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PENSION PLANS, FIDUCIARY DUTIES AND THE THORNY QUESTION OF DISCLOSURE

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Pension trusts have caused courts to fundamentally rethink trust law principles. In the author's view, more rethinking is called for, particularly with regard to the thorny issue of disclosure. What rights should plan members have to obtain information about the management of their employment pension plans? In exploring the answer to that question, this article examines the differences between pension trusts and traditional trusts, and builds on the different approaches currently taken to a beneficiary's right to disclosure. The article concludes with a suggested framework for the resolution of disclosure disputes in respect of pension trusts, one that recognizes their unique location at the highly regulated intersection of the law governing fiduciaries, contracts, employment and trusts.

Les fiducies de régime de retraite ont amené les tribunaux à réexaminer en profondeur les principes du droit des fiducies. Selon l'auteure, il importe d'examiner davantage ces principes, notamment en ce qui a trait à la question épineuse de la divulgation des renseignements. Quelle doit être l'étendue des droits d'un participant à un régime de pension quant à la communication d'informations relatives à la gestion de l'employeur? En cherchant la réponse à cette question, le présent article examine les distinctions qui existent entre les fiducies de régimes de retraite et les fiducies traditionnelles, en s'appuyant sur les différentes approches relatives au droit du bénéficiaire à la divulgation d'information. L'article se termine en proposant un cadre pour le règlement des différends en

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matière de divulgation de renseignements spécifiques à la fiducie de régime de retraite. Ce cadre reconnaît la position unique de ce type de fiducies qui se trouvent, en fait, à être à la jonction du droit, très règlementé, qui régit les fiduciaires, les contrats, l'emploi et les fiducies.

1. Introduction

While the Canadian legal system has tackled a significant number of pension disputes, little attention has been paid to the rights of pension plan members to obtain information about the management of their employment pension plans. This may sound like an arid subject, but consider the following examples.

> *Example 1*
> Aaron and Bertha both take early retirement. They work for the same employer, have the same number of years of service, and neither has reached the age of 55, the age at which they could take early retirement with an unreduced pension.
>
> Aaron is given an unreduced pension. Bertha is not. When she asks why, she is told that the Pension Committee that administers the pension plan exercised its discretion in making the two decisions and has no obligation to give reasons for the exercise of its discretion.
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> *Example 2*
> A company has a pension plan with a large actuarial surplus. It sells a division and transfers the associated employees to the purchaser. It transfers enough money to the purchaser's pension plan to cover the cost of the accrued pension benefits of the transferred employees but refuses to transfer any part of the surplus. When the transferred employees ask why, they get the same response as in example #1 – the decision whether to transfer a part of the surplus is a discretionary one. Therefore, there is no obligation to disclose the reasons for refusing to transfer a part of the surplus.

What response would the Canadian courts give if the employees seek their assistance in obtaining the information? More generally, how can pension plan members[1] gain access to documents governing the management and administration of their pension plans, if at all?

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[1] I refer to plan members for ease of reference. However, the term is intended to include all plan beneficiaries, including retirees and those who receive benefits but are

If the assets of a pension plan are impressed with a trust, they are governed primarily by trust law.[2] Thus, as the assets of many pension plans are held by way of a trust, any answer to these questions must begin with a consideration of how trust law has treated the question of disclosure.[3] While trust law principles are the starting point, however, they may not be decisive because determining the rights and obligations of employers and plan members involves "the intersection of contracts, trust law, and statute law."[4]

Before turning to the question of disclosure of trust documents, it is useful to consider how pension trusts differ from traditional trusts. By traditional trusts, I am referring to express private trusts, not resulting or constructive trusts. Accordingly, in the following article, I will:

- compare traditional trusts with pension trusts;
- summarise the beneficiary's right to access to the trust accounts;
- describe the three different legal approaches that have been taken in respect of a beneficiary's right to disclosure of other trust documents, outside of an action for breach of trust;
- explain the beneficiary's right to disclosure of other trust documents in a civil action (for breach of trust);
- set out the existing English and Canadian law on a plan member's right to disclosure of documents respecting pension trusts;
- summarise the positions of the players in a pension trust disclosure dispute; and
- conclude with a framework that may assist in resolving the thorny issue of disclosure in pension trusts.

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not members of the plan. For example, when a surviving spouse becomes entitled to pension payments on the death of a member, he or she is not a member of the plan but is a plan beneficiary.

2 *Schmidt v Air Products Canada Ltd*, [1994] 2 SCR 611 at para 92 [*Schmidt*]; *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 144, [2009] 2 SCR 678 (*per* LeBel J in dissent, but not on this point).

3 There is another sense in which the question of fiduciary disclosure has been examined, namely, what personal information a trustee must disclose, if any, to beneficiaries. This article does not examine that question.

4 *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para 1, [2004] 3 SCR 152 [*Monsanto*].

2. Traditional Trusts and Pension Trusts Compared

A) Traditional Trusts

In the traditional trust, one person (the settlor) gratuitously transfers title to certain property (the trust property) to one or more persons (the trustees) for the benefit of one or more other persons (the beneficiaries).[5] The settlor is under no duty to make further contributions to the trust and has no continuing financial interest in it. The trustees normally are independent, with no financial or contractual relationship with the settlor. The beneficiaries are the recipients of the "gift," having given no consideration for their beneficial interests. They have no contractual – or other legal – relationship with the settlor.

For the purposes of this article, it is sufficient to draw attention to the following three points about traditional trusts.

First, as holders of the legal title, trustees have the right to manage and dispose of the trust property. The beneficiaries, however, have the right to enjoyment of the trust property. Hence it is said that the beneficiaries are the equitable or beneficial owners of the trust property.

Second, the trustee is a fiduciary, a status that holds the trustee to the highest levels of conduct in the discharge of its duties. The fiduciary relationship between trustee and beneficiary is characterised by an obligation on the part of the trustee, which the beneficiary may enforce, to deal with the trust property solely for the benefit of the beneficiaries. This has been termed the duty of loyalty.

The duty of loyalty has several facets. The trustee must act honestly and in good faith, putting the interests of all beneficiaries before its interests; must not profit from the trust; and must not place itself in a position where its duty and interests may conflict. In addition, the trustee has an obligation to keep an accurate account of the trust property and be ready to render it when required. This obligation is called the duty to account and is dealt with more fully below in part 3.

Third, a tension exists between the rights of the trustee and those of the beneficiaries in respect of information about the trust property and how it

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5 The trustee may be a beneficiary, albeit not the sole one; see *Central Guaranty Trust Co v Hees International Bancorp Inc*, 2001 CarswellOnt 3329 (Ont Sup Ct) at para 133 ("It is well established that a party can be both a trustee and a beneficiary under a trust so long as there is at least one other beneficiary"). See also John Mowbray *et al*, *Lewin on Trusts* (London: Sweet & Maxwell, 2008) at 1-09.

is being managed and disposed of. As holders of the legal title, the trustees have that information. For a variety of reasons, they may not want to disclose the information to the beneficiaries. The beneficiaries, on the other hand, may want some or all of that information. Indeed, they may need the information in order to protect their equitable ownership rights. It is this tension – and how it might be resolved – that is explored in this article.

B) Pension Trusts

1) Some Basics

Occupational pension trusts are not free-standing. They arise as part of the wider relationship created by employment. In employer-sponsored pension plans, the employer promises that certain pension benefits will be paid to an employee on retirement. The funding of such pension plans can be by the employer alone (non-contributory plans) or by the employer and employee jointly (contributory plans). It is the employer's obligation, as plan administrator,[6] however, to ensure that the necessary contributions are made.[7] Typically, the employer administers the pension plan through a committee.

There are two common models of pension schemes: the defined contribution (DC) plan[8] and the defined benefit (DB) plan. Under both, the employer contributes an amount based on an employee's salary or earnings.

In a DC plan, the employer guarantees the amount of contribution that it will make for each employee. On retirement, the employee receives the amount that has been contributed to his or her account plus or minus any gains or losses resulting from investments. The employee bears all of the investment risk in a DC plan.

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6 I am assuming the model of governance where the employer is also the plan administrator. This is expressly permitted by legislation in most parts of Canada; see e.g. s 8 of the *Pension Benefits Act*, RSO 1990, c P-8, as amended (*PBA*). In Quebec, however, the employer may not be the plan administrator; see the *Supplemental Pension Plans Act*, RSQ, c R-15.1, s 147. Under this provision, every pension plan must be administered by a pension committee consisting of at least three members: one of whom is neither a party to the plan nor a third person to whom a loan may not be granted; one of whom is designated by the active members of the plan; and one of whom is designated by the non-active members and beneficiaries. According to s 150 of the *Supplemental Pension Plans Act*, the pension committee acts in the capacity of a trustee.

7 The obligation is typically created by the pension plan documentation. It is also imposed by legislation; see e.g. s 56(1) of the *PBA*.

8 Also referred to as a money-purchase plan.

In a DB plan, the employer guarantees the employee a specified pension on retirement. The amount of the pension benefit is calculated according to a formula, normally based on salary levels over a period of time and the number of years of service. In a DB plan, the employer bears the investment risk. The focus of this article is on DB plans.

2) DB Plan Documentation and the Roles of the Parties

There are usually two primary documents for a DB plan: the plan text and the trust agreement. They are not "stand alone" documents, however. Typically, each expressly incorporates by reference the provisions of the other.

The plan text is a contract between the employer and the employee. It sets out such things: as the method by which the plan will be administered; the conditions for eligibility for membership in the plan; the contributions of the employer and employee (if any); the mechanism for establishing and maintaining the pension fund; termination and retirement provisions; and, the pension benefits to be paid on retirement.

