One of the trustees refused to exercise the discretion as he was concerned about the maintaining an even hand between the life tenant and the remaindemen. The court indicated that it would interfere with the exercise of the discretion of the trustees in cases where the trustees exercised their discretion in a manner inconsistent with the purpose of the trust. In this case the court found that the primary objective of the testator was to provide for his wife, the life tenant.

In the case of *Paterson v. Paterson estate* (1996) 13 ETR (2d) 86 (Man. Ct Q.B.) the court refused to interfere with the decision of a sole trustee who was also a beneficiary and who refused to exercise discretion to distribute income to the other beneficiary on the basis that the other beneficiary had the financial ability to look after herself.

In *Re Blow* 1977 82 DLR (3d)721 (Ont HCJ) the court outlined the circumstances that would justify judicial interference:

1. mala fides exercise of discretion
2. failure to exercise such discretion
3. deadlock between trustees as to the exercise of such discretion

With respect to the second principle, the court held that the narrow supervisory jurisdiction set out in *Gisborne v. Gisborne* where the court will not interfere in the absence of mala fides, should not apply when the trustees have failed to exercise such discretion. And with respect to the jurisdiction to interfere on the third ground, it was held that the court should only interfere if failure to interfere would be prejudicial to the interests of the beneficiaries.

The courts are even loath to interfere where the sole trustee is also the sole beneficiary as evidenced in the case of *Saunders v. Halom* (1986) 25 ETR 186 (BCCA). In that case the testator had appointed his wife as sole trustee and sole beneficiary of the annual net income of the trust. The wife-trustee was also given the right to encroach on the capital...
for her benefit. In fact the wife-trustee exercised her discretion to distribute all of the capital in her favour. The remaindermen (nephews of the deceased) applied to the court for an order that the wife account for the capital encroachments and for her removal as a trustee. The court held that it was reluctant to interfere with the discretion exercised by a trustee when the trustee and beneficiary were the same person and especially if intervention would be inconsistent with the intention of the testator, drawing on such intention from the language of the will.

The case of Fox v. Fox estate has received a great deal of attention (1996) 10 ETR (2d) 229 (Ont CA). In that case, a testator had given his wife a 75% interest in the residue of his estate and appointed her as the sole executrix and trustee. His son was given a life interest in the remaining 25%. If the son survived his mother, on her death he was to receive the residue. The widow was given broad powers of encroachment on the capital for the benefit of the children of the son. The executrix and trustee exercised that power and distributed all of the capital of the residue of the estate to her grandchildren. As a result, the son was deprived of any interest in the estate.

At trial Haley J. determined that the trustee had exercised the power to encroach properly notwithstanding the clear and unambiguous finding of fact that her motivation for exercising the power to encroach on capital was the disapproval of the son’s marriage.

The son’s appeal from that decision was allowed on the grounds that the exercise of discretion to encroach on capital could not be supported because it was motivated by disapproval of the marriage which was an extraneous consideration and demonstrated mala fides on the part of the mother.

While the Fox case may have raised the possibility that the courts would adopt a more aggressive role in interfering with the exercise of discretion of trustees several post-Fox decisions demonstrate that the case has not been broadly applied.

In the case of Martin v. Banting (2001) 37 ETR (2d) 270 (Ont SCJ) two inter vivos trusts were established as part of an estate freeze. The trustees exercised their discretion to distribute the trust’s assets and wind up the trusts. The plaintiff beneficiary was not contesting the right of the trustees to encroach on the capital but argued that the portion of the capital received by him should have been different. There was evidence that the trustees held the view that the plaintiff had a bad attitude, was ungrateful, lacked industry and loyalty to the family and that his conduct lacked integrity. There was also evidence that the plaintiff had already received substantial assets from the family. The court reviewed the trust instruments and found no limits on the discretion granted to the trustees and refused to find that the trustees acted with mala fides or for reasons contrary to public policy and that in all the circumstances the court could not say that the factors considered by the trustees were irrelevant.

In the case of Edell v. Sitzer (2001) 55 OR (3d) 198 (Ont SCJ) Cullity J. provided a detailed commentary on the grounds on which a court will interfere with the decision taken by a trustee. The facts of the case are complicated but briefly put, involved the creation of two trusts as part of an estate freeze of a family business created by two
brothers. One of the brothers had two children, one of whom was involved in the business. Over the years the relationship between the child who was not involved in the business and her father and brother (who were both involved in the business) deteriorated notwithstanding many efforts on the part of the father to maintain the relationship. For example he was generous to the daughter and her family, supporting them financially, and even when the relationship was deteriorating, continued to try to salvage the relationship and to effect a settlement with the daughter. Finally in 1998 after concluding that there was an irreparable split in the family and it would be detrimental to the future financial viability and existence of the family business to allow the daughter and her family to have any interest in the business, the father in his capacity as a trustee exercised the power of encroachment to transfer the shares of the company held by the trust to the son.

The decision of Cullity J. is worth reading in that he provides a detailed and insightful commentary on the grounds on which a court may interfere with trustee discretion. He noted that the burden of proving that a trustee has considered irrelevant and extraneous considerations rests with the plaintiff. He then went on to note as follows:

The grounds on which the court will strike down an attempt by a trustee to exercise discretionary powers --even where, as here, the discretion is indented [to] be as unfettered as possible -- have been described the terms over the years. The old approach that limited the court’s intervention to cases of the “mala fides”: has been reformulated in the more recent cases in terms of a concept of abuse of discretionary powers by administrative bodies and officials -- including judges. Non-interference is still the general rule. The court is not to substitute an exercise of its discretion for that of the trustee; it is not exercising a parens patriae jurisdiction. In Fox Estate -- the leading case in this jurisdiction -- Galligan J.A. quoted with approval the following statements of the governing principles by Steele J. in Hunter Estate (at p. 186 E.T.R.):

Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in the Re Hastings-Bass . . . p.41 Ch., [p.203 A11 E.R.] as being applicable to the court’s review of the exercise of such power.

