

CANADA / JUDGMENT

Re Newton Trust

2005 BCSC 1049

COURT

Supreme Court of British Columbia

DECIDED

11 July 2005

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2005 BCSC 1049 Re Newton Trust

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Newton Trust,

2005 BCSC 1049

Date: 20050711

Docket: A861861

Registry: Vancouver

Between:

In the Matter of the Trustee Act R.S.B.C.

1979, Chapter 414, as Amended

And in the Matter of the Supreme Court

Rules 61(58), 32(1), 42(3) and 52(2)

And in the Matter of That certain Trust set up by Deed

of Settlement dated the 17th day of December, A.D. 1959

by the late Samuel Joseph Cohen for the benefit

of the issue and lawful wife of his son Jacob Wener Cohen

Before: Registrar Blok

Reasons for Decision

Counsel for the Trustee,

Graham C. MacKenzie, Q.C.:

M.D. Murphy

Counsel for the Trustees,

Tom Mayson, Q.C. and Jacqueline Cohen:

H.S. Delaney

Dates and Place of Hearing:

February 2-4, 2004,

May 26-28, 2004 and

September 7 & 8, 2004

Vancouver, B.C.

A. Introduction

[1] This is a passing of accounts conducted pursuant to an order of Master Groves made October 24, 2002 (the "Order").

[2] The Order reads as follows:

THE EX PARTE APPLICATION of Graham C. MacKenzie, one of the Trustees of the above-described trust, otherwise known as the "Newton Trust" coming on for hearing this day at Vancouver, British Columbia; AND UPON READING the Affidavit of Graham C. MacKenzie AND UPON HEARING Patrick M. Holmes, Counsel for the Applicant;

THIS COURT ORDERS that the accounts of the Trustees in respect of their administration and management of the Newton Trust from March 1, 1998 to February 29, 2000, be audited, taken and passed before the Registrar of this Honourable Court in Vancouver, British Columbia;

THE COURT FURTHER ORDERS that the Registrar recommend a fair and reasonable remuneration to the Trustees for their care, pains and trouble and time expended in and about the Newton Trust in administering, disposing of and arranging and settling the affairs of the Newton Trust from March 1, 1998, to February 29, 2000, and in respect to any capital distributions made at any time before February 29, 2000 when the Applicant was a Trustee.

THIS COURT FURTHER ORDERS that the Registrar do recommend a fair and reasonable allowance as a care and management fee for the years during which each Trustee served as a Trustee of the Newton Trust up to February 29, 2000.

THIS COURT FURTHER ORDERS the Registrar review the unauthorized pre-taking of fees (based on income of the Trust) by two of the three Trustees for the period ending February 29, 2000, and decide whether such fees should be repaid to the Trust with interest.

THIS COURT FURTHER ORDERS that the Registrar review the payment of director's fees received by two of the three Trustees from Newton Investments Ltd.

THIS COURT FURTHER ORDERS that the Registrar certify their findings.

- [3] The issues in this passing of accounts relate to the remuneration of the three trustees of a trust. No other aspects of the trust accounts are in issue. Two of the trustees, Tom Mayson, Q.C. and Jacqueline Cohen, are content with the remuneration that has already been paid. The third trustee, Graham MacKenzie, Q.C., claims additional remuneration for himself and for the estate of Garth Kennedy, a trustee who died in 1998.
- [4] At the outset of this passing of accounts Mr. MacKenzie quantified the claim of additional remuneration at \$225,000 for himself and \$175,000 for the Kennedy estate (see Exhibit 50). In final submissions, counsel for Mr. MacKenzie indicated that the additional remuneration he sought was now \$800,000.

B. History of the Trust

- [5] The trust, sometimes known as the Newton Trust (the "Trust"), was established by the late Samuel Joseph Cohen by deed of settlement dated December 17, 1959.
- [6] Samuel Cohen was the founder of Army & Navy Department Store Limited ("Army & Navy"), which has carried on a discount department store operation in Western Canada since the 1920s. Samuel Cohen died in 1966.
- [7] The purpose of the Trust was to benefit the wife and issue of Jacob Wener ("Jack") Cohen, who was the son of Samuel Cohen. Jack Cohen himself had no interest in the Trust.
- [8] At the time the Trust was established Jack Cohen had a wife, Marlene Cohen, and children Jeffrey Cohen, Jacqueline Cohen and Karen Cohen. Jack Cohen and Marlene Cohen subsequently divorced. Jeffrey died in 1978 and Karen died in 1982. Jeffrey and Karen were each unmarried at the time of their deaths and neither left any issue. Jacqueline Cohen has a daughter, K., who has not yet attained the age of majority. Jacqueline and K. are the only surviving beneficiaries of the Trust.
- [9] Prior to 1992 the Trust held just one asset, being 9,900 Class "A" equity shares of Newton Investments Ltd. ("N.I.L."). These shares were all of the issued and outstanding shares of N.I.L. N.I.L., in turn, owned (as of 1990) 1,232 Class "A" common shares of Army & Navy, which represented 49% of the 2,500 Class "A" common shares of the company. N.I.L. also owned real property: the Dominion Building, the Abbott Building, the Hildon Hotel, 13 acres of undeveloped land in Port Coquitlam and a condominium unit. At some point N.I.L. also owned a house in Los Angeles, which had been acquired for use by Ms. Cohen, but the house was sold when Ms. Cohen no longer needed it.
- [10] During the times relevant to this passing of accounts, the trustees were as follows:

Garth Kennedy

1972 - 1998

Samuel Goldsmith

1972 - 1996

Graham MacKenzie, Q.C.

1977 - 2000

Tom Mayson, Q.C.

1998 - 2000

Jacqueline Cohen

1997 - 2000

- [11] Mr. MacKenzie, a lawyer, had done legal work for Samuel Cohen, Army & Navy and N.I.L. for a number of years prior to his appointment as a trustee. Mr. Goldsmith and Mr. Kennedy were senior officers and employees of Army & Navy. Mr. Kennedy was the president of the company. He died in 1998 and was replaced as trustee by Mr. Mayson. Mr. Mayson is an Edmonton lawyer who did the vast majority of the planning and legal work for the Trust over the years. Mr. Goldsmith ran the Edmonton store and had been a friend of Samuel Cohen for many years. Mr. Goldsmith died in 1997 and was replaced by Ms. Cohen. Ms. Cohen is the current president of Army & Navy.
- [12] The trustees were also appointed as directors of N.I.L. Mr. MacKenzie was a director and secretary of N.I.L. from July 1978 to June 2000. He was also appointed as a director of Army & Navy, a position he held from March 1990 to June 2000, for which he was paid \$5,500 per year. In 2000, when the differing views on remuneration became a full-fledged dispute between the trustees, Mr. MacKenzie was not re-appointed as a director of N.I.L. or Army & Navy.
- [13] The accounts have been passed every two years or so, starting in 1972. The trustees have been paid fees equal to 4% of the income of the Trust. They have never taken a fee on capital and have never taken a care and management fee.
- [14] In June 1992 Mr. Mayson, then not yet a trustee, reported to the trustees concerning an impending problem with the 21-year deemed disposition rule prescribed by the Income Tax Act. Briefly, with the advent of capital gains tax in 1971 it had been recognized that trust assets might never be disposed of and thus no tax paid on any gains in the capital of a trust. Accordingly, the Act was amended to provide that every trust would be deemed to have disposed of and immediately reacquired its capital property, at fair market value, every 21 years.