Normally, the assets of the pension plan are held by a third party trustee. Accordingly, the second document is the trust agreement that the employer enters into with a trust company, bank or other financial institution. The employees are not parties to the trust agreements – the parties are the employer and the trust company. Note that it is the trust company that has legal title to the trust property and, therefore, is the trustee. The employer is not the trustee. Rather, as mentioned above, it frequently acts as the plan administrator. The person or entity that administers the pension plan is a fiduciary.[9]

The trust agreement sets out the trustee's duties. The trustee's functions are generally closely circumscribed, being restricted to holding title to the trust property and distributing it in accordance with the employer's directions. [10] In trust terms, the trustee disposes of the funds at the direction of the employer while the employer – as the administrator of the pension plan – remains responsible for the balance of the management

[9] Confirmation that the administrator is a fiduciary can be found both in pension legislation and the jurisprudence; see e.g. s 22(1) of the *PBA*, which provides that "The administrator … shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise *in dealing with the property of another person*" [emphasis added]. See also *Burke v Hudson's Bay Co*, 2010 SCC 34 at para 41, [2010] 2 SCR 273 [*Burke*].

[10] In some cases, the trust company may also perform the investment management function. The focus in this article, however, is on the bare custodial trustee.

and administrative functions. In *Buschau v Rogers Communications Inc*, Newbury JA described the unusual role of the employer, in respect to its relationship with the pension trustee, in the following way:

> In Canada at least, pension trusts and plans also usually contemplate that the settlor, or employer, will play a role akin to that of the trustee in a traditional trust, even though a trust company is appointed as formal trustee. Indeed, employers often retain the authority to direct the trustee as to many matters relating to the administration of the trust, and even to amend or modify the class of beneficiaries under the trust, change the benefits to which they will be entitled, and on occasion, revoke or terminate the trust unilaterally.[11]

C) How Traditional Trusts and Pension Trusts Differ

In *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*, Browne-Wilkinson VC described the differences between traditional trusts and pension trusts in the following terms:

> Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses ….
> [A] pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, … membership in the pension scheme is a requirement of employment. In contributory schemes, … the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty.[12]

As this passage points out, pension trusts are quite different from traditional trusts. Their distinct character is a result of a number of different factors, including that they arise in the employment context, often have a very large number of beneficiaries and involve very large sums of money, and are highly regulated by provincial/territorial pension legislation and federal income taxation legislation.[13]

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[11] 2001 BCCA 16 at para 1, 195 DLR (4th) 257.

[12] [1991] 1 WLR 589 at 597.

[13] For an additional consideration of the differences between traditional trusts and pension trusts, see the Pension Law Review Committee, *Pension Law Reform: The Report of the Pension Law Review Committee*, vol 1 (London, UK: Secretary of State for Social Security, 1993) ch 3.2.

In summary, I would offer the following nine points of distinction between DB pension trusts and traditional trusts.

1. Pension trusts are not free-standing legal arrangements, as traditional trusts are. Rather, they form part of the wider relationship created by the employment contract.

2. Pension benefits are not gifts. They are part of the consideration that an employee receives for rendering his or her services.

3. Employees are not volunteers; they earn their pension rights by work.

4. In contributory pension plans, employees are bound to make their own contributions to the trust fund. In contributing directly to their pension benefits, the employees are akin to a settlor (or donor) in traditional trust terms.

5. Membership in a pension plan is normally mandatory, as a condition of employment.

6. Pension trusts do not have a fixed class of objects. Rather, they are open-ended with constantly fluctuating membership.

7. Unlike traditional trusts where the settlor has no ongoing obligations to or legal relationship with the trust, in a pension trust the employer has ongoing funding obligations[14] and bears the ultimate risk and responsibility for payment of the pensions. Thus, it has a direct and ongoing interest in how the pension plan and trust operate.

8. Unlike traditional trusts, in pension trusts although the employer is the settlor, it is directly involved in the ongoing management and administration of the trust.

9. Traditional trusts are established with the intention that, ultimately, they will end through a distribution of the trust property. Pension trusts, by contrast, are established with the intention that they will last indefinitely.

[14] Even if the employer is entitled to take contribution holidays, it retains the ongoing obligation to ensure that adequate funds are being contributed.

3. The Beneficiary's Right to Access to the Trust Accounts

As mentioned above, a trustee has the duty to account. The corollary to this is that beneficiaries have the right to demand that the trustee provide them with access to accurate information about the trust accounts. According to Donovan Waters, Mark Gillen and Lionel Smith:

> It was clearly established in the early nineteenth century that a trustee, like an executor and other accounting persons, must be ready at all times with his accounts.[15]

In *Sandford v Porter*, the Ontario Court of Appeal described the duty to account as follows:

> The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required; but as a general rule he is not obliged to prepare copies of his accounts for the parties interested.[16]

What then are trust accounts? Trust accounts contain a true and perfect inventory of the whole property and normally include an account of: what the original trust property consisted of; all moneys received; all moneys disbursed; and all moneys remaining in the trust fund.[17]

Halsbury's Laws of England[18] describes the content of the duty to account as follows:

> A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder.

While the right to inspect the trust accounts is enforceable as a matter of trust law, beneficiaries may also enforce the right by means of statute or subordinate legislation. For example, in Ontario, Rule 74.16 of the *Rules of Civil Procedure*[19] specifies that the rules governing the accounts of estate trustees apply, with necessary modifications, to accounts of other trustees. Trustees must keep accurate records. Accounts that must be filed

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15 Donovan W M Waters, Mark R Gillen and Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) at 1063.

16 (1889), 16 OAR 565 at 571-72.

17 See *Campbell v Hogg*, [1930] 3 DLR 673 (Ont PC) at 684.

18 4th ed (London: Butterworths, 2007) vol 48 at para 962.

19 RRO 1990, Reg 194 [*Rules*].

with the courts are to include, among other things: a statement of the assets; an account of all money received and disbursed; an account of investments made by the trustee; and a statement of all liabilities and assets, including money and investments, at the closing date of the accounts.[20]

Because the duty to account is well-settled, trustees normally voluntarily provide beneficiaries with such information, thus obviating the need for recourse to the courts.

4. The Beneficiary's Right to Disclosure of Other Trust Documents, Outside of a Civil Action

A) Introduction

There are three introductory points to make in respect of the following commentary. First, trust accounts are but a fraction of the trust documents. They do not encompass such things as the agendas for and minutes of trustees' meetings, legal and other professional advice provided to the trustees about the management and administration of the trust, background reports and documents prepared for the trustees, correspondence passing between trustees or correspondence from trustees to beneficiaries. For instance, in the two examples given at the outset of this article, there is nothing in the trust accounts that would answer the beneficiaries' questions as to why the trustees had exercised their discretion as they did. For ease of reference, I will refer to information other than the trust accounts as "other trust documents."

Second, the courts have made a distinction between motions for disclosure within a civil action for breach of trust and motions for disclosure raised in other types of legal proceedings, such as an application for advice and directions. The former is discussed in the following section of this article. The latter is the focus of this section.

Third, until recently, *Re Londonderry's Settlement*[21] was viewed as the governing law on the issue of disclosure of other trust documents in legal proceedings other than civil actions. In it, the Court adopted a proprietary approach to the question of disclosure to the beneficiaries. On this approach, as the equitable owners of the trust property, the beneficiaries have a *prima facie* right to disclosure of other trust documents and the trustee is obliged to make disclosure so that the beneficiaries can know the ways in which the trustees' rights and powers of disposition, holding and

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20 See *Rules*, *ibid*, Rule 74.17(1).

21 [1965] Ch 918, [1964] 3 All ER 855 (CA) [*Londonderry*]

management have been exercised (the proprietary approach). There is one clear exception to this general proposition: beneficiaries are not entitled to disclosure of documents that would reveal the reasons for the exercise of discretion by the trustees.

Today, however, apart from the beneficiary's basic right of access to the trust accounts, it is not clear that a beneficiary has any right to disclosure. In *Schmidt v Rosewood Trust Ltd*, the Privy Council set aside the proprietary approach on the basis that disclosure is best approached as one aspect of the court's inherent jurisdiction to supervise trusts (the discretionary approach).[22]

Yet another approach was adopted in *Attorney General of Ontario v Stavro* (generally referred to as *Ballard Estate*).[23] In *Ballard Estate*, the Court ordered disclosure because of the joint interest of the trustee and beneficiary in the due administration of the trust (the joint interest approach).

Each of these three approaches warrants close examination.

B) The Proprietary Approach – Londonderry

In 1934, the seventh Marquess of Londonderry settled certain shares in trust. The trustees were given the discretion to appoint both income and capital to a defined class of the settlor's descendants. The exercise of discretion by the trustees was to be done with the consent of persons called appointors.

The settlor's daughter was a member of the class. She was unhappy with the amount that the trustees decided to give her and asked for more. When they refused, her lawyer sought disclosure of certain documents. The trustees disclosed the original appointments that had been made and the trust accounts. The daughter persisted in her claim to see minutes of the trustees' meetings, agendas and other documents prepared for the trustees, and correspondence relating to the administration or execution of the trust between the trustees and various others.

The trustees applied to the court for directions as to their disclosure obligations, and at first instance they were ordered to make the disclosure.

The Court of Appeal allowed the appeal of the trustees. The Court held that although in general beneficiaries have a proprietary right to inspect

22 [2003] 2 AC 709 (PC) [*Rosewood Trust*]

23 (1994), 20 OR (3d) 350, 119 DLR (4th) 750 (Ct J (Gen Div)) [*Ballard Estate*].

trust documents, in the absence of an action impugning the trustees' good faith, the trustees were not bound to disclose those parts of documents that would reveal their deliberations as to the manner in which they should exercise their discretionary powers, the reasons for any particular exercise of such powers, or the material upon which such powers were or might have been exercised. Specifically, the Court ordered that certain agendas for, and minutes of, meetings did not have to be disclosed, nor did communications between the trustees and appointors, or between the trustees or appointors and an individual beneficiary. Legal advice and opinions from their solicitors to the trustees as to the manner in which the trustees were entitled to exercise such powers had to be disclosed, however.[24]

All three judges wrote separate concurring judgments. Given the prominence of the proprietary approach, the salient aspects of each judgment are worth examining.