To sum up the proceeding observations, in our judgment where by the terms of a trust . . . a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect that he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he
would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account…

He further noted that the authorities do not attribute significance to a distinction between motives that might influence trustees and the purposes or end result intended to be achieved:

Although this decision provides some comfort in that judicial restraint has been shown in interfering with the exercise of trustees’ discretion, the foregoing comment appears to cause some uncertainty. Subjectivity once again rules the day in that an individual judge will make the subjective determination as to when extraneous motives, such as displeasure and disapproval of a beneficiary’s conduct, actually form the material basis for the discretionary decision as opposed to those cases in which those same extraneous motives may only possibly serve as the partial or complete motivation for the decision.

Is the difference between the Fox decision and the Edell v. Sitzer decision based upon perhaps nothing more than that the degree of emphasis or priority placed by the trustee on one of the several possible motivating factors in making the decision as interpreted by the judge in review of the discretionary decision?

He indicated that in a situation such as the case at hand where the father was exercising personal and business judgment, a court should be loath to characterize his conviction and concern as unwarranted or unreasonable especially in a case where such concerns might have a reasonable basis.

While the Edell v. Sitzer decision is of interest in demonstrating that the courts are still reluctant to interfere with the exercise of trustee discretion, notwithstanding the Fox case, there remains ambiguity as to the circumstances in which a court will or will not interfere. As noted in one article, a number of conclusions can be drawn from these cases:

• In drafting trusts, whether inter vivos or testamentary, consideration should be given to including a clear statement of intention as to how the absolute, unfettered discretion given to trustees is to be exercised. For example if a trust provides a life interest to a spouse with gift over to issue, the settlor/testator may wish to

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indicate that the major consideration is to ensure that the life tenant be well looked after, or maintained at a certain standard of living.

- The trust instrument should also indicate whether the independent means of the life tenant should or should not be taken into consideration by the trustees.
- If appropriate, consideration should be given to ousting the even hand rule.
- The trustees could be directed to give consideration to the incidence of tax on the estate/trust and the beneficiaries, in making decisions.
- Side memoranda have also been suggested as a means of providing guidance to trustees as to the intentions of the settlor/testator and the purposes of the trust although because such memoranda are precatory in nature, there is some question as to the extent they may be relied on by trustees.
- Finally consideration should be given to documenting the decisions of the trustees in exercising their discretion in such a way as to ensure that the reasons for such a decision took into consideration the purposes of the trust, the intentions of the settlor and the best interests of the beneficiaries as a whole.

III. THE RIGHT TO TRUST INFORMATION: A CHANGING LANDSCAPE

(A) When is there a Right to Trust Information?15

The duty of trustees to account to beneficiaries is at the heart of the trust relationship. That duty extends to the provision of information relating to the administration of the trust, what the trust property consists of, how it is invested and administered.

A number of authors have attempted to clarify the essence of a trust. For example, Professor Hayton states that “the core element of a trust, for its existence reflecting the irreducible minimum of obligation on trustees, is the right of a beneficiary to enforce the trusteeship, in default of which, the beneficial ownership remains with the Settlor.”16

In another article “The Irreducible Core Content of Trusteeship17, he observes: “Knowledge of the trust is necessary to make the trust effectual with the trustees being accountable to the beneficiaries for their stewardship of the property.” Put another way, if the beneficiaries have no rights enforceable against the trustees, there are no trusts.

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15 This section of the paper is drawn from M. Elena Hoffstein, “Beneficiaries’ rights to trust information: Commentary in light of the Privy Council case of Schmidt v. Rosewood” in The Six-Minute Estates Lawyer, presented by the Law Society of Upper Canada (February 8, 2005).
16 Professor Hayton, “Developing the Obligation Characteristic of the Trust” 2001 LQR 94.
The recent case of *Vadim Schmidt v. Rosewood Trust Limited*¹⁸ a decision of the Privy Council on appeal from the courts of the Isle of Man, is of great interest to trust practitioners in that it considers and restates the approach to be taken to the question of disclosure of information by trustees to beneficiaries

(i) **The Facts**

The facts of this case are complex and shed some light into the murky world of offshore trusts. Mr. Vitali Schmidt, a senior executive of one of the largest oil companies in Russia, was one of several settlors of two fully discretionary Isle of Man trusts, the Angora Trust and the Everest Trust. The other settlors were also senior executives of the oil company. Rosewood Trust Ltd., an Isle of Man company providing corporate and trustee services was the trustee of both settlements.

Mr. Schmidt died suddenly and intestate in Moscow in 1997. The son was a beneficiary of his father’s estate together with his mother and his paternal grandmother. Following his father’s death, his son obtained a grant of letters of representation and sought disclosure of trust documentation relating to his father’s interests under the two trusts to determine if his father, the family and the estate had received their full entitlement. He brought the proceedings as administrator of his father’s estate and in his own capacity by virtue of the discretionary interests which he and his father had under the settlements.