- [15] Given that the Trust was in existence at the advent of capital gains tax on January 1, 1972, there would have been a deemed disposition and reacquisition of the Trust's capital property on January 1, 1993 with a consequent tax liability that Mr. Mayson said could be "ruinous" in amount. Amendments to the Income Tax Act, implemented in 1992, ameliorated the harsh consequences of the deemed disposition rule somewhat by allowing trusts to postpone the deemed realization. In the case of the Newton Trust the postponement was to the date of Jacqueline's death.
- [16] Other provisions, however, eliminated the possibility of making a tax-deferred distribution to K. after January 1, 1993, a distribution that would have had the effect of splitting the tax burden. A plan was devised to meet this problem. N.I.L. was to change its capital structure from 9,900 Class "A" equity shares, with a par value of \$1.00, to:
- (a) 9,900 Class "A" voting shares with a par value of 50¢ a share; and
 - (b) 9,900 Class "D" non-voting equity shares with a par value of 50¢ a share.
- [17] The Class "D" shares were to be distributed to K. in satisfaction of her capital interest in the Trust. The Trust was to retain the new Class "A" shares.
- [18] A favourable tax ruling was sought and obtained from Revenue Canada in December 1992, and the plan was carried out.
- [19] The result of the implementation of this plan was that the risk of the deferred capital gains tax was divided equally between the lives of Jacqueline Cohen and her daughter K.
- [20] In 1994, in the course of dealing with the accounts of the Trust for the period 1992 to 1994, Mr. MacKenzie raised the issue of the trustees' entitlement to a fee on capital for the 1992 transaction. A debate took place between, primarily, Mr. Mayson and Mr. MacKenzie, the result of which is reflected in a letter from Mr. Mayson to Ms. Cohen dated October 3, 1994 (where Mr. Mayson describes the capital fee issue as "the Situation"):

Garth [Kennedy] and Sam [Goldsmith] pretty well, from the outset, have made it clear that the Situation is not something they had anticipated and is not something that they wish to actively pursue. At this time, they are not prepared to formally give up whatever rights they may be entitled to under the Situation but that remains a possibility.

...

While Graham [MacKenzie] is not prepared to give up whatever rights the Situation may give him, he has agreed that the matter could be deferred to be determined by the Court at some future undetermined date. He is concerned that there be some clear indication of the existence of the possible right to remuneration and that it was not being waived or given up.

This arrangement seemed to serve all parties concerned, including yourself, as it recognized the existence of the Situation but would not result in any kind of immediate determination or payment.

- [21] Another tax problem was identified in 1998 as a result of changes to the Income Tax Act and a further restructuring was required to deal with it. On January 1, 1999 there would be a deemed disposition of the shares of N.I.L., and a tax on the capital gain comprised in the accrued value of the shares, unless the trustees took steps to distribute that accrued share value by December 31, 1998.
- [22] The transaction designed to meet this new exigency was a complicated one.
- [23] The Class "A" voting shares of N.I.L. were determined by PricewaterhouseCoopers to have a fair market value of \$22,132,000, and a Valuation Day value of \$5,555,052, thus meaning that the accrued value of the shares was about \$16.5 million. The Class "D" shares of N.I.L. were valued at zero based upon the lack of voting rights. According to Elise Rees, the Ernst & Young partner who was advising the Trust on tax issues, the assumption was that no arms-length purchaser would purchase shares without voting rights where the payment of dividends for those shares was entirely discretionary.
- [24] A new company, Wesbrook Holdings Ltd. ("Wesbrook") was incorporated, with the trustees (Ms. Cohen, Mr. Mayson and Mr. MacKenzie) appointed as directors. The Trust's Class "A" shares of N.I.L. were transferred to Wesbrook in return for 9,999 Class "A" preferred shares and 99,999 common shares of Wesbrook. The class "A" preferred shares were made redeemable and retractable for \$5,555,052, the valuation day value. Wesbrook then declared a stock dividend on the 99,999 common shares of Wesbrook of 10,000 Class "B" preferred shares of Wesbrook. These shares were redeemable and retractable for \$16,576,938, which was equal to the estimated accrued gain on the N.I.L. shares. The Class "B" shares were then distributed to Ms. Cohen in partial satisfaction of her capital interest in the Trust.
- [25] Thus on January 1, 1999 the Trust owned 99,999 common shares of Wesbrook and 9,999 Class "A" preferred shares of Wesbrook, which together had a fair market value equal to the adjusted cost base of the 9,900 Class "A" shares of N.I.L. that it had exchanged. The Trust no longer had a direct ownership in N.I.L.; Wesbrook now had the 9,900 Class "A" voting shares and K. had, as before, the 9,900 Class "D" shares of N.I.L.
- [26] The tax that was deferred due to the 1998 transaction was as much as \$7.9 million (Exhibit 2, Tab 25).
- [27] As noted earlier, the trustees were paid fees based on 4% of the income of the Trust. Over the years that he was a trustee Mr. Kennedy was paid a total of \$146,325, Mr. Goldsmith was paid \$138,461 and Mr. MacKenzie was paid \$130,490, although it should be noted that the latter figure includes a payment of \$11,939.39 for the last accounting period, a sum which Mr. MacKenzie refused to accept. In cross-examination Mr. MacKenzie said that he agrees that this amount is appropriate, but that he disagrees that it should have been paid prior to a formal passing of accounts.

- [28] No amount has ever been paid to any trustees in respect of capital. Claims for a fee on capital have been expressly reserved since 1994. Neither Mr. Goldsmith nor Mr. Kennedy ever maintained a claim for remuneration in respect of capital, although neither did they ever expressly waive any claims they might have had for a fee on capital. Mr. MacKenzie now claims a fee on capital of \$800,000 based on what he asserts were capital distributions in both 1992 and 1998, and he also asserts a claim for a capital fee of \$175,000 on behalf of the Kennedy estate.
- [29] No amount was ever claimed for a care and management fee, as provided for in section 88(3) of the Trustee Act, R.S.B.C. 1996, c. 464, and, unlike the situation with the capital fee, there was no reservation of rights agreed to or asserted for such a fee.

C. Witnesses

(a) Graham MacKenzie, Q.C.

- [30] Mr. MacKenzie was called to the bar of British Columbia in 1957. He has had a varied practice over the years. In the first ten years or so his practice was primarily oriented toward litigation, but in later years his work has mostly been solicitor's work, including work in the estates area.
- [31] Mr. MacKenzie described in great detail the activities he undertook on behalf of the Trust and N.I.L.
- [32] As noted earlier, N.I.L. owned the Dominion Building, the Abbott Building, the Hildon Hotel, 13 acres of undeveloped land in Port Coquitlam and a condominium unit.
- [33] The commercial buildings were in badly in need of upkeep and proper management. They had been found deficient in fire code requirements and the City of Vancouver took enforcement action over these deficiencies. Appeals had to be taken from City compliance orders. Extensive renovations had to be carried out and the management of the buildings changed. Mr. MacKenzie became centrally involved; he said, "My role changed from being a lawyer to dealing with these buildings".
- [34] The Hildon Hotel was a particular problem and occupied a great deal of Mr. MacKenzie's time for several years. The condition of the building was so bad it had generated newspaper stories and the City had required an attendance before council. Its elevator was condemned, the roof leaked, its boiler leaked, an assignee of the lease had done no repairs and there were large arrears of rent. Although there were 145 lodging rooms there were only 45 tenants.

- [35] The urgent problems were rectified and a new lessee was put in place, but numerous problems persisted. Ultimately, the decision was made to undertake an extensive refurbishment at a cost of about \$1 million, which was carried out from 1983 to 1985. Mr. MacKenzie said that he was centrally involved with overseeing of these repairs, and he wrote all of the cheques. Mr. MacKenzie was also successful in securing a RRAP grant of \$500,000 from the federal government, a grant that was available for social housing purposes.
- [36] Continuing problems with the lessee resulted in an agreement that N.I.L. would take over the operation of the hotel rooms, while the lessee would continue to operate the pub and restaurant. Ongoing problems resulted in the lessee becoming merely the on-site manager of the premises and, later still, the pub and restaurant closed entirely. The Liquor Control and Licensing Branch cancelled the liquor licence for the premises, which was in the name of the tenant.
- [37] It was decided that N.I.L. would take over the operation of the entire building, which required that N.I.L. obtain a new liquor licence. The application, however, was refused. Mr. MacKenzie appealed that decision to the Deputy Minister, who reinstated the tenant's licence and allowed a transfer of that licence to N.I.L. on certain conditions. However, the licence subsequently approved was for just 125 seats compared to the 208 seats formerly allowed under the tenant's licence. This decision, too, was appealed, with the result being that seating capacity was increased from 125 seats to 150 seats. City approvals were still needed, which required an appearance before a committee of city council and an appearance before the council itself. In the end, all approvals were obtained.
- [38] Mr. MacKenzie was responsible for all of these activities.
- [39] By late 1988 the hotel was fully occupied. The pub also became a financial success. Net income rose substantially from 1989 onward: by 1992 net income from the building was \$450,000 and by 1994 it was \$700,000. Mr. MacKenzie said that this was a huge success, and income from the Hildon Hotel operations enabled N.I.L. to carry out necessary renovations to the Dominion building.
- [40] In October 1997 a ceiling collapsed in the Hildon Hotel building, which raised safety concerns. Engineers were called in and it was determined that structural repairs had to be carried out. The pub was closed for 10½ months in 1999 while these repairs were done. The total amount spent on this refit was about \$1.8 million.
- [41] Mr. MacKenzie said that for this refurbishment alone he opened 29 files. He let all of the contracts, which were at least 30 in number, and he paid all of the bills. The result was a well-refurbished building that was structurally sound and worth \$4-5 million. The building operation was profitable, the pub was profitable and N.I.L. was the holder of a valuable liquor licence.

- [42] The Abbott building, a four-storey office building in downtown Vancouver, also required repairs and renovations. The exterior of the building was falling apart and it needed a new roof. Two engineers were consulted; the first felt that the deterioration was too extensive for the outside look to be preserved, but a second opinion was sought and a way was found to preserve and upgrade the outside of the building. These repairs were carried out accordingly. Later, Army & Navy moved its buying office to the Abbott Building and another \$100,000 was spent on the building at that time.
- [43] The Dominion building, at one time called the Dominion Bank building, was the third downtown Vancouver building owned by N.I.L. It leaked through the terra cotta on the upper floors and part of the exterior had fallen off. This was a serious safety concern. Mr. MacKenzie recommended that N.I.L. engage a consultant to report on the state and management of the building. Many recommendations were made for refurbishment and repair and \$240,000 in immediate work was recommended to make the building more rentable. New management was also brought in. The exterior was repaired, the windows were updated, the internal cast iron piping was replaced and new sprinklers, smoke alarms, fire escapes and elevators were installed. Mr. MacKenzie said he was successful in achieving a savings of \$100,000 from the best tender for this work. The magnitude of the work was considerable: \$1.2 million was budgeted for work in the years 1997-1999 alone (see Exhibit 25).
- [44] Mr. MacKenzie said that he prepared a construction budget for review by the other trustees/directors and he arranged a line of credit through his connections at the Royal Bank at an interest rate that was less than that offered by Army & Navy's usual banker.
- [45] Each of the three buildings had management in place, but Mr. MacKenzie supervised the managers. He signed all cheques, including payroll cheques.
- [46] The Port Coquitlam property was bare land, about 13 acres in size, and was originally in the Agricultural Land Reserve. Mr. MacKenzie took steps to remove the property from the ALR, which steps were successful. He conceded that this work might well have occurred prior to his appointment as trustee. Costco bought 3.77 acres from N.I.L. in 1998 and built a store, which had a significant effect on development in the area. Other large retailers have since moved in. The nine acres that N.I.L. still holds are now much more valuable than before.
- [47] Mr. MacKenzie described other activities he undertook. The condominium occupied by Marlene Cohen was owned by N.I.L. and he went to strata council meetings and attended to any problems. He reported regularly to his fellow directors and trustees, at least twice a year in addition to specific reports. At one point Mr. MacKenzie was sued in his capacity as a director of Army & Navy. He said he faced considerable personal liability in that lawsuit. The lawsuit, ultimately, was unsuccessful.

- [48] The work of the trustees, at the Trust level, was limited. Each year Mr. Mayson would prepare a financial plan which balanced the goal of meeting the Cohen family's financial needs (taking into account income from other sources) with the amount of money that was available in the companies. The plan was reviewed by the other trustees but seems to have been always approved.
- [49] In many, and perhaps most, of the years relevant to this passing of accounts the main source of the money received and distributed by the Trust was the dividends declared by Army & Navy. These dividends would flow through to the Trust via N.I.L.
- [50] Mr. MacKenzie acknowledged that, at the Trust level, the task of the trustees was simply to receive and disburse these monies.
- [51] The trustees met four times a year, in conjunction with meetings of the Army & Navy board of directors. These trustees' meetings were also meetings of the directors of N.I.L. The trustee portion of the meetings did not take long because most of the work was done at the N.I.L. level.
- [52] By 1999 or 2000 relations between the trustees had deteriorated sharply. The poor relationship between the trustees resulted in Mr. MacKenzie's exclusion from the business of the Trust. He ceased to be a director of either N.I.L. or Army & Navy in June 2000 and he ceased to be a director of Wesbrook in July 2001. Despite this exclusion Mr. MacKenzie has refused to resign as trustee.
- [53] In cross-examination Mr. MacKenzie acknowledged that he is making his present claim for remuneration because of the way he has been excluded as a trustee.
- [54] Mr. MacKenzie acknowledged that he billed at his professional rate for virtually everything he did. This was done by arrangement with Mr. Kennedy. Some of the work he did was pure legal work (for example, the liquor licence appeals), but most of the work was related to the management of N.I.L.'s assets. The supervision of the on-site managers, the signing of payroll cheques, the supervision of the construction and renovation work and the dealings with the numerous contractors and consultants were all billed by way of professional fees, at rates that varied over the years but latterly were in the range of \$250 per hour. Even such mundane tasks as shopping for new mattresses for the hotel rooms, the securing of beer supplies during beer strikes and an attendance at a staff retirement dinner were billed at Mr. MacKenzie's professional hourly rate.
- [55] Although Mr. MacKenzie said that there was time he spent on Trust matters that was not billed - the examples he gave were "thinking about it in bed" and "having coffee with the building manager in the morning" - I am satisfied that any unbilled time spent on Trust, N.I.L. or Army & Navy matters was inconsequential.
- [56] I note as well that Mr. MacKenzie billed Army & Navy for work done defending the lawsuit in which he had been named (see Exhibit 37, tab 1, page 41).

- [57] Mr. MacKenzie also billed all of his activities as a trustee, including attendances at trustees' meetings, at his professional hourly rate. Although he said that he did not bill for attending meetings of the directors of Army & Navy (where directors received an annual fee of \$5,500), he acknowledged in cross-examination that he had, in fact, done so on one occasion.
- [58] As of Feb. 1, 1999, the agreed arrangement was that Mr. MacKenzie would no longer bill his time at his professional rate but instead he would bill for his management services at \$8,000 a month. Fees payable to him as trustee or director, or for legal services, were not included in this monthly sum. Mr. MacKenzie said that he subsequently kept track of his time and found that he had to write off \$66,000 in fees that would have been billed had his time been billed at full rates.
- [59] Although some work was done for Army & Navy and billed accordingly, the vast majority of bills were sent to N.I.L. Mr. MacKenzie said that all business activities were in N.I.L., that N.I.L. was the vehicle through which the assets were managed, and that "all my work was done for N.I.L. because N.I.L. was the legal owner". He conceded that his management of the properties, for example, was done as a representative of N.I.L. and thus all of these activities were billed by way of an account from his law firm to N.I.L.
- [60] Mr. MacKenzie was unable to state the total amount billed over the years. His law firm has changed its computer system twice in the last twelve years and full computer records are simply not available. As for hard copies of accounts, many of the files are no longer available.
- [61] One printout (Exhibit 44) shows total billings to N.I.L. of \$849,676 from June 1991 to December 1999. Copies of legal accounts that exist for the period from March 1987 to June 1988 show a further \$48,500 in billings (Exhibit 37, tab 1). Three further accounts for the periods January to March 1984, June 1984 to February 1985 and February to September 1989 add a further \$45,159 to the total.
- [62] Several of Mr. MacKenzie's accounts include the phrase "to... all general and continuing management functions involving all B.C. assets", or something similar (see, for example, Exhibit 36, tabs 7 and 8). Mr. MacKenzie said that he used this type of phrase in his accounts to N.I.L. from about 1984 onward.
- [63] In addition to the accounts rendered to N.I.L. there were accounts that Mr. MacKenzie rendered to the Trust directly for such activities as passings of accounts. These accounts could not be located. I note, however, that the formal accounts of the Trust (Exhibit 32, plus the accounts for the latest period) show that Mr. MacKenzie's firm billed the Trust a total of \$17,264 from 1977 to 2000, the period during which Mr. MacKenzie was trustee.
- [64] Mr. MacKenzie received a total of \$88,000 in fees for acting as a director of Army & Navy from 1985 to 2000.
- (b) Tom Mayson, Q.C.