Harman LJ began by pointing out that disclosure raises two conflicting principles:

> The first is that, as the defendant beneficiary admits, trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision. This is a long-standing principle and rests largely I think on the view that nobody could be called on to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he were not liable to have his motives or his reasons called in question either by the beneficiaries or by the court.[25]

All of the documents in question came into existence for the purposes of the trust, however, and were in the possession of the trustees as such. Accordingly, a second principle arose, namely, that the trust documents are the property of the beneficiaries and as such are open to them to inspect. Harman LJ referred to the following quotation from *O'Rourke v. Darbishire*:[26]

> If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. *The beneficiary is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in a sense*

24 See also *Talbot v Marshfield* (1865), 62 ER 738, 2 Dr & Sm 549 [*Talbot*] to the same effect.

25 *Supra* note 21 at p 928.

26 [1920] AC 581, 36 TLR 350 [*O'Rourke*].

> *his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. A proprietary right is a right to access to documents which are your own.* No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their *cestuis que trust*, and the beneficiaries are entitled to see them because they are beneficiaries.[27]

Harman LJ noted that these comments in *O'Rourke* beg the question of what documents are trust documents. He concluded, however, that even if the documents being sought were trust documents, the principle that trustees need not disclose their reasons for the exercise of discretion overrode the "ordinary rule" entitling the beneficiaries to their production. He added that "very different considerations" apply when disclosure is sought in an action in which a beneficiary impeaches the validity of the trustees' actions.[28]

Danckwerts LJ agreed with the result but for different reasons. He was of the view that the right to disclosure should not apply to all trust documents. Stating that beneficiaries have the right to inspect trust documents is of little assistance in the absence of knowing what is meant by "trust documents." He rejected the suggestion that the phrase encompasses all documents that are in the trustees' hands as trustees because this would cover everything "from advertisements for pink pills to blackmailing letters from people who think that they have a grudge against the trustees."[29] He did not view letters written to the trustees to be trust documents and opined that there are many classes of documents that ought not to be disclosed because disclosure might cause "infinite trouble in the family,"[30] out of all proportion to the benefit that might be derived from inspection. In his view, trustees could not properly fulfill the confidential role they are given if they are subject to investigation at any given moment. However, "if a case is made of lack of *bona fides*, that is an entirely different matter."[31]

Salmon LJ also agreed with the result but again for different reasons. He began by explaining the rationale for the general rule that trustees are not obliged to disclose their reasons for the exercise of discretion, saying:

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27 Quoted in *Londonderry, supra* note 21 at 932-33 [emphasis added].

28 *Ibid* at 934.

29 *Ibid* at 935.

30 *Ibid* at 935.

31 *Ibid* at 936.

> The settlement gave the absolute discretion to appoint to the trustees and not to the courts. So long as the trustees exercise this power with the consent of persons called appointors under the settlement and exercise it *bona fides* with no improper motive, their exercise of the power cannot be challenged in the courts – and their reasons for acting as they did are, accordingly, immaterial. This is one of the grounds for the rule that trustees are not obliged to disclose to beneficiaries their reasons for exercising a discretionary power. Another ground for this rule is that it would not be for the good of the beneficiaries as a whole, and yet another that it might make the lives of trustees intolerable should such an obligation rest upon them. Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens.[32]

He then noted the "no less firmly established" rule that beneficiaries have a proprietary right to see all trust documents. Recognizing the difficulty in reconciling these two rules, he agreed with the solution proposed by Harman LJ, namely that the documents would be provided to the daughter, with those parts that would reveal the trustees' reasons being covered up prior to disclosure.

Salmon LJ also noted that the position is "quite different" where the beneficiary seeks discovery of documents in an action in which allegations are made against the *bona fides* of the trustees:

> If the documents are in the possession or power of the trustees and are relevant to the issues in the action, they must be disclosed whether or not they are trust documents. In some instances, however, the fact that they are trust documents may nullify the privilege that would otherwise exist, as for example, if the document consists of counsel's opinion taken before the issue of the writ, clearly the beneficiary is entitled to see any opinion taken on behalf of the trust.[33]

C) The Discretionary Approach – Rosewood Trust

In *Rosewood Trust*, Mr Schmidt put substantial money into two offshore trusts in the Isle of Man. The sole trustee of each settlement was Rosewood Trust Ltd, an Isle of Man company that was in business as a provider of corporate and trustee services. Schmidt died unexpectedly. His widow and son were entitled to share in his estate. His son devoted much time and many resources to tracing the assets of his father's estate. When he

32 *Ibid* at 936-37 [citations omitted].
33 *Ibid* at 938.

attempted to find out what had happened to the money in the two trusts, Rosewood resisted disclosure.

The son started an action against Rosewood in which he alleged breach of trust and fiduciary duty. In these proceedings he obtained an *ex parte* order prohibiting Rosewood (and others) from dealing with the assets in the two trusts.

The son also commenced, by petition, a second proceeding. In this latter proceeding, the son provided affidavit evidence in which he deposed that the disclosure made to him pursuant to the *ex parte* order in the first proceeding raised more questions than it answered, especially as parts of the disclosed documents had been obliterated. He explained that the sums Rosewood gave him represented only a fraction of what he believed his father's entitlement was under the two trusts. He had an accountant's report that set out alleged deficiencies and inconsistencies in the material that the trustee provided. In this, the second proceeding, the son sought fuller disclosure of the trust accounts and information about the trust assets.

At first instance, the Court ordered Rosewood to make extensive disclosure of unredacted documents and to provide information. In making the order, the Court relied on the proprietary approach in *Londonderry*.

On appeal, the decision was reversed, for reasons related to the question of whether the deceased had ever been more than an object of a power, rather than a beneficiary. The appeal court indicated that had it to deal with the question of disclosure, it would have exercised its discretion in favour of making an order for disclosure.

Much of the debate before the Privy Council on a further appeal addressed the question of whether a beneficiary's right to disclosure should be regarded as a proprietary right. The Privy Council stated that "the more principled and correct approach" is to regard the right to disclosure as "one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts."[34] The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest; thus the object of a power (as well as a beneficiary) may seek such assistance. It is neither sufficient nor necessary that an applicant have a proprietary right in order to request disclosure.[35]

After noting that the trustee's duty to account follows from the fact that it is subject to a personal obligation to hold and deal with the trust property

34 *Supra* note 22 at para 51.

35 *Ibid* at paras 51 and 54.

for the benefit of others, the Court stated that no beneficiary "has any entitlement as of right to disclosure" of trust documents.[36] 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 and third parties. Disclosure may have to be limited and safeguards put in place.[37]

In the result, the Privy Council allowed the appeal and remitted the matter to the High Court for further consideration in light of its judgment.

D) The Joint Interest Approach – Ballard Estate

In *Ballard Estate*, the estate of Harold E Ballard was under administration. The Public Trustee representing the Harold E Ballard Foundation, the residual legatee, brought a motion for disclosure of all communications regarding management of the estate, including all communications between the solicitors and the executor of the estate. Because the estate was not fully administered at the time of the motion, it could not be said with certainty that assets of the estate would ever vest in the Foundation, as residual legatee.

Lederman J of the Ontario Court of Justice (General Division)[38] ordered disclosure. He began by noting that counsel on both sides accepted that communications passing between a solicitor and executor or trustee are not privileged against the beneficiaries of the will or trust. The executors contended, however, that because the Public Trustee represented only a potential beneficiary (that is, one with a contingent or residual interest), it was not a beneficiary with a proprietary right to the information.

Lederman J rejected this submission, saying:

> This analysis confuses "proprietary right" in the sense of its dictionary meaning, i.e. owning something as property akin to ownership in land ... with the right to information on the basis of commonality of interest. When Lord Wrenbury used the phrase "proprietary right" he was saying no more than the documents in question are in a sense the beneficiary's and [the beneficiary] is therefore entitled to access them. They 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 administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust.[39]

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36 *Ibid* at para 67.

37 *Ibid*.

38 Now the Ontario Superior Court of Justice.

39 *Ballard Estate*, *supra* note 23 at para 6.

He went on to explain that the rationale for solicitor-client privilege did not apply to the trust relationship because a trustee has the duty to act in the best interests of the beneficiaries and legal advice is obtained for the purpose of furthering their interests. There is no need to protect the solicitor-client communication from disclosure to the very persons who are claiming under the estate because the trustee and beneficiary have a "joint interest" in the advice. There can be no privilege asserted against beneficiaries of a trust over communications between a trustee and its solicitors with respect to the business and affairs of the trust, given their joint interest. The fact that the Foundation had only a contingent interest, as residual legatee, did not affect the application of the joint interest rule. A potential beneficiary need not wait until the administration of the estate is complete and there is specific property available to him or her before seeing the information that the trustees have gathered.

Lederman J noted, however, that there may be exceptions to the joint interest rule, as in *Londonderry*, where it was more important to preserve the confidentiality of deliberations on the exercise of discretion as to which beneficiaries were to take. In such situations, the "balancing of interests" could lead to a different result.

The Court concluded by noting that whatever approach to privilege is taken, as the action was based on allegations of breach of fiduciary duty and lack of good faith, production would be ordered as part of the civil litigation process.

5. The Beneficiary's Right to Disclosure in a Civil Action

When a beneficiary starts a civil action in which he or she sues the trustee for an alleged breach of trust, the law of civil procedure is engaged. That law gives the beneficiary the general right to production (documentary disclosure) of all documents in the trustee's possession that are relevant to an issue raised in the proceeding and which are not covered by a legally recognized privilege.[40] Relevancy is very broadly cast.[41]

Two significant consequences follow from disclosure being governed by the law of civil procedure.