In 1998 he commenced proceedings alleging breach of trust and breach of fiduciary duty and obtained an *ex parte* order prohibiting the trustee from dealing with the assets of the trusts, and an order providing for extensive disclosure. On the basis of the disclosures made, further questions arose. It appears that about $105 million (US) was received by the two settlements on their creation and shortly, thereafter, and that about $14.6 million (US) had been paid to the son as administrator of his father’s estate in 1998. He believed that more was owing and sought fuller disclosure of the trusts’ accounts and information about the trust assets to address alleged deficiencies and inconsistencies in the material provided.

The fuller disclosure sought in these later proceedings was for disclosure not by way of discovery but by virtue of the discretionary interests and expectations which the son claimed he and his late father had.

The terms of the two trusts were essentially the same and both were very unclear in certain material respects. As noted by Lord Walker delivering the judgement for the Privy Council:

> It has become common for wealthy individuals … to place funds at their disposition into trusts … regulated by the law of and managed by trustees resident in territories with which the settlor has no substantial connection … these

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territories … (tax havens) … provide … confidentiality … and protection from fiscal demands, insolvency laws or laws restricting freedom of testamentary disposition.

The nature of the trusts was described by Lord Walker as being typical of offshore trusts.

The trusts and powers contained in a settlement established in such circumstances may give no reliable indication of who will in the event benefit from the settlement. Typically it will contain very wide discretions exercisable by the trustees (sometimes with the consent of the so-called protector) in favour of a widely-defined class of beneficiaries. The exercise of those discretions may depend on the settlor’s wishes as confidentially imparted to the trustees and the protector. As a further cloak against transparency, the identity of the true settlor or settlors may be concealed behind some corporate figurehead.

The trusts were fully discretionary trusts, the terms of which were essentially the same. They named one beneficiary, the Royal National Lifeboat Institute, but additional beneficiaries were added in a schedule. The names on that schedule included Mr. Schmidt and other Lukoil senior executives. The trusts further provided that on the death of a beneficiary the trustee was to hold that part of the trust fund to which the beneficiary was entitled for such persons as the deceased beneficiary notified the trustee.

Documents discovered by the son after his father’s death provided that, at least with respect to the Everest Trust, Mr. Schmidt was to receive a 30% share of the trust fund, and others were to receive 10% each. Some of these percentages had been crossed out but were still legible. All of this added to the confusion as to whether the “beneficiaries” were mere objects of discretionary power of the trustee or had fixed shares and provided further evidence that the trusts had been cobbled together.

There was also correspondence from Mr. Schmidt to the trustee expressing the wish that his shares go to his son. This too added to the confusion as, by the terms of the trust, if indeed it was a discretionary trust, Mr. Schmidt would have no fixed or defined interest.

While at the first court application Deemster Cain ordered disclosure of documents, the argument before the next judicial level, the Staff of Government Division of the High Court of Justice, was argued on the basis that Mr. Schmidt Jr. was not a trust beneficiary either as administrator of his father’s estate or directly and that he was at most a mere object of a power of appointment. As such he was not entitled to documents or information. The trustee won on this argument and the son appealed to the Privy Council.

(ii) **Principal Findings**

The Privy Council engaged in an extensive review of the law relating to disclosure of information by trustees to beneficiaries. Prior to the judgement of the Privy Council,
there was debate both at the academic level and in the courts as to whether a beneficiary’s entitlement to trust information was based on some form of proprietary right of that beneficiary to the information and only those who qualified as established beneficiaries were entitled to make such requests, or was founded on a more general principle that it is essential to ensure that trusts can be enforced against the trustees.

There has also been considerable debate within the context of the existence of a proprietary right to information as to whether the right to information is limited to documents described as “trust documents” and the nature of documents that can be described as falling within that category.

The Privy Council reviewed the case of *O’Rourke v. Darbishire*¹⁹ wherein the court found that the trustees of a trust have a duty to provide documents and that beneficiaries are entitled to be informed about matters affecting the trust and its beneficiaries. It also reviewed the case of *Re Londonderry’s Settlements*²⁰ wherein the court struggled with whether documents in dispute were trust documents. In that case the court determined that agenda of meetings, minutes of meetings, correspondence of trustees and information about the basis on which trustees exercised their discretion were not trust documents and therefore not producible but had difficulty determining what was a trust document.

The Privy Council chose not to follow those cases but found instead that no beneficiary has a proprietary or other form of absolute right to information concerning a trust and that the above cases did not support such a view. Instead the Privy Council restated the basis for disclosure as follows:

“the more principled and correct approach is to regard the right to seek disclosure of documents as one aspect of the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court’s intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of the discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection and the nature of the protection he may expect to obtain, will depend on the Court’s discretion²¹”.

Secondly, as noted in the above passage, the nature of the interest of a beneficiary is no longer sufficient to determine the right of the beneficiary to information. By this conclusion the court appears to move away from the earlier cases, which distinguish between a trust beneficiary and a mere object of a power (i.e. a beneficiary of a discretionary trust). The interest of a beneficiary is one factor to be considered by the

¹⁹ (1920) AC 581 (HL).
²⁰ (1965) 2 WLR 229 (1964) 3 All E.R. 855 CA.
²¹ Schmidt, *supra* note 31 at p.51.
courts in determining if it is appropriate to provide information to an individual. It may not be necessary for a person requesting information to be within a current class of beneficiaries or object of a power if it can be shown to be reasonable to contemplate that at some time he may be included by addition or by power of appointment.

Thirdly the courts and trustees faced with a request for information will now have to weigh all relevant factors in determining how to respond to such a request. As noted by the Privy Council:

“There are three such areas in which the court may have to form a discretionary judgement whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court:22.

Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise, which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief23.

