COURT FILE NUMBER	1601-01675
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF ARGENT ENERGY TRUST, ARGENT ENERGY (CANADA) HOLDINGS INC. and ARGENT ENERGY (US) HOLDINGS INC.
DOCUMENT	**BRIEF OF ARGUMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Sean Zweig Telephone No.: 403-298-3323 / 416-777-3254 Fax No.: 403-265-7219 Client File No.: 68859-14

Application scheduled for the 30th day of August, 2016 at 1:00 p.m.
before The Honourable Mr. Justice D. B. Nixon

TABLE OF CONTENTS

I. INTRODUCTION

1. Argent Energy Trust (the "**Trust**"), Argent Energy (Canada) Holdings Inc. ("**Argent Canada**") and Argent Energy (US) Holdings Inc. ("**Argent US**", and, together with the Trust and Argent Canada, "**Argent**") seek an Order, among other things:

(a) deeming service of the application and the materials in support thereof to be good and sufficient, and dispensing with service of this application and the supporting materials on any other parties, including, but not limited to, the unitholders of the Trust;

(b) authorizing Argent Canada to make an assignment into bankruptcy under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (the "**BIA**") and authorizing FTI Consulting Canada Inc. to act as the trustee in bankruptcy of the Trust and of Argent Canada (the "**Bankruptcy Trustee**");

(c) approving the resignations of the directors and officers of Argent US and of Argent Canada effective August 30, 2016;

(d) granting enhanced powers to the Monitor with respect to Argent US, including but not limited to:

(i) authorizing and directing the Monitor to dissolve Argent US and terminate the proceedings pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") with respect to Argent US at such time as it deems appropriate; and

(ii) authorizing and directing the Monitor to administer the plan of dissolution of Argent US, in accordance with the laws of the State of Delaware;

(e) extending the stay of proceedings with respect to Argent US to March 31, 2017;

(f) authorizing and directing the Monitor to pay the funds held by it in trust pursuant to the Ad Hoc Committee First Charge into Court, subject to further Court Order;

(g) discharging the Monitor with respect to Argent Canada and the Trust; and

(h) terminating these proceedings pursuant to the CCAA (the "**CCAA Proceedings**") with respect to Argent Canada and the Trust at the CCAA Termination Time, being the earlier of (i) 11:59 p.m. MDT on August 31, 2016; and (ii) the time at which the assignment into bankruptcy pursuant to the BIA is filed for each of the Trust and Argent Canada;

further, Argent and Computershare Trust Company of Canada, the trustee of the Trust ("**Computershare**") seek an Order:

(i) immediately upon the Trust making an assignment into bankruptcy pursuant to the BIA and the vesting of the Trust's assets with the Bankruptcy Trustee, deeming the Trust to be terminated by operation of law and deeming the trustee of the Trust to be discharged by operation of law.

2. Argent also seeks an Order:

(a) establishing a claims procedure for the identification of claims against the current and former directors and officers of Argent and of Argent Energy Limited (the administrator of the Trust) (the "**D&O Claims Process**");

(b) authorizing the Monitor to continue to hold in trust the funds pursuant to the Directors' Charge pending the completion of the D&O Claims Process; and

(c) upon the completion of the D&O Claims Process, authorizing the Monitor to distribute the funds held by it in relation to the Directors' Charge in accordance with any claims proven pursuant to the D&O Claims Process, with any excess funds to be distributed to the Syndicate, or alternatively, to pay the funds held by it in relation to the Directors' Charge into Court, in accordance with the proposed form of D&O Claims Process Order.

3. Capitalized terms not otherwise defined herein shall have the meanings as defined in the Affidavits of Sean Bovingdon sworn in these proceedings.

II. STATEMENT OF FACTS

A. The Structure of Argent

4. The Trust wholly owns Argent Canada, which in turn wholly owns Argent US. Argent US owned and operated oil and gas producing assets in Texas, Wyoming and Colorado.

First Affidavit of Sean Bovingdon sworn February 16, 2016, paras. 29-41.

B. The CCAA and Chapter 15 Proceedings

5. Due to, among other things, the global decline in commodity prices over the past few years, on February 17, 2016, Argent sought and obtained an Initial Order pursuant to the CCAA, and FTI Consulting Canada Inc. was appointed as Monitor. On March 11, 2016, the Monitor sought and was granted foreign recognition of the CCAA Proceedings by the US Bankruptcy Court, as "foreign main proceedings", pursuant to Chapter 15 of the US Bankruptcy Code (the "**US Proceedings**").

First Affidavit of Sean Bovingdon sworn February 16, 2016, para. 80.

Initial Order granted February 17, 2016.

Third Affidavit of Sean Bovingdon sworn April 14, 2016, para. 8, Exhibit "3".

6. Pursuant to the Initial Order granted February 17, 2016, and pursuant to the Amended and Restated Initial Order granted March 9, 2016, this Honourable Court authorized Argent to pursue a Sale Solicitation Process to sell the assets or business of Argent US. The US Bankruptcy Court recognized the Initial Order and the Amended and Restated Initial Order. In accordance with the Sale Solicitation Process, Argent US entered into a purchase and sale agreement with BXP Partners IV, LP ("**BXP**") for the sale of all or substantially all of the assets of Argent US (the "**Transaction**"). The sale was approved by this Honourable Court on May 10, 2016, and by the US Bankruptcy Court on May 11, 2016, and the Transaction closed on May 17, 2016.

Initial Order granted February 17, 2016.

Amended and Restated Initial Order granted March 9, 2016.

Third Affidavit of Sean Bovingdon sworn April 14, 2016, para. 8, Exhibit "3".

7. Pursuant to the Initial Order, and as confirmed in the Amended and Restated Initial Order, the Court granted a Directors' Charge as against the assets of Argent, in the amount of US $200,000, as security for Argent's indemnification of the directors and officers of Argent and of Argent Energy Limited (the administrator of the Trust) against obligations that the directors and officers might incur after the commencement of the CCAA Proceedings. The Monitor currently holds the US $200,000 from the proceeds of sale of Argent's assets in trust, for the purposes of the Directors' Charge.

8. On June 27, 2016, in consideration of the expectation that the directors of Argent Energy Limited (the administrator of the Trust) would be resigning on June 30, 2016, this Honourable Court granted the Monitor enhanced powers which would allow it to administer the Trust. This Court also authorized and directed the Monitor to assign the Trust into bankruptcy at such time as the Monitor deemed appropriate.

Order granted June 27, 2016, paras. 6 and 7.

9. Since June 27, 2016, Argent has worked with the Monitor on post-closing matters, including preparation of and agreement upon a final statement of adjustments with BXP, effecting transfers of operatorship of Argent US' Wyoming assets to BXP, and effecting other transfers of operatorship of other purchased assets of Argent US.

Bovingdon Affidavit No. 5, para. 9.

III. DISCUSSION

A. Termination of the CCAA Proceeding is Appropriate

10. Argent does not have sufficient assets to repay the Syndicate's pre-CCAA secured debt, which exceeds the purchase price received from BXP. Accordingly, a CCAA plan of arrangement is not warranted or feasible and there is no further purpose to or benefit to these CCAA Proceedings with respect to the Trust and Argent Canada.

Bovingdon Affidavit No. 5, para. 13.

11. In the CCAA proceedings relating to Parallel Energy Trust et al., the Alberta Court of Queen's Bench granted an Order terminating those CCAA proceedings in the absence of a plan of compromise or arrangement, where the debtors did not have sufficient assets to repay the pre-CCAA secured debt. Further, the Ontario Supreme Court of Justice terminated the CCAA proceedings in relation to Grant Forest Products Inc. et al, in the absence of a CCAA plan.

> CCAA Termination Order in Parallel Energy Trust et al., Court File No. 1501-13318, Alta. Q.B., filed March 2, 2016. **[TAB 1]**
>
> Transition Order in Grant Forest Products Inc. et al., Court File No. CV-09-8247-00CL, Ont. S.C.J., entered September 30, 2013. **[TAB 2]**

B. Enhanced Powers of the Monitor with respect to Argent US

12. Argent is not seeking to terminate the CCAA Proceedings with respect to Argent US at this time, as there are several ongoing matters to be dealt with. In particular, Argent US is still engaged in the process to finalize the statement of adjustments with BXP, is still awaiting response and receipt of a tax refund from a tax refund application process through Tax Consultants of Texas ("**T-COT**"), certain changes of operatorship to BXP are still being processed by the relevant Wyoming authorities, and Argent US is still working to resolve lien claims of Baker Hughes Incorporated (or its subsidiaries).

13. The directors and officers of Argent US expect to resign on August 30, 2016 and seek this Court's approval in that regard.

14. As such, Argent seeks an Order granting the Monitor enhanced powers with respect to Argent US. This will ensure that, in the absence of any directors of Argent US, the Monitor has the power to preserve, protect, and maintain control of the property of Argent US, receive funds on behalf of Argent US, make distributions or payments by Argent US, execute documents with respect to the property of Argent US, provide instructions to advisors of Argent US, oversee and direct the preparation of cash flow statements and assist in the dissemination of information in these proceedings with respect to Argent US, and address the other matters that Argent US remains engaged in as referenced above.

C. Extension of the Stay of Proceedings with respect to Argent US

15. Argent US seeks an extension of the stay of proceedings in its favour to March 31, 2017.

1. Statutory Requirements

16. The current stay of proceedings expires on August 31, 2016. Argent US seeks an extension of the stay period up to and including March 31, 2017.

17. Section 11.02(2) of the CCAA gives the court discretion to grant or extend a stay of proceedings:

> 11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph 1(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> *CCAA*, s. 11.02(2)

18. Pursuant to section 11.02(3) of the CCAA, to exercise its discretion to extend the stay of proceedings, the Court must be satisfied that: (i) circumstances exist that make the order appropriate, and (ii) the applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.

> *CCAA*, s. 11.02(3)

2. Actions in Good Faith and with Due Diligence

19. As is described in further detail in this Bench Brief and in the Bovingdon Affidavit No. 5, Argent US has acted in good faith and with due diligence since the previous stay extension was granted on June 27, 2016. Argent has taken the following steps:

(a) diligently worked with the Monitor on post-closing matters, including but not limited to:

(i) preparation and resolution of a final statement of adjustments;

(ii) transfers of operatorship of the Wyoming assets of Argent US to BXP;

(iii) other transfers of operatorship in relation to other assets of Argent US that have been purchased; and

(iv) working to resolve lien and tax claims against Argent US;

(b) cooperated with the Monitor to facilitate its monitoring of the Applicants' business and operations;

(c) communicated with various stakeholder groups and/or their advisors; and

(d) continued to operate and manage the business of Argent US, in the context of winding down the company, in accordance with the Orders granted in these CCAA Proceedings and the Chapter 15 Proceedings.

Bovingdon Affidavit No. 5, paras. 9, 14.

3. Circumstances Exist that make a Stay Extension Order Appropriate

20. Argent seeks to extend the stay of proceedings to March 31, 2017, which will allow for a number of post-closing matters to continue to be addressed. These post-closing matters include, but are not limited to:

(a) reaching final agreement on the statement of adjustments and the final accounting statement, as is contemplated in the Sale Agreement with BXP;

(b) waiting for a response from the Wyoming regulatory authorities regarding effecting the change in operatorship of the assets of Argent US located in Wyoming, which have been purchased by BXP;

(c) working with respect to other post-closing matters including other matters relating to changes of operatorship to purchasers of Argent's assets;

(d) working to resolve lien claims of Baker Hughes Incorporated (or its subsidiaries);

(e) receipt and disbursement of the tax refund to Argent US from the U.S. taxing authorities; and

(f) winding down the CCAA proceedings with respect to Argent US.