First, legal advice and communications between a party and its solicitor normally need not be disclosed in civil actions because they are

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40 *Geffen v Goodman Estate*, [1991] 2 SCR 353.

41 *Glegg v Smith & Nephew Inc*, 2005 SCC 31 at para 23, [2005] 1 SCR 724; *Deloitte & Touche LLP v Ontario (Securities Commission),* 2003 SCC 61 at para 16, [2003] 2 SCR 713; *M (A) v Ryan*, [1997] 1 SCR 157 at para 19.

cloaked by solicitor-client privilege. However, solicitor-client privilege does not attach to communications between the trustee and its solicitor when those communications relate to the administration of the trust. They must be disclosed to the beneficiary because the trustee and beneficiary share a common interest in the administration of the trust. Thus, the advice the trustee receives in the course of administration of the trust is not privileged as against the beneficiary.[42]

Second, despite the trust law principle that a trustee is not required to disclose documents that will reveal the reasons for the exercise of its discretion, once a civil action is commenced, documents relating to the exercise of discretion must be disclosed, subject only to relevancy. [43]

Is this result, dictated by the rules of civil procedure, in conflict with the trust law principle against requiring disclosure? In my view, it is not. Recall that the trust law principle applies to legal proceedings other than a civil action. Disclosure in those proceedings has not been ordered because a trustee's exercise of discretion is not to be interfered with by the court – via its supervisory jurisdiction – absent fraud or *mala fides*.[44] However, in a civil action in which fraud or *mala fides* is alleged and there is some evidence, apart from such disclosure, to support the allegations, trust law would also require disclosure.[45]

But, you might point out, an allegation of breach of trust in a civil action is not an allegation of fraud or *mala fides*. That is correct, but neither fraud nor *mala fides* bear their usual meanings when used in respect of trustees.

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42 *Talbot*, *supra* note 24; *O'Rourke*, *supra* note 26 at 626-27; *Londonderry*, *supra* note 21 at 938. See also, *Ballard Estate, supra* note 23 at para 14; Alan W Bryant, Sidney N Lederman and Michelle K Fuerst, *The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis Canada, 2009) at 928-29. One exception occurs where the trustee consults a lawyer for the purpose of defending against a lawsuit by a beneficiary. In this situation, the advice is protected by solicitor-client privilege; see *Talbot, supra* note 24; *Cooke v Canada Trust Co*, 2005 BCCA 112, 210 BCAC 33.

43 *Ballard Estate*, *supra* note 23 at para 16; *Froese v Montreal Trust Co of Canada* (1993), 41 ACWS (3d) 481 at para 27 (BCSC) [*Froese1*], leave to appeal to BCCA refused..

44 *Gisborne v Gisborne* (1877), 2 App Cas 300 (HL).

45 See *Wilson v Law Debenture Trust Corp*, [1995] 2 All ER 337 (Ch D) [*Wilson*]; *Londonderry, supra* note 21 at 936.

A trustee's discretion must be exercised honestly, in good faith, and with integrity and fairness.[46] Fraud in this context means any improper exercise of discretion, that is, any exercise of discretion that is wrong or unreasonable.[47]

Furthermore, *mala fides* is a "notoriously elastic" concept.[48] It has been construed so broadly when dealing with trustees that it encompasses any allegation that the trustee acted improperly in the exercise of discretion, whether from an improper motive or by taking account of factors which the trustee should not have taken into account or not taking into account factors which the trustee should have taken into account.[49] Likely it would include an allegation that the trustee failed to consider the exercise of the discretion or that the exercise had been for an improper purpose, arbitrary, based on irrelevant considerations, or was unreasonable. It may go so far as to include an allegation that the trustee exercised its discretion "in a manner prejudicial to the interests of" the beneficiary.[50]

Accordingly, when a lawsuit has been started in which allegations of breach of trust have been made, in my view, both the law of civil procedure and trust law principles would require the disclosure of documents that were obtained or prepared by the trustee in the administration of the trust and in the course of carrying out its duties as trustee, including documents that reveal the reasons for the exercise of discretion.

6. The Plan Member's Right to Disclosure in England

A) Statutory Rights to Information

In England, there are a number of statutes that provide for the making of regulations relating to disclosure to employees: the *Pension Schemes Act 1993*,[51] the *Pensions Act 1995*,[52] the *Pensions Act 2004*[53] and the *Pensions Act 2008*.[54] Nonetheless, the statutory rights of disclosure are limited in scope. In part this is because only one regulation has been passed, namely, *The Occupational Pension Schemes* (*Disclosure of Information*) *Regulations*

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46 *In re Beloved Wilkes' Charity*, [1851] 42 ER 330 at 333.

47 *Tempest v Lord Camoys No 3* (1882), LR 21 Ch D 571.

48 See Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975) 25 U of T LJ 99 at 101.

49 See *Wilson, supra* note 45 at 343-47, a decision considered at length below in this article.

50 *Re Sayers et al and Philip* (1993), 38 DLR (3d) 602 (Sask CA) at paras 10-12.

51 1993 (UK), c 48, s 113.

52 1995 (UK), c 26, s 41.

53 2004 (UK), c 35, ss 12 and 238.

54 2008 (UK), c 30, s 10.

1996/1665.[55] Section 5 of the regulation provides that the trustees of a pension scheme shall disclose certain information to plan members, including: the amount of the benefit payable to the member; the amount of contributions credited to the member; the options available to the member in respect of his or her protected rights; the rights and options available on the death of the member; what action is being taken to establish the scheme's liabilities and to recover assets; and, an explanation of any change in the funding position of the scheme.

B) Disclosure in the Courts or Through the Pensions Ombudsman

In England, the "go to" court decision on this matter is *Wilson v Law Debenture Trust Corp.*[56] In *Wilson,* the court applied the same rules of disclosure in pension trusts as for traditional trusts. Thus, it refused to order disclosure of documents that would reveal the reasons for the trustees' exercise of discretion.

Traditional trust principles were not applied, however, where disclosure was sought through the Pensions Ombudsman. In *C Allen v TKM Group Pension Trust Limited*, failure to provide reasons for decision was found to be an act of maladministration and disclosure was ordered.[57] *Allen* has been followed in a number of subsequent decisions of the Pensions Ombudsman, such as *Clifton v Rover Group Pension Scheme*, *M Stone v Ford Pension Fund Trustees Ltd* and *Hedley v Pearl Group Ltd*.[58]

Both *Wilson* and *Allen* warrant a fuller discussion.

1) Wilson

The plaintiffs were former employees of a division of Chloride Group plc. While Chloride employees, they were members of the Chloride pension scheme and they contributed to it. The defendant was the trustee of the Chloride pension scheme. The terms of the scheme provided that surplus could be used to provide additional benefits for plan members.

Chloride sold the division in question and transferred the affected employees to the purchaser's employment. At the time of the transfer, the

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55 It applies to both s 113 of the *Pension Schemes Act 1993* and s 41 of the *Pensions Act 1995*.

56 *Wilson, supra* note 45.

57 [2000] PLR 333 [*Allen*].

58 *Clifton v Rover Group Pension Scheme* [2001] (K00519); *M Stone v Ford Pension Fund Trustees Ltd* [2007] (R00465); *Hedley v Pearl Group Ltd* [2008] (R00049).

Chloride pension scheme was in surplus. The transferred employees joined the purchaser's pension scheme. The trustee transferred an amount equal only to the past service costs of the transferring employees, leaving all of the surplus in the Chloride scheme.

Clause 22 of the Chloride trust deed provided that when employees were transferred from the Chloride pension scheme to another scheme, the trustee had the discretion to determine the appropriate amount to be transferred, after taking actuarial advice on the matter.

The plaintiffs brought an originating summons in which they sought an order requiring the trustee to disclose:

(i) the basis and information on which it determined what part of the assets of the Chloride pension scheme to appropriate to the purchaser's pension scheme;

(ii) the actuarial and other professional advice it received in connection with the proposed transfer payment; and

(iii) the representations it received from or on behalf of Chloride in connection with the proposed transfer payment, including any representations made in relation to the allocation of any surplus over liabilities of the scheme assets.

The trustee then disclosed the actuarial advice it had received in relation to the requirement in clause 22. It also disclosed the letters of advice from its solicitors. That part of the advice that would reveal the trustee's reasons for the way in which it had exercised its discretion had been blanked out. Certain other documents including minutes were also disclosed but, again, those parts that disclosed the reasons were blanked out.

Rattee J refused to order disclosure. He acknowledged that pension trusts are different from traditional trusts. However, citing *Cowan v Scargill*, he held that traditional trust law principles apply to pension schemes.[59] Accordingly, in the absence of evidence that the trustee had acted improperly, the Court would not interfere with the exercise of discretion.[60] As there was no such evidence of impropriety, the Court would not compel the trustee to disclose the reasons for the exercise of its discretion.

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59 *Wilson*, *supra* note 45 at 347.

60 *Cowan v Scargill,* [1984] 2 All ER 750 at 764.

The plaintiffs argued that it would be unreasonable that members of the scheme "who had bought their interests" should be unable to see that the trustee had exercised its discretion properly. To determine that, they contended, the plan members needed to see the reasons for the exercise of discretion.

The Court rejected this argument, saying that the trustee undertook its role based on long-established trust law principles and it would be wrong to say those principles no longer applied and the trustees were subject to a more onerous disclosure obligation. Rattee J also accepted the defendant's argument that any change to the applicable trust principles was a matter for the legislature. Moreover, he concluded, there were sound reasons for the parties to the trust instrument to have conferred such a discretion on the trustee, namely, the hope of minimising the potential for dispute and possible litigation.

2) Allen

Mr Allen began work in 1956 at the Clay Cross branch of Kennings Limited. In 1964, he became a member of the Kennings pension scheme. During the period of his employment, Kennings and its pension schemes went through a number of changes due to sales and mergers.

Allen was told that if he were to retire at age sixty, rather than sixty-five, his pension would be reduced by just over £10,000. He sought clarification because he understood that employees with more than forty years of service could retire without suffering a reduction.

Allen and the trustee differed on the length of his service. Allen viewed himself as having forty-two years of service whereas the trustee took the view that he had something less than forty years of company service. He was told that in any event the alleged rule was discretionary and had to be approved by the trustee. Allen's request for an unreduced early retirement pension was declined. He asked for the minutes of the meeting at which the decision was made, but the trustee refused.

Allen complained to the Pensions Ombudsman, both that the trustee failed to exercise its discretion and give him an unreduced early retirement pension, and that it refused to give him a copy of the minutes of the meeting at which the decision was made.

The Ombudsman accepted that the power to grant an unreduced pension was discretionary and that the trustee had no obligation to allow employees with 40 years of group service to retire early without penalty.

In considering itself bound to not grant an unreduced pension because Allen did not have forty years' service, however, the trustee had misdirected itself and failed to properly exercise its discretion. This was "maladministration."[61]

The Ombudsman stated that there was no legal duty on the trustee to make copies of the minutes available to Allen and that a court would not order such disclosure. He concluded, nonetheless, that the "absence of a breach of law" does not mean there is no act of maladministration. Maladministration is a wider concept than breach of law.[62] As a matter of "good administrative practice," he said, trustees should provide reasons for their decision to those with a legitimate interest in the matter and, subject to the need to preserve privacy rights of individual members, should make the minutes of their meeting available to scheme members.[63] Failure to provide the minutes was maladministration: "Not knowing the basis on which an adverse decision is taken is itself an injustice."[64]

The Ombudsman ordered the trustee to "fairly reconsider" Allen's application, give him a copy of the material before it as part of that consideration, provide him with reasons for its decision, and pay him £150 in costs.[65]

C) A Question

It is worth asking, in light of *Allen*, whether the plaintiffs in *Wilson* would have succeeded in obtaining disclosure had they taken their case to the Pensions Ombudsman instead of the courts. Based on *Edge v Pensions Ombudsman*, it seems unlikely that they would have.[66] In *Edge*, the English Court of Appeal held that notwithstanding the breadth of powers conferred on the Pensions Ombudsman by section 146(1) of the *Pension Schemes Act 1993*,[67] the Ombudsman should decline to investigate complaints unless all those whose interests could be affected by the investigation were heard. In light of the large number of disparate groups of plan beneficiaries, it would be very difficult to meet this threshold.

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61 *Allen, supra* note 57 at para 30.
62 *Ibid* at para 29.
63 *Ibid* at para 30.
64 *Ibid.*
65 *Ibid* at para 31.
66 *Edge v Pensions Ombudsman* [2003] 3 WLR 79 (CA) [*Edge*].
67 *Supra* note 51.

7. The Plan Member's Right to Disclosure in Canada

A) Statutory Rights to Information

To the extent that pension legislation in Canada deals with disclosure, its focus is on information about the individual plan member's entitlement, rather than on information relating to the administration and management of the pension fund. So, for example, section 25 of the *PBA* requires the plan administrator to provide plan members with a written explanation of the plan provisions that apply to them and an explanation of that person's rights and obligations in respect of the pension plan. Section 26 dictates that the administrator give plan members notice of proposed adverse amendments to the pension plan. Section 27 makes it mandatory that the administrator transmit to plan members an annual statement of pension benefits and section 28 requires the administrator to provide plan members with a statement of benefits on termination of employment.

In addition, there are provisions that are of some assistance when a plan member[68] seeks information about the management of the pension fund. Sections 29 and 30 of the *PBA* are illustrative of such provisions in Canadian provincial pension legislation. Section 29 of the *PBA* provides that, on written request, the administrator must make available the "prescribed records" about the pension plan and fund for inspection, without charge. The prescribed records will include such things as: the provisions of the current pension plan including any amendments to the plan; the applicable provisions of any document that sets out the employer's responsibilities with respect to the pension plan; a document that delegates the administration of the pension plan or pension fund; copies of any information returns that are filed in respect of the pension plan; and copies of any financial statement or audited financial statement for a pension fund that is filed.[69] Section 29(5) limits the right of inspection to once in a calendar year; and section 30 gives a plan member the right to inspect certain filed documents at the office of the Superintendent of Financial Institutions (the Superintendent). These documents include the filed documents that create and support the pension plan and fund[70] and other prescribed documents.

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68 It will be recalled that the term "plan member" is being used for convenience. The rights of inspection extend to a much broader group; see s 29(1) of the *PBA*, *supra* note 6, for a list of those so entitled.

69 *PBA*, *ibid*, s 45.

70 Section 10(1) of the *PBA*, *ibid*, sets out the information that must be contained in the documents that create and support a pension plan. As s 30(1) gives a right of inspection of filed documents that create and support the pension plan *and the fund*, a plain reading suggests that the plan member would have the right to inspect documents filed pursuant to s 10(1) and comparable documents in respect of the pension fund.

There will undoubtedly be documents provided to the Superintendent that will not be covered by section 30 and which the Superintendent is unlikely to voluntarily disclose. For example, if the Superintendent conducts an examination, investigation or inquiry,[71] a plain reading of section 30 suggests that its scope would not encompass the results of that activity.

B) Disclosure in the Regulatory Process

Proceedings within the regulatory process offer opportunities for plan members to obtain access to documents relating to the management and administration of the pension fund. *Sutton v Superintendent of Financial Services and AIG Assurance Canada*,[72] is an example of this.

AIG Assurance Canada (AIG) provided a DB pension plan (the Plan) for its salaried employees. It was both the Plan sponsor and the administrator. Mary Sutton was a Plan beneficiary.

The Superintendent issued a notice of proposal to refuse to make an order for a full wind up of the Plan. The notice of proposal did not deal with AIG's pending application for Plan merger and transfer of assets. Sutton requested a hearing of the matter before the Financial Services Tribunal (FST). She brought a motion within that proceeding in which she asked that AIG be required to produce certain reports prepared by legal and actuarial consultants in relation to the Plan. The documents that Sutton sought related to a proposed conversion of the Plan from a DB to a DC plan; a proposed merger of the Plan with another plan; and the transfer of assets from the Plan to that other pension plan. The FST refused to order disclosure.

In deciding the matter, the FST applied a test of whether the "information is arguably relevant to an issue in the proceedings." At the very least, the FST said, it had to be persuaded that there was some possibility that the disclosure being sought could assist it in resolving the issues in the substantive application. While the documents that were sought were arguably relevant to the proper use of the AIG pension funds, that relevance was "too remote from the much narrower issue" of the winding up application.

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[71] See s106 of the *PBA*, *ibid*, which grants these powers to the Superintendent and his or her designate.

[72] Financial Services Tribunal (FST) Decision No P0245-2004-1, online: http://www.fstontario.ca/english/decisions/pension/P0245-2004-1.pdf.

C) Court-Ordered Disclosure

Disclosure in pension trusts cases has been dealt with in five first instance Canadian decisions: *Froese v Montreal Trust Co of Canada* (*Froese 1*); *Froese v Montreal Trust Co of Canada* (*Froese 2*), *Camosun College Faculty Assn v College Pension Board of Trustees*, *Patrick v Telus Communications,* and *MacPherson v MacPherson*.[73]

All five cases are examined below but it is important to note that disclosure – full or partial – was ordered in every instance. The disclosure included legal advice[74] and associated communications,[75] employee information,[76] information about the decision-making processes involved in the making of discretionary decisions,[77] and expert opinion.[78] Significantly, the courts applied the proprietary approach to situations that are not strictly speaking that of trustee-beneficiary. In both *Froese 2* and *Patrick*, the defendant argued against disclosure on the basis that its role was that of plan administrator, not the pension trustee. The argument was rejected based on the trust-like nature of the relationship.

In every case but *Camosun College*, the court followed the proprietary approach in concluding that disclosure was warranted. In *Camosun College*, disclosure was ordered based on the reasoning in *Ballard Estate*.

1) Froese 1

The plaintiff worked for Johnson Terminals Limited (Johnson). Johnson asked him to take early retirement with an enhanced pension. Later, to the knowledge of the trustee (Montreal Trust), and contrary to the advice of the plan actuary, Johnson stopped making its contributions to the pension fund. The trustee continued to pay out pensions as if the plan were fully funded. It took no steps to require Johnson to meet its funding obligations or to notify the plan members of the failure to fund.

Ultimately, there were insufficient plan assets to meet the pension obligations and the trustee advised the plaintiff that his pension would be

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73 *Froese 1*, *supra* note 43; [1994] 25 CPC (3d) 45[*Froese 2*]; 2004 BCSC 941, 33 BCLR (4th) 162 [*Camosun College*]; 2005 BCSC 1762, 23 CPC (6th) 219 [*Patrick*]; 2005 BCSC 207, 137 ACWS (3d) 584 [*MacPherson*].

74 *Froese 1, supra* note 43. In *Patrick*, *supra* note 73, legal advice was not ordered disclosed because the Court accepted that the communication had gone to the company in its role as employer, not its role as plan administrator.

75 *Froese 2*, *supra* note 73.

76 *Patrick*, *supra* note 73.

77 *Ibid*.

78 *MacPherson*, *supra* note 73.

reduced from $2600 per month to $565 per month. The plaintiff sued the trustee for damages, alleging breaches of trust and of the obligation to duly administer the trust.

The plaintiff sought production of the legal advice that the trustee had received in connection with the decisions it made and the actions it took in administering the pension trust. The trustee resisted disclosure, saying that it was not a trustee for the plaintiff. It also claimed solicitor-client privilege over the documents and that, in any event, it acted honestly and reasonably and ought fairly to be excused if there was a breach of trust.

Master Joyce ordered disclosure. As the legal advice related to the due administration of the trust and did not involve the exercise of discretion, the plaintiff had a proprietary right to see the documents. He rejected the trustee's argument that the plaintiff could not succeed on the basis of a proprietary interest until he had first proven that he was a beneficiary. It was sufficient that the plaintiff had made out a *prima facie* case that he was a beneficiary.

2) Froese 2

As a result of the decision in *Froese 1,* the plaintiff obtained disclosure of part of a legal opinion prepared for third parties. In *Froese 2*, the plaintiff sought production of the full legal opinion and the balance of communications associated with it. These documents were in the hands of third parties: two numbered companies that were the successors of his former employer (Johnson), two former directors of that employer, and a firm of actuaries. The third parties claimed solicitor-client privilege. Again, production was ordered.

In making the order, Master Grist rejected the claim that the documents were privileged. He referred to the general proposition that privilege cannot be claimed where the advice in question has been given for the purposes of administering the trust. "In such circumstances, the opinion is said to be property of the trust and cannot be withheld from those to whom the trustees owe a fiduciary duty."[79]

He then considered whether Johnson stood in a position of trust in respect of the plaintiff. He found that it did, based on the control that Johnson played in respect of the plan, including the power to direct the "nominal trustee," Montreal Trust, as to any benefits to be paid out of the trust fund and the investments to be undertaken with the trust funds. As well, Johnson had the power to terminate the plan and direct the trustee as

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79 *Froese 2*, *supra* note 73 at para 13.

to the disposition of assets on plan termination, a power that it had exercised. He concluded that the documents had been prepared in the course of administration of the pension plan whose terms were sufficient to create a trust relationship between the employer and plan members. They could not be shielded from the plaintiff who was a person to whom the company owed a fiduciary duty.

3) Camosun College

The petitioner faculty association sought production of a legal opinion relied on by the respondent board of trustees when interpreting the pension plan provisions as they related to phased retirement provisions of the collective agreement. The board claimed that the opinion was subject to solicitor-client privilege.

Vickers J rejected this claim and ordered production. Relying on *Ballard Estate*, the Court said that production was warranted not because of a proprietary interest but because there was a joint interest in the proper administration of the trust.[80]

4) Patrick

The plaintiffs were former employees of the defendant, Telus Communications Inc. They paid into the Telus pension plan. They were denied full pensions although they had fulfilled certain age and service levels (consent pensions). They brought an action in which they sought declarations of entitlement.

The plaintiffs sought an order compelling Telus to disclose: personal information relating to other employees' applications for consent pensions; legal opinions that Telus had received relating to the consent pensions (the "legal advice"); and documents relating to the decision-making process in respect of applications for consent pensions.

Rogers J ordered disclosure of the personal information in other employees' applications for consent pensions from 2000 forward.[81] However, he refused to order disclosure of the legal advice. He acknowledged that the plaintiffs had a *prima facie* proprietary interest in the legal advice but accepted Telus' assertion that it received the legal advice in its capacity as employer, not trustee.[82] Consequently, he held that

80 *Camosun College*, *supra* note 73 at para 33.

81 *Patrick*, *supra* note 73 at paras 11-13.

82 While Rogers J used the word "trustee," he meant plan administrator.

the plaintiffs' *prima facie* right to disclosure of the legal advice had been rebutted.

As for the documents related to Telus' decision-making process, Telus argued against disclosure on two bases. First, it said that it was administrator of the pension plan, not trustee of the pension fund. CIBC Mellon Global Securities was the trustee.

Rogers J found this argument "disingenuous," saying that Telus could not escape the nature of its role as administrator of the plan because "some financial institution holds legal title to the plan's assets."[83] Telus's role as administrator clothed it with trust responsibilities, giving the plaintiffs a proprietary interest in documents relating to the administration of the trust.

Second, Telus argued, it was a matter of discretion whether to agree to a consent pension and documents relating to a trustee's exercise of discretion are exempt from production. Rogers J considered *Londonderry*, *Rosewood Trust*, and a number of other cases and concluded:

> 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.[84]

The plaintiffs fell into the latter category because their pleadings raised the *bona fides* of Telus' acts as administrator. Accordingly, the documents had to be disclosed despite the fact that they had to do with Telus' exercise of discretion.[85]

5) MacPherson

The MacPhersons were divorced in 1982. A court order declared, among other things, that: Mr MacPherson's pension contributions to August 1982 were family assets and Ms MacPherson was entitled to half of them; on receipt of funds from the pension plans, Mr MacPherson was to pay

83 *Patrick*, *supra* note 73 at para 17.

84 *Ibid* at para 39.

85 *Ibid* at para 40.

Ms MacPherson her share; and Mr MacPherson was trustee for Ms MacPherson's share in the plans.

A dispute arose about the value of Ms MacPherson's share of the pensions. Mr MacPherson and his lawyer obtained the advice of a pension expert on various issues (the "advice") but, relying on solicitor-client privilege, refused to produce the opinion to Ms MacPherson. The Court ordered production.[86]

Humphries J began with the proposition that a beneficiary has a proprietary interest in, and is entitled to production of, documents relating to advice sought and obtained by a trustee in connection with the administration or management of the trust but not to documents that arise in the course of an adversarial relationship between the trustee and beneficiary.[87]

In the circumstances of this case, a trust relationship arose out of the practical necessity of managing a pension where there was no other way to do it. In that context, the two parties were no longer in an adversarial relationship. Ms MacPherson did not have an independent right to the pensions which was in conflict with Mr MacPherson's right. The asset to which she could assert a right was a share in whatever benefits her former husband was entitled to. She could assert her right only through him.[88]

By virtue of the court order, Mr MacPherson became the trustee of her beneficial interest. He was therefore required to take her interests into account when he dealt with the pensions. The advice related to matters that might or might not fall within the terms of the trust. Thus, it was relevant to the administration of the trust. Whether this creates a proprietary interest in the wife or is part of the good faith duty of a trustee, the trustee owed a duty of full disclosure to the beneficiary (wife) and had to disclose the opinions in full.[89]

8. The Parties' Positions

Before considering how the Canadian appellate courts might resolve the thorny issue of disclosure in pension trusts, it is useful to summarise the positions that each of the key stakeholders – plan members, the employer

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[86] It is not clear if the expert opinion was prepared by a lawyer or some other professional. While the bulk of the references are simply to an "expert opinion," the Court refers to it as a "legal opinion" in para 1 of its reasons for decision.

[87] *MacPherson*, *supra* note 73 at para 18.

[88] *Ibid* at paras 21-22.

[89] *Ibid* at paras 21-23, 25, 26 and 29.

as plan sponsor and administrator, and the pension trustee – might advance.

A) The Plan Members

The plan members will argue that in order to protect and enforce their rights – including the right to compel due administration of the pension trust[90] – they need access to information about the management and administration of their pension plans. They are likely to rely on two key points when arguing for disclosure.

First, in a great many senses of the word, the plan members collectively own the trust property, or at least a significant part of it.[91] While the rights of plan members were once understood to be contingent (not vesting until the member reached a certain age, for example), provincial pension legislation makes it clear that pension rights vest once membership and eligibility requirements are met.[92] Moreover, in contributory plans, the trust fund consists, in part, of the plan members' own money. In all cases, the plan members have paid for the contributions made on their behalf in the form of services. They need information about the management and administration of the pension fund so that they can take the necessary steps to protect their rights.

Second, plan members are vulnerable. For many, their pension benefits are the most valuable asset they own. They do not have control over the pension fund or its management but they will suffer if there are insufficient assets when it comes time to collect their pensions. For example, if a company falls on hard times, it may stop making its contributions to the pension fund. If the company later fails, pension benefits may be cut back drastically. Information in the hands of the plan members is not alone sufficient to prevent such problems from arising. It may, however, give plan members an opportunity to protect their pensions and/or be involved in the legal processes that affect their pensions.

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[90] This right of plan members was recently affirmed by the Supreme Court of Canada in *Burke*, *supra* note 9 at para 86.

[91] If there is an actuarial surplus in the trust fund, absent a determination as to ownership of the surplus, it cannot be said unequivocally that the plan members own the entire trust fund. Also, if the employer has the right to take a contribution holiday, it can take the benefit of the actuarial surplus, regardless of surplus entitlement.

[92] See, for example, s 14.1 of the *PBA*, *supra* note 6, which stipulates that the pension plan must provide for the accrual of pension benefits in a gradual and uniform manner.

B) The Pension Plan Administrator

The plan administrator's position is equally compelling. There is no obligation on an employer to offer a pension plan. When it does, it is responsible for due administration of the plan and fund and, in a DB plan, to ensure that there are sufficient trust funds to meet the pension obligations. Disclosure can be expensive and time consuming. There can be thousands of pension plan members and that many again in the form of interested persons such as spouses with entitlement on the death of the member. If the administrator is bound to provide all requested information, it could find itself with no time to administer the plan itself. Where the administrator is also the employer, it could find itself being diverted from its core job of running the business.

Moreover, decisions that are made often involve information confidential to the plan member or to the company. Take the first example given in this article. Aaron may have contracted an illness and have only a few months within which to live and it was for that reason that the decision was made to give him an unreduced pension. Information about Aaron's medical condition is confidential to him. Employers would argue that confidentiality concerns should be honoured in all parts of the employment context, including in relation to the pension plan and trust.

It takes little imagination to think of examples of confidential corporate information that needs to be shared with the plan administrator, so that the administrator can do its job properly, but that would be damaging if disclosed prematurely: plans to sell, downsize, merge or reorganize the business, for example.

Furthermore, disclosure can create problems with employee morale. Different classes of plan members have different needs and priorities. For example, the needs of active members are generally different than those of retirees. Active members may want low contribution rates because they need their employment income for basic living costs. Those nearing retirement age may favour higher contribution rates because they want either increased pension benefits or things such as indexation. Disclosure of information could lead to or exacerbate "intergenerational" tensions among employees. Even within classes of employees, there are often competing wishes. Again, these tensions could be exacerbated by the disclosure of certain documents.

The employer will argue that, in a DB plan, it has the ultimate responsibility to ensure that the pension benefits are paid and, therefore, it must be free to manage and administer the pension fund and plan without disclosure obligations beyond those prescribed in the governing legislation. As support for its position, it will point not only to the filings that it must make with the regulator but to the scheme of the legislation as a whole, which "seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system."[93] Provision of a pension plan is onerous but a valuable social good. The task of administering a pension plan is onerous enough. The legislature has spoken, in terms of disclosure obligations. The courts should apply traditional trust principles and, in the absence of a lawsuit, refuse to order disclosure of documents that would reveal the reasons for the exercise of discretion. So long as pension plans and pension trusts are being managed in good faith and with no improper purpose, the courts ought not to intervene in any way, including by ordering disclosure.

C) The Pension Fund Trustee

From the trustee's perspective, an obligation to disclose information to plan members, on request, is unworkable for two reasons.

First, given the numbers of plan members and amount of documentation, such an obligation could prove extremely expensive and time consuming. This has obvious implications for the cost of managing the trust fund, a matter of concern to both plan members and the employer, as plan sponsor.

Second, many decisions – including discretionary ones – are made by the employer and the trustee simply implements them. A disclosure obligation could seriously strain the trustee's relationship with the employer, lead to the situation where the employer is unwilling to provide the trustee with the information necessary to properly manage the trust property, and cause the trustee to be in breach of its confidentiality obligations to the employer.

The trust agreement creates a contractual relationship between the pension trustee and the employer. Typically the trust agreement contains confidentiality provisions. Even if it does not, however, for the pension trustee to operate effectively, it needs to be kept abreast of any corporate changes that might affect its investment (and other) obligations under the trust agreement. That information is often confidential to the employer company. It is readily apparent that the pension trustee would have conflicting legal obligations if it is subject to a disclosure obligation in favour of plan members. In that situation, it would owe a duty to keep confidential information imparted to it by the employer, and a duty to

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93 *Monsanto*, *supra* note 4 at para 14.

disclose the information, on request, to plan members. This conflict in duties arises even if the pension trustee receives information without the imprimatur of confidentially. Take, for example, the situation in *Froese 1*[94] where the pension trustee became aware that the plan sponsor was not making the necessary contributions. That was a signal that the company was in financial difficulty. If the trustee must disclose such information, on request, even though the information might not technically be confidential, at a minimum, revealing that information could be very harmful to its relationship with the employer.

Set aside for the moment the question of confidential corporate information that the trustee might receive from or about the employer. If the trustee obtains legal and other professional advice that is paid for out of the trust fund, it is unclear what its disclosure obligations are. Must it disclose the advice to the employer? If so, is it sufficient to disclose to the employer? Or, must it disclose the advice to plan members, on request? The trustee would argue that principles of contract law and trust law collide on this issue. As we have seen, trust law principles indicate that disclosure must be made to plan members. However, the trust agreement is also a contract that contains the obligations of the employer and the trustee. It is likely that the trustee's disclosure obligation in respect of the employer will be addressed in the trust agreement. The trustee will argue that its disclosure obligation is limited to that set out in the trust agreement and that any disclosure obligation in respect of plan members is a matter best left with the employer as plan administrator.

The essence of the custodial trustee's position is this. As a general proposition, the trustee functions at the direction of the employer. Its relationship is with the employer. If the court rules that it has disclosure obligations in respect of plan members, its role will become unduly complicated, onerous and expensive. Disclosure to plan members should be resolved as a matter of the fiduciary relationship that exists between plan administrator and member rather than the trust relationship, given that the pension trustee is akin to a bare trustee.

9. A Framework to Govern Disclosure in Pension Trusts

The foregoing information can be organized into the beginnings of a framework for resolving disclosure disputes in pension trusts. I begin by setting out what is accepted law on this matter. This is followed by a summary and critique of the three existing approaches to court-ordered disclosure. I conclude this section by identifying a possible alternative test

[94] *Supra* note 43.

and four overarching questions that should inform the courts as they settle on a test for disclosure in pension trusts.

A) Settled Law

Somewhat surprisingly, there are only four points that can be made with any degree of certainty about disclosure in pension trusts.

First, in the provinces and territories with pension legislation, there are certain statutorily mandated disclosure rights and obligations. Pension plan members must be given specified information about their individual entitlements annually and on key events, such as termination of employment. As well, as explained above, they have other limited rights to disclosure from the plan administrator, through the Superintendent and in proceedings before the regulator.

Second, as a result of the ordinary rules of civil procedure, there is a broad right to disclosure in civil actions for breach of trust. Plan members in such actions are entitled to disclosure of all documents in the trustee's possession that are relevant to an issue raised in the proceeding and which are not covered by a legally recognized privilege. Unlike the usual situation in a lawsuit where legal advice and communications between a party and its solicitor are cloaked by solicitor-client privilege, solicitor-client privilege does not attach to communications between the trustee and its solicitor when those communications relate to the administration of the trust. They must be disclosed because the trustee and plan member share a common interest in the administration of the trust. Furthermore, as we have seen, a trustee must disclose relevant documents even if they reveal the reasons for the exercise of discretion, despite the trust law principle which would protect such documents from disclosure.

Third, if the plan administrator is named in the suit, the same rights of disclosure apply to documents in its possession.

Fourth, it is not clear whether the basic trust law principle that a beneficiary must be given access to the trust accounts applies to pension trusts. It will be recalled that this principle means that, on request, the trustee must give beneficiaries access to accurate information about the trust accounts.[95] While this principle has been held to apply to trustees, as well as those similarly situated such as executors, there is no case that establishes this right on the part of plan members. It may be tempting to

95 Recall also that the meaning of trust accounts is limited to an inventory of the original trust property, a summary of all receipts and disbursements from the trust fund, and a closing inventory of assets in the trust fund.

assume that this basic right extends to plan members but even a cursory review of the concerns of the plan administrator and trustee, as outlined in the preceding section, demonstrates the need for caution when this point of law comes to be decided.

B) Other Rights to Disclosure

Outside of these settled disclosure rights and obligations, when will a court order disclosure? The answer to this question depends on which approach the court uses when deciding the matter. It has three approaches from which to choose: proprietary, discretionary or joint interest. An important consideration when choosing – albeit one that is largely unarticulated in the existing case law – is this: Who has the burden of proof in a disclosure dispute? Should it be assumed that the plan member has a right to disclosure and that it is up to the respondent to convince the court that there is some circumstance that warrants refusing disclosure? Or should the plan member have the burden of proving that disclosure is warranted? In large measure, the answer to this question is embedded in the approach that is adopted. With that in mind, I will summarize the three approaches, along with key problems associated with each.

C) The Three Approaches

1) The Proprietary Approach

On the proprietary approach enunciated in *Londonderry*, the plan members are viewed as the equitable owners of the trust property with a *prima facie* right to disclosure of trust documents. There is one clear exception, however, to this general proposition: plan members are not entitled to disclosure of documents that would reveal the reasons for exercise of discretion by the trustee or plan administrator.[96]

The proprietary approach shows deference to the trustees' decision making. Of the three approaches, it is arguably also the most deferential to the legislature, as it continues the law's historical stance on the matter of disclosure, leaving any change in the law to the legislature.

There are two significant difficulties with the proprietary approach. First, while this approach gives plan members a *prima facie* right to trust documents, there is no clear understanding of, or test for, what documents are "trust documents." This problem was identified in *Londonderry*[97] and

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96 Recall that this rule does not apply when a civil action for breach of trust has been commenced.

97 *Supra* note 21 at 933, 934 and 935.

remains with us today. Indeed in *Londonderry*, all three judges acknowledged that they did not know whether the documents being sought were trust documents or not.[98] Is a trust document simply anything paid for with trust funds? That test is both too broad and too narrow. It is too broad because the fact that a document has been paid for with trust funds does not mean it is a trust document. It may be that the payment was an improper use of trust funds, in which case the appropriate remedy is to force repayment of the wrongly used funds, not to order disclosure of the document. The test is too narrow because the administrator or pension trustee is likely to have all kinds of documents that have not been paid for but which affect the administration of the plan and trust. The examples given at the outset of this article make this point. It is unlikely that the documents that would exist in those examples were paid for but, given that they relate to decisions having a direct impact on the pension fund and plan members' rights, one would be hard pressed to say that they are not trust documents.

A functional approach in which any document used in the administration of the pension fund that has an impact on plan members' rights is treated as a trust document suffers from the same problems. A document outlining a company's decision to sell a division will be used in the administration of the fund and will doubtless impact on plan members' rights as, for example, where layoffs are made in anticipation of the sale. That does not make the corporate document a trust document, such that plan members have a *prima facie* right of inspection.

Second, the proprietary approach presupposes that only those with a beneficial interest in the trust property are entitled to disclosure. What implications does this have for those with only a contingent, remote or wholly defeasible interest? In considering this question, recall the facts in *Londonderry* and *Rosewood Trust*. In *Londonderry,* the daughter who was seeking disclosure was one of a class of 22 persons. In *Rosewood Trust*, the class was so broad and the discretion so wide that the son who was seeking disclosure had a theoretically very remote interest. That said, on the facts, it would be hard to argue that the latter had a weaker right to discover what had been done with the trust property than the former.

2) The Discretionary Approach

On the discretionary approach espoused in *Rosewood Trust*,[99] disclosure is a matter of the court's inherent jurisdiction to supervise trusts. While a claimant need not have a vested beneficial right in order to obtain

98 *Ibid*.

99 *Supra* note 22.

disclosure, he or she has the burden of proof of demonstrating why disclosure should be made. The court will decide whether to order disclosure based on an assessment of all relevant factors.

The discretionary approach gives the courts the most flexibility in deciding whether to order disclosure, an advantage given the polycentric nature of pension trusts. Further, this approach creates the possibility of broader access to disclosure because it is not limited to those with an equitable interest in the trust property.

Yet this approach has serious shortcomings. People will have to go to court in every situation of contested disclosure, which is self-evidently expensive and time consuming. Further, it removes the prior court guidance that flowed from *Londonderry*, guidance that had enabled the various players to understand their rights and obligations in relation to disclosure and order their affairs accordingly. There is value in settled law. There is obvious disadvantage to unsettling it.

Moreover, it is unclear what factors are relevant to the exercise of the court's discretion. Factors that may be relevant include: (1) the nature and extent of the plan member's interest in the plan; (2) the nature of the plan member's concern; and, (3) the nature and extent of employee participation in plan governance.

The first and third factors are self-explanatory.

The second factor is best explained by reference to two types of possible concerns underlying a disclosure request: investment decisions made in respect of pension trust assets, and an employer's financial situation. In relation to an investment concern, the courts may distinguish between a member seeking information about investments where the concern is that the assets are invested in companies using child labour, as opposed to a concern that the assets have been invested in shares in which the pension trustee had a personal interest. Similarly, they may distinguish between a request for disclosure based on alleged corporate financial difficulties where the plan member wishes to determine whether the employer is making the requisite contributions to the pension plan as opposed to attempting to determine whether the company is going into receivership with an underfunded plan. Self-evidently, information going to the security of the pension fund is likely to be more susceptible to disclosure than is information relating to discretionary decision-making.

The open-ended nature of a discretion based on "all relevant factors" compounds the uncertainty inherent in this approach.

3) The Joint Interest Approach

In *Ballard Estate*,[100] it will be recalled, the Court ordered disclosure based on the joint interest of the trustee and beneficiary in the due administration of the trust. Entitlement to disclosure on this approach exists when the documents in question are created as part of the trustee's obligation of due administration for the benefit of all beneficiaries who take or may take under the trust. The beneficiaries have a shared interest in the due administration of the trust. It is that commonality of interest that leads to their entitlement to disclosure. Solicitor-client privilege does not act as a shield from production on this approach because the interest of the claimant is the same as that of the trustee and/or plan administrator – the legal advice had been obtained for the purpose of the due administration of the trust/plan. The Court caveated this general principle by stating that exceptions might have to be made to address such things as confidentiality concerns.

It can be assumed that this approach would operate similarly when disclosure is sought from the plan administrator because of the joint interest that the plan administrator and plan members have in the due administration of the plan.

This approach has the advantages of the proprietary approach and one further advantage: it expressly recognizes that those with something less than a vested equitable interest have a *prima facie* right to disclosure so long as the claimant has a shared interest in the due administration of the pension trust.

As with the proprietary approach, however, there are questions about what documents are encompassed on this approach. *Ballard Estate* refers to documents that are "created" as part of the trustee's obligation to duly administer the trust. Does it apply equally to documents that come into the trustee's hands as part of that duty? Would confidential corporate documents, such as plans to downsize the workforce, be caught? Furthermore, *Ballard Estate* was a classic trust case. Is its approach sufficiently flexible that it will work for pension trusts? The concerns of the parties in pension trusts, as explained in part 8 above, are markedly different from those in traditional trusts. That said, the recognition in *Ballard Estate* that there may be exceptions to the joint-interest principle gives the court flexibility in dealing with the parties' competing interests.

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100 *Supra* note 23.

4) Overarching Questions

There are two paths that the courts might follow in terms of disclosure.

The first is to choose from one of the three existing approaches summarized immediately above.

The second is to develop a test[101] for disclosure, one that builds on the strengths of the existing approaches but minimizes the problems that are associated with each. One suggestion for such a test is based on the test for removal of trustees. A trustee will be removed only where his or her continued presence would jeopardise the trust assets, put the welfare of beneficiaries at risk, or prevent the trust from being properly executed.[102] This test, suitably modified, would be that disclosure will be ordered unless it would jeopardise the pension trust assets, put the welfare of the beneficiaries at risk or prevent the pension trust from being properly executed.

A test such as this makes it clear that the burden of proof falls on those opposing disclosure. It also makes clear what must be established to resist disclosure. Further, the test is sufficiently flexible that it would enable the court to balance the concerns of the various parties.[103] For example, concerns based on the cost of disclosure (both time and money) could be considered when deciding whether there was a possible jeopardy to the trust assets. Morale and confidentiality concerns could be addressed as part of determining whether disclosure would place the welfare of the beneficiaries at risk. And, concerns about how disclosure might affect the working relationship between the trustee and employer could be considered as part of determining whether disclosure would prevent the pension trust from being properly executed.

In deciding which path to follow, the courts may wish to consider the following overarching questions.

a) What is the rationale governing disclosure in the pension plan context? Does the same rationale apply to both pension trustees and plan administrators?

In the context of a civil suit for breach of trust, the rationale for disclosure is that it is necessary to ensure the full and fair resolution of the

101 A test can be distinguished from an approach on the basis that it tends to be more specific, thereby creating more clarity and predictability.

102 *Letterstedt v Broers* (1884), 9 App Cas 371.

103 Set out at part 8 of this article.

dispute. This rationale suggests there should be an obligation of full disclosure by both pension trustees and plan administrators.

The trust law rationale for disclosure is that it is necessary in order for the court to exercise its supervisory jurisdiction over trusts.[104] Trustees must disclose to the court not so that the court can remake the trustee's decisions but so that it can be satisfied that the trust has been duly administered and that discretions have been exercised in good faith, after genuine consideration, and in accordance with the purposes for which they were conferred. On this rationale, disclosure must be made to the court but no further.

Waters, Gillen and Smith suggest another rationale for disclosure: trustees have a duty to disclose because the trustee is administering property in which others have an interest. Consequently, the trustee has an obligation to account for its administration and it is that duty which leads to the obligation to account and to produce trust documents.[105] This rationale suggests that plan administrators should be required to make disclosure to plan members because they are administering the pension fund in which plan members have an interest. However, this rationale does not assist in determining whether the custodial pension trustee must disclose to the plan members or the employer or both.

When deciding what rationale underpins the disclosure obligation, it would be prudent to bear in mind the positions of the parties as set out in the preceding section. Their positions reflect, in practical terms, the fundamental differences between pension trusts and traditional trusts, and the serious ramifications that follow an order for disclosure, or a refusal to order it.

b) How does the pension legislation impact on the question of court-ordered disclosure?

On the one hand, it could be argued that the statutory rights to information[106] are a legislative expression of the totality of disclosure obligations. On the other hand, however, because the pension legislation is "minimum standards" legislation, it could be argued that the legislative intent was to stipulate a minimum level of information that had to be made available to plan members, with the expectation that the common law would deal with the broader notions of disclosure and accountability.

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[104] This proposition is discussed in part 5 of this article.

[105] Waters, Gillen and Smith, *supra* note 15 at 1063.

[106] Set out in parts 7 (A) and (B) of this article.

c) Is disclosure a matter that can be resolved by means of the plan text and pension trust agreement? In other words, could contractual provisions dictate whether and how disclosure is made?

It is not at all clear how the courts might respond to a provision in a trust agreement or plan text purporting to limit disclosure obligations. They may even draw a distinction between the two for purposes of enforceability. When dealing with the plan text – that is, the governing document between employer and employee under the terms of which the employer serves as plan administrator and, hence, is a fiduciary – the court might view limitations on disclosure obligations as running afoul of its supervisory jurisdiction over trusts. On the other hand, when considering a trust agreement between an employer and a bare custodial trustee, the court may view the matter as being more akin to a contractual relationship, with the result that its provisions properly govern the matter of disclosure.

What is clear, however, is that amending plan documentation to deal with disclosure is unlikely to be straightforward, given the lack of clarity around disclosure rights and obligations. If an employer were to attempt to amend existing pension plan documentation to dictate the rights of plan members in respect of disclosure, it may be that such an amendment would be treated as adverse.[107] Subject to the terms of existing plan documentation on the matter of amendments, the answer to whether the amendment is adverse may depend upon whether the amendment is seen to be the exercise of a fiduciary power or the exercise of a power by the employer *qua* employer.

d) Is there a fiduciary duty to inform? If so, what is the content of the duty?

In *Rosewood Trust*, the Privy Council referred to a fiduciary duty "to keep the beneficiary informed."[108] If there is such a duty, it might include such things as an obligation to explain to the plan member what his or her rights are and, possibly, to supply periodic information without request. An exploration of whether such a duty exists and, if so, its content, is well beyond the scope of this paper. I suspect that the broader questions around communication and accountability that are inherent in a duty to inform will not arise in Canadian courts for many years. I raise this consideration here only to alert those in the pension field and the courts of its possible existence, as the mere fact it may exist could influence the disclosure debate.

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107 If considered adverse, provincial legislation may require that notice be given when registering the amendment with the Superintendent; see e.g. s 26 of the *PBA*, *supra* note 6.

108 *Supra* note 22 at para 52

10. Conclusion

Pension trusts have caused the courts to rethink trust law principles governing the management practices of trustees and plan administrators. In my view, more rethinking is called for.

The pension trust has few of the features of the traditional trust. I will not repeat the many points of distinction between the two, other than to note the following. Unlike the traditional trust which is typically a "one time" gift, the pension trust is part of a legally complex arrangement arising in the employment context. It begins as the product of an agreement between parties, one in which value flows both ways. Moreover, it is highly regulated.

The thorny question of disclosure is not one that can be resolved by reference only to a single set of legal principles. Like so many pension issues, the question of disclosure in pension trusts cries out for a contextual consideration. That context involves the recognition that pension trusts lie at the intersection of the law governing fiduciaries, contracts, employment and trusts – with an overlay of statutory law and civil procedure. It is my hope that this article has contributed to that recognition and to the beginnings of a framework for resolving this important question.