The Privy Council decided that Mr. Schmidt Jr. as personal representative of his father’s estate, appeared to have a strong claim to disclosure of documents or information relevant to whether there may have been breaches of fiduciary duty (such as overcharging by the trustee) which, had such breaches not occurred, may have resulted in more funds being available for distribution to the estate of his father. In addition the court determined that he was also entitled to disclosure with respect to certain claims made concerning distributions made to the late Mr. Schmidt during his lifetime. In the view of the Privy Council the right of a beneficiary is not a right to trust documents or information but an equitable right incident to his beneficial interest entitling him to invoke the jurisdiction of the court to compel the trustee to make disclosure.

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22  Schmidt, supra note 31 at p.57.  
23  Schmidt, supra note 31 at p.67.
(iii) **Comment**

As noted by Professor Lionel Smith in a recent article\(^{24}\) while the *Schmidt* case is “concerned with the rights of the objects of a trustee’s fiduciary dispositive powers to have information” the case is of interest in that it restates the basis of every claim to entitlement of beneficiaries to information from trustees and also has implications for our understanding of the nature of trusts.

The decision in *Schmidt* has, for example, abrogated the need for a bright line between beneficial interests which do and those which do not carry with them the right to apply for access to documents and information. It has also broken down the distinction as to what constitutes “trust documents” which may be disclosed and other documents or information which are not required to be disclosed. Both written documents and information not in documentary form is property of the trust. All documents relating to the trust and all information held by the trustees as such are trust property and, accordingly, the possible subject of a direction for disclosure. The question in each case must be whether, in the particular circumstances of the case, the legitimate requirements of the beneficiaries to obtain access must be balanced against the competing interests and objections to disclosure of the trustees, beneficiaries, and third parties.

Professor Smith notes that while the court, in the case of *Re Londonderry’s Settlement*, struggled with what documents were “trust documents” it determined that trustees are not required to disclose information about the basis on which they exercised their discretion even if that information was in written form. The confidentiality of the exercise of discretion was held to be greater than the rights of beneficiaries to this information.

He goes on to note that following the *Schmidt* decision, a disappointed beneficiary or object of a power could seek this type of information. The corollary to this is that trustees must be prepared to provide reasons for the exercise or non-exercise of a discretion, and as a result these decisions can be reviewed.

In the context of offshore trusts, it is not uncommon for settlers to provide trustees with a confidential memorandum of wishes, which though lacking in legal force, sets out how the settlor wishes the trustees to exercise of a discretion. One wonders if post-*Schmidt* such documents are in a proper case available for scrutiny.

Another question which arises is to what extent a settlor can expressly or by implication confer or exclude a right of access to trust documents or information. Are such provisions legally effective or can access remain a matter of discretion for the court? David Steele in his article “The Beneficiary’s Right to Know”\(^{25}\) notes that while there is little law directly on point there is considerable consensus among commentators that while a trust instrument may limit the trustee’s usual duties to account and disclose, it may not eliminate these duties altogether. This is in line with the *Schmidt* decision.

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The *Schmidt* decision may find support in Ontario. In that regard it is interesting to note that in the *Re Ballard Estate* case, in considering the *Re Londonderry Settlement* case, Mr Justice Lederman suggests that the tension between trust disclosure and the need to preserve confidentiality of trustee deliberations is not static. Balancing of interests may call for a different result depending on the circumstances. In that same case in considering the *O'Rourke* decision, Mr Justice Lederman rejected the proprietary argument for determining the rights of beneficiaries to disclosure and found that the beneficiary was entitled to access the legal opinions between trustees and solicitors not because they had an ownership interest in these opinions, but because the beneficiary might have an interest in ensuring the administration of the trust was properly carried out and that interest may be compromised if the opinions were not disclosed.

What then should trustees do in light of the *Schmidt* case? The following suggestions are made:

1. Each request for information will need to be considered individually in light of the underlying principle that any right to disclosure is based on the fundamental obligation of trustees to act in the interests of the beneficiaries as a whole, and the overriding jurisdiction of the court to ensure that the terms of any trust can be enforced.

2. Trustees may need to consider whether there are any factors which might weigh against the provision of disclosure to a particular beneficiary, in particular the interests of other beneficiaries.

3. The nature of the interest of the beneficiary in the trust and the realistic expectation of benefit being conferred on that beneficiary may also be relevant.

4. Arguments based on what may or may not be trust documents will no longer be material as to the right of any given beneficiary to disclosure. Rather the nature of any given document will be one factor to be weighed in the balance to determine whether it is appropriate for particular information to be given to a particular beneficiary.

5. Trustees will need to consider whether to require that limitations be imposed on the manner in which information is disclosed or on the uses to which information disclosed can be put if this could protect trust property or the interests of other beneficiaries.

6. While Trustees still have no legal obligation to explain their reasons for the exercise of their discretion, it would be prudent for them to record their reasons in the event of litigation arising out of a failure to disclose. As noted in the earlier discussion on exercise of discretion and based on the *Edell v. Sitzer* case noted earlier, the onus is on the beneficiary to prove an abuse of the exercise of its discretion.

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27 In a recent memorandum issued by the Jersey law firm of Bedell Cristin in February 2004, the following suggestions were made.
7. While, as noted above, an attempt by settlors of trusts to completely oust the jurisdiction of the court in this area, modification of a beneficiary’s right to seek disclosure may be valid in certain circumstances.