Bovingdon Affidavit No. 5, para. 13.

21. As such, Argent submits that the requested extension of the stay of proceedings to March 31, 2017 is reasonable and appropriate, in the circumstances. It is anticipated that the tax refund will have been received and disbursed by that point (with the other above-mentioned steps to be completed well before that).

D. It is Appropriate for Argent Canada to be Assigned into Bankruptcy

22. Argent Canada is a company incorporated pursuant to the laws of Alberta. Argent Canada has assets in Canada and satisfies the definition of "corporation" within the BIA. Corporations are included within the definition of "person" pursuant to the BIA.

First Bovingdon Affidavit, para. 15.

BIA at section 2. **[TAB 3]**

23. Section 2 of the BIA defines an "insolvent person" as "a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and (a) who is for any reason unable to meet his obligations as they generally become due, (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."

BIA at section 2. **[TAB 3]**

E. Termination of the Trust and Discharge of its Trustee

24. This Honourable Court has already authorized and directed the Monitor to assign the Trust into bankruptcy.

> Order (Stay Extension and Other Relief) granted June 27, 2016, paras. 6(h) and 7.

25. Pursuant to section 71 of the BIA, all property of the bankrupt immediately passes to and vests in the trustee, subject to the BIA and the rights of secured creditors, on a bankruptcy order being made or an assignment being filed with an official receiver. Accordingly, upon the assignment of the Trust into bankruptcy, it will cease to have any property.

> BIA at section 71. **[TAB 3]**

26. A trust without property terminates by operation of law. As explained by Underhill and Hayton in *Law Relating to Trusts and Trustees*, 17th ed., and adopted by the Court in *Bronson v. Hewitt*, "Because a trust of property cannot exist unless there is property held on trust, once a trust has been duly emptied of all of its assets, there is no trust."

> *Bronson v. Hewitt*, 2011 BCSC 1115 at para. 34 citing Underhill and Hayton, *Law Relating to Trusts and Trustees*, 17th ed. (London: Butterworths, 2006), rev'd on other grounds, 2013 BCCA 367 at paras. 102-104. **[TAB 4]**

27. On the assignment of the Trust into bankruptcy, it will cease to exist and, accordingly, there will be no trust existing in respect of which Computershare can act as trustee. All that will continue to exist is the estate of the Trust, to be administered by the Bankruptcy Trustee.

> *Bronson v. Hewitt, supra.* **[TAB 4]**
>
> CCAA Termination Order in Parallel Energy Trust et al., Court File No. 1501-13318, Alta. Q.B., filed March 2, 2016. **[TAB 1]**

28. In the CCAA proceedings relating to Parallel Energy Trust et al., in similar circumstances where the trusts in question no longer held any assets, the Alberta Court of Queen's Bench granted an Order deeming the trusts terminated by operation of law, and deeming the trustees discharged.

CCAA Termination Order in Parallel Energy Trust et al., Court File No. 1501-13318, Alta. Q.B., filed March 2, 2016. **[TAB 1]**

F. Requested Declaration Regarding Sufficiency of Service

29. As noted at paragraph 1(a) above, Argent requests an order, *inter alia*, dispensing with service of this Application on the unitholders of the Trust (the "**Unitholders**"). The units of the Trust have been traded widely on the TSX since 2012. Service of this Application upon each of the individual Unitholders would result in significant delay and expense to the process which would, in turn, exacerbate the already significant shortfall in recovery being faced by the Syndicate. There are and will be no funds available for distribution to the Unitholders.

Affidavit No. 5 of Sean Bovingdon ("Bovingdon Affidavit No. 5"), para. 25.

30. Further, Argent has issued press releases advising the public, including the Unitholders, of the commencement and status of these CCAA Proceedings and the US Proceedings. Such notices include, but are not limited to, a press release dated May 17, 2016, advising the public, including the Unitholders, of the approval of the Transaction and that no funds are available for distribution to the Unitholders.

Affidavit No. 5 of Sean Bovingdon, para. 26, Exhibit "7".

31. In the CCAA proceedings relating to Parallel Energy Trust et al., the Court of Queen's Bench of Alberta granted an Order dispensing with service of an application to terminate the CCAA proceedings, to authorize the assignments of the trusts into bankruptcy, and, upon that occurring, deeming the trusts to be terminated and the trustees discharged.

CCAA Termination Order in Parallel Energy Trust et al., Court File No. 1501-13318, Alta. Q.B., filed March 2, 2016. **[TAB 1]**

G. Administration Charge

32. Argent seeks the continuation of the Administration Charge in the continued CCAA Proceedings of Argent US, over those funds held by the beneficiaries of that charge as retainers for professional fees.

H. Ad Hoc Committee First Charge

33. As counsel for the Ad Hoc Committee has not responded to requests by the Monitor for an invoice for its professional fees, such that the Monitor may disburse the CDN $300,000 held by it for the purposes of the Ad Hoc Committee First Charge created pursuant to the Amended and Restated Initial Order, the Monitor seeks to pay those funds into Court, subject to further Court Order.

I. D&O Claims Process

34. The D&O Claims Process is intended to solicit, determine and resolve claims, if any, against the beneficiaries of the Directors' Charge, being the current and former directors and officers of Argent and of Argent Energy Limited, the administrator of the Trust.

35. Pursuant to the Initial Order and the Amended and Restated Initial Order, (i) Argent is required to indemnify the directors and officers of Argent and of Argent Energy Limited against obligations and liabilities that they may have been incurred by the directors and officers after the commencement of the CCAA Proceedings, subject to a carve-out for gross negligence and willful misconduct; and (ii) the directors and officers of Argent and of Argent Energy Limited were granted a US $200,000 charge on the assets, undertakings and properties of Argent, as security for the indemnity (the "**Directors' Charge**"). The Directors' Charge is only available to the directors and officers to the extent that they do not have coverage under any directors' and officers' insurance policy or to the extent the insurance coverage is insufficient to pay amounts indemnified pursuant to the Initial Order and the Amended and Restated Initial Order.

Initial Order granted February 17, 2016, paras. 21-23.

Amended and Restated Initial Order granted March 9, 2016, paras. 21-23.

36. The D&O Claims Process will ensure the resolution of any claims against the current and former directors and officers of Argent and of Argent Energy Limited, prior to the funds currently held by the Monitor to the credit of the Directors' Charge being distributed. Alternatively, if the Monitor is unable to resolve claims made pursuant to the D&O Claims

Process without further Court processes and Orders, or if the aggregate amount of the claims submitted in the proposed D&O Process exceeds US $200,000, the proposed D&O Claims Process Order would permit the Monitor to, on notice to the interested parties, pay the US $200,000 into Court and terminate the D&O Claims Process.

37. Absent the D&O Claims Process, a liability could arise against the directors or officers of Argent or of Argent Energy Limited sometime after the Monitor has distributed the funds held to the credit of the Directors' Charge, in which case Argent would not have any funds to satisfy its requirement to indemnify the directors and officers, as required by the Initial Order and by the Amended and Restated Initial Order.

38. In addition to claims under the Directors' Charge, the D&O Claims Process calls for claims against the directors and officers of Argent and of Argent Energy Limited that pre-date the CCAA filing for which those directors and officers may be entitled to indemnification from Argent. These claims are included in the process as the Monitor needs to identify any indemnification claims by the directors and officers against Argent before it makes a further distribution of the funds held as security for the Directors' Charge to the Syndicate, as the secured creditor of Argent.

39. Upon the completion of the D&O Claims Process, any claims submitted to the Monitor pursuant to that process will have been resolved, any other claims against the directors and officers of Argent and of Argent Energy Limited will be barred, and, subject to any distributions to be made with respect to claims proven in the D&O Claims Process, the remainder of the funds held by the Monitor to the credit of the Directors' Charge will be distributed by it to the Syndicate. Alternatively, where the Monitor is unable to resolve any of the claims submitted to it in the D&O Claims Process, without further Court processes and Orders, or where the claims submitted to it exceed, in the aggregate, the amount of US $200,000, it would be impractical and unnecessary for the Monitor to continue to be involved in further Court processes to determine the claims, in which case the Monitor would pay the US $200,000 into Court and terminate the D&O Claims Process.

40. The Applicants submit that the proposed D&O Claims Process is reasonable in these circumstances.

41. Claims processes with respect to claims against directors and officers have been approved by Canadian courts in CCAA proceedings related to Grant Forest Products Inc. and in bankruptcy proceedings in relation to Danier Leather Inc.

> D&O Claims Order and Endorsement, In the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc. et. al., Ontario Superior Court of Justice, Commercial List, granted June 30, 2010. **[TAB 5]**
>
> Order (D&O Claims Procedure) and Endorsement, In the Matter of a Plan of Compromise or Arrangement of Danier Leather Inc., Ontario Superior Court of Justice, Commercial List, granted August 11, 2010. **[TAB 6]**

IV. RELIEF SOUGHT

42. Argent seeks the relief as set out in the proposed forms of Orders attached as Schedules "A" and "B" to the application.

Calgary, Alberta
August 22, 2016

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Estimated Time for Argument: 30 minutes

BENNETT JONES LLP

Per: _____

Kelsey Meyer / Sean Zweig
Counsel for the Applicants,
Argent Energy Trust, Argent Energy (Canada) Holdings Inc. and Argent Energy (US) Holdings Inc.

V. TABLE OF AUTHORITIES

1. CCAA Termination Order in Parallel Energy Trust et al., Court File No. 1501-13318, Alta. Q.B., filed March 2, 2016.

2. Transition Order in Grant Forest Products Inc. et al., Court File No. CV-09-8247-00CL, Ont. S.C.J., entered September 30, 2013.

3. *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended, ss. 2, 71.

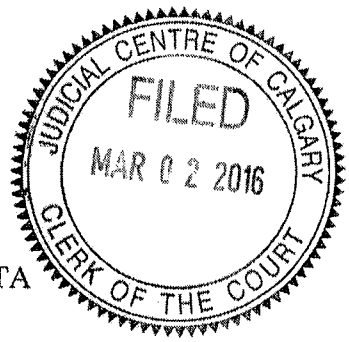
4. *Bronson v. Hewitt*, 2011 BCSC 1115, rev'd on other grounds, 2013 BCCA 367.

5. D&O Claims Order and Endorsement, In the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc. et. al., Ontario Superior Court of Justice, Commercial List, granted June 30, 2010.

6. Order (D&O Claims Procedure) and Endorsement, In the Matter of a Plan of Compromise or Arrangement of Danier Leather Inc., Ontario Superior Court of Justice, Commercial List, granted August 11, 2010.

