

KEEPING CURRENT

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Is there such a thing as TMI? What, with whom, and when should a trustee share information?

By Nadia Bechai

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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"I don't want the beneficiaries of my family trust to know how much they might inherit – especially the young ones."

"I don't want my former spouse to know how much my child will inherit."

"I don't want the back-up beneficiaries to know that I have named them, or to know how much is in the trust."

These concerns are frequently shared by clients when preparing trusts under their Wills (which come into existence following their death) or when establishing a family trust (which are created during the client's lifetime).

In each case, the shared concerns are about privacy and access to information. Understandably, my clients want to avoid the sharing of "too much information".

But what, with whom, and when, must a trustee share information about a trust?

To appreciate the answer to this question, it is helpful to first understand the nature of a trust and the relationship between its trustee and beneficiaries. The Supreme Court of Canada in [Valard Construction Ltd. v. Bird Construction](#)

[Co. \[2018\] S.C.J. No. 8](#), summarized these as follows:

1. A trust divides ownership of the trust property into, (a) legal ownership, and (b) beneficial ownership. The trustee is the registered owner (legal owner) of the trust property, which they hold and manage on behalf of the beneficiaries (beneficial owners) for their use and enjoyment.
2. The trustee has a fiduciary duty to the beneficiaries which is characterised by the following:
 - a. The trustee must act honestly and with the skill level expected of a reasonable business person.
 - b. The trustee must act in the best interests of the beneficiaries.
 - c. The trustee cannot personally profit from its dealings with the trust property.

Taking 1 and 2 together, it follows that a trustee is accountable to the beneficiaries and must sufficiently inform them about the trust property so that the beneficiaries can enforce their rights to the property.

The Supreme Court of Canada went on to say that while a trust instrument can specify a trustee's powers and duties, any limitation to a beneficiary's entitlement to information is subject to the court's supervision. Otherwise stated, if the trust instrument tries to limit a beneficiary's right to information, a Court can interfere to ensure that the beneficiary has sufficient information to enforce the trust's terms. There are, therefore, certain rights to information that a trust cannot "contract out of".

What information must be shared? A trustee must provide beneficiaries with an accounting of the trust's assets at the start and end of the accounting period, all asset transactions, and any credits, debits, or distributions. Trustees should also share information that could disadvantage a beneficiary if they are unaware of it. However, they are not required to disclose reasons behind discretionary decisions, such as why one beneficiary received a distribution over another.

With whom must the trustee share this information?

A trustee must share information with beneficiaries whose interests have "vested" – i.e. their interests are not conditional on something occurring, such as someone else dying before they can inherit. Depending on the circumstances, a trustee should also consider whether other remote beneficiaries should be informed. In Ontario, for minor beneficiaries, the trustee must consider whether legislation requires information be shared with the Office of the Children's Lawyer and the minor's parent or guardian. Similarly, for beneficiaries under a disability, information may need to be shared with the Office of the Public Guardian and Trustee. These statutory requirements cannot be circumvented by the trust's terms.

When should a trustee share this information? To satisfy their fiduciary duty, trustees are encouraged to share information regularly (at minimum,

annually) and when reasonably requested.

Therefore, to directly address the common concerns expressed by clients, it can be concluded that:

- a trustee is obligated to provide beneficiaries over the age of majority (18) with the trust accounting;
- for beneficiaries under age 18, a trustee must follow statutory requirements regarding disclosure, which may sometime require sharing information with a former spouse who is the parent of a beneficiary; and
- a trustee is not required to share information with back-up beneficiaries unless withholding certain information is somehow unfair to them.

My clients' concerns are reasonable. However, when we remember that the trust is intended to benefit the beneficiaries, it is understandable that the beneficiaries (or someone on their behalf) must be able to hold the trustees accountable. And they can only do so with access to the trust's accounting and other basic information.

Contact Us

If you have a tax and estate matter and are in need of legal advice, please do not hesitate to contact [Nadia Bechai](mailto:nbechai@grllp.com), at 416.865.6717 or nbechai@grllp.com.

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