



# ADVICE ABROAD – CONTRASTING THE US, UK & CANADA

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# AGENDA

- Privilege
- Approach to trustee decisions
- Civil practice and evidence
- Anti-money laundering/source of wealth



# PRIVILEGE

Comparison: UK, US & Canada

# PRIVILEGE IN ENGLAND & WALES

- **Legal professional privilege**

- Covers (a) communications seeking/providing legal advice (client/lawyer) and (b) communications exchanged for the dominant purpose of litigation (includes third parties)
- Communications with non-lawyers (i.e. accountants) are not privileged unless litigation contemplated

- **Iniquity exception**

- Privilege lost if advice furthers a criminal or fraudulent purpose (even if the adviser is unaware of the criminal or fraudulent purpose)
- E.g. Privilege in advice will be lost where the primary purpose of settling assets on trust is to defeat the claims of creditors (i.e. asset protection purposes)

- **Post-Brexit**

- UK treated as third country for purpose of legal advice given to clients situated in the EU

# PRIVILEGE IN CANADA

- Legal advice privilege exists any time a solicitor is asked for or provides legal advice, whether or not litigation involved (v. litigation privilege)
- The privilege is that of the client and endures forever
- Extends to professional relationship between lawyers and trustees
- Beneficiaries entitled to ask for general information on status of administration
- If trustee conduct in issue, historic documents otherwise privileged may be producible
- Who: “owns” the information and/or “paid” for it?
- Move towards balance of interests approach, i.e. regarding beneficiaries seeking information on a trust: *Ont. (A.G.) v. Ballard Estate* (1994) 20 O.R. (3d) 350 OCGD
- Exception to privilege
  - Public/individual safety
- Exclusion
  - Crime/fraud

# PRIVILEGE IN THE UNITED STATES

- Three Rules:
  - Majority Rule: privilege between fiduciary and counsel is no different than any other privilege—intact for all communications
    - *E.g., Canarelli v. Eighth Judicial District Court*, 464 P.3d 114 (Nev. 2020)
  - Two Minority Rules:
    - Routine administration: no privilege; defending against claims: privilege applies
    - Can turn on whether a claim has been asserted
- OR
  - Whether fiduciary pays from personal funds
  - *E.g., Society of Professional Engineering Employees in Aerospace v. Boeing*, 2009 WL 3711599 (D. Kan. 2009).
- Handful of states do not recognize privilege for fiduciaries
  - *E.g., Murphy v. Gorman*, 271 F.R.D. 296 (D. N.M. 2010).
- See generally: Bartolacci *et al.*, *The Attorney-Client Privilege and the Fiduciary Exception*, 48 RPTELJ 1 (2013)



# TRUSTEE DECISIONS

## Comparison: UK, US & Canada

Approach by the courts to reviewing and intervening in decisions made by Trustees



# TRUSTEE DECISIONS IN ENGLAND & WALES

- **When are Trustee decision making documents disclosable?**
  - Claims for breach of trust
  - Data Protection Act requests (*Dawson Damer v Taylor Wessing*)
  - The majority of applications for directions by the Trustees
- **When will the court intervene and set aside Trustee decisions?**
  - Trustee does not have the power to take the step proposed or has exercised their power in an improper way
  - Mistake of law or fact
  - Decision amounts to a breach of trust or duty:
    - Trustee must take into account relevant considerations and not take into account irrelevant considerations
    - Decision may be set aside if it is irrational, i.e. no reasonable decision maker would have reached the same decision
  - The decision was influenced by a conflict of interests

# TRUSTEE DECISIONS IN ENGLAND & WALES, *CONTINUED*

- **When might Trustees seek the court's blessing of decisions in advance?**
  - *Re Beddoe* applications
    - To obtain approval from the court to bring or defend court proceedings
  - *Public Trustee v Cooper* applications:
    - Blessing of momentous decisions
    - Surrender of discretion where a conflict of interest exists
    - Ruling on interpretation of Trustee's powers under the Trust Deed