With respect to the impact of the *Schmidt* decision on the law of trusts in general, Professor Smith notes that the “most tantalizing part of the decision is the holding that the discretionary jurisdiction [of the court] is merely one part of a wider jurisdiction to supervise trusts and to intervene where appropriate”28. He muses that “it will be interesting to see whether *Schmidt* is followed widely in the common law world and, if it is, the effect will be a change in understanding of the right of access to information by the objects of a trust and perhaps a reaffirmation of the essential historical character of the trust as an accountable stewardship of property”29.

In light of Professor Smith’s comments, it should be noted that the *Schmidt* decision has already been adverted to in at least three Canadian decisions, all taking place in British Columbia courts.30 *Cooke v. Canada Trust Company*31 was a request for leave to appeal a dispute over an *inter vivos* trust that was amended by the settlor during a period in which she may or may not have been incapacitated and it involved a demand for the production of medical reports commissioned by the corporate trustee. Justice Chambers, of the British Columbia Court of Appeal, granted leave to appeal without commenting directly on *Schmidt*, although it was the case relied upon by corporate trustee that was disputing the disclosure of the documents.

Other mentions of the *Schmidt* decision came in the cases *MacPherson v. MacPherson*32 and *Camson College Faculty Assn. v. College Pension Board of Trustees*,33 both decisions of the British Columbia Superior Court. In *Camson College*, the beneficiaries under the college pension plan applied for production of a legal opinion relied upon by the pension board of trustees in their administration of the plan. Justice Vickers of the British Columbia Supreme Court allowed the appeal, and found that *Schmidt* was not applicable in this circumstance, as there were no competing interests between the trustees and beneficiaries, as “[b]oth the Trustees and the petitioning beneficiaries have a common interest in the proper administration of the trust.” *MacPherson* was a family law dispute in which the wife applied for production of an opinion obtained by her husband’s counsel, on the basis that she was entitled to it as a beneficiary of the trust established by the court-ordered division of her husband’s pension plan. Justice

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28 Smith, supra note 37 at p.6.
29 Smith, supra note 37 at p 8.
30 While an exhaustive study of other jurisdictions has not been undertaken, it is noted that the recent New Zealand case of *Foreman et al v. Rowan Stanley Kingstone et al* [2005] W.T.L.R. 823 has applied *Schmidt*. The Court held that the beneficiaries were entitled to receive information that would enable them to ensure the accountability of the trustees, but not to receive information concerning the reasons the trustees exercised their discretions.
Humphries canvassed the *Schmidt* case, amongst others, in making the decision to order production of the opinion, commenting that “[u]nder the Rosewood Trust approach, if a beneficiary cannot obtain documents merely by asserting a claim, then a trustee should not be able to resist disclosure merely by asserting that he questions the claimant’s right to be considered a beneficiary, especially where the trust relationship was imposed upon unwilling parties. The circumstances should be looked at and the competing interests weighed.”

As of yet, the application and consideration of *Schmidt* in Canadian courts is still insufficient to fully determine what its impact will be on trust law in this country. However, the understanding articulated in *Schmidt* of what constitutes the beneficiary’s right to trust information is beginning to infiltrate into our jurisprudence and may eventually become more influential as further cases are decided.

In other jurisdictions, note should be taken of the New Zealand case of *Foreman v Kingstone*.34

In this case, the trustees of several family trusts (“the Defendants”) sought the court’s determination as to the extent to which they were required to disclose documents and information to certain discretionary beneficiaries of the trusts (‘the Plaintiffs’). The Plaintiffs sought the following documents and information:

(a) financial statements, including material excluded from estate accounts;

(b) information as to the basis upon which the trustees had made decisions to vary a trust, to partially distribute a trust fund, and to resettle the balance of assets of a trust;

(c) details as to the winding up of a trust, including the basis upon which it was wound up and the person(s) to whom the trust fund was paid;

(d) information as to the change of policy in respect of the application of the provisions of a trust document regarding distributions made to one beneficiary;

(e) copies of all communications between the trustees and their legal advisers in respect of the trusts;

(f) copies of all deeds appointing all previous and present trustees;

(g) details of all distributions of capital and/or income or settlements;

(h) information as to the amount and state of the property in the trust funds;

34 [2005] WTLR823 NZ HC This portion of the paper is quoted in its entirety from a talk given by Geoffrey Shindler at a STEP seminar held in October, 2003 entitled “Trusts, Estates and You: a contemporary trip around the world in 80 minutes”.
(i) information evidencing material transactions in respect of which the trusts had been involved;

(j) information in relation to any changes in the structure of the trusts, including the names of past and present trustees and the date(s) of changes of trustee;

(k) details of the advice given to the trustees which led them to decline to provide information and trust documents; and

(l) copies of all letters, memoranda of wishes and any other communications by the settlers of the trusts to the trustees.

The Defendants contended that:

(i) they were not obliged to furnish to the Plaintiffs with any documents or information other than the trust instruments and copies of estate accounts;

(ii) disclosure of the documents and information sought would provoke further conflict within the family; and

(iii) the settlor had desired confidentiality.

The court applied the Schmidt case and held that the beneficiaries were entitled to receive information which would enable them to ensure the accountability of the trustees in terms of the trust deed, but not to the reasons for the exercise by the trustees of their discretion. The beneficiaries were subject to the discretion of the court in its supervisory jurisdiction. The fundamental duty of trustees to be accountable to all beneficiaries could not be compromised by a settlor’s desire for confidentiality unless there were exceptional circumstances (lacking in this case) which outweighed the right of the beneficiaries to be informed.

The likelihood of acrimony within the family was not of itself a reason for denying beneficiaries information to which they were entitled, indeed, the denial of information might cause or exacerbate friction.

In respect of the documents and information sought, the following relief was granted:

(a) the trustees were to disclose financial statements;

(b) the trustees did not have to disclose information as to the basis upon which they had made decisions;

(c) accounts and details of beneficiaries who received distributions on the winding up of a trust were to be provided, but the trustees did not have to disclose their reasons for deciding to wind up the trust;
(d) the trustees did not have to disclose information as to their change of policy in respect of the application of the provisions of a trust document regarding distributions made to one beneficiary;

(e) the category of ‘copies of all communications between the trustees and their legal advisers in respect of the trusts’ was too wide for determination - legal opinions obtained by the trustees for the purposes of the trust were prima facie trust documents and should be available to the beneficiaries, but the duty of trustees to disclose communications depended on the nature of the communications;

(f) the trustees were to disclose copies of all deeds appointing all previous and present trustees;

(g) the trustees were to disclose details of all distributions of capital and/or income or settlements;

(h) the trustees were to disclose information as to the amount and state of the property in the trust funds;

(i) the category of ‘full information evidencing material transactions in respect of which the trusts had been involved’ was too wide for determination, but insofar as it related to the management of trust property, the trustees were not under a duty to disclose it because it related to their discretions;

(j) the trustees were to disclose information in relation to any changes in the structure of the trusts including the names of past and present trustees and the date(s) of changes of trustee;

(k) the trustees did not have to disclose details of the advice given to them which led them to decline to provide information and trust documents because the request appeared to be for disclosure of the trustees’ reasons for making that decision; and

(l) the category of ‘copies of all letters, memoranda of wishes or any other communications by the settlers of the trusts to the trustees’ was too wide for determination, but (obiter) memoranda of wishes or like communications from a settlor which exist outside a trust deed are trust documents which should be disclosed in the absence of a substantial claim for confidentiality by the trustees.
(B) **How does privacy law impact a right to trust information?**

Privacy law in Canada is changing rapidly. New legislation and a developing jurisprudence is changing the face of many practice areas. Of particular importance to estates and trust practitioners is how privacy legislation may affect trust administration. Since January 1, 2004, the PIPEDA has applied to every Canadian organization that collects, uses and discloses personal information in the course of its commercial activities. Originally, the PIPEDA’s applicability was limited to federal works and undertakings, but as of January 1, 2004, it has also applied to the collection, use and disclosure of personal information in the course of commercial activities by organizations in the whole private sector in those provinces that have not enacted their own “substantially similar” privacy legislation. To date, only three provinces, namely Quebec, Alberta and British Columbia, have introduced general private sector privacy legislation that is substantially similar to the PIPEDA and therefore only organizations within these provinces are exempt from the application of the PIPEDA.

The body of privacy jurisprudence is growing but few cases have been decided in the estates and trusts context. The PIPEDA was drafted in a very general manner, and left many legislative gaps that have raised many unanswered questions.

Preliminarily, the issue is, of course, whether these privacy laws apply at all to the activities of trustees. The application of the PIPEDA is triggered when an organization collects, uses or discloses personal information in the course of a commercial activity. An “organization” is defined in the PIPEDA to include an association, a partnership, a person and a trade union. By contrast, the provincial Acts apply regardless of the commercial nature of the activity in question and so counsel must look to the definitions and exceptions in those Acts for guidance. For example, in each of those Acts, individuals acting in a personal or domestic capacity are specifically excluded. Further, the British Columbia Personal Information Protection Act, (the “PIPA (B.C.)”) specifically excludes a private trust for the benefit of one or more designated individuals who are friends or members of the family of the settlor. The Alberta Personal Information Protection Act, (the “PIPA (Alta)”) provides that it is not to be applied so as to limit or affect the collection, use or disclosure of information that is the subject of trust conditions or undertakings to which a lawyer is subject.
commercial activity is defined in section 2 of the PIPEDA to be “any particular transaction, act or conduct, or any regular course of conduct that is of a commercial character.” There appears to be little question that the PIPEDA will apply to corporate trustees such as bank and trust companies, but whether individual trustees will be subject to the requirements of the PIPEDA is unresolved. A collection, use or disclosure of personal information for a personal or domestic purpose is exempt from the Act, but one done in the course of a commercial activity is subject to the Act. Thus, confusingly, the application of the PIPEDA is triggered by each particular act or activity in which the trustee is engaged when the collection, use or disclosure occurred rather than by the purposes of the particular activity in the circumstances.

This may result in unintended outcomes. Take for example the case of a private trust, where a trustee may be engaged in activities which may legally constitute a “commercial activity”, such as the buying and selling of a real property, yet may only be doing so on behalf of an elderly or disable relative/beneficiary. To parse the activities of a trustee in this manner may give rise to practical problems in the administration of private trusts. One applauds the approach of the government of British Columbia, which specifically exempted such trusts from the provincial privacy regime. Thus, an important issue moving forward is whether all trustee appointments will be seen to have a “commercial character” or whether this description will only apply to specific situations, such as when compensation is claimed or whether the appointment is a result of a greater commercial or professional relationship.

(i) The Impact of the PIPEDA

If PIPEDA does apply to a particular trustee, the ten principles of privacy with which trustees would be obliged to comply, subject to certain specific exceptions in the Act, are:

(i) Accountability of Organizations: Organizations are required to appoint individuals to be held accountable for PIPEDA compliance, to establish compliance policies, and to ensure the privacy of personal information that they transfer to third parties for processing;

(ii) Identifying Purposes: Organizations must identify the purposes for which they are collecting, using or disclosing personal information in the course of a commercial activity;

(1) Leanne D. Kaufman, “PIPEDA and the Estate or Trust You Represent” The Six Minute Estates Lawyer LSUC Lectures (February 8, 2005) at p. 4-3.

41 Leanne D. Kaufman, “PIPEDA and the Estate or Trust You Represent” The Six Minute Estates Lawyer LSUC Lectures (February 8, 2005) at p. 4-3.

42 For example, in Carter v. McLaughlin (1996), 27 O.R. (3d) 792 (Gen. Div.), Rutherford J. held that a private sale of a personal residence was a “commercial” transaction for the purpose of the application of the International Commercial Arbitration Act (Ontario).

43 Leanne D. Kaufman, supra note 53 at p. 4-3.
(iii) **Consent:** Organizations must obtain the consent of individuals for the collection, use or disclosure of personal information, except where the Act expressly permits otherwise;

(iv) **Limiting Collection:** Organizations are limited to collecting only that information necessary to fulfill their identified purposes;

(v) **Limiting Use, Disclosure and Retention:** Organizations, unless otherwise specified in the Act, are not permitted to use or disclose personal information for any purpose other than that which was identified at the time of collection without consent unless they are required to do so by law;

(vi) **Ensuring Accuracy:** Organizations must keep personal information as current and accurate as necessary for their identified purposes;

(vii) **Establishing Safeguards:** Organizations must establish safeguards in order to help ensure the security of personal information;

(viii) **Maintaining Openness:** Organizations must be open about their privacy practices and procedures and make information about the practices and procedures readily accessible upon request;

(ix) **Facilitating Individual Access:** Upon request, and subject to exceptions in the Act, organizations must provide individuals with information about the existence, use and disclosure of their own personal information. Generally, responses to requests are required within 30 days; and

(x) **Providing Recourse:** Organizations must ensure that individuals can complain about the organization’s compliance with PIPEDA by identifying by name or title the persons in the organization to whom such complaints should be directed.44

For trustees, the most significant and potentially troublesome of these requirements will be those that conflict with the trustees’ common law duty to account and provide information to the beneficiaries of the trust.45 However, before proceeding immediately to a discussion of a trustee’s duty to account, a consideration of how the consent requirements under PIPEDA may impact on the administration of a trust is in order.

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44 Please note that these principles are more fully described in the Fact Sheet produced by the federal Privacy Commissioner, entitled ‘Gearing up for the Personal Information Protection and Electronic Documents Act, accessed online at <www.privcom.gc.ca/fs-fi/02_05_d_16_e.asp>. This Fact Sheet also provides organizations with an overview of best practices for PIPEDA compliance.

45 The following discussion developed from issues first identified and discussed by Leanne D. Kaufman, supra note 53.
(ii) **The requirement to obtain consent**

Consent may be express or implied, depending on the circumstances. The PIPEDA includes an exception to consent for circumstances in which “the collection is in the interests of the individual and consent cannot be obtained in a timely way.”[^46] However, these provisions appear to be intended to address emergency situations or similar situations where obtaining consent in a “timely” way is at issue and do not specifically seem to apply to the regular administrative duties of trustees.

Personal information is essential to the management and administration of most trusts. Information may be required not only from beneficiaries, but also from co-trustees, settlors and family members of these parties. Obtaining the consent of all of these parties before collecting, using or disclosing their personal information can be expected to be impractical or burdensome for the trustee in some circumstances.

However, if the trustee required the personal information in order to perform his or her duties as a trustee, it is arguable that consent may not be necessary. For example, section 4.5 of the PIPEDA provides that if the collection, use and disclosure of the information is required by law, then consent is not required. In *Ferenczy v. MCI Medical Clinic,*[^47] “required by law” was held to include the common law. On the authority of the *Ferenczy* case, then, it is arguable that where the trustee requires personal information in order to meet his or her fiduciary duty to properly administer the trust, he or she need not seek consent. However, practitioners should be cautioned that the limiting principle, discussed above, requires organizations to limit the collection, use and disclosure of personal information to that which is necessary for the identified purpose. Therefore, if a trustee collects information that is superfluous and unnecessary for the completion of his or her duties as a trustee, and thereby collects more information than is “required by law”, obtaining consent may become an issue.

(iii) **The duty to account and to provide information**

Trustees have a duty to disclose financial information about the trust to beneficiaries on request. In complying with their duty to account, trustees may be required to disclose personal information about third-party beneficiaries. Very specific information about third parties may be revealed, such as the amounts loaned or distributed by the trust to beneficiaries, as well as the banking information, addresses or dates of birth of particular beneficiaries.

As noted above, the *common law duty* of trustees to, for example, pass the accounts of the trust upon request, would arguably permit disclosure of third-party personal information contained in financial records to beneficiaries without the consent of the third parties under the “required by law” exception to the consent requirement. In such circumstances, it would appear that trustee compliance with the PIPEDA would be met.

[^46]: PIPEDA section 7(1)(a).
However, when beneficiaries request documents containing third-party information that the trustee may not feel obligated to disclose under the fiduciary obligations of trust law, third-party consent may be required. As the question of what sort of information beneficiaries can legally require from trustees is in a state of flux, the application of privacy law, and specifically, when consent will be required, is unclear.

(iv) **Request for access to personal information under the PIPEDA and the duty to disclose**

All privacy laws grant individuals a right of access to their own personal information on request. Accordingly, where a trustee denies a beneficiary access to information on the basis of trust law principles, the beneficiary could still gain access to the at least his or her own personal information through a request for access under the PIPEDA. In the one published Privacy Commissioner case summary on point,\(^48\) two beneficiaries of a trust filed a complaint with the Privacy Commissioner when the bank with which the trustees of the trust had an account refused to provide the beneficiaries with copies of the cheques issued on the account. The Assistant Privacy Commissioner found that although no direct claim to the account could be made, the cheques were still personal information of the beneficiaries due to the fact that they had ownership over the funds involved. Although this case would suggest a wide latitude to beneficiaries to access trust information, it should be noted that the case was removed from the Privacy Commissioner’s website due to the fact that, according to Leanne Kaufman, the Privacy Commissioner found the “utility of the case summary…..questionable.”\(^49\)

It may prove difficult for trustees subject to the PIPEDA to refuse to provide information to beneficiaries. This is because although there are exceptions to the right of access, they are limited and specific. Section 9(1) of the Act prohibits an organization from granting an individual access to his or her personal information if doing so would reveal personal information about a third party and the third-party information is impossible to sever. In addition, section 9(3) of the Act specifies that an organization is not required to give access to personal information if:

(a) the information is protected by solicitor-client privilege,

(b) to do so would reveal confidential commercial information,

(c) to do so could reasonably be expected to threaten the life or security of another individual,

(d) the information was collected for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;

\(^{48}\) Privacy Commissioner PIPEDA Case Summary No. 236.

\(^{49}\) The author relies on Kaufman, supra note 53 at p. 4-15 for this summary, as well as the background information, as the case summary was not available at the time this paper was written.
(e) the information was generated in the course of a formal dispute resolution process.

Although the above-noted exceptions for confidential commercial and third party information may apply to some requests for information, the other exceptions do not appear particularly useful if a trustee subject to the PIPEDA wishes to limit access of beneficiaries to information that could qualify as their own personal information. Thus a conflict could arise if privacy law requires that access be granted to beneficiaries but the fiduciary obligations of trust law indicate that the trustee must not disclose the information in question.

(v) **Requests to keep information confidential**

As stated above, section 9(1) of the PIPEDA provides that a request for access must not be granted where information requested would likely reveal personal information about a third-party, unless such information may be severed. As the preceding analysis suggests, if a settlor of a trust requests his or her trustees to keep particular information confidential and not disclose it to beneficiaries, (as can sometimes be the case with sensitive family matters), such a request may not completely prevent a beneficiary’s access request from being granted if the personal information of the settlor may be severed. This raises the issue of what kind of duty of confidentiality is owed by a trustee to the settlor or any particular beneficiary as against any other relevant parties. It remains to be seen whether privacy law will be held to override a settlor’s intention or a trustee’s other duties.
APPENDIX

Trustee Act R.S.O. 1990, c. T.23

Authority of surviving trustee to appoint successor by will

4. Subject to the terms of any instrument creating a trust, the sole trustee or the last surviving or continuing trustee appointed for the administration of the trust may appoint by will another person or other persons to be a trustee or trustees in the place of the sole or surviving or continuing trustee after his or her death. R.S.O. 1990, c. T.23, s. 4.

What may be done

6. On the appointment of a new trustee for the whole or any part of trust property,

increase in number

(a) the number of trustees may be increased; and

separate trustees for distinct trusts

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, even though no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

where not less than two to be appointed

(c) it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where more than two trustees were originally appointed but, except where only one trustee was originally appointed, a trustee shall not be discharged under section 3 from the trust unless there will be a trust corporation or at least two individuals as trustees to perform the trust; and

execution and performance of requisite deeds and acts

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in the person who is the trustee, or jointly in the persons who are the trustees, shall be executed or done. R.S.O. 1990, c. T.23, s. 6.

Powers of new trustee

7. Every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance or otherwise vested in the trustee, has the same powers, authorities and discretions, and may in all respects act as if the trustee had been originally
appointed a trustee by the instrument, if any, creating the trust. R.S.O. 1990, c. T.23, s. 7; 1993, c. 27, Sched.

Nominated trustee dying before testator

8. The provisions of this Act relative to the appointment of new trustees apply to the case of a person nominated trustee in a will but dying before the testator. R.S.O. 1990, c. T.23, s. 8.

Vesting of trust property in new or continuing trustees without conveyance

9. (1) Where an instrument, executed after the 1st day of July, 1886, by which a new trustee is appointed to perform any trust, contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any personal estate so subject, shall vest in the person or persons who, by virtue of such instrument, shall become and be the trustee or trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in the trustee, or in the trustees as joint tenants, and for the purposes of the trust, that estate, interest or right.

On retirement of a trustee

(2) Where such an instrument, by which a retiring trustee is discharged under this Act, contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates.

Application to mortgages, stocks, shares, etc.

(3) This section does not extend to land conveyed by way of mortgage for securing money subject to the trust, or to any share, stock, annuity, or property transferable only in books kept by a company or other body, or in a manner prescribed by or under an Act of the Parliament of Canada or of the Legislature.

Interpretation for registration purposes

(4) For the purpose of registration the persons making the declaration shall be deemed the conveying parties, and the conveyance shall be deemed to be made by them under a power conferred by this Act. R.S.O. 1990, c. T.23, s. 9.
Survivorship

46. (1) Where there are several personal representatives and one or more of them dies, the powers conferred upon them shall vest in the survivor or survivors, unless there is some provision to the contrary in the will.

Idem

(2) Until the appointment of new personal representatives, the personal representatives or representative for the time being of a sole personal representative, or, where there were two or more personal representatives, of the last surviving or continuing personal representative, may exercise or perform any power or trust that was given to, or capable of being exercised by the sole or last surviving personal representative. R.S.O. 1990, c. T.23, s. 46.