Production of Estate Documents in Contested Beneficiary Litigation

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> A person who can demonstrate a *prima facie* beneficial interest in a trust has a *prima facie* proprietary right to trust documents and his trustee may not withhold those documents from him unless the documents relate to the exercise of discretion pursuant to the trust, or if disclosure would be contrary to the interests of the beneficiaries as a whole and would be prejudicial to the trustee's ability to discharge his trust obligations. All of that applies to a person who has not actually sued his trustee for breach of the trust conditions. Once a suit has been launched, though, the conventional rules of discovery engage and trust documents of whatever stripe must be produced provided they are relevant to an issue raised in the pleadings and are not subject to a legally recognized privilege.[2]

I. Introduction

When an estate is involved in litigation against its beneficiaries, the production of estate documents is often a highly emotional subject, not to mention legally complex. The complexity is due to the convergence of multiple forms of disclosure obligations and privileges, some of which are unique to estates litigation. These include:[3]

- A trustee's obligation to disclose trust documents to beneficiaries;
- The disclosure obligations found in the *Rules of Civil Procedure*;
- Solicitor-client privilege;
- Litigation privilege; and

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[2] *Patrick v. Telus Communications Inc.* (2005), 2005 BCSC 1762, 2005 CarswellBC 3086 (BC SC)

[3] NOTE: This paper will not be dealing with the "wills exception," which allows disclosure of communications between the deceased and his solicitor in order that the deceased's true testamentary intentions may be determined. On this topic, see *Goodman Estate v. Geffen,* [1991] 2 S.C.R. 353; *Re Hoedl Estate,* 2012 CarswellOnt 15178 (ON SCJ); and *Re Bion Estate,* 2011 ONSC 5447.

- Joint interest principle.

The interaction of these obligations and limits on disclosure have not been thoroughly canvassed in the context of estates law. However, court cases from outside Canada, as well as decisions from different areas of law, provide a basic framework to understand these issues.

II. Disclosure Obligations of Trustees: Pre-Litigation

The general rule is that trustees (be they estate trustees or otherwise) must make available all documents related to the trust upon request by the beneficiaries. The rational for this rule is that the beneficiaries, having a right in the trust, also have an interest in making sure that the trust is properly run. In other words, the beneficiaries have a right to maintain oversight of the trustees.

Waters Law of Trusts in Canada[4] sets out three types of information that beneficiaries have a right to review: (i) evidence of the existence of the trust, (ii) trust accounts, and (iii) documents relating to the administrative actions of trustees. It is information relating to the third category that a trustee most often seeks to withhold from a beneficiary. In addition, defining which documents fall into this third category can be problematic. The following discussion is found in *Waters*:

> The third type of information essentially concerns the exercise by the trustee of dispositive or administrative discretions granted to the trustee by the trust terms. The beneficiary is probably anxious to question the manner in which discretion

[4] *Waters Law of Trusts in Canada,* 3rd ed., Toronto: Thomson Canada Ltd., 2005.

> was exercise, and the request (or demand) is for such material as copies of correspondence between the trustees and their delegates and agents, including the trustees' solicitors, agendas for trustee meetings, background papers for such meetings, and the minutes of meetings. Trustee memoranda to file may be sought, or copies of legal opinions obtained by the trustees. The questions here are whether any beneficiary is entitled to this type of information, and in what circumstances a beneficiary can obtain it. It is clear that a beneficiary who issues a statement of claim against trustees alleging breach of trust may obtain at least some of this material under litigation disclosure rules. However, no court is likely to let the empty-handed beneficiary go on a "fishing trip" looking for evidence of trustee bad faith or *ultra vires* acts in the exercise of discretion. A *prima facie* case must be shown before pre-litigation disclosure can be had. The issue to be considered at this point is whether information of this third type can be obtained by the beneficiary without bringing court proceedings.[5]

Limiting Disclosure to Reasonable Requests

The courts have denied disclosure requests where it suspects that the applicant is going on a "fishing expedition." The courts may come to this conclusion where the request is to "see everything," rather than a well-articulated request for specific documents for a particular purpose. Broad requests for disclosure suggest that the beneficiary is trying to create problems for the estate trustee rather than pursue a particular claim.

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[5] *Waters* at p. 1069.