- [65] Mr. Mayson is an Edmonton lawyer, now semi-retired, who was a partner with Fraser Milner (formerly Milner & Fenerty and, before that, Milner & Steer) for many years. He was called to the bar in 1953.
- [66] Mr. Mayson has been involved in estate matters for the Cohen family since 1964. He was involved with the estate of Harry Cohen, Samuel Cohen's brother, and he was an executor of Jeffrey Cohen's estate. Through his estate work he developed expertise with both the legal and practical aspects of trusts.
- [67] In approximately 1972 Mr. Mayson prepared the first accounts of the Newton Trust, which he did by sorting through a lot of old records. These accounts were successfully passed by the court. Thereafter he created and maintained most of the records and accounts of the Trust and he prepared the documents for the passings of accounts. Effectively, he was the solicitor for the Trust.
- [68] As noted earlier, it became Mr. Mayson's function to see that the Trust provided the funds to meet the needs of the Cohen family. Each year Mr. Mayson prepared a financial plan and then sent the plan to Mr. Kennedy, who had, as one of his duties, the task of looking after the Cohen family. Once reviewed by Mr. Kennedy the plan was then finalized and forwarded to the other trustees for their approval.
- [69] In the earlier years the income of the Trust was derived from dividends paid by Army & Navy to N.I.L. Trustees' fees were paid from the income of the Trust. Mr. Mayson believed that originally the fees were based on 5% of the income of the Trust, but after some concerns were raised it was agreed that this should be reduced to 4%, where it has remained to the present day.
- [70] Mr. Mayson prepared the financial plan for the Trust, he carried out the income distribution, he prepared the reports, he prepared the accounts and he prepared the income tax returns for the Trust.
- [71] Mr. Mayson recalled that Mr. MacKenzie first raised the issue of remuneration on capital shortly before the distribution to K. near the end of 1992.
- [72] Mr. Mayson forwarded the 1992-1994 accounts to the trustees on March 18, 1994 as part of the passing of the accounts of the Trust for that period. Mr. MacKenzie replied by letter of April 28, 1994, pointing out that the accounts did not deal with a capital fee and that the right of the trustees to such a fee ought either to be protected or a capital fee set at that time.
- [73] Mr. Mayson said that both Mr. Goldsmith and Mr. Kennedy were taken aback by Mr. MacKenzie's letter. Discussions ensued. Mr. Mayson said that the main question raised was, "How much are we talking about?", but Mr. MacKenzie would not commit to a figure other than to refer to the percentage set out in the Trustee Act. Only an order made at a pre-hearing conference in these proceedings, complied with on February 20, 2004, prompted a figure to be stated by Mr. MacKenzie, a figure which was revised substantially upward by the time of final submissions.

[74] Mr. Mayson replied to Mr. MacKenzie's April 1994 letter by letter to all of the trustees dated May 25, 1994. He expressed concern that the assertion of a capital fee in respect of the 1992 transaction might cause doubts to be raised about the bona fides of the trustees in carrying out that transaction. He said:

The four of us know that we were only doing what we thought was best in developing and carrying out the [1992 transaction] and you must now consider whether you now wish to cast any doubt on your good intentions by seeking Trustees' fees which, in many ways, might be considered a windfall which had not been expected or contemplated but to which you probably have a legal entitlement.

[75] In his letter Mr. Mayson went on to suggest several options for dealing with the matter, including the option that was ultimately chosen, that of preserving the claim but deferring the issue until a later time.

[76] Mr. Mayson said that he discussed the matter with Messrs. Kennedy and Goldsmith and both indicated to him that they felt they were already well paid and that they were not looking for a fee on capital. They indicated to Mr. Mayson that if Mr. MacKenzie wanted to pursue the matter they would not give up their rights, but they did not intend to pursue capital remuneration themselves.

[77] Mr. Kennedy was well paid from various sources related to the Cohen family. In addition to his salary as president and chief executive officer of Army & Navy, he received director's fees as a director of the company and he also received remuneration from his involvement with the estates of Samuel Cohen, Jeffrey Cohen and Karen Cohen. He also received remuneration as a trustee of the Newton Trust. The remuneration he had received from the Newton Trust alone totalled \$146,325 up to the time of his death in 1998.

[78] From time to time Mr. Kennedy raised concerns about the amount of money that was being paid to Mr. MacKenzie. Mr. Kennedy commented that Mr. MacKenzie was "managing the pub" but was being paid legal fees to do so. Mr. Kennedy spoke of wanting to get these payments under better control and, ultimately, Mr. MacKenzie's fees were fixed, by agreement, at \$8,000 per month.

[79] From 1981 onwards the trustees agreed to pay "advances" on their fees so that the fees could be claimed as an expense in the current year. These advances seem not to have been merely part payment of fees but the full payment of the 4% fee on income that had been accepted for some time. All subsequent accounts (save the present ones) were approved by all parties and passed by the court.

[80] The same process was adopted for the 1998-2000 accounts that are the subject of this hearing, but in this instance Mr. MacKenzie objected because he considered that the payment of trustees' fees prior to the passing of accounts to be an unauthorized pre-taking of fees and a breach of trust.

- [81] Mr. Mayson gave evidence concerning the 1992 and 1998 transactions. Although Mr. Mayson did some of the preparatory work for the 1992 transaction, most aspects were handled by a tax lawyer in his firm, Mr. Sommerfeldt, and by outside tax counsel. No valuation of the N.I.L. shares was done for this transaction. The values for the assets of N.I.L. that were given by Mr. Mayson in his briefing memorandum of June 8, 1992 (Exhibit 2, tab 9), values which were repeated by Mr. Sommerfeldt in the advance ruling application to Revenue Canada, were based on mere estimates or "eyeball" appraisals provided by Mr. Kennedy.
- [82] Mr. Mayson did concede, however, that he was a bit surprised when in 1998 valuation consultants concluded that the shares distributed to K. in the 1992 transaction were not worth anything. He said, "We felt we'd given half to K."
- [83] The 1998 valuation of the N.I.L. shares by PricewaterhouseCoopers was the first valuation that was carried out for these shares. The Class "A" shares were valued at \$22.1 million, while the Class "D" shares were found to have no value.
- [84] Mr. Mayson became a trustee in 1998. Ms. Cohen had become a trustee in 1997. The trustees functioned adequately at first but it was not long before things became "dysfunctional" and Mr. MacKenzie and Ms. Cohen "could hardly stand to be in the same room together". It became obvious that unanimity would be impossible to achieve. On the death of Mr. Goldsmith in 1997 the trustees had obtained an opinion from a trust law expert, who confirmed that decisions could be made by vote of a majority of the trustees. In order to ensure that the business of the Trust could be effectively carried out Mr. Mayson and Ms. Cohen relied on the rule of majority vote and Mr. MacKenzie's role, and his involvement in the Trust, became very limited.
- [85] Currently, Mr. MacKenzie has no substantive involvement in Trust matters, although he remains a trustee in name.
- (c) Jacqueline Cohen
- [86] Ms. Cohen is the current president and chief executive officer of Army & Navy. She is the granddaughter of Samuel Cohen, who was the settlor of the Trust and the founder of Army & Navy.
- [87] Although Ms. Cohen was appointed a trustee of the Trust in May 1997, prior to her appointment she was kept well-informed of Trust matters by Mr. Kennedy and she attended some trustees' meetings as a guest. She had also involved herself in some matters; for example, she was the person responsible for securing a reduction in the remuneration of the trustees from 5% to 4% of the income of the Trust.
- [88] Ms. Cohen said that there had been discussions prior to 1997 about appointing her as a trustee but Mr. MacKenzie had objected to her appointment at that time.
- [89] Ms. Cohen confirmed that it was Mr. Mayson who did the annual financial planning for the Trust and who carried out that plan.

- [90] Ms. Cohen said that the trustees met four times each year, usually after the quarterly meetings of the Army & Navy board of directors. At the meetings most of the discussions were between Mr. Kennedy and Mr. MacKenzie, although Mr. Goldsmith was equal in authority.
- [91] Ms. Cohen said that Mr. MacKenzie oversaw the refurbishment and management of the three buildings owned by N.I.L., and while she did not have any criticisms of his efforts she said that "he was being paid very well to do so".
- [92] N.I.L. hired a professional property manager to manage the Abbott and Dominion buildings, yet while this manager was in place Mr. MacKenzie still occupied himself in such activities as interviewing tenants and reviewing building repairs. Ms. Cohen ruefully remarked, "I guess we had two property managers". During one period of time the property manager was paid \$27,000 for managing the properties and during the same time Mr. MacKenzie was paid \$58,000.
- [93] Until these proceedings Ms. Cohen was not aware of the extent of the activities for which Mr. MacKenzie billed his time. For example, she was not aware that he had billed for attendances at staff parties, preparing cheques, placing advertising for the pub, shopping for mattresses and televisions or going to a local stereo shop to buy speakers for the pub. Ms. Cohen said that she was appalled that Mr. MacKenzie had billed for these activities at his full professional rate.
- [94] She was also unaware that Mr. MacKenzie had billed for "attendances on directors", which she thought ought to have been part of his remuneration as a director and trustee.
- [95] Finally, Ms. Cohen said she was unaware that Mr. MacKenzie had hired his daughter's common law spouse to do repair work at one or more of the buildings. This work was not put out for bids. This issue became "a thorn in my side, and then in Mr. Kennedy's too". As a result of this event, and in view of the excessive billings, Mr. Kennedy and Ms. Cohen made the decision to put Mr. MacKenzie on a fixed fee per month. Ms. Cohen, however, was unable to explain why there was a delay between the decision that she said was taken before Mr. Kennedy's death in March 1998 and the implementation of that arrangement in February 1999.
- [96] Ms. Cohen said that Mr. MacKenzie was not happy with the new billing arrangement.
- [97] Meetings of the trustees became dysfunctional because the three trustees could not agree on anything. Mr. MacKenzie was informally "removed" and business was conducted thereafter by the majority vote of Mr. Mayson and Ms. Cohen.

- [98] As for the tax restructurings of 1992 and 1998, Ms. Cohen said that her daughter K. did not receive \$16 million, or anything like it, in 1992, and as part of the 1998 transaction the trustees agreed on the valuation that showed K.'s shares valued at "nil". Similarly, in 1998 Ms. Cohen did not receive \$16 million - only if her shares were redeemed without tax consequences would she receive that sum.
- [99] In cross-examination, Ms. Cohen agreed that there have been some redemptions of the shares belonging to both herself and her daughter.
- [100] Ms. Cohen acknowledged that a fee in respect of capital was reserved from the time of the 1992 transaction. There was, however, never any reservation for any care and management fee.
- [101] When Mr. MacKenzie asserted his entitlement for a fee on capital in 1994 Ms. Cohen discussed the situation with Mr. Goldsmith and Mr. Kennedy. She said that Mr. Goldsmith was adamant that such a fee was inappropriate, and both Mr. Goldsmith and Mr. Kennedy were "shocked" and "taken aback" by Mr. MacKenzie's claim. Neither Mr. Goldsmith nor Mr. Kennedy was interested in being paid anything other than the 4% they were being paid on the income of the Trust.
- (d) Other Witnesses
- [102] Elise Rees, who is a chartered accountant with Ernst & Young, provided tax advice to the trustees at the time of the 1998 transaction and gave advice on the structure of the reorganisation itself. Ms. Rees gave evidence concerning the rationale for the reorganisation and the steps that were taken to meet the capital gains tax problem that would arise on the deemed disposition of the shares of N.I.L.
- [103] In simple terms, the purpose of the transaction was to distribute the accrued value of the shares of N.I.L. before December 31, 1998. Two other tax issues also arose, and were dealt with, as a result of the restructuring, but these do not seem to be relevant to the issues on this passing of accounts.
- [104] Valuations of the shares were done by PricewaterhouseCoopers as part of the 1998 transaction. As previously noted, PricewaterhouseCoopers found the Class "A" shares of N.I.L. to have a fair market value of \$22,132,000 and a Valuation Day value of \$5,555,052, thus meaning that the accrued value of the shares was about \$16.5 million.
- [105] Robert Mackay is an experienced business valuator who gave an opinion on the value of the assets distributed in the 1998 transaction; specifically, the value of the 10,000 Class "B" preferred shares that were distributed by the Trust to Ms. Cohen in that transaction.
- [106] Mr. Mackay identified a number of issues that hampered the fair market value of the shares. The details are complex. There are restrictions, both legal and practical, on the ability of a shareholder to realize on these shares. Although the shares have a redemption value of about \$16.5 million, the share structure of Wesbrook is such that there are

restrictions on Wesbrook's ability to redeem these shares, there is a practical difficulty in finding the funds that would be necessary to effect a redemption of shares and any redemption by an outside party would result in a tax liability of 66.67% by virtue of the provisions of Part VI.1 of the Income Tax Act.

[107] Taking these factors into consideration, Mr. Mackay opined that the net realizable value of the Wesbrook Class "B" preferred shares was \$4,016,000. In other words, these are the "after tax" proceeds that could be realized by an owner. To this figure Mr. Mackay applied a discount of 20% for a minority shareholding, resulting in a fair market value of \$3.2 million.

D. Positions of the Parties

(a) Mr. MacKenzie

[108] Mr. MacKenzie submits that the capital of the Trust was distributed in the transactions that took place in 1992 and 1998 and, accordingly, he is entitled to a fee in respect of capital for these transactions.

[109] Mr. MacKenzie referred to several indications of the value of these transactions:

- (a) Mr. Mayson's memorandum of June 8, 1992 (Exhibit 2, tab 9), setting out the case for the 1992 transaction, where for illustrative purposes Mr. Mayson showed N.I.L.'s assets valued at \$30,379,000;
- (b) A letter From Mr. Sommerfeldt to Revenue Canada dated September 9, 1992 (Exhibit 2, tab 12), where the value of N.I.L.'s assets was estimated to be between \$30 million and \$35 million;
- (c) Mr. Mayson's letter to Ms. Cohen of October 3, 1994 (Exhibit 2, tab 20), where the value of N.I.L.'s assets at the time of the 1992 transaction is again stated to be between \$30 million and \$35 million, with the shares transferred to K. "being backed by assets worth between \$15,000,000 and \$17,500,000";
- (d) A Revenue Canada form, "Election on Disposition of Property", dated December 9, 1998 (Exhibit 3, tab 38), signed by the trustees in connection with the 1998 transaction, in which the 9,990 Class "A" shares of N.I.L. are shown as having been disposed of for the fair market value of \$22,132,000, of which \$5,555,052 is the adjusted cost base, or valuation day value, for these shares;
- (e) the 1998 tax return for the Newton Trust (Exhibit 2, tab 27), which shows a value of the trust assets, had they not been reorganized, of \$22,132,000 as at December 31, 1998, of which \$5,555,052 was the valuation day value and \$16,577,000 was the gain in the value of trust assets since valuation day.

- [110] Mr. MacKenzie thus submits that there were capital dispositions from the trust in both 1992 and 1998, with the value of the 1992 distribution being between \$15,000,000 and \$17,500,000, and the value of the 1998 transaction being \$16,577,000. He says that both of these transactions entitle him to a fee on capital.
- [111] As for the activities to be considered in assessing both the fee on capital and the care and management fee, Mr. MacKenzie submitted I ought to consider all of the work that he did for N.I.L., which included, in particular, the vast amount of work Mr. MacKenzie did concerning the management and refurbishment of N.I.L.'s commercial buildings.
- [112] Mr. MacKenzie also submitted that the charging clause in the deed of settlement entitled Mr. MacKenzie to both recover Trustee Act remuneration and to charge for business and professional services rendered to the Trust.
- [113] Citing the factors to be considered in fixing the remuneration of trustees that are set out in *Re McColl Estate* (1968), 65 W.W.R. 110 (B.C.S.C.), and arguing that the two tax-driven transactions had left the Trust with no income and little remaining capital to distribute, Mr. MacKenzie urged that he be rewarded with a fee on capital in the range of 3% to 4% of the \$16,000,000 that he says was distributed in each of 1992 and 1998. This translates to a range of fees from \$960,000 to \$1,280,000.
- [114] As the 1992 and 1998 transactions were final distributions of the capital of the Trust, Mr. MacKenzie argued that there was no need to maintain a healthy reserve for future capital fees, as is the practice on typical interim passings of accounts.
- [115] Mr. MacKenzie also said that he is seeking a fee on account of care and management going back to the date of his initial appointment as trustee, that is, back to July 1977. Through his counsel Mr. MacKenzie presented a calculation of care and management fees, based on the maximum percentage of .4% of the average market value of the assets and using what I understood to be the book or appraised values of the assets of N.I.L. (as opposed to the assets of the Trust), which showed total care and management fees totalling \$1,454,773 for the years in question (1978 to 2000).
- [116] Finally, Mr. MacKenzie argued that the payment of trustees' fees for the period 1998-2000 and the payment of directors' fees (presumably for both 1999 and 2000) amounted to improper pre-taking of remuneration by the other two trustees. The authority cited in this regard was *Re Prelutsky*, (1982), 36 B.C.L.R. 214, [1982] 4 W.W.R. 309, 11 E.T.R. 233 (S.C.). He submitted that this pre-taking ought to be condemned and that it should be remedied by way of an order that Mr. Mayson and Ms. Cohen repay the amounts with interest.
- (a) Mr. Mayson and Ms. Cohen
- [117] On behalf of Mr. Mayson and Ms. Cohen it was argued that, throughout all of the time in question, the assets of the Trust have been made up of just one item, shares of N.I.L. (now shares of Wesbrook). At the Trust level (as distinct from the N.I.L. level) there was little for the trustees to do. During the years in question the Trust did not acquire any material assets

and the shares of N.I.L. required no ongoing care or management. The trustees met no more than four times each year, those meetings being held in conjunction with Army & Navy directors' meetings and meetings of the directors of N.I.L. The scope of the trustees' meetings seems to have been very limited, as indicated by the minutes available.

- [118] The annual work of preparing and implementing the financial plan for the Cohen family - that is, to carry out the objects of the Trust - was done by Mr. Mayson, acting as solicitor for the Trust. The trustees' involvement was merely to review and approve the annual plan. Indeed, Mr. MacKenzie himself conceded that, at the Trust level, the task of the trustees was simply to receive and disburse monies paid to the Trust by the companies.
- [119] Mr. Mayson and Ms. Cohen submitted that Mr. MacKenzie was well remunerated for all the services he provided to N.I.L. He was paid at his professional hourly rate for all of his services, legal or not, and he was paid trustee's fees based on 4% of the income of the Trust. For him also to be paid further trustee's fees for the same services would amount to a double reward.
- [120] It was submitted that the amount billed to N.I.L. by Mr. MacKenzie was as much as \$1.9 million.
- [121] As for the other claimant, the estate of the late Mr. Kennedy, Mr. Kennedy was the president of Army & Navy and he had, as part of his duties, the responsibility for looking after the Cohen family's finances and responsibilities associated with N.I.L. and the Trust. Accordingly, he was paid his Army & Navy salary throughout for all of this work.
- [122] As for the 1992 restructuring, Mr. Mayson and Ms. Cohen submit that this was solely a tax-driven transaction and that nothing of substance took place to change the ownership of N.I.L. by the Trust. The expert advice received by the trustees was that the value of the shares transferred to K. in 1992 was "nil", a valuation that Mr. MacKenzie himself confirmed in documents prepared for Revenue Canada.
- [123] The result of this restructuring was not a tax savings but merely a tax deferral.
- [124] As for the 1998 restructuring, again this involved a tax deferral, not a tax savings. Value can only be transferred out of the ownership structure if the Wesbrook shares that were transferred to Ms. Cohen are redeemed (at which time tax is payable), but all share redemptions are entirely within the discretion of the directors of Wesbrook and they are dependent upon funds being made available to Wesbrook to pay for the redemptions, as Wesbrook is asset-rich but relatively cash poor. For this and other reasons Mr. Mackay, the valuator, opined that the fair market value of the shares transferred to Ms. Cohen was not the full redemption value of \$16.5 million but instead was \$3.2 million.

[125] In the case of both restructurings, it was submitted that the identification of the tax problem, the creation of the solutions and all of the work undertaken to carry out the restructurings were all done by professional advisers to the Trust. The role of the trustees was limited to the consideration and approval of the plans.

[126] Finally, on the pre-taking allegation Mr. Mayson and Ms. Cohen argue that the amount of trustees' fees for 1998-2000 was the same as that which was agreed to by all parties in prior passings of accounts, and payment was made in the same manner that had been accepted by all parties before. Importantly, even Mr. MacKenzie agrees that the amount is appropriate. In these circumstances it was submitted that *Re Prelutsky*, supra, is distinguishable or, alternatively, that an order pursuant to s. 96 of the Trustee Act ought to be made relieving the trustees of the consequences of any minor breach, as was done in *Re Prelutsky*.

E. Discussion

(a) Capital Fee

[127] Section 88 of the Trustee Act sets out the basis on which trustees are to be remunerated. It reads as follows (with certain words removed for readability):

88 (1) A trustee ... is entitled to ... a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship ..., and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

(2) The court ... may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor ... in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.

(3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

[128] *Re Toronto General Trusts Corporation v. Central Ontario Railway Company* (1905), 6 O.W.R. 350 (Ont. H.C.) and *Re McColl*, supra, establish the following criteria to be considered in setting a fee on capital and income:

- (a) the magnitude of the estate;
- (b) the care and responsibility involved;
- (c) the time occupied in the administration of the estate;

- (d) the skill and ability displayed;
- (e) the success achieved in the final result.

[129] A great deal of evidence and argument was led on the nature and value of the transactions that took place in 1992 and 1998. I am satisfied that each of those transactions involved a distribution of capital. The more difficult questions concern the value of those distributions and the amount of remuneration, if any, that is to be awarded given the circumstances of this case. For reasons that will emerge I deal with the latter question first.

[130] Mr. MacKenzie's evidence and argument emphasized the work he did to manage, maintain and refurbish assets owned by N.I.L. For the purposes of his argument he treated the work he did for N.I.L. as being work done for the Trust. Although, arguably, this is inconsistent with the general approach adopted by the courts [see, by analogy at least, *British Columbia (Public Trustee) v. Lohn Estate* (1994), 98 B.C.L.R. (2d) 26 (C.A.)], I will assume for the moment that this is a correct approach. However, I conclude that this necessarily raises the question of the remuneration already received by Mr. MacKenzie for the work he did for N.I.L.

[131] Mr. MacKenzie took the position that his billings to N.I.L. are not to be taken into account. In effect, he asked that I consider all of the work he did in managing the assets of N.I.L. but he argued that I must ignore the amounts he has already been paid for managing those assets.

[132] Mr. MacKenzie referred to the charging clause set out in the deed of settlement, which reads as follows:

If on one or more occasions one or more of the Trustees is a chartered accountant, solicitor or real estate agent or conducts a profession or business in which it is usual to charge a fee or commission for performing services then even though he or she is one of the Trustees and in addition to his or her remuneration as one of the Trustees such individual shall be allowed and paid his or her professional or business fees or commissions for any business or professional services rendered to the Trustees by such individual or by any firm or corporation with which he or she is connected and the Trustees may use capital and/or income for the purpose of this paragraph as the Trustees from time to time in their absolute discretion deem advisable.

[133] Mr. MacKenzie argued that this clause entitled him to be paid for all of the services he provided (and billed) to N.I.L. in addition to the full trustee's fees he is entitled to receive.

[134] Mr. MacKenzie cited *Re Heap Estate* (1951), 4 W.W.R. (N.S.) 206 (B.C.S.C.) in support of his submission. In that case two beneficiaries of an estate opposed the fees of the estate solicitor, charged at the rate of 2% of the value of the estate (in accordance with the tariff of the time), on the grounds that the fees ought to be reduced to reflect the fact that the solicitor was also receiving remuneration as an executor of the estate. There was a charging clause in the will.

[135] Farris C.J.S.C. rejected the argument of the beneficiaries. He said (at p. 209):

As already referred to, the testator specifically provided that any one of his trustees and executors, in addition to his trustee and executor fees, should be paid for all professional services rendered by himself or his firm in connection with the said will. I can only interpret this in one light and this is, the testator desired that, if one of his trustees was a solicitor, in determining his fees as trustee and in determining his fees as a solicitor, his remuneration was to be considered for the work done in each capacity as if strangers were acting in the different capacities. It is my view, therefore, that I must consider the bill of costs rendered for the work done by the solicitors as if it had been done by an entirely independent legal firm of solicitors and that this, by no stretch of the imagination, can be treated as a special circumstance which, in itself, would either justify the reduction of the fee or the increasing of it.

[136] Mr. MacKenzie submitted that all his billings were for professional work, because he was "hired as a lawyer" to carry out the work he did for N.I.L., and thus he also is entitled to full remuneration as a trustee. However, the evidence clearly disclosed that the vast majority of the work done for N.I.L. by Mr. MacKenzie was non-legal work that related to the management of N.I.L.'s assets. He might have been paid a legal hourly rate but, most of the time, he was not acting as a lawyer or bringing any legal expertise to bear.

[137] To interpret the charging clause in the manner submitted by Mr. MacKenzie would mean that he would be paid for managing the assets of N.I.L. at, say, \$250 per hour and he would still be entitled to full trustee remuneration for the identical services. This is inconsistent with *Re Heap Estate* and with the established view that is taken of that case.

[138] Mr. MacKenzie's interpretation would mean that, in some cases, a trustee could rely on a charging clause to recover remuneration that is in excess of the limits prescribed by the Trustee Act. It is well-established that trustees cannot, in effect, "subcontract" their duties to others (or as here, to one of their own) without having the cost of those services taken into account in some way, often by deducting the cost from the trustee's remuneration. To hold otherwise would be to invite a doubling of the administration cost of estates.

[139] In my view, the proper interpretation of the charging clause, applying the principles in *Re Heap Estate*, requires that the legal work done for N.I.L. by Mr. MacKenzie be considered as if outside counsel had been engaged for the purpose, but that his billings for non-legal work must be considered as remuneration for services he rendered as a trustee.

[140] There are two problems in quantifying the fees paid to Mr. MacKenzie for his non-legal services. First of all, in his accounts he did not distinguish between legal and non-legal work although, as noted earlier, the evidence was clear in establishing that non-legal work constituted the vast majority of the work done. On the authority of *Re Heap Estate* he ought to have billed these activities separately. No percentage was stated by the witnesses but I conclude from the evidence generally that legal work constituted, at the very most, 20% of the billings.

- [141] Second, the figure for the overall billings by Mr. MacKenzie to N.I.L. is simply unknown because the records have been lost. I appreciate that there were reasons given for the loss of the records but the fact is that Mr. MacKenzie's record-keeping was inadequate. If, as Mr. MacKenzie urged, I am to consider the work he did for N.I.L. as work done for the Trust in his capacity as trustee, then Mr. MacKenzie must be held to a standard of record-keeping relating to this work that is commensurate with that imposed on trustees. A duty to keep adequate records is one of the fundamental duties of a trustee. Here, Mr. MacKenzie did not adequately fulfill that duty.
- [142] Counsel for Mr. Mayson and Ms. Cohen argued that Mr. MacKenzie's total billings were in the range of \$1.9 million, but that figure included fees billed to Army & Navy (and which seemed to be for "pure" legal work), amounts paid to Mr. MacKenzie for acting as a director of Army & Navy and amounts shown in the books of N.I.L. as "asset management fees", which may well include amounts paid to the resident management of each of N.I.L.'s buildings.
- [143] As noted in paragraphs 61 and 62 of these reasons, the records that are available show billings by Mr. MacKenzie to N.I.L. totalling \$943,000 for certain periods of time in 1984, 1985, 1987, 1988 and 1989, and from June 1991 to December 1999. There is no information on billings from 1978 to 1983, 1986, 1990 and parts of 1984, 1985, 1987, 1988, 1989 and 1991.
- [144] From June 1991 to December 1999, a period of 8½ years, billings totalled \$850,000, an average of \$100,000 per year. The accounts that are available for certain periods in 1984, 1985, 1987, 1988 and 1989 show billings averaging about \$35,000 per year, these being periods of perhaps moderate activity on Mr. MacKenzie's part. There are over 10 years of billings unaccounted for, some being times of lesser activity and some being times of intense activity on Mr. MacKenzie's part. Having regard to the lower billing rates that would have applied in the earlier years, I am satisfied that Mr. MacKenzie would have billed N.I.L. an average of at least \$30,000 each year in the years for which records are missing. This results in further billings of \$300,000 to be added to the known total of \$943,000, for a grand total of \$1,243,000.
- [145] Applying the earlier conclusion that no more than 20% of fees billed related to legal work, it is evident that even on a conservative approach to the evidence Mr. MacKenzie has been paid at least \$1 million for his work in managing the assets of N.I.L. over the years.
- [146] In addition, Mr. MacKenzie was paid about \$17,000 by way of bills rendered directly to the Trust for such things as passings of accounts, and he was (or is to be) paid a total of \$130,490 for trustee's fees.
- [147] I turn now to the factors to be considered in the assessment of trustees' fees. I do not propose to review each of the factors in detail but suffice it to say that, in the aggregate, the assets of N.I.L. were roughly estimated to be worth \$30 million in 1992 (see the figures given "for illustration" at Exhibit 2, tab 9, p. 12), although most of that value (\$25 million) was made up by N.I.L.'s 49% interest in Army & Navy, an asset that required no real

administration on Mr. MacKenzie's part. By 1998 the value of the three buildings owned by N.I.L. was about \$8.6 million. The West End condominium and Port Coquitlam land brought the value of the real estate holdings to about \$11 million (see Exhibit 2, tab 25, pp. 33-37), although again these latter assets required little administration on the part of Mr. MacKenzie (Mr. MacKenzie having conceded that the ALR application for the Port Coquitlam property might well have occurred before his appointment as trustee). The care and responsibility involved on Mr. MacKenzie's part for the three buildings owned by N.I.L. was considerable, Mr. MacKenzie spent a very large amount of time on the care and management of these buildings, and his efforts resulted in the successful refurbishment and profitable operation of the buildings.

- [148] In addition to the services rendered to N.I.L. Mr. MacKenzie also rendered services at the Trust level. These services consisted primarily of reviewing the annual financial plan for the Cohen family that was prepared by Mr. Mayson, attending trustees' meetings four times each year (in conjunction with other meetings), reviewing the accounts prepared by Mr. Mayson for the biennial passings of accounts, and considering and approving the restructurings of 1992 and 1998. As noted earlier, Mr. MacKenzie billed, and was paid for, all of the time he spent on these activities at his professional hourly rate and received trustee's fees in addition to those billings.
- [149] The services rendered by Mr. MacKenzie directly to the Trust involved responsibility for shares worth millions of dollars, but the actual work required and time spent were not great. There were exceptions for the 1992 and 1998 restructurings, which imposed a great deal of responsibility on all of the trustees, including Mr. MacKenzie, but the identification of the tax issues, the creation of the solutions and the restructurings themselves were all done by professional advisers.
- [150] Against all of Mr. MacKenzie's efforts, both those for the Trust and those for N.I.L., must be weighed the estimated amount of \$1 million and the actual amounts of \$17,000 and \$130,490 paid to Mr. MacKenzie. Mr. MacKenzie was paid at \$250 per hour, or a rate that was equivalent in earlier years, for any and all activities he undertook on behalf of the Trust and N.I.L., and he was paid (or is to be paid) sums totalling \$130,490 in addition to the hourly billings. Importantly, he was paid at a professional's rate for work that did not require professional expertise. He was paid at \$250 per hour, or the equivalent, for all his activities in administering, caring for and managing the assets of N.I.L., which included important things such as contract management but which also included such mundane tasks as shopping for televisions and mattresses and attending staff events. Clearly he was overpaid for all of the latter type of activities, and the evidence showed that the time spent on these types of matters was significant. Only at the more sophisticated end of his managerial duties did the rate of \$250 per hour (or its equivalent) approach an appropriate level of compensation.

- [151] Ms. MacKenzie also benefited from the fact that, unlike most trustees, he was paid when he billed and for most of his remuneration he did not have to wait for a passing of accounts. I cannot help but observe that, in some sense at least, there was an element of pre-taking to much of Mr. MacKenzie's own remuneration.
- [152] Having regard to all of the factors discussed above, and taking a view of the value of the N.I.L. shares and N.I.L. assets that is most favourable to Mr. MacKenzie, I am of the view that Mr. MacKenzie has been fully and fairly remunerated for all his services as trustee.
- [153] To this point I have proceeded on the assumption, based on Mr. MacKenzie's submissions, that it is appropriate that I ignore the separate legal status of N.I.L. and that I should consider the services rendered by Mr. MacKenzie to N.I.L. as if they were services rendered to the Trust. I now consider the alternative approach: that it is only the work done by Mr. MacKenzie for the Trust that I must consider in assessing the appropriate level of trustee remuneration.
- [154] As noted above, the activities of the trustees, including Mr. MacKenzie, at the Trust level were relatively limited given that the Trust assets consisted of shares. Mr. MacKenzie was paid as and when billed for all of the time he spent on behalf of the Trust at his professional hourly rate and received substantial remuneration (\$130,490) in addition to that. Having given full consideration to the necessary factors I again find that Mr. MacKenzie has been adequately remunerated for his services and that there is no justification for an additional award.
- [155] Mr. Kennedy's situation was somewhat different, although my conclusion is the same. He did not have responsibility for the local management of the assets of N.I.L., although was the person to whom Mr. MacKenzie directed all of his management-type reports (although Mr. Goldsmith was a joint addressee on many of these as well). Thus at the N.I.L. level his involvement in asset management was far less than that of Mr. MacKenzie. At the Trust level his involvement in administration was the same as Mr. MacKenzie.
- [156] Mr. Kennedy was paid for all of his services on behalf of the Trust and N.I.L. by way of his remuneration from Army & Navy. I was not told what that remuneration was, such that I might be able to draw conclusions on his effective compensation for Trust and N.I.L. activities, but I gather that it was substantial. In addition, he was paid sums totalling \$146,325 as trustee's fees for the years 1972 to 1998.
- [157] I conclude that, from these two sources, Mr. Kennedy was paid fully and fairly for all the services he rendered to the Trust.
- [158] In the circumstances it is unnecessary to express a view on the value of the capital transactions that took place in 1992 and 1998.

(b) Pre-Taking of Remuneration

- [159] Mr. MacKenzie takes the position that the remuneration of \$11,938.39 paid to Mr. Mayson and Ms. Cohen (and which Mr. MacKenzie declined until the accounts are passed) for the period 1998-2000 is improper "pre-taking" because the accounts were not approved. He takes no issue with the amount paid, simply that they have paid themselves before approval. Evidently there was a tax advantage to the Trust in having the trustees' fees expensed in the current year and all parties (including Mr. MacKenzie) had agreed to this course of action since 1981 (see Exhibit 35).
- [160] While it is true that trustees ought not to take remuneration without the consent of all parties or, if consents cannot be obtained, before the accounts are passed, given the particular circumstances of this case I consider that the transgression, if any, is trivial. The impugned payments were made in accordance with a practice that had been accepted by all parties for many years, and approved by the court, and the amount of the payment was not at issue as all parties agreed it was reasonable and ought to be paid, at least at some point.
- [161] Any pre-taking that occurred in this case seems less serious than that in *Re Prelutsky*, supra, where McKay J. relieved the institutional trustee from the consequences of having collected an "administration fee" before a passing of accounts, applying what is now s. 96 of the Trustee Act. Accordingly, I do not consider it appropriate that the two trustees be ordered to repay with interest the amounts paid to them.
- [162] Mr. MacKenzie also raised the issue of pre-taking with respect to the directors' fees paid to Mr. Mayson and Ms. Cohen. He submitted that the annual fees of \$5,500 that were paid to each of the directors constituted pre-taking in 1999 and 2000 because the accounts of the Trust were not passed for those years.
- [163] Mr. MacKenzie's submission on this point referred to fees paid to the directors of N.I.L., as does the Order, but I must confess that I was unable to find any reference in the evidence to any directors' fees paid by N.I.L. The only evidence of directors' fees being paid was the \$5,500 fee paid annually to the directors of Army & Navy.
- [164] Little argument was directed to this point despite the fact that this issue was expressly included in the order directing the passing of accounts. No authority was cited for the proposition that a registrar, in considering the passing of accounts of a trust, may consider, as trustees' remuneration, payments made to trustees when acting as a director of a company whose shares are owned by the trust (which would be the situation with N.I.L.), or, for that matter, when acting as a director of a company that is only partly and indirectly owned by the trust (which is the situation with Army & Navy). Certainly in the latter situation, at least, I entertain doubt that such an examination would be appropriate except, perhaps, in special circumstances. In any event, I would observe that, as with the situation with the trustees' fees that were paid, if this is to be construed as unauthorized pre-taking of remuneration then it is very minor in nature and in the circumstances of this case it merits no ameliorative order.

(c) Care and Management Fee

[165] A preliminary issue on the care and management fee is whether it may be claimed for the time periods covered by previous passings of accounts given that the trustees, on the previous passings, did not reserve their right to claim this fee at a later date.

[166] I was not favoured with any case authority on point. The only mention of the subject is a brief reference in *Re Pedlar* (1982), 34 B.C.L.R. 185 (S.C.) where Hinds J. opined on the wording of what is now s. 88 (3) of the Trustee Act, stating that the words "may apply annually to the Supreme Court for a care and management fee" in that section did not mean that the application had to be made within the year or within the period of time for which the fee was claimed. He added (at p. 193):

Whether the present wording of s. 90 (2) [now s. 88 (3)] would permit an executor to delay making an application for a number of years, and then apply for an annual care and management fee for an accumulation of years, is an interesting issue. Because the determination of that issue is not necessary for the resolution of this application, I decline to express an opinion thereon.

[167] I conclude that, in the circumstances of this case, it is not open to Mr. MacKenzie to claim a care and management fee for services he provided during periods of time covered by previous passings of accounts. Mr. MacKenzie was fully aware of his right to claim this "annual" fee but chose not to do so and, unlike the situation with the capital fee, did not reserve his right to claim the fee at a later date. I conclude that, the capital fee aside, the trustees were entitled to consider that the books were closed for these periods.

[168] In any event, I would not have considered an award of a care and management fee to Mr. MacKenzie and Mr. Kennedy as it is my conclusion that these trustees were already adequately remunerated elsewhere.

[169] As for the last time period, for which the accounts have not yet been passed, in the event it is proper to ignore the separate legal status of N.I.L. I conclude that Mr. MacKenzie was adequately remunerated by way of payment for all his time at his professional hourly rate for the period to March 1, 1998 to February 1, 1999, and at the rate of \$8,000 per month thereafter for management of the N.I.L. assets, plus the fees he billed to the Trust for this period, plus the trustee's fees that are to be paid to him. If only his services to the Trust are to be examined, I again conclude that he has already been adequately remunerated. Aside from the 1998 restructuring (for which time Mr. MacKenzie received remuneration at his professional rate), the shares of N.I.L. required no ongoing management to speak of and Mr. MacKenzie was well remunerated generally for his time at \$250 per hour plus the sum \$11,939.39 that is being paid to him.

[170] Similarly, Mr. Kennedy was fully remunerated for his services by his continued executive salary from Army & Navy during those times he worked on Trust matters, plus the trustee's fees he received based on 4% of the income of the Trust.

F. Conclusion

[171] In summary, I conclude as follows:

- (a) the accounts of the Trust are passed as presented;
- (b) the amounts already paid or tendered to the trustees represent full, fair and reasonable remuneration to the trustees for their administration of the estate from March 1, 1998 to February 29, 2000 and in respect of the capital distributions made in 1992 and 1998;
- (c) Mr. MacKenzie and the estate of Mr. Kennedy are not entitled to claim a care and management fee for those periods of time covered by previous passings of accounts. No care and management fee would have been awarded in any event for these periods, and no care and management fee is awarded to Mr. MacKenzie or Mr. Kennedy for the period from March 1, 1998 to February 29, 2000;
- (d) the amounts paid as trustees' fees to Mr. Mayson and Ms. Cohen for the period ending February 29, 2000 need not be repaid to the Trust with interest; and
- (e) the payment of directors' fees to Mr. Mayson and Ms. Cohen requires no ameliorative order.

[172] If counsel cannot agree on costs, arrangements should be made to attend for further submissions (one hour should be sufficient) because counsel did not address costs in oral submissions and each referred to costs only very briefly in their written submissions. In addition to any authorities counsel may wish to bring to my attention counsel should address *Re Kanee Estate* (1992), 69 B.C.L.R. (2d) 89, 46 E.T.R. 1 (C.A.) and *Turner v. Andrews* (2001), 197 D.L.R. (4th) 533, 85 B.C.L.R. (3d) 53, [2001] 3 W.W.R. 620, 38 E.T.R. (2d) 126, 2001 BCCA 76.

[173] If the parties come to terms on costs, counsel for Mr. Mayson and Ms. Cohen should submit a certificate for my signature, as required by the terms of the Order.

"Registrar M. Blok"

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