TAB 1

Clerk's stamp:



COURT FILE NUMBER:	1501-13318
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PARALLEL ENERGY TRUST, PARALLEL ENERGY COMMERCIAL TRUST AND PARALLEL ENERGY INC.
APPLICANTS:	PARALLEL ENERGY TRUST, PARALLEL ENERGY COMMERCIAL TRUST, PARALLEL ENERGY INC. AND COMPUTERSHARE TRUST COMPANY OF CANADA
DOCUMENT:	**CCAA TERMINATION ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Osler, Hoskin & Harcourt LLP** Box 50, 1 First Canadian Place Toronto, ON M5X 1B8 Solicitors: Tracy Sandler, Mary Paterson and Joshua Hurwitz Telephone: 416.862.5890 Facsimile: 416.862.6666 Email: tsandler@osler.com, mpaterson@osler.com and jhurwitz@osler.com File Number: 1168698

DATE ON WHICH ORDER WAS PRONOUNCED: March 1, 2016

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Madam Justice Strekaf

LOCATION OF HEARING: Calgary Courts Centre, 601-5th Street SW, Calgary, AB

I hereby certify this to be a true copy of the original Order
Dated this 2 day of March 2016
for Clerk of the Court

UPON the application of Parallel Energy Trust (the "Public Trust"), Parallel Energy Commercial Trust (the "Commercial Trust"), Parallel Energy Inc. ("PEI", and together with the Public Trust and the Commercial Trust, the "Canadian Parallel Entities") and Computershare Trust Company of Canada, in its capacity as trustee of the Public Trust (collectively, the "Applicants") for an Order under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "CCAA"); **AND UPON** having read the Termination Application, the Affidavit of Richard N. Miller sworn February 24, 2016 (the "Fifth Miller Affidavit"), filed; **AND UPON** reading the Third Report of the Monitor, KPMG Inc. (the "Monitor") dated February 24, 2016, filed (the "Monitor's Third Report"); **AND UPON** hearing counsel for the Applicants, counsel to KPMG Inc., and counsel to the syndicate of Canadian bank lenders under a Credit Agreement dated April 21, 2011 (the "Credit Agreement", with such lenders constituting the "Bank Lenders"), as amended from time to time, and the interim lenders under an Interim Financing Term Sheet dated November 8, 2015;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE AND DEFINITIONS

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today, with service of the notice of application on the unitholders of the Public Trust specifically dispensed with.

2. Any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Order of the Honourable Justice Romaine granted on November 9, 2015 (the "Initial Order") in these proceedings (the "CCAA Proceedings").

STAY EXTENSION

3. The Stay Period, as defined in paragraph 14 of the Initial Order, is hereby further extended in respect of each Canadian Parallel Entity up to and including the time that is the earlier of (i) 11:59 p.m. MST on March 3, 2016, and (ii) the time at which the assignment into bankruptcy pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") is filed for each Canadian Parallel Entity (the "CCAA Termination Time").

TERMINATION OF CCAA PROCEEDINGS

4. These CCAA Proceedings shall be terminated without any other act or formality at the CCAA Termination Time.

5. The KERP Charge, the Interim Lenders' Charge, the Remaining KERP Charge and, subject to the payment in full of all amounts owing to the beneficiaries of the Administration Charge, the Administration Charge, shall be and are hereby terminated, released and discharged at the CCAA Termination Time.

6. Notwithstanding the termination of these CCAA Proceedings at the CCAA Termination Time, the Directors' Charge, shall continue to be valid and enforceable for all purposes in accordance with the terms of the Initial Order and shall continue to have the priority and rank set out therein and as outlined in paragraph 7 hereof.

7. The Canadian Parallel Entities are hereby authorized and directed to turn over funds in the amount of CDN $65,000 (the "**D&O Funds**") securing the Directors' Charge to the Bankruptcy Trustee (as defined in paragraph 16 herein). The D&O Funds shall be held in trust by the Bankruptcy Trustee for the benefit of the Canadian Parallel Entities' directors and officers for a period of 8 months (the "**Holdback Period**") following the assignment of the Canadian Parallel Entities into bankruptcy. If a claim is made against the directors

and officers during the Holdback Period that would be covered by the Directors' Charge, the D&O Funds shall only be released pending either agreement of the directors and officers or further Order of the Court in the bankruptcy proceedings of the Canadian Parallel Entities. In all other events, at the end of the Holdback Period, the D&O Funds (or any residual amounts after satisfaction of valid claims against the Directors' Charge) shall be distributed by the Bankruptcy Trustee to the Bank Lenders up to the amount of the value of the Bank Lenders' pre-filing secured debt pursuant to the Credit Agreement.

APPROVAL OF ACTIVITIES

8. The Pre-Filing Report of the Proposed Monitor dated November 8, 2015, the First Report of the Monitor dated November 28, 2015, the Second Report of the Monitor dated January 28, 2016 and the Monitor's Third Report, and the activities and conduct of the Monitor as described in each such report, are hereby approved.

APPROVAL OF FEES AND DISBURSEMENTS

9. The fees and disbursements of the Monitor for the period from November 9, 2015 to March 3, 2016 and the Monitor's estimated fees and disbursements to complete its remaining duties and the administration of these CCAA Proceedings, all as set out in the Monitor's Third Report, are hereby approved.

10. The fees and disbursements of Dentons Canada LLP, in its capacity as counsel to the Monitor ("Dentons") for the period from November 9, 2015 to March 3, 2016 and Dentons' estimated fees and disbursements in connection with the completion by the Monitor of its remaining duties and the administration of these CCAA Proceedings, as set out in the Monitor's Third Report, are hereby approved.

DISCHARGE OF THE MONITOR

11. Effective at the CCAA Termination Time, for each Canadian Parallel Entity, KPMG Inc. shall be and is hereby discharged as Monitor of such Canadian Parallel Entity and shall have no further duties, obligations or responsibilities as Monitor from and after such CCAA Termination Time, save and except as set out in paragraph 19 hereof.

12. The Monitor has satisfied all of its duties and obligations pursuant to the CCAA and the orders of the Court in respect of these CCAA Proceedings, save and except as set out in paragraph 19 hereof.

13. The Monitor, Dentons and each of their respective affiliates and officers, directors, partners, employees and agents (collectively, the "Released Parties") are hereby released and discharged from any and all claims that any person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in respect of the CCAA Proceedings or with respect to their respective conduct in the CCAA Proceedings (collectively, the "Released Claims"), and any such Released Claims are hereby released, stayed, extinguished and forever barred and the Released Parties shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Released Parties.

14. No action or other proceeding shall be commenced against any of the Released Parties in any way arising from or related to the CCAA Proceedings, except with prior leave of this Court on at least seven days' prior written notice to the applicable Released Parties.

15. Notwithstanding any provision of this Order and the termination of the CCAA Proceedings, nothing herein shall affect, vary, derogate from, limit or amend any of the protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order or any other Order of this Court in the CCAA Proceedings.

BANKRUPTCY OF THE CANADIAN PARALLEL ENTITIES

16. Each of the Canadian Parallel Entities is hereby authorized to make an assignment into bankruptcy under the BIA, and KPMG Inc. is hereby authorized to act as trustee in bankruptcy (in such capacity, the "Bankruptcy Trustee") in respect of each such Canadian Parallel Entity that makes an assignment into bankruptcy pursuant to the BIA.

17. Immediately upon the Public Trust and the Commercial Trust making assignments into bankruptcy pursuant to the BIA and the vesting of the Public Trust's and the Commercial Trust's assets in the Bankruptcy Trustee, each of the Public Trust and the Commercial Trust shall be deemed to be terminated by operation of law and the trustee of the Public Trust and the Commercial Trust, respectively, shall be deemed to be discharged by operation of law.

DISTRIBUTIONS TO BANK LENDERS

18. Notwithstanding paragraph 9 of the Initial Order, to the extent that the Canadian Parallel Entities hold funds in excess of CDN $5,000, including any deposits, refunds, release of cash retainers by beneficiaries of the Administration Charge or others, or other similar

amounts subsequently received, following the satisfaction and discharge of the CCAA Charges (provided that such funds are not held in trust or are not otherwise required to fund a claim in priority to the Bank Lenders) (the "Excess Funds"), the Canadian Parallel Entities or the Bankruptcy Trustee, as applicable, are authorized and directed to distribute such Excess Funds to the Bank Lenders up to the amount of the value of the Bank Lenders' pre-filing secured debt pursuant to the Credit Agreement.

GENERAL

19. Notwithstanding the discharge of KPMG Inc. as Monitor and the termination of the CCAA Proceedings, the Court shall remain seized of any matter arising from these CCAA Proceedings, and each of the Applicants and KPMG Inc., shall have the authority from and after the date of this Order to apply to this Court to address matters ancillary or incidental to these CCAA Proceedings notwithstanding the termination thereof. KPMG Inc. is authorized to take such steps and actions as it deems necessary to complete or address matters ancillary or incidental to its capacity as Monitor following the termination of these CCAA Proceedings, and in completing or addressing any such ancillary or incidental matters, KPMG Inc. shall continue to have the benefit of provisions of the CCAA and provisions of all orders made in the CCAA Proceedings in relation to its capacity as Monitor, including all approvals, protections and stays of proceedings in favour of KPMG Inc. in its capacity as Monitor.

20. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in

carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

Justice of the Court of Queen's Bench of Alberta

TAB 2

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 20th DAY OF
	)	
JUSTICE CAMPBELL	)	SEPTEMBER, 2013

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

TRANSITION ORDER

THIS MOTION, made by Grant Forest Products Inc. ("**GFPI**"), Grant Alberta Inc. ("**GAI**") and Grant Forest Products Sales Inc. ("**GFPSI**", and together with GFPI and GAI, the "**Remaining Applicants**") for the relief set out in paragraph 1(f) of the Notice of Motion dated June 8, 2012 (the "**June Notice of Motion**"), originally returnable June 25, 2012 and adjourned pursuant to the endorsements of Mr. Justice Campbell made on June 25, 2012, August 27, 2012, September 17, 2012 and October 22, 2012, and **THIS MOTION** made by West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term

Opportunities Global Master L.P. (together, the "**West Face Funds**"), by their adviser, West Face Capital Inc. ("**WFCI**") originally returnable on October 22, 2012 and adjourned pursuant to the endorsement of Mr. Justice Campbell made on October 22, 2012 for an Order, inter alia, lifting the stay of proceedings to permit the issuance of an application for a bankruptcy order and a bankruptcy order against GFPI, were heard together on November 27, 2012, with additional submissions heard on July 23, 2013, at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-Fifth Report to the Court of Ernst & Young Inc. ("**E&Y**"), in its capacity as Court-appointed monitor (the "**Monitor**"), dated June 20, 2012 (the "**Twenty-Fifth Report**"), the Twenty-Sixth Report of the Monitor dated August 22, 2012 (the "**Twenty-Sixth Report**"), the Twenty-Ninth Report of the Monitor dated February 21, 2013, (the "**Twenty-Ninth Report**"), the affidavit of Hap Stephen, sworn June 8, 2012 (the "**Stephen Affidavit**"), the affidavit of Charlie Evans, sworn August 17, 2012, the affidavit of Peter Fraser, sworn October 19, 2012, the Affidavit of Chantal Laurin, sworn April 2, 2013, filed, and the written and oral submissions from counsel for the Remaining Applicants, WFCI, the Monitor, Peter Grant Sr., the Superintendent of Financial Services, and PricewaterhouseCoopers Inc., in its capacity as administrator of (i) the Pension Plan for the Salaried Employees of GFPI - Timmins Plant, Registration Number 1053008 (the "**Timmins Salaried Plan**") and (ii) the Pension Plan for Executive Employees of GFPI, Registration Number 0992537 (the "**Executive Plan**") (collectively, in such capacities, the "**Pension Administrator**") and upon reading the Affidavit of Service of Roger Jaipargas, sworn October 22, 2012, filed.

SERVICE

1. **THIS COURT ORDERS** that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. **THIS COURT ORDERS** that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. **THIS COURT ORDERS** that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. **THIS COURT ORDERS** that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "**Initial Order**"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. **THIS COURT ORDERS** that none of GFPI, Stonecrest Capital Inc. ("**SCI**") in its capacity as Chief Restructuring Organization (the "**CRO**"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan

(collectively, the "**Pension Plans**") or their respective trustees or to the Pension Administrator.