# TRUSTEE DECISIONS IN CANADA

- **Trustee immunity from disclosure of reasons for trustee decisions**
  - Covers, generally, documents that record: deliberations; reasons; or, upon which reasons based or may relate to
  - Advent of balance of interests approach means less than full immunity
  - Breach of trust claim or direct challenge to use of discretion can lead to disclosure including by reason that Trustee will need to defend
  - Judicial intervention rare in trustee decisions: *Clayton v. Clayton* 2021 ONSC 5811
  - As long as Trustee has acted without *mala fides* court should not intervene
  - But even an “absolute discretion” does not displace common law duties

# TRUSTEE DECISIONS IN CANADA, *CONTINUED*

- Court will intervene, if trustee:
  - “So unreasonable”, no honest fair Trustee could come to same decision
  - Ignored relevant factors or took into account irrelevant factors
  - Did nothing and failing to act
  - Unable to demonstrate properly considered whether or not should have acted
- Examples of “so unreasonable” include:
  - lack of knowledge of obligations
  - Offering cont’d payments upon release of rights to inquire into management
  - Acting outside scope of discretionary power or of duties as trustees
  - Failure to document and secure loans to a beneficiary and put overall distribution at risk
  - Preferring a beneficiary
- Exculpatory language in trust document does not oust common law duties unless specific and directly on point

# TRUSTEE DECISIONS IN CANADA, *CONTINUED*

- If a Trustee is concerned a suit needs to be commenced/defended, it should take the advice of counsel
- The court will not make the decision or approve payment of costs in advance
- If a Trustee has made a decision and is concerned whether within scope of a power or its interpretation or have different view from beneficiaries (distinguished from direct challenge), it may put the facts and decision to the court on an application for directions, before implementing
- Such do not always result in production of decision-making documents
- Case law indicates Trustee should be neutral and strive to present both sides of an issue
  - However, as a practical matter, this can be difficult or even contraindicated by the circumstances

# DISCRETION & THE COURT IN THE UNITED STATES

- **Investment and prudence issues**
  - Duties of care, loyalty, impartiality
  - Breach cases make internal documents and process discoverable
  - Discretionary distribution challenges
  - Strict standard: “health, maintenance, support”
  - Objective criterion, can be second-guessed
    - Restatement (Third) of Trusts, § 50 cmt. d.
  - Pure discretion
  - Only reviewable for abuse of discretion
    - *E.g., Carter v. Carter*, 965 N.E.2d 1146 (Il. Ct. App. 2012)
  - Following process discoverable in both types of cases

# DISCRETION & THE COURT IN THE UNITED STATES, *CONTINUED*

- Petition for Instructions
- Where Trustee has discretion, many courts will not intervene
  - Petitions for instructions can be dismissed without ruling
  - *See generally, Bogert's § 560*
- Where document is ambiguous
  - Trustee can only bring the matter to court
  - Name the parties impacted, then step aside
  - Since duties are unclear, trustee cannot weigh in
  - All parties get paid from trust corpus



# CIVIL PRACTICE & EVIDENCE

Comparison: UK, US & Canada



# CIVIL PROCEDURE & EVIDENCE IN ENGLAND & WALES

- **Pre-action procedure**
  - Requirement to set out and respond to legal claim and exchange information to promote early resolution
  - Sanctions for non-compliance
- **Service rules**
  - Personal service not compulsory
  - Can serve by post, fax or alternate means
- **Access to Court documents**
  - All pleadings are accessible; application required to obtain evidence and other documents
  - Court has the power to seal court file or restrict access
- **Privacy/anonymity orders**
  - Typically granted to protect information relating to health, children and commercially sensitive information

# CIVIL PROCEDURE & EVIDENCE IN ENGLAND & WALES, *CONTINUED*

- **Depositions**
  - Written witness statements only with live cross examination at trial
- **Discovery**
  - ‘Disclosure’ required at an early stage and more targeted orders contemplated
- **Costs rules**
  - The court has discretion to award costs with a “loser pays” starting point. Don’t assume that trustees/fiduciaries’ costs will always be indemnified from the trust/estate
- **Mediation**
  - Not currently compulsory, but costs sanctions may be imposed against a party if they unreasonably refuse to mediate

# CIVIL PRACTICE & EVIDENCE IN CANADA

- An originating process, (i.e. application or claim) shall be served personally or by an alternative, (i.e. acceptance by lawyer) by mail if acknowledgement of service card returned
- No other document need be served personally, unless specified
- All documents filed with the Court are “public”
- Limited ability to obtain sealing orders (See: *Sherman Estate v. Donovan* 2021 SCC 25)
- Applications heard on affidavits with cross-examination in advance of hearing
- Claims heard on basis of oral evidence with exam in advance of trial
- Sometimes hybrid procedures with both are devised for trust and estate

# CIVIL PRACTICE & EVIDENCE IN CANADA, *CONTINUED*

- Applications to pass accounts in trust and estate are not uncommon
- Costs follow the event in trust and estate
  - Losing litigants should expect to pay costs albeit on less than full indemnity
    - Just like in commercial cases
- Reference to older case law and payment from the trust/estate, i.e. where dispute clearly testator's fault –
  - Approach with some caution, except, i.e. for Trustees generally and document interpretation applications
- Mediation has been mandatory in trust and estate matters in Toronto, Ottawa and Essex County in Ontario, since 2003
- It is now being resorted to increasingly in Montreal, Quebec and other major urban centres, though not mandatory everywhere ... yet

# CIVIL PRACTICE & EVIDENCE IN THE UNITED STATES

- **No real distinction between trust cases and other civil matters**
- **No pretrial special disclosure or evidentiary rules**
  - Most states do not even require court accountings (NY an exception)
  - Personal service of parties is required
  - Court files are generally public, rarely sealed
  - Minor's cases and interest an exception, but only on application
  - Depositions are live, not written
    - Still live during pandemic, just done via video conference
  - Trustee fees/counsel generally paid from trust, absent surcharge
  - Mediation not required unless required by document or local court



# ANTI-MONEY LAUNDERING

Comparison: UK, US & Canada

# ANTI-MONEY LAUNDERING RULES & SOURCE OF WEALTH IN ENGLAND & WALES

- Requirement for UK and EU lawyers to request information and documents as part of the “Know Your Client” process
  - Personal Identification documents
  - Trust deeds or estate documents
  - Company information and structures and identification of Ultimate Beneficial Owners (UBOs)
  - Practical implications wide ranging, e.g. includes purchase of European art
- Politically Exposed Persons (PEPs)
  - Wide definition including politicians, board members of central banks, judges, etc
  - Includes family members, close business associates and UBOs of PEPs
  - Requirement to verify PEPs source of wealth
- Unexplained Wealth Orders
  - The UK government can seize assets if an individual cannot explain the source of their wealth

# ANTI-MONEY LAUNDERING & SOURCE OF WEALTH – CANADA

- Legal profession not subject to *Proceeds of Crime Act*
- 2018 report by the Federal government recommends adopting model similar to UK
- In response, Federation of Law Societies established guidelines for regulatory best practices by provincial law societies
- In Alberta and British Columbia this has been done
  - Ontario is in process with by-law amendments coming into force January 1, 2022
- Large national law firms will already have best practices in place
  - These will cover:
    - Trust fund use; client verification procedures for individuals/entities (including directors names and beneficial owners' identity); and, obtaining a general understanding of client's wealth and source of funds for a transaction and keeping a record of such inquiries (i.e. broad open source inquiries conducted by risk management persons, including whether PEP involved)



# ANTI-MONEY LAUNDERING & SOURCE OF WEALTH – UNITED STATES

- No equivalent provisions to the UK “Know Your Client” processes
- Some identification documents required

# THANK YOU

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