This was the conclusion reached by Justice Greer in the context of a bankruptcy proceeding in *Re Battery Plus Inc*.[6] In that case, the court acknowledged that a fiduciary relationship existed between the interim receiver and Battery Plus' creditors and shareholders. As with all fiduciary relationships, the interim receiver (i.e. trustee) was under an obligation to make full disclosure to all interested persons.[7] Nevertheless, the court limited the receiver's disclosure obligations to "reasonable requests."[8] The court held:

> To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents must relate to a specific purpose. That right does not entitle [the applicant] to go on a fishing expedition.[9]

In the result, the court ordered specific disclosure to be made to the applicant and production of a list certain other documents in his possession. However, the applicant's request for copies of <u>all</u> the documents in the receiver's possession, including copies of all computer hard drives, was denied.

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[6] *Re Battery Plus Inc.* (2002), 31 C.B.R. (4th) 196, 2002 CarswellOnt 230 (ON SCJ).
[7] *Re Battery Plus Inc*. at para. 16.
Note: the court went on to consider who met the definition of "interested persons." It then held that even if the sole shareholder and former director was an "interested person," the interim receiver did not owe him a duty to "copy every single piece of paper that is now in the interim receiver's possession." [at para. 17]
[8] *Re Battery Plus Inc*. at para. 19.
[9] *Re Battery Plus Inc*. at para. 21.

Documents Relating to Discretionary Decisions

Where no wrongdoing is alleged, trustees are not obligated to provide reasons for their exercise of a discretionary trust power.[10] In addition, the trustees may withhold the documents upon which they based their discretionary decision. There are two main justifications for this limit on disclosure: (i) trustees require a "zone of privacy" in which to make decisions, free from the interference of beneficiaries and (ii) documents relating to discretionary decisions are not true "trust documents." Both reasons were adopted in the English court of appeal in *Re Londonderry's Settlement*.[11]

In *Re Londonderry's Settlement*, the trustees had been given the discretionary power to appoint capital among a group of beneficiaries. One of the beneficiaries objected to the amount of capital she was given, arguing that her share was inadequate and unjust.[12] She applied to court to compel the trustees to disclose documents relating to their decision, in particular the agenda and minutes of the trustees' meetings and correspondence from the trustees on this issue. The court denied her request on the grounds that (i) the documents requested did not fall within the definition of trust documents and (ii) that a beneficiary's right to disclosure is not absolute and is subject to reasonable limits.

The court accepted the evidence of the trustees that disclosure of the documents sought by the beneficiary would cause family friction and that such friction would cause more harm than good. The court held that the overall welfare of the beneficiaries, not

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[10] See *Widdifield on Executors and Trustees*, 6th ed. Vol. 1, section 8.9 at p. 8-22.
[11] (1964), [1965] Ch. 918, [1964] 3 All ER 855 (Eng CA).
[12] See *Waters' Law of Trusts in Canada* at p. 1071-1073 for a complete summary of the case.

just the rights of individual beneficiaries, must be taken into account before ordering disclosure. Where the decisions of trustees may favour one beneficiary over another, and the trustees were empowered to make such decisions, the trustees were entitled to a zone of privacy in which to work.[13] The court held:

> It seems to me that there must be cases in which documents in the hands of trustees ought not to be disclosed to any of the beneficiaries who desire to see them, and I think the point was a good one which was taken in the affidavit of Lord Nathan, that to disclose such documents might cause infinite trouble in the family, out of all proportion to the benefit which might be received from the inspection of the same. It seems to me that, where trustees are given discretionary trusts which involve a decision on matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best manner.[14]

In the result, the court found that the balance of interests favoured withholding disclosure of the requested documents.

The second reason given for denying disclosure was that documents requested were not true "trust" documents. The court defined "trust documents" as follows: (1) they are documents in the possession of the trustees as trustees; (2) they contain information about the trust which the beneficiaries are entitled to know; (3) the beneficiaries have a

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[13] *Waters' Law of Trusts in Canada* at p. 1072.
[14] *Re Londonderry's Settlement* at p. 861 as quoted in *Ontario (Attorney General) v Ballard Estate*, *supra*, at para. 11.

proprietary interest in the documents and, accordingly, are entitled to see them.[15] The court held that documents relating to an exercise of trustee discretion fall outside of this definition and therefore do not need to be disclosed.

There are problems with this definition of "trust documents." First, Canadian courts have moved away the "proprietary interest" rational for justifying the beneficiaries' right to view trusts documents, preferring instead the joint-interest approach (discussed below). In addition, this definition is somewhat circular: documents relating to an exercise of discretion are not trust documents because a beneficiary is not entitled to the information contained within, and the beneficiary is not entitled to the information in those documents because they are not trust documents.

Nevertheless, by attempting to define "trust documents," the court in *Re Londonderry's Settlement* made it clear that not all documents in the possession of a trustee must be disclosed. Trustee are well advised to consider carefully a request for documents by a beneficiary and proceed with some degree of caution.

Re Londonderry's Settlement has been quoted in many Canadian cases, though never explicitly followed. See for example, *Patrick v. Telus Communications Inc*.,[16] discussed further below.

Balancing Competing Interests

Trustees may have good reason for withholding trust documents from beneficiaries. This is especially true where there are more than one beneficiary of the trust, all of

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[15] As quoted in *Waters' Law of Trusts in Canada* at p. 1072.
[16] *Patrick v. Telus Communications Inc.* (2005), 2005 BCSC 1762, 2005 CarswellBC 3086 (BC SC).

whom have differing views about the wisdom of the course of action being pursued by the trustee, and where disclosure of the trust documents will only serve to inflame tensions between the beneficiaries and/or the trustee.[17] In those cases, courts will not compel disclosure.

Courts in England and Australia[18] have held that disclosure is not always in the best interests of the beneficiaries as a group. In those cases, the courts have held that the obligation of the trustees to protects the interest of the beneficiaries as a whole outweigh the duty of the trustee to disclosure. In addition, disclosure has not be ordered where doing so will hinder the trustee from discharging his obligations under the trust. As a result, disclosure is determined on a case by case basis, and cannot be considered an absolute right.

In *Schmidt v Rosewood Trust Ltd*.,[19] the English Privy Council held that disclosure of trust information is at the discretion of the court. The court held:

> a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts.[20]

The court went on to find that a beneficiary is not entitled as of right to disclosure; rather, the court must balance competing interests. The court held:

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[17] See *Rouse v IOOF Australia Trustees Ltd.* (1999), 73 SASR 484 (Aust. SC) as quoted in *Patrick* at para.35.
[18] *Ibid.*
[19] [2003] 2 AC 709, [2003] 3 All ER 76 (Eng PC).
[20] *Schmit* at para. 66, as quoted in *Patrick v Telus Communications Inc.* at para. 30.

> no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. 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 relief.[21] [*emphasis added*]

The court found that a beneficiary's right to disclose may be trumped where the interests of the beneficiaries and trustees as a whole were better protected by withholding the information.[22]

III. Disclosure Obligations of Trustees: Post-Litigation

Both *Schmidt* and *Re Londonderry's Settlement* were considered by the BC Supreme Court in *Patrick v Telus Communications Inc*. While not disagreeing with the English cases, the court found that both could be distinguished on their facts from the case at bar. However, the court did implicitly adopt the principle that requests for disclosure of trust information can be limited.

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[21] *Schmidt* at para. 67, as quoted in *Patrick v Telus Communications Inc.* at para. 30.
[22] See *Widdifield on Executors and Trustees* at section 8.9, p. 8-22.

In *Patrick,* Justice Rogers held that a distinction must be drawn between a party seeking disclosure in its capacity as a beneficiary (in which case, the court may deny their request) and a party seeking disclosure in its capacity as a litigant. In the later case, the usual rules of litigation discovery apply (for example, rule 30 of the *Rules of Civil Procedure* in Ontario). The rules of discovery afford a litigant a larger scope of discovery over all relevant documents than will be granted to an ordinary beneficiary. Thus, while a beneficiary is not generally entitled to disclosure of documents pertaining to a trustee's exercise of discretion, once a beneficiary alleges that the trustee has exercised his discretion improperly, the litigant is afforded a broader right of discovery.[23] The court held:

> A person who can demonstrate a *prima facie* beneficial interest in a trust has a *prima facie* proprietary right to trust documents and his trustee may not withhold those documents from him unless the documents relate to the exercise of discretion pursuant to the trust, or if disclosure would be contrary to the interests of the beneficiaries as a whole and would be prejudicial to the trustee's ability to discharge his trust obligations. All of that applies to a person who has not actually sued his trustee for breach of the trust conditions. Once a suit has been launched, though, the conventional rules of discovery engage and trust documents of whatever stripe must be produced provided they are relevant to an issue raised in the pleadings and are not subject to a legally recognized privilege.[24] [*emphasis added*]

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[23] *Patrick v Telus Communications Inc.* at para. 31.
[24] *Patrick* at para. 39.

Given that the beneficiaries of the pension plan were now suing its administrator (i.e. the trustee), the court ordered disclosure of all documents relevant to the matters raised in the pleadings. These documents would not have been available to the beneficiaries of the plan outside the context of litigation. For example, the plaintiffs were allowed access to the personal information of fellow pension plan members (who were not parties to the litigation). This is information that ordinarily would have been kept private.

Joint Interest Principle – Disclosure of Trustee-Solicitor Communications

The current state of Canadian law regarding disclosure of legal advice received by estate trustees is set out in *Ontario (Attorney General) v Ballard Estate*.[25] In that case, a beneficiary of the estate alleged that the executors of the estate had breached their fiduciary duty. As part of the litigation, the beneficiary requested that the executors produce, among other documents, all communications between themselves and their solicitor. The executors resisted production on the grounds of solicitor-client privilege.

In granting the beneficiary's request for disclosure, the court moved away from the "proprietary interest" principle which was commonly used in English decisions to justify disclosure. Instead, the court applied the "joint interest" principle, which created a waiver of solicitor-client privilege where the interests of the solicitor's client and the party seeking disclosure of the solicitor's file were aligned. The court held:

> [Trust documents] are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice taken by the trustees was for the due

[25] (1994), 6 ETR (2d) 34, 119 DLR (4th) 750, 20 OR (3d) 350, 1994 CarswellOnt 579.

> administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust.
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> The proper approach is to bear in mind the rationale of the solicitor-client privilege and whether it has any applicability to this kind of situation. The Supreme Court of Canada in *Goodman Estate v. Geffen* (1991), 81 D.L.R. (4th) 211 made it clear that there are situations where the privilege does not even arise as where the interests of the party seeking the information are the same as those of the "client" who retained the solicitor in the first place.[26]

The court held that solicitor-client privilege could not be invoked in this case to deny the beneficiary access to the solicitor's advice. In addition, the court held that where a breach of fiduciary duty is alleged, disclosure is particularly important. As a result, the court ordered production by the executors of all communications concerning the management of the estate.[27]

Despite ordering full disclosure in this case, the court cited *Re Londonderry's Settlement* and left open the possibility that in different circumstances, complete disclosure of trust documents to a beneficiary may not be appropriate.[28]

Withholding Disclosure of a Solicitor's Advice

The interests of the trustee and the beneficiary will be aligned in most cases: the trustee is duty bound to act in the best interest of the beneficiaries and the legal advice

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[26] *Ballard* at paras. 6-7.
[27] See also *Camosun College Faculty Assn. v British Columbia (College Pension Board of Trustees)*, (2004), 2004 BCSC 941, 33 BCLR (4th) 162, 2004 CarswellBC 1612 (BC SC).
[28] *Ballardd* at para. 11.

obtained by the estate trustee is for the purpose of furthering those interests.[29] Thus the joint interest principle acts to waive solicitor-client privilege as against beneficiaries, who are allowed to review communications between the estate trustee and his lawyer. However, the interests of beneficiaries and trustees are not always aligned. This is true where the trustee and beneficiary are involved in litigation against one another.

In *Haydu v Nagy*,[30] the applicant and respondent were two sisters and equal beneficiaries of the estates of their parents. Ms. Nagy was the estate trustee of both estates. When Ms. Nagy took over the administration of her parents' estates, the estates were involved in litigation relating to the incomplete sale of real estate. As part of the litigation, Ms. Nagy named her sister, Ms. Haydu, as an additional defendant to the action (it was alleged that Ms. Haydu, who was responsible for the sale of the property, had negotiated a side deal with the buyers so that certain money from the sale went directly to her rather than to her parents).

The real estate litigation eventually settled and Ms. Nagy sought to recover the costs of the real estate litigation from her parents' estates in her application to pass her accounts. Ms. Haydu objected to the recovery of Ms. Nagy's litigation fees. Further, Ms. Haydu sought disclosure of Ms. Nagy's solicitor's file in order to better assess whether the costs of the litigation were reasonable. Ms. Nagy asserted solicitor-client privilege over the file except for pleadings, correspondence with counsel, expert opinions and accounts.

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[29] *Ballard* at para. 9.
[30] *Haydu v Nagy* (2012), 2012 BCSC 1870, 84 ETR (3d) 320, 42 BCLR (5th) 107, 2012 CarswellBC 3839 (BC SC).

Ms. Haydu took the position that since the real estate litigation had settled, the two were no longer adverse in interest. As a result, the joint interest principle applied to give her the right to review Ms. Nagy's solicitor's file.

The Court recognized that a distinction must be drawn between opinions procured by the trustee for his own protection and opinions received in the course of determining the proper administration of the estate.[31] In the present circumstances, the court recognized that Ms. Nagy was in an impossible position. Ms. Haydu continued to be adverse interest despite the end of the litigation because she was seeking to deny Ms. Nagy recovery of her legal fees.[32] However, the solicitor's file was clearly relevant to the passing of account application because it was needed for the proper assessment of the reasonableness of the work done by the solicitor for the estate.[33]

In the circumstances, the court ordered disclosure of certain documents in the file which privilege no longer applied or where Ms. Nagy and Ms. Haydu were aligned in interest. As for the rest, the court gave Ms. Nagy the choice: she could elect to maintain solicitor-client privilege over communications with her solicitor relating to matters where Ms. Haydu was adverse in interest or she could waive the privilege. If she maintained privilege, the court warned Ms. Nagy that she risked being denied full recovery of her legal costs from the estate on the basis that her claim would not be adequately supported.[34]

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[31] *Haydu* at para. 25.
[32] *Haydu* at para. 26.
[33] *Haydu* at para. 29.
[34] *Haydu* at para. 35.

Litigation Privilege

Litigation privilege was recognized and defined in *Blank v Canada (Department of Justice)*.[35] Justice Fish held that the purpose of litigation privilege was to create a "zone of privacy"[36] in which parties can prepare for and complete litigation. The test of whether litigation privilege attaches is whether the document was prepared for the dominant purpose of the litigation (whether contemplated or already commenced). This privilege extends to any document created for the dominant purpose of the litigation, whether it was created by a solicitor or another person.

Although litigation privilege is lost once the litigation is over, Justice Fish held in *Blank* that the litigation "cannot be said to have "terminated," in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat." He held:

> At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.[37]

Thus, even when litigation between trustees and beneficiaries end, the trustees may not be required to disclose the opinions received from their solicitors.

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[35] (2006), 2006 SCC 39, 51 CPR (4th) 1, 270 DLR (4th) 257, 47 Admin LR (4th) 84, [2006] 2 SCR 319, 2006 CarswellNat 2704.

[36] *Blank* at para. 34. NOTE: this "zone of privacy" is different than the "zone of privacy" which may be given to trustees when making decisions about the exercise of discretionary powers.

[37] *Blank* at para. 39.

Litigation privilege cannot be used to justify withholding communications between an estate trustee and his solicitor regarding the administration of the trust just because the administration of the trust is now the subject of litigation. Justice Fish held:

> The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.
>
> Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.[38]

The convergence of these privileges and duties can be traced as follows: administrative decisions must be disclosed, but the reasons behind discretionary decisions need not be, unless the discretionary decision is the subject of litigation, but a *prima facie* showing of actionable misconduct must be made out to prevent beneficiaries from going on fishing expeditions.

The mere assertion of misconduct does not necessarily override privilege. In *Davies v American Home Assurance Co.* the court held that an assertion of bad faith on the part of an insurance company did not necessarily override solicitor-client and litigation privilege. Rather, the relevance of each document had to be assessed. The court

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[38] *Blank* at paras. 44-45.

overturned the motion judge's order for disclosure, and substituted an order for the production of a more detailed affidavit of documents. The court held:

> [L]itigation privilege (or solicitor-client privilege), when properly asserted, trumps relevance in almost all circumstances. That is its very nature. There is no "bad faith insurance claim" exception to either litigation privilege or solicitor-client privilege that creates a special rule for bad faith claims against insurers and consigns the normal rules respecting privilege to other claims. The same rules apply in all cases.[39]

Joint Retainers

Matters get more complicated when co-estate trustees turn against each other. Where the co-estate trustees had previously retained the same lawyer, the parties will likely seek disclosure of their joint solicitor's file.

Whether the joint solicitor can withhold any documents from his former clients was addressed in *Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.*[40] In that case, two groups (AMEC and AD) formed a joint venture which eventually soured. AMEC and AD turned against each other and the client of their joint venture, Jormag. Having lost their joint suit against Jormag, AMEC and AD sued each other for contribution and indemnity. AD requested production of various documents, including internal documents produced by AMEC during the course of their joint litigation against Jormag. The court held that the documents relating to the joint action against Jormag had to be produced, whether those documents had been shared with their joint solicitor

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[39] (2002), 40 CCLI (3d) 22, 60 OR (3d) 512), 162 OAC 92, 24 CPC (5th) 49, 2002 CarswellOnt 2225. ¶44.
[40] (2011), 2011 ABQB 794, 2011 CarswellAlta 2193.

or not (joint interest principle applying). However, documents relating to the litigation against each other did not have to be produced.

> As against one another no privilege may be claimed by AMEC or AD in respect of communications to and from the jointly retained solicitors and experts. Both AMEC and AD must be afforded the "zone of privacy," described in *Blank* at para. 34, necessary to freely prepare for the litigation against one another. But that zone of privacy is available only jointly with regard to documents prepared for the dominant purpose of the Jormag litigation. Consequently, only documents prepared in contemplation of and for the dominant purpose of *this* litigation by both AMEC and AD remain privileged.[41]

Even where a party is entitled to view a jointly-retained solicitor's file, the court will give the solicitor the opportunity to remove from the file any communications not directly related to the joint retainer. For example, in *Divinsky v Bethania Mennonite Personal Care Home Inc.*, the court allowed the solicitor to review his files and remove from them any notes or portions thereof that did not relate to the matter in dispute but to other advice he was providing to one of the joint clients.[42]

Where a party would otherwise have a right to request production, the right to view documents does not disappear simply because litigation has begun. In *Boreta v Primrose Drilling Ventures Ltd.* the court held:

> VB is entitled to the documentation as an officer of the company regardless of his adversarial position. He would be entitled to the documentation as an officer of

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[41] *Attila* at para. 37.
[42] (2002), 2002 MBQB 307, [2003] 3 WWR 674, 169 Man R (2d) 215, 28 CPC (5th) 335, 2002 CarswellMan 523. ¶23.

> the company before he commenced litigation. Post litigation, [the fact that] he becomes involved in an adversarial position should not impact upon his right to obtain the documentation. If the other officers of Primrose are entitled to see the documents, VB is equally entitled to document production as an officer of Primrose regardless of his adversarial position.[43]

Where documents are relevant to two actions, disclosure will be required where the requesting party has a right to view the documents in one action but not in the other. Such was the case in *Chersinoff v Allstate Insurance Co*.[44] Mr. Chersinoff had been involved in an auto accident and was sued by Ostrikoff (*Ostrikoff v Chersinoff)*. Mr. Chersinoff's insurance company assumed carriage of the defence of Mr. Chersinoff. Once it settled the claim with Ostrikoff, the insurance company sought contribution from Mr. Chersinoff.

Mr. Chersinoff sued the insurance company for complete indemnity and requested disclosure of the insurance company's entire file (*Chersinoff v Allstate Insurance Co.*). In deciding the matter, the court drew a distinction between documents relating solely to Mr. Chersinoff's defence action against Ostrikoff and documents relating to Mr. Chersinoff's action for indemnity. The court held:

> The insurer may not assert, as against its insured [Mr. Chersinoff], privilege in respect of the documents which are relevant to the conduct of the defence or to compromise of the action *Ostrikoff v Chersinoff*, even though such documents may also be relevant to the determination of the insurer's obligation to indemnify

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[43] *Boreta v. Primrose Drilling Ventures Ltd.* (2010), 2010 ABQB 383, 500 A.R. 137, 2010 CarswellAlta 1038 (AB QB) at para. 63.
[44] *Chersinoff v Allstate Insurance Co* (1969), 67 WWR 750, 3 DLR (3d) 560, 1969 CarswellBC 34.

> [Mr. Chersinoff] against the claims made in that action. Documents in the second category which are relevant to the latter obligation, *i.e.*, the insurer's obligation [to indemnify Mr. Chersinoff] and which are not relevant to the defence or compromise of the *Ostrikoff* action are privileged.[45]

IV. Conclusion

The convergence of a beneficiary's right to review trust documents, a litigants obligation to disclose relevant information, and the different privileges create a maze of complications for the trustee to navigate during litigation with a beneficiary. It should be kept in mind that disclosure is not automatic: a trustee has tools available to him to limit the disclosure owed to a beneficiary within reason. However, when making his decision, the trustee should be aware of the consequences: will the overall administration of the trust be harmed by disclosure? Will failure to disclose a solicitor's file mean there is insufficient evidence to prove a claim? And finally, are the costs of fighting disclosure worthwhile? Happy litigating.

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[45] *Chersinoff* at para. 15.