6. **THIS COURT ORDERS** and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

OPERATION OF ORDER

7. **THIS COURT ORDERS** that paragraphs 8 to 28 of this Order become effective only on further order of this Court or on the Monitor's filing with the Court a certificate in the form attached as Schedule "**A**" hereto (the "**Monitor's Certificate**") confirming that: (i) October 15, 2013 has passed and no person sought leave to appeal this Order; (ii) any leave to appeal sought in respect of this Order has been denied with any further time periods for seeking additional leave to appeal having expired or such additional leave requests having been denied; or (iii) this Order has been upheld in whole on appeal and no further leave to appeal has been sought in respect of the decision on appeal within the time periods for seeking such leave or, if further leave is sought, such leave is denied or if such leave is granted this Order has be upheld in whole on such further appeal.

PENSION PLANS AND RESERVES

8. **THIS COURT ORDERS** and declares that none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to subsections 57(3) or 57(4) of the *Pension Benefits Act* (Ontario).

9. **THIS COURT ORDERS** and declares that none of GFPI, the CRO, or the Monitor shall make any further payments to either of the Pension Plans or their respective trustees or to the Pension Administrator and none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

10. **THIS COURT ORDERS** and declares that the Monitor be and is hereby relieved of any obligation to hold back from distribution to creditors of GFPI the funds currently held by the Monitor in the amount of $191,245.00 in respect of the Timmins Salaried Plan Reserve referred to in the Order of Mr. Justice Campbell dated August 26, 2011 and increased to the amount of $726,372 pursuant to the Order of Mr. Justice Campbell dated June 25, 2012 (the "**Timmins Reserve Funds**").

11. **THIS COURT ORDERS** and declares that the Monitor be and is hereby relieved of any obligation to hold back from distribution to creditors of GFPI the funds currently held by the Monitor in the amount of $2,185,000 in respect of the Executive Plan Reserve referred to in the Order of Mr. Justice Campbell dated September 21, 2011 and increased to the amount of $2,384,688 pursuant to the Order of Mr. Justice Campbell dated June 25, 2012 (the "**Executive Reserve Funds**").

12. **THIS COURT ORDERS** and declares that none of GFPI, the CRO, or the Monitor shall incur any liability for the release of the Timmins Reserve Funds or the Executive Reserve Funds (collectively, the "**Reserves**") or any other liabilities associated with the Pension Plans.

TERMINATION OF PROCEEDINGS UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT* ("CCAA") WITH PROCEEDINGS UNDER THE BANKRUPTCY AND INSOLVENCY ACT ("BIA")

13. **THIS COURT ORDERS** that GFPI, of the City of Toronto, Province of Ontario; GAI, of the City of Toronto, Province of Ontario; and GFPSI, of the City of Toronto, Province of Ontario, be and are hereby adjudged bankrupt and a bankruptcy order is hereby made against each of the Remaining Applicants and as necessary this Order may issue in those bankruptcy proceedings.

14. **THIS COURT ORDERS** that Ernst & Young Inc., of the City of Toronto, Province of Ontario, be and is hereby appointed trustee of the estates of the Remaining Applicants (the "**Trustee**"), without security.

15. **THIS COURT ORDERS** that the CRO be and is hereby authorized and directed to transfer any and all cash, cash equivalents, negotiable instruments and demand deposits held by or in the name of the Remaining Applicants to the Monitor or to bank accounts held by, in the name of or controlled exclusively by the Monitor (the "**Transferred Funds**").

16. **THIS COURT ORDERS** that the CRO be and is hereby authorized and directed to transfer control of all books and records of the Remaining Applicants to the Trustee.

17. **THIS COURT ORDERS** that, except as expressly provided in paragraph 18 hereof, the assets, undertakings and properties of the Remaining Applicants shall vest in the Trustee (as defined below) in accordance with the provisions of the BIA, and the Trustee may

rely on Orders in this proceeding in respect of the security opinion for the indebtedness of the Second Lien Lenders.

18. **THIS COURT ORDERS** that the Monitor shall:

(a) hold or continue to hold all of the funds currently in its possession or which it receives and all Transferred Funds (collectively, the "**GFPI Cash Proceeds**") pursuant to the terms hereof; for greater certainty, all amounts previously held in respect of the Reserves shall be deemed to be GFPI Cash Proceeds;

(b) from the GFPI Cash Proceeds, establish, maintain and hold a reserve of cash or cash equivalents in the amount of $550,000 CAD (the "**Administration Charge Reserve**"), which funds shall be used by the Monitor only for the payment of all amounts secured by the Administration Charge (as defined in the Initial Order);

(c) from the GFPI Cash Proceeds, pay to WFCI, the fees and expenses of WFCI in the amount actually invoiced to WFCI by Borden Ladner Gervais LLP in connection with these motions (the "**WFCI Costs**") up to a maximum of $300,000, plus any amounts responding to any appeal from this Order (the "**WFCI Appeal Costs**") upon receipt of a copy of an account statement indicating such invoiced amount; and

(d) from the GFPI Cash Proceeds, pay to the Trustee, the amount of $275,000 CAD as a third party guarantee (the "**Third Party Guarantee**") pursuant to a third party retainer agreement (the "**Third Party Retainer**") in respect of the Trustee's fees and expenses to complete its statutory obligations under the BIA.

19. **THIS COURT ORDERS** that, following the reservation and payment of funds set out in paragraph 18 hereof, all of the Charges (as defined in the Initial Order) created by the Initial Order, including without limitation, the Administration Charge, shall be fully and finally discharged.

DISTRIBUTION OF PROCEEDS TO SECOND LIEN LENDERS

20. **THIS COURT ORDERS** that after reservation or payment of the amounts set out in Paragraph 18(b) (c) and (d) hereof, the Monitor be and is hereby authorized and directed to forthwith make a distribution of immediately available funds from the remaining GFPI Cash Proceeds to the Second Lien Lenders' Agent for the Second Lien Lenders pursuant to the Second Lien Credit Agreement; and (ii) after payment of other amounts as set out in this Order the Monitor be and is authorized to make a distribution of any remaining funds from time to time, without further Court order to the Second Lien Lenders' Agent for the Second Lien Lenders pursuant to the Second Lien Credit Agreement (collectively, the "**Distributions**"), free and clear of any and all security interest, trusts, deemed trusts, or other claims, liens or encumbrances whatsoever.

21. **THIS COURT ORDERS** that the Distribution is to be applied on account of the indebtedness owing by the Remaining Applicants under the Second Lien Credit Agreement.

TERMINATION OF CCAA PROCEEDINGS AND DISCHARGE OF MONITOR AND CRO

22. **THIS COURT ORDERS** that upon payment of the amounts set out in paragraph 15 hereof and delivery of the books and records set out in paragraph 16 hereof and upon the CRO filing with the Court a certificate in the form set out in Schedule "**B**" hereto certifying that it has completed such, SCI shall be discharged as CRO of the Remaining Applicants, provided however that notwithstanding its discharge herein: (a) SCI shall remain CRO for the performance of such incidental duties as may be required to complete its administration; and (b) SCI shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of SCI in its capacity as CRO.

23. **THIS COURT ORDERS** that upon payment of the amounts set out in paragraphs 18 and 19 20 hereof and upon the Monitor filing with the Court a certificate in the form set out in Schedule "**C**" (the "**Monitor's Discharge Certificate**") certifying that it has completed all necessary actions, E&Y shall be discharged as the Monitor of the Remaining Applicants, provided however that notwithstanding its discharge herein: (a) E&Y shall remain the Monitor for the performance of such incidental duties as may be required to complete its administration; and (b) E&Y shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of E&Y in its capacity as Monitor.

24. **THIS COURT ORDERS** that upon filing of the Monitor's Discharge Certificate these CCAA Proceedings and the Stay Period shall be and are hereby terminated.

PROTECTION OF CCAA PROFESSIONALS

25. **THIS COURT ORDERS** that the CRO, the Monitor, their respective affiliates and legal counsel and GFPI's legal counsel, Dentons Canada LLP, and their respective officers, directors, partners, employees and agents (collectively, the "**Released Parties**") shall be on issuance of this Order released from any and all claims that any person may have or be entitled to assert against them (and any of them), whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission of the CRO or the Monitor while acting in such capacities in respect of the Applicants (or any of them), or on any act or omission of any of the other Released Parties who have assisted the CRO or Monitor in the exercise of their powers and obligations, or based in whole or in part on any act, omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in connection with the Applicants (or any of them) or these CCAA proceedings (collectively, the "**Released Claims**"), and any such Released Claims shall be on issuance of this Order released, stayed, extinguished and forever barred and the Released Parties shall have no liability in respect thereof; provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released Parties.

26. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the CRO or the Monitor or any of the other Released Parties in any way related to their capacity or conduct in connection with any Applicant or Applicants, except with prior leave of this Court on at least seven (7) days prior written notice to the CRO, the Monitor, and any other applicable Released Party, and upon further order securing, as

security for costs, the solicitor and client costs of the CRO, the Monitor, and such other Released Party in connection with any proposed action or proceeding.

27. **THIS COURT ORDERS** that, notwithstanding any provisions of this Order, the CRO, the Monitor and other Released Parties shall continue to have the benefit of all orders made in the CCAA Proceedings (including all protections and stays of proceedings) and nothing contained in this Order shall affect, vary, derogate from or amend any of the protections in favour of the CRO or Monitor or the other Released Parties pursuant to the Initial Order and any other orders in the CCAA Proceedings.

ADVICE AND DIRECTION

28. **THIS COURT ORDERS** that each of the Trustee, the Monitor and the CRO shall be entitled to seek the advice and direction of this Court as to the implementation of this Order and, in the case of the Trustee, the discharge of the powers and duties of the Trustee under the BIA in connection with this Order, and/or any of them may apply for such further Order or Orders as may be appropriate.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

SEP 30 2013

MB

SCHEDULE "A"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

MONITOR'S CERTIFICATE

Pursuant to an Order of the Honourable Mr. Justice Campbell of the Ontario Superior Court of Justice (the "**Court**") dated September 20, 2013 (the "**Transition Order**") Ernst & Young Inc. in its capacity as Court-appointed monitor of the Remaining Applicants hereby certifies:

[check one]

[ ] October 15, 2013 has passed and no person sought leave to appeal this Order;

[ ] any leave to appeal sought in respect of this Order has been denied with any further time periods for seeking additional leave to appeal having expired or such additional leave requests having been denied; OR

[ ] this Order has been upheld in whole on appeal and no further leave to appeal has been sought in respect of the decision on appeal within the time

periods for seeking such leave or, if further leave is sought, such leave is denied or if such leave is granted this Order has been upheld in whole on such further appeal.

such that paragraphs 8 to 28 of the Transition Order are now operative.

THE MONITOR CERTIFIES the following:

This Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

ERNST & YOUNG INC., in its capacity as Court-appointed monitor of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

Per: _____

Name:

Title:

SCHEDULE "B"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

CRO'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of this Court made on June 30, 2010, Stonecrest Capital Inc. ("**SCI**") was appointed as Chief Restructuring Organization (the "**CRO**") of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc. (the "**Remaining Applicants**").

B. Pursuant to an Order of this Court dated September 20, 2013, (the "**Transition Order**") SCI was discharged as CRO of the Remaining Applicants upon the filing of this CRO's Certificate with the Court certifying that the CRO has completed the activities set out in paragraphs 15 and 16 of the Transition Order.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Discharge Order.

THE CRO HEREBY CERTIFIES that it has completed all of the actions set out in paragraphs 15 and 16 of the Transition Order.

This certificate was delivered by the CRO at _____ on _____, 20___.

STONECREST CAPITAL INC., in its capacity as court-appointed Chief Restructuring Organization of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

Per:

_____

Name:
Title:

SCHEDULE "C"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

MONITOR'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of this Court made on June 25, 2009, Ernst & Young Inc. ("**E&Y**") was appointed as monitor (the "**Monitor**") of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc. (the "**Remaining Applicants**").

B. Pursuant to an Order of this Court made dated September 20, 2013, (the "**Transition Order**") E&Y was discharged as Monitor of GFPI upon the filing of this Monitor's Certificate with the Court certifying that the Monitor has completed the actions set out in paragraphs 18 and ~~19~~ 20 of the Transition Order and all other necessary actions.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Transition Order.

THE MONITOR HEREBY CERTIFIES that it has completed all of the actions set out in the paragraphs 18 and 19 of the Transition Order and all other necessary actions. 20 also.

This certificate was delivered by the Monitor at _____ on _____, 20___.

ERNST & YOUNG INC., in its capacity as Court-appointed monitor of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

Per:

_____

Name:
Title:

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

and

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

TRANSITION ORDER

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Lawyers for West Face Capital Inc.

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to July 7, 2016

Last amended on February 26, 2015

À jour au 7 juillet 2016

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Definitions

2 In this Act,

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, insurance companies, trust companies, loan companies or railway companies;

...

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

...

person includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

...

Vesting of property in trustee

71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

R.S., 1985, c. B-3, s. 71; 1997, c. 12, s. 67; 2004, c. 25, s. 44.

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bronson v. Hewitt,*
2011 BCSC 1115

Date: 20110817
Docket: L052583
Registry: Vancouver

Between:

Thomas E. Bronson, J. Tom Bronson, Lee. B. Lewis, Virginia L. Shaffer, H. Davis Lewis, Jr. and Harold D. Lewis, Sr.

Plaintiffs

And

Howard H. Hewitt, A. Eugene Lewis, Jennifer Lewis Browning, Julie Anne Lewis, William David Tompkins, Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper and Bull, Housser & Tupper LLP

Defendants

And:

Thomas E. Bronson

Third Party

Before: The Honourable Mr. Justice Goepel

Further Supplementary Reasons to: Supreme Court of British Columbia, February 8, 2010, *Bronson v. Hewitt*, 2010 BCSC 169, Docket #L052583 and Supreme Court of British Columbia, January 28, 2011, *Bronson v. Hewitt*, 2011 BCSC 102, Docket #L052583

Further Supplementary Reasons for Judgment

Counsel for the Plaintiffs and Third Party:	R.R.E. DeFilippi D.D. Stewart
Counsel for the Defendant, Howard H. Hewitt:	J.J.L. Hunter, Q.C. B.R.H. Johnston
Counsel for A. Eugene Lewis:	J.G. Dives, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. June 15-16, 2011
Place and Date of Judgment:	Vancouver, B.C. August 17, 2011

INTRODUCTION

[1] Following a 68-day trial, I released the judgment in these proceedings on February 8, 2010. Those reasons are indexed at 2010 BCSC 169 (the "Trial Reasons"). Subsequent to release of the Trial Reasons, I heard further submissions on the question of remedies, aggravated and punitive damages and costs. Those submissions led to further reasons which are indexed at 2011 BCSC 102 (the "Supplementary Reasons").

[2] The focus of these additional reasons is whether the Big Nine Trust (the "BNT") continues in existence. If it does continue in existence, the question is whether it is now necessary to appoint new or additional trustees and if so, who those trustees should be. A further question for determination is when the existing trustee, Howard H. Hewitt ("Howard"), must pass his accounts.

[3] The background to this dispute and my various findings of fact and law are set out in detail in the Trial Reasons and the Supplementary Reasons and will only be repeated here as is necessary to give context to the submissions and my conclusions. These reasons will use the terms as defined in the Glossary found at para. 7 of the Trial Reasons.

BACKGROUND

A. Pre-Trial Events

[4] In 1972, Harold D. Lewis, Sr. ("Harold") and his brother A. Eugene Lewis ("Eugene") purchased a guide outfitting business that operated in northern British Columbia. Big Nine Outfitters ("Big Nine") was incorporated to operate the business.

[5] In 1978, Harold and Eugene settled the BNT to hold their shares in Big Nine. By the time of the trial, the beneficiaries of the BNT were Eugene's daughters, Jennifer Lewis Browning ("Jennifer") and Julie Anne Lewis ("Julie") as to 40 percent and the plaintiffs, Thomas E. Bronson ("Tommy"), Lee. B. Lewis ("Lee"), Virginia L.

Shaffer ("Virginia") and H. Davis Lewis, Jr. ("Davis") (collectively the "Plaintiff Beneficiaries") as to the remaining 60 percent. Lee, Virginia and Davis are Harold's children.

[6] In July 1979, Harold and Eugene each signed letters declaring that if they were unable to serve as successor trustee, they appointed Howard to act in their place and stead (the "Revocation Letters"). In the Revocation Letters they specifically renounced any right to remove or replace or appoint any present or future trustee.

[7] In December 1981, Harold, Eugene and Tommy entered into an agreement to purchase a second guide/outfitting business. Graham River Outfitters Ltd. ("GRO") was incorporated to complete the sale and acquire the assets. Since its incorporation, the shares of GRO have been held in trust. A significant issue in the litigation concerned determining the beneficial ownership of the GRO shares. I found that Tommy had a one-third beneficial interest in the GRO shares and that the BNT beneficially owned the remaining two-thirds of the GRO shares.

[8] Audrey Tompkins acted as the sole trustee of the BNT from 1986 until her resignation in September 2002. Upon her resignation, Harold and Eugene were entitled to act as trustees. Eugene renounced his right to be trustee in favour of Howard.

[9] In February 2004, Howard, acting as the sole trustee of the BNT, sold the BNT shares in Big Nine (the "BNO Share Transaction") to Tompkins Ranching Ltd. ("TRL"). Subsequent to the purchase, TRL changed the name of Big Nine to High & Wild Wilderness Safaris (2005) Inc. ("High & Wild").

[10] Following the BNO Share Transaction, Howard planned to distribute the assets of the BNT and terminate the trust. The BNT assets at that time consisted of the proceeds of the BNO Share Transaction and its beneficial interest in the shares of GRO.

[11] On February 25, 2004, Howard wrote to the beneficiaries (the "Distribution Letter"). In the Distribution Letter, he provided the beneficiaries with an accounting regarding the BNO Share Transaction and advised that upon receipt of the enclosed release he would forward to them a cheque which would constitute a complete distribution of their interest in Big Nine. He further advised that he was distributing to the beneficiaries all of the BNT's interest in GRO.

[12] Jennifer and Julie each signed the release and in March 2004 Howard forwarded to each of them a cheque in the sum of $132,000 USD. The Plaintiff Beneficiaries, other than Davis, did not sign the release. No distribution was made to the Plaintiff Beneficiaries.

[13] On May 18, 2005, the Plaintiff Beneficiaries filed a petition seeking Howard's removal as trustee of the BNT (the "Removal Petition"). On November 30, 2005, they amended the Removal Petition and sought an order that Harold be appointed or confirmed as a trustee of the BNT. On April 7, 2006, the Removal Petition was consolidated together with two other petitions into the present action.

[14] The consolidated proceedings then went forward. In the Amended Amended Statement of Claim, upon which the trial proceeded, the plaintiffs sought orders that Howard be removed as trustee, that Harold be confirmed as trustee and that Virginia be appointed as the, or a trustee in substitution for Howard.

B. The Trial Reasons

[15] In the Trial Reasons, I found that Howard had a duty to determine whether or not Harold was going to accept his appointment as trustee and, having failed to do so and having participated in a course of conduct to keep Harold ignorant of his potential appointment, he did not have the right as sole trustee to sell the BNT shares in Big Nine. I held that the BNO Share Transaction was a breach of trust.

[16] I found that Howard had sold the Big Nine shares improvidently. In the Trial Reasons, I awarded the Plaintiff Beneficiaries damages of $350,000 for the improvident sale of the Big Nine shares (the "Damage Award").

[17] I further found that by paying certain beneficiaries and not others, Howard breached the terms of the BNT. I ordered that he pay the Plaintiff Beneficiaries $396,000 USD, being their proportionate share of the BNO Share Transaction proceeds (the "Proceeds Award"). I further found that the Distribution Letter had distributed to the beneficiaries their respective interests in the GRO shares (the "Share Distribution").

[18] Near the conclusion of the Trial Reasons, I commented briefly on and invited further submissions concerning the continued existence of the BNT, whether Howard should be removed as trustee and who should succeed him. At paras. 702-705 I wrote:

> [702] The plaintiffs seek an order that Howard be removed as trustee, that Harold be confirmed as a trustee of the Big Nine Trust and that Virginia be appointed a trustee in substitution for Howard.
>
> [703] Given the findings I have made, Howard's removal as trustee would in the normal course follow. I am hesitant, however, to make that order absent further submissions. In that regard, I note that as a result of the decisions made in these reasons the entire *corpus* of the BNT has been distributed. Whether a trust remains to be administered would appear to be a live question. Further, Howard has been in negotiations with Revenue Canada concerning certain matters. The status of those discussions has not been disclosed to the Court and I do not know whether Howard's removal would prejudice those discussions.
>
> [704] I should say that I am not inclined at this stage to confirm Harold as a trustee. Although I have found that Harold was entitled in 2002 to become a trustee, given the events of the last several years I am not certain that it would now be appropriate for him to take up that mantle. Jennifer and Julie are beneficiaries of this trust, and given the now further exacerbated enmity between Harold and their father, they may have some legitimate concerns concerning that appointment. Virginia's appointment as sole trustee might possibly raise similar concerns. A possible solution might be to appoint Virginia and either Jennifer or Julie as co-trustees.
>
> [705] I will leave it to the parties to consider whether, in light of these reasons, it is necessary to remove Howard as trustee and, if he is removed, who should replace him.

C. The Supplementary Reasons

[19] Following the release of the Trial Reasons, the Plaintiff Beneficiaries submitted that the Damage Award and the Proceeds Award should not be paid to

the Plaintiff Beneficiaries personally but to the BNT, and that the Proceeds Award should be calculated in Canadian currency. Those submissions were dealt with in the Supplementary Reasons at paras. 41-90.

[20] In the Supplementary Reasons, I rejected the Plaintiff Beneficiaries' submission that as a matter of law any damages had to be paid to the BNT as opposed to the individual beneficiaries. I confirmed that the Proceeds Award and the Damages Award should be paid to the Plaintiff Beneficiaries directly. I rejected the submission that Howard, in lieu of the Proceeds Award, should repay the BNT the sum paid out to Jennifer and Julie. I did accede to the plaintiffs' submission that the Proceeds Award should be calculated in Canadian currency with the result that the Proceeds Award was changed from $396,000 USD to $522,000 CND.

D. Subsequent Events

[21] On January 11, 2011, the Plaintiff Beneficiaries commenced proceedings against TRL and High & Wild (Vancouver Action No. VA S110304) (the "TRL Action"). In their Notice of Civil Claim in the TRL Action they allege that TRL had actual or constructive notice that Howard did not have the authority to enter into the BNO Share Transaction. They claim that TRL holds the Big Nine shares as constructive trustee for the BNT. They seek an order that TRL transfer the BNO shares to the trustee of the BNT or, in the alternative, pay damages to the trustee of the BNT. They further seek an order directing an accounting of all dividends, profits and other monies received by TRL from Big Nine attributable to the Big Nine shares from February 2004 to the date of the order and an order that TRL pay to the trustee of the BNT all such dividends, profits and other monies.

[22] Subsequent to the hearing of this application, the plaintiffs' counsel advised that he intended to add Jennifer and Julie as defendants to the TRL Action. It is not clear whether he is joining them because they are beneficiaries of the BNT or because he intends to seek recovery from them of the money Howard paid to them in March 2004.

[23] Among the various defences it has filed, TRL alleges that by pursuing this action to judgment, without making an alternative plea that the BNO Share Transaction should be set aside, the Plaintiff Beneficiaries have elected to pursue a remedy for damages and any attempt to now attack the validity of the BNO Share Transaction is an abuse of process. It further submits that as the BNT no longer exists it is not possible to grant the relief sought in this action. In the alternative, it submits that the action is defective because the plaintiffs have failed to name any trustee or obtain the trustee's consent for the relief proposed. It alleges that no relief can be granted to the BNT without consent of the trustees of the BNT.

[24] On June 7, 2011, Harold purported, pursuant to s. 27(1) of the *Trustee Act*, R.S.B.C. 1996, c. 464 (the "*TA*"), to appoint Tommy in the place and stead of Howard as the trustee of the BNT.

POSITION OF THE PARTIES

[25] The plaintiffs now seek Howard's removal as trustee of the BNT and an order that he pass his accounts. They seek an order that Harold be confirmed as trustee of the BNT and that Tommy be confirmed or, if necessary, appointed a trustee of the BNT. They submit that Harold's status as trustee arises from the provisions of the BNT Trust Agreement and in that position he has the power to appoint Tommy as additional trustee because Howard had been absent from British Columbia for 12 months.

[26] The defendants oppose the confirmation of Harold and the appointment of Tommy as trustees of the BNT. They submit that the continued existence of the BNT is a necessary precondition to the appointment of new trustees. They submit that the assets of the BNT have been distributed and accordingly there is no trust remaining to be administered. They submit that Harold took no steps prior to the amendment of the Removal Petition on November 30, 2005 to accept his appointment and by that date the BNT had ceased to exist. Alternatively, if the Court determines that the BNT continues to exist and new trustees should be appointed, the defendants submit that none of the parties to the litigation should be appointed trustee.

[27] The defendants further submit that the appointment of new trustees would not be consistent with the remedies ordered in the Supplementary Reasons. They submit that the effect of the Court's findings and rulings was to confirm the complete distribution of the BNT. They submit that in doing so the Court has effectively placed the plaintiffs in the position they would have been had Howard distributed the trust property in accordance with his trustee duties and in the circumstances the BNT has ceased to exist.

[28] Howard submits that because the trust is at an end, there is no need for an order removing him as trustee. He acknowledges that he must pass his accounts but asks that his obligation to do so be suspended pending the exhaustion of the outstanding appeals that have been filed. He seeks such relief because his entitlement to remuneration, if any, cannot be properly determined until the appeals in this proceeding are completed.

[29] In reply, the plaintiffs submit that the BNT continues to exist. They submit that the transfer by Howard of the trust property in breach of trust did not terminate the trust. As to the contention that the entirety of the BNT trust property has been distributed, they submit that the trust still retains further property, being a claim against TRL for the BNO shares and a claim against Jennifer and Julie for return of the funds Howard paid them in March 2004. They submit that a new trustee is required to bring those claims and to subsequently administer any proceeds recovered if the claims are successfully litigated.

DISCUSSION

A. Continuation of the BNT

[30] A trust is a relationship. It is not a separate legal entity. In *Guerin v. The Queen* [1984] 2 S.C.R. 335 at 355, Wilson J. explained the nature of a trust:

> ... A trust arises, as I understand it, whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries.

[31] In D.W.M. Waters, Q.C., M.R. Gillen and L.D. Smith, *Waters' Law of Trusts in Canada,* 3d ed. (Toronto: Thompson, 2005 ("*Waters*"), the author explained the mechanism of a trust at 163:

> A trust is a mechanism whereby one person manages property for the benefit of another. The trustee has consequent duties, and it is up to the beneficiary to see that those duties are discharged. If they are not, and loss has to be recovered from the trustee or from a liable third party, it is the trust beneficiary who brings an action for breach against the trustee or recovers the trust property on behalf of all the trust beneficiaries from the hands of the third party. This is the mechanism of the trust in operation.

[32] In regard to the question of when a trust terminates, *Waters* states at 1173-4:

> A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out. As we have seen, the terms may be of the simplest, requiring for instance the holding of land until the beneficiary is of age, or more complex, as when the trust creates a number of successive interests and confers upon the trustee extensive discretions and duties additional to those which are imposed by law. But whatever the terms, and in practice in almost all cases there is an instrument creating the trust which will contain those terms, the natural end of the trust is the moment when the trustee has properly transferred to beneficiaries all the remaining trust property in his name and possession, and has had his final accounts passed. [footnotes omitted]

[33] In this case, the plaintiffs submit that because the property has been distributed in breach of trust and the trustee's accounts have not been passed the trust remains in existence.

[34] Other authors suggest once the trust property has been distributed the trust is at an end because the trust cannot exist without trust property. Underhill and Hayton, *Law Relating to Trusts and Trustees,* 17th ed. (London: Butterworths, 2006) states at 385-386:

> 27.2 Because a trust of property cannot exist unless there is property held on trust, once a trust has been duly emptied of all of its assets, there is no trust.... In the case of a discretionary trust to distribute capital amongst a class of beneficiaries alive at the end of the trust period, the trust terminates once all the trust assets have been transferred by the trustee to such beneficiaries as they have selected in their discretion, a temporary bare trust arising of identified property that the trustees have decided to transfer to a particular beneficiary but have not yet transferred to him.

[35] In E.E. Gillese and M. Milczynski, *The Law of Trusts,* 2d ed.(Toronto: Irwin Law, 2005) ("Gillese"), the author lists "Distribution" as one of the ways in which a trust terminates. At 85, she states:

> Distribution occurs when all of the trust assets have been paid out or transferred to the beneficiaries. Obviously, once distribution occurs and the required accounting takes place, the trust comes to an end. A trust cannot exist without trust property.

[36] In this case, upon the closing of the BNO Share Transaction the trust property consisted of the proceeds of that transaction and the BNT's interest in the GRO shares. By way of the Distribution Letter, Howard distributed the GRO shares to the beneficiaries. He subsequently paid Jennifer and Julie their share of the BNO Share Transaction. Having paid Jennifer and Julie their share of the BNO Share Transaction proceeds, the remaining proceeds of the BNO Share Transaction were then held not pursuant to the BNT Trust Agreement, but on a bare trust in favour of the Plaintiff Beneficiaries. The Proceeds Award subsequently enforced that trust.

[37] As of March 2004 the trust was without property. This was some 21 months before Harold first indicated an intention to step up and act as trustee. As noted in the passage in Gillese a trust cannot exist without property. By November 2005 the BNT no longer existed. There was no trust for Harold to administer and in the circumstances Harold never became trustee. As Harold never became trustee, his purported appointment of Tommy as co-trustee pursuant to s. 27 of the *TA* is of no force and effect. I need not decide whether the Revocation Letters ousted Harold's right to appoint a trustee.

B. Appointment of New Trustee

[38] A new trustee is not presently required for the proper administration of the estate: *Mario Estate (Re),* [1998] B.C.J. No. 3149 at paras. 32-34 (S.C.). I do not accept the plaintiffs' submission that a new trustee is necessary to pursue the TRL Action or any potential claims against Jennifer and Julie. If trust property falls into the hands of third persons who have no right to it, the beneficiaries may be entitled

to the proprietory remedy of a constructive trust. This remedy allows them to recover the trust property or its product. In *Waters* at 1266, the author states:

> A beneficiary may bring his action for breach of trust in order to assert an interest of his own in the trust property, denied or overlooked by the trustee, or he may be suing, effectively on behalf of all the beneficiaries, because trust property has been misappropriated or otherwise improperly handled. In either case his prime remedy is against the trustee (or trustees) personally, and in most cases this remedy secures to the beneficiary compensation for the loss which the breach has caused. If the trustee successfully pleads one of the defences to an action for breach, is the beneficiary or the trust left without compensation? If the trustee or each trustee is insolvent, has the trust beneficiary or the trust to be content with a claim in bankruptcy and to take his or its place with the trustee's creditors? Insolvency of the trustee is a frequent companion of the misappropriation of trust property.
>
> The answer is that, placed in either of these positions, the beneficiary has another recourse, namely, the pursuit and recovery of the wrongly alienated or misappropriated trust property. Again he is seeking to restore the trust corpus to its original condition, but instead of requiring the trustee to reconstitute the trust fund out of his own pocket, the beneficiary's object is to make good the loss by recovering the trust property. To make the Latin distinction, the remedy against the trustee is personal or *in personam*, the remedy to recover the trust property is proprietary or *in rem*. It will be clear that the particular value of the *in rem* remedy arises when the trustee is insolvent or the trust property has got into the hands of innocent third parties.

[39] Similar comments are found in A.H. Oosterhoff et al, *Oosterhoff on Trusts: Text, Commentary and Materials,* 7th ed. (Toronto: Thomson, 2009) at 1159:

> If the trustee retains the trust property, or it falls into the hands of third persons who have no right to it, the beneficiaries may also be entitled to the proprietary remedy of the constructive trust, if they can trace the property, or the equitable lien. These remedies allow them to recover the trust property or its product, or entitle them to a charge upon it.

[40] In *Foskett v. McKeown and Others*, [2000] UKHL 29, the House of Lords held that a beneficiary's proprietary claim to trust property or its traceable proceeds can be maintained against a wrongdoer and anyone who derives title from him except a *bona fide* purchaser for value without notice of the breach of trust.

[41] In *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, the Supreme Court of Canada held that strangers to a trust could be personally liable to the beneficiaries for breach of trust if they knowingly participated in a breach of trust.

[42] In *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 276 at para. 30, the court noted the right of a beneficiary to sue a third party or "stranger" who knowingly participated in a breach of trust.

[43] These authorities confirm that the Plaintiff Beneficiaries have the right to bring in their own name a claim against third parties that arise from a breach of trust. Indeed, the plaintiffs do not seriously argue otherwise. It is the foundation of the TRL Action. Whether the Plaintiff Beneficiaries can maintain an *in rem* proprietory claim after successfully bringing an *in personam* claim against the trustee is a live issue which will be determined in the TRL Action.

[44] A second issue to be determined in the TRL Action is whether the Plaintiff Beneficiaries can obtain a remedy back to themselves as opposed to the trust. *Waters* suggests an answer to this question at p. 1267:

> The decision that some property in the hands of a third party is subject to a trust will mean that the third party is liable to hand the property over to the trustees. This might be the original trustees, or, if those trustees have been removed, their successors. Only if the trust was a bare trust, giving the beneficiaries the right to demand the property from the trustees, will the third party recipient be liable likewise to transfer it directly to the beneficiaries.

[45] The plaintiffs rely on that passage and submit that because the BNT is a discretionary as opposed to a bare trust, the beneficiaries cannot obtain the property directly from the third party. Rather, it will have to be paid to new trustees and for that reason new trustees are required.

[46] Whether new trustees will be required if the proposed actions are successful is, in my view, a matter for determination in those proceedings. If the plaintiffs succeed in those claims, the court will have to determine the remedy. A court's ability to draft appropriate equitable remedies has been long recognized and I repeat my comments at para. 58 of the Supplementary Reasons:

> [58] In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, LaForest J. made clear the court's discretion to adapt equitable remedies to the circumstances of a particular case. He said, at 585-6 and 588:
>
> > I agree ... that the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that

> must be rigorously applied but malleable principles intended to serve the ends of fairness and justice. ...
>
> ...
>
> Its flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations. ...

[47] I find that it is not necessary to appoint new trustees at this time. The trust is presently without assets. Trustees are not needed to administer the trust. If the Plaintiff Beneficiaries are successful in the TRL Action, their proposed claim against Jennifer and Julie or their appeals concerning the remedies I have ordered, it is possible that the trust may be reconstituted. In those circumstances new trustees may be required to administer the trust. Until then, however, I find the appointment of new trustees is not required. If the BNT is reconstituted and funds come into its possession, the plaintiffs can reapply. I will not be seized of that application.

[48] Given my finding that it is not necessary to appoint new trustees at this time, I need not decide whether it is appropriate for Harold or Tommy to serve as trustee.

C. Removal of Howard as Trustee/Passing of Accounts

[49] A trustee's duty to account is found in s. 99 of the *TA*. Pursuant to s. 99(2), the court may on application make such order as it considers proper as to the time and manner of passing of accounts.

[50] On an application to pass accounts, a trustee must present an inventory of the trust property, an account showing what the original estate consisted of, an account of all money received and disbursed, an account of all property remaining, a statement of compensation requested and such other accounts as the court may require: Gillese at p. 153.

[51] Howard seeks to suspend his passing of accounts until the appeals in this matter are concluded. He submits that his entitlement to remuneration, if any, cannot be determined until the appeals are concluded.

[52] The plaintiffs oppose the suspension of the passing of accounts. They submit that Howard must account to the BNT for the money he paid out to Jennifer and Julie in March 2004. This submission mirrors that which I specifically rejected in the Supplementary Reasons. Unless my conclusions on that issue are disturbed on appeal, it is difficult to understand a basis upon which Howard would have to account for those sums.

[53] It would cause undue and perhaps unnecessary expense to require an immediate accounting. The circumstances may be much different once the appeals are finally concluded. Accordingly, I order that Howard pass his accounts, but the passing of his accounts is stayed until 90 days following the exhaustion of all appeals or other agreement of the parties.

[54] In the present circumstances, there is no need for an order removing Howard as trustee because the trust assets have been distributed.

COSTS

[55] Although the parties filed specific applications in relation to this hearing, the hearing was required to resolve matters raised at trial and was necessitated by findings made in the Trial Reasons and Supplementary Reasons. Although the plaintiffs were generally speaking not successful in their submissions, these matters form part of the trial and the plaintiffs are entitled to their costs as set out in the Supplementary Reasons.

SETTLE ORDER

[56] From discussions with counsel, I understand that proceedings in this action in this Court are now at an end. If the parties are not otherwise able to agree to the terms of the orders that arise, I am prepared to settle same. The parties should make arrangements with Trial Scheduling for that purpose. In order that the hearing can proceed expeditiously, counsel in advance of the hearing should forward to my

attention their respective draft orders and any submissions. Any matters in dispute should be highlighted in the draft orders.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

Editor's Note: Erratum released on November 8, 2013. Original judgment has been corrected with text of erratum appended.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bronson v. Hewitt,*
2013 BCCA 367

Date: 20130814
Dockets: CA037941; CA037947; CA038299

Docket CA037941

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis,
Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis, Sr.

Respondents
(Plaintiffs)

And

Howard H. Hewitt

Appellant
Respondent by Cross Appeal
(Defendant)

And

A. Eugene Lewis

Respondent by Cross Appeal
(Defendant)

And

Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins,
Trustee of the Graham River Trust, Graham River Outfitters Ltd.,
Margaret H. Mason, Bull, Housser & Tupper and Bull, Housser & Tupper LLP

(Defendants)

- and -

Docket: CA037947

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr.

Respondents
(Appellants by Cross Appeal)

And

A. Eugene Lewis

Appellant
(Respondent by Cross Appeal)

And

Howard H. Hewitt, Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, in his capacity as Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper, and Bull, Housser & Tupper LLP

(Defendants)

- and -

Docket: CA038299

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr.

Respondents
(Plaintiffs)

And

Howard H. Hewitt

Appellant
(Defendant)

And

A. Eugene Lewis, Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper, and Bull, Housser & Tupper LLP

(Defendants)

Corrected Judgment on November 6, 2013: J.G. Dives, Q.C. is Counsel for the Respondent by Cross Appeal, A.E. Lewis (Page 3); at para. 48 the citation for *Armitage v. Nurse* is corrected to read [1998] Ch. 241 (C.A.); and at para. 114, the amounts listed should be as follows:

Tommy	$198,000
Lee	$66,000
Virginia	$66,000
Davis	$66,000

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice A. MacKenzie

On Appeal from the Supreme Court of British Columbia (*Bronson v. Hewitt*)
February 8, 2010, 2010 BCSC 169 (Main Reasons)
June 21, 2010, 2010 BCSC 871
November 19, 2010, 2010 BCSC 1638
January 28, 2011, 2011 BCSC 102
April 15, 2011, 2011 BCSC 482
August 17, 2011, 2011 BCSC 1115
(Vancouver Registry L052583)

Counsel for the Appellant H. Hewitt:	W.G. MacLeod S. Field
Counsel for the Respondent by Cross Appeal, A.E. Lewis:	J.G. Dives, Q.C
Counsel for the Respondents:	R.R.E. DeFilippi C. Kim
Place and Date of Hearing:	Vancouver, British Columbia June 10, 11 & 12, 2013
Place and Date of Judgment:	Vancouver, British Columbia August 14, 2013

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice A. MacKenzie

Summary:

Appeal from a long trial judgment and various later judgments regarding a trust established by two brothers, "Harold" and "Eugene", who lived (and practised law) in Florida. They settled the trust in 1978 for the benefit of their children and transferred to it their shares in a company ("Big Nine") that owned and operated a guide outfitting business in northern BC. The Trust Agreement stated that in certain events (which came to pass in 2002), the two brothers would be the trustees. In 1980, each brother signed a "revocation letter" in which each stated that if he was unable to be a trustee, the defendant Hewitt ("Howard") should be the trustee in his place. Howard was a friend of the family and had lent money to Eugene at different times. Another friend was the plaintiff Bronson ("Tommy"), who had also lent money to Harold's family and provided assistance to his ex-wife and children.

Harold became a recluse, leaving Florida to live in northern BC at a place that did not have mail delivery or phones. The two brothers became estranged.

When the surviving trustee of the trust became ill in 2002, Eugene contacted a lawyer, who provided somewhat incomplete and misleading advice re the succession of the trusteeship. In particular she told Eugene that Harold had the right to become a trustee if he "stepped up". She did not inform Harold of this and neither did Eugene. He himself disclaimed his trusteeship and in accordance with the revocation letter he had signed, appointed Howard to act in his place. Howard accepted the role in order to help the family out.

TJ made various findings of a "subterfuge" engaged in by Eugene and Howard to conceal Harold's right from him, and found that Eugene deliberately failed to provide copies of the trust documents to Tommy, who was acting informally as advisor to Harold's children and as Harold's contact with the outside world. (Tommy had also acquired a share in the trust.) TJ also found that Harold forgot he was entitled to be a trustee, and that Howard "must have known" Harold had not given up this "right".

In 2003, Howard and Tommy discussed the possible sale by the trust of its shares in Big Nine. They agreed the time was right. Some efforts by Howard to engage a professional evaluator were unsuccessful. However, Tommy had had extensive experience in buying and selling businesses. He did not voice any opposition on behalf of Harold, even though Harold was "upset" that a sale was being contemplated. Eventually, Howard agreed to sell the shares from the trust to "TRL", a company owned by the then manager of the business. Howard decided to distribute the proceeds to the beneficiaries and wind up the trust, given the enmity between the two sides of the family. The sale was closed in Florida in early 2004.

Howard wrote to the beneficiaries, many of whom were now adults or near adults, and asked them to sign a release/indemnification agreement in his favour as a condition of receiving their shares of the proceeds. Eugene's children did so – and received their money – but the others did not. Eventually the litigation began, and blossomed into a breach of trust case, the children of Harold, Tommy, and Harold

himself alleging that Eugene and Howard had unlawfully concealed from him his right to be a trustee, that Howard had sold the shares without authority and improvidently, and that Howard had had no right to demand a release from the beneficiaries in return for their shares of the trust corpus. The plaintiffs sought an accounting, equitable compensation for the undervaluing of the Big Nine shares, or damages, as well as the distribution of the remaining proceeds of sale received by the trust but not paid out to them.

The TJ made many findings of fact that are discussed briefly by the CA, but most importantly, found that Howard and Eugene had "colluded" in not informing Harold of his right to be a trustee; and that Howard had breached the trust by acting without telling Harold that he (Harold) was entitled to be a trustee, by selling the shares without exposing them to the market, and by requesting the releases from the beneficiaries as a condition of their receipt of the sale proceeds.

Howard relied on an exoneration clause in the Trust Agreement that required that a trustee be excused from loss occasioned to the trust provided he had acted in good faith. The TJ ruled that although Howard had carried out the share sale in good faith and believing it to be in the interests of the beneficiaries, he was not entitled to be excused from liability in respect of the "improvident" sale because his collusion with Eugene was not in good faith. "But for" this collusion, the TJ said, he would have applied the exoneration clause. Eugene's conduct was found to constitute "knowing assistance" and he was liable jointly and severally with Howard for the difference between the sale price of the shares and the fair market value found by the Court – the "Damage Award".

Howard was also ordered to pay the remaining sale proceeds (the "Proceeds Award") to Harold's children and to Tommy – a liability not challenged by Howard on appeal.

Some time after the TJ issued his reasons, the defendants sought to re-open the case because they had found fresh evidence that showed that in fact Eugene had sent the trust documents to Tommy in October 2002 as requested. The TJ declined to allow this evidence to be adduced even though he accepted it proved the documents had been sent. He remained of the view that because Howard and Eugene had not told Harold of his right to be a trustee, the sending of the documents changed nothing.

The TJ also issued various judgments post-trial dealing with remedy questions, the continuation of the trust in future, the currency of the awards to the plaintiffs, the appointment of a new trustee, costs, etc.

***On Appeal**: The appeals of Howard and Eugene were allowed. The TJ had erred in conflating the "subterfuge" and the question of the improvident sale in analyzing the exoneration clause. The breach of trust found by the Court with respect to Harold's "right to be" a trustee had not caused the damages suffered by reason of*

the improvident sale. In Equity as elsewhere in the law, there must be a causal connection between the breach and the damage or loss for damages to be awarded: Canson Enterprises (SCC), Target Holdings (HL). The sale itself had been carried out in good faith according to the Court's findings; hence Howard was entitled to the benefit of the exoneration clause. It also followed that Eugene was not liable for the Damage Award on the basis of "knowing assistance". There was no authority for the proposition that he was under some duty to tell Harold that he was entitled to be trustee. On the other hand, in acting without the consent of his co-trustee Howard had failed in his obligations as a trustee. He should have immediately familiarized himself with the terms of the trust and not just taken Eugene's word that he was (sole) trustee.

The TJ had also erred in law in assuming that Harold had the "right to be" a trustee, when in fact he became a trustee upon the retirement of the former trustee, and thus had a responsibility to assert his position or to inquire as to the trusteeship – assuming the TJ was right in finding he did not remember he was a trustee. Harold had been aware of Howard's taking on the role and of the sale but had done nothing. The TJ should have considered whether Harold had in fact effectively renounced his trusteeship. The CA expressed the view that many of the TJ's findings of fact rested on shaky foundations, but that it was not necessary, given the errors of law, to decide if such factual findings or inferences met the Housen standard of "clearly and palpably" wrong.

Howard remained bound to distribute the undistributed proceeds of sale to the plaintiffs and the Foreign Money Claims Act applied thereto, given that the distribution to Eugene's children had been in US funds. CA did not interfere with the TJ's costs and related orders, and declined to rule that the "Proceeds Award" should be paid to the trust rather than to the plaintiff beneficiaries directly. Other ancillary rulings not found to be erroneous.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] These appeals and cross appeal are brought from six sets of reasons for judgment the first of which was issued by Mr. Justice Goepel on February 8, 2010 after a trial of 68 days. Further applications and appearances by counsel continued until the final reasons were issued on August 17, 2011. At the start of his main reasons (indexed as 2010 BCSC 169), the trial judge noted that the case had the "sweep of an historical novel", spanning events that took place over the course of 30 years. The reasons themselves remind one of an historical novel, occupying two large volumes and constituting a fact-intensive story of family conflict played out in the dry words of legal documents. I doubt, however, that anyone other than the parties will be interested in reading this "sequel"; and will therefore confine myself in these reasons to the issues raised on appeal and the facts necessary to explain them. I will use many of the defined terms set out in the "Glossary" at para. 7 of the February 2010 reasons.

Description of Actions

[2] As the trial judge noted at para. 33 of his main judgment, the proceedings before him arose from the consolidation of three separate actions. The first proceeding was in respect of the shares of "GRO", a company with which we are not concerned on this appeal. The remaining two proceedings consisted of an action commenced in May 2005 by Mr. Bronson ("Tommy") and others seeking an order removing Mr. Hewitt ("Howard") as the trustee of the "Big Nine Trust"); and an action commenced in October 2005 by Howard, seeking *inter alia* a determination of the identity of the beneficiaries of that trust. The pleadings were then amended and expanded substantially, both before and after the consolidation order dated April 7, 2006, notably to allege various breaches of trust on the part of the defendants.

[3] The final Amended Statement of Claim in the consolidated action was 43 pages long. I have attached as a schedule to these reasons the relevant portions of the prayer for relief sought by the plaintiffs against Howard Hewitt, Eugene Lewis and his children, and Ms. Margaret Mason and her firm. For reasons that will

become apparent later, it is important to note that no relief was sought as against the defendants Jennifer Browning ("Jennifer") or Julie Hendrickson ("Julie") and that no tracing or other *in rem* remedy was sought in respect of the breaches of trust alleged by the plaintiffs.

Background

[4] The Big Nine Trust was established in 1978 by Harold Lewis, Sr. and his brother Eugene Lewis. The trial judge described the professional and family backgrounds of Harold and Eugene beginning at para. 42 of his reasons. Both brothers were lawyers who had attained some prominence in Florida, and for some time had practiced law together. Harold's career came to a crashing halt in 1997 when he was accused of wrong-doing by the Attorney General for the State of Florida and became the subject of a protracted investigation. At the end of it, no probable cause was found and no charges were brought against him. By April 2000, the trial judge recounted:

> ... Harold felt completely burnt out. His marriage was in trouble and he did not want to be in Florida for the 2000 presidential election. In June 2000, he left his wife and moved to Crying Girl Prairie ("Crying Girl"), which forms part of the GRO property.
>
> Crying Girl is located approximately 120 miles northwest of Fort St. John, BC. It is a completely isolated location. The nearest telephone and fax machines are 40 miles away. Mail goes to a post office box in Fort St. John.
>
> When Harold moved to Crying Girl, he left behind in his garage his personal files, including his papers concerning Big Nine, the BNT and GRO. When he returned to Florida in November 2000, he learned that his wife had had his personal papers taken to the dump.
>
> From June 2000 through to 2007, save and except for some brief trips back to the United States, Harold lived by himself at Crying Girl. He would pick up his mail once every five weeks. While he was living at Crying Girl, Harold and Tommy gave consideration to various schemes to make GRO profitable. [At paras. 54-7.]

[5] For his part, although Eugene practised law at various points over the 1980s and 1990s, he also engaged in some business activities that were unsuccessful and resulted in various judgments against him. His relationship with Harold became

strained and the two brothers have not spoken to each other since August 2000. (Para. 65.)

[6] Back in 1971, however, Harold had gone on a hunting trip in northern British Columbia. He returned to the area a year later with Eugene and some friends. One thing led to another and the group ended up incorporating Big Nine Outfitters Ltd. ("Big Nine") and using it to purchase the guide outfitting business of the guide, Mr. Powell ("Gary"). By 1975, Harold, Eugene and Gary each owned one-third of the shares. At least initially, the business was a success. (Para. 88.)

[7] In order to ensure that Big Nine qualified as a Canadian-controlled private corporation under the *Income Tax Act*, the Lewises eventually decided to transfer their shares to a (Canadian-controlled) trust. The Trust was established by Trust Agreement dated as of February 1, 1978 between Harold and Eugene as settlors. Its purpose was to vest the brothers' shares in Big Nine in trust for the benefit of their respective children – Lee and Virginia Lewis, who were the children of Harold; and Jennifer and Julie, who were the children of Eugene. (Some time later, Harold had another son, Davis, who was added as a beneficiary.) The Trust was a simple one-generational trust: each child was entitled to an equal share in the Trust and during the lifetime of the settlors, the trustees were authorized in their discretion to "distribute or accumulate to or for the benefit of" the children, in equal shares, the income and principal of the Trust. Upon the death of the last surviving settlor, the trustees were directed to pay one-half of the corpus together with accumulated income to Lee and Virginia (and later, Davis), and the other half to Jennifer and Julie, provided they had attained the age of 21. No express provision was made for the children or heirs of the Lewis children, nor for the share of a beneficiary who might die before the death of both settlors.

[8] Initially, the Trust was revocable: Article 11 provided that the trustees could at any time revoke the instrument entirely and re-convey the trust property to the settlors. The laws of British Columbia applied to the Trust, notwithstanding that the settlors and their children resided in Florida at the time.

[9] For purposes of this appeal, Articles 15 and 13 of the Trust Agreement are of key importance. Article 15 provided:

> Successor Trustees – In the event that Gary James Powell shall be unable to serve as Trustee herein for any reason whatsoever, Olive Powell, of Hudson Hope, British Columbia and Audrey Tompkins of Fort St. John, British Columbia, shall act as co-Trustees. In the event that Olive Powell and Audrey Tompkins shall be unable to serve as Trustees, then Harold D. Lewis and A. Eugene Lewis, or the survivor of them, shall act as Co-Trustees. The Grantors, or either of them, reserve the right to appoint successor Trustees in lieu of the above by notice in writing to the then existing Trustee. [Emphasis added.]

and Article 13 stated:

> Exoneration of Trustee – No Trustee provided he act in good faith, shall be held liable for any loss occasioned to the trust property except for [loss] caused by his own dishonesty, gross negligence or willful breach of trust.

[10] At some point in 1980, the settlors learned that the revocability of the Trust might create tax difficulties. Each of Harold and Eugene therefore signed, in the presence of a notary, a letter addressed to Gary, the then trustee, in the following terms:

> Having been fully apprised in the premises of my right to revoke, alter or amend the above Trust Agreement as provided in paragraph 10 thereof, I hereby renounce and disclaim any power to revoke, amend or in any way alter said Trust Agreement, individually, or as a successor Trustee, and declare such Trust Agreement to be irrevocable by me from this date forward.
>
> In the event I am unable to serve as successor Trustee for any reason as provided in paragraph 15 thereof, I hereby appoint Howard H. Hewitt of Leesburg, Florida to act in my place and stead. I hereby renounce any right to remove or replace or appoint any present or future Trustee of said trust. [Emphasis added.]

These were the so-called "Revocation Letters".

[11] On Gary's tragic death in an airplane accident in October 1983, his wife Olive and his sister Audrey became co-trustees. At some point in the 1980s, Olive resigned, leaving Audrey as the sole trustee.

[12] In the early 1990s, there was a proposal by a Mr. Hall to buy a 25% share interest in Big Nine – an idea opposed by Harold. In the course of making his

objections known, Harold retained a lawyer in Fort St. John, Mr. McAdam, and provided him with a copy of the Trust Agreement and related documents. A compromise was eventually reached under which Mr. Hall purchased a lesser share than previously proposed, leaving the Trust with 55.56% and each of Mr. Hall and TRL with 22.22% of the shares of Big Nine. (Para. 126.) The price paid by Mr. Hall was based on an assumed "enterprise value" of $1.6 million.

[13] Sometime in early 1994, the "Davis Assignment" was prepared in order to permit Davis Lewis to be recognized as an equal beneficiary with his siblings. They transferred their interest to themselves and Davis. Also around this time, Harold's three children assigned 50% of their interest in the Trust to Tommy by means of the "Bronson Assignment" – even though Article 4 of the Trust Agreement prohibited any assignment of a beneficiary's interest. The trial judge observed:

> The purpose of the Bronson Assignment was to settle Harold's debt to Tommy. Throughout the 1980s and into the 1990s, Tommy had been advancing funds to Harold. Much of the money had been used to pay for the education of Harold's children.
>
> ...
>
> The Bronson Assignment was drafted by Harold's lawyer, Dexter Douglass, in consultation with Eugene. Mason, when consulted by Audrey concerning the Bronson Assignment, had a concern as to whether Harold and Susan, as Davis' parents could, on his behalf, agree to the assignment, Davis then still being a minor. To alleviate that concern, Harold, Eugene, their wives and children all signed an indemnity in Audrey's favour protecting her from any claims arising out of the Bronson Assignment. [At paras. 130, 132.]

[14] Both brothers had been acquainted for many years with Tommy, a successful businessman who had been involved in the purchase and sale of many businesses. He had made various loans over the years to Harold. Indeed, the trial judge noted at para. 143 that Harold was dependent on his children and Tommy for financial support after he moved to Crying Girl. Tommy took on the role of advising Harold's children over the years regarding various business matters and in 2002, wrote to both brothers asking to be kept "in the loop" in matters involving the Trust and Big Nine.

Findings of Fact

The Trusteeship

[15] Howard was also a friend of the two brothers, as well as being their brother-in-law, and had provided financial assistance to them over the years. He had paid for the weddings of Virginia and Jennifer and assisted Harold's ex-wife with financial and other matters. (Para. 73.) At the time of trial, he held a mortgage on Eugene's home in the principal amount of $156,000 to secure part of Eugene's indebtedness to him. (Para. 75.)

[16] The trial judge discussed the circumstances under which Howard became a trustee of the Trust, beginning at para. 141 of his reasons, and again beginning at para. 341. The series of missteps, miscommunications, and incomplete or ambiguous professional advice that characterize this matter speak for themselves, but below I note some of the judge's findings of fact regarding the first chapter of this "saga", the story of Howard's trusteeship:

- By 2002 Audrey was afflicted with dementia. Ms. Mason, who had had no involvement with the Trust since 1995, was asked by the lawyer in Fort St. John who acted for Big Nine, to contact Eugene. In a conversation on July 25, 2002, Eugene told Ms. Mason that he and Harold had named Howard as a successor to Audrey. He also said he wanted to "keep Harold out of the trusteeship." (Para. 149.) He sent her the Trust Agreement, Revocation Letters, and the Trust's 1997 financial statements. (Para. 150.) She regarded Audrey as her client.

- On August 2, 2002, Ms. Mason advised Eugene that the "basic route of the trusteeship" was as follows:

    1. Audrey dies/resigns;
    2 Gene and Harold (or survivor) become co-trustees;
    3. <u>If either Gene or Harold resign or die, Howard steps up</u>;

> 4. If Howard dies, or refuses to accept his appointment, then the last man standing (either Gene or Harold) would appoint a new trustee by deed pursuant to section 27 of the *Trustee Act*.
>
> You and Harold could of course both resign and Howard could step up. An agreement could be reached with Howard that he, by deed, make a new appointment. [At para. 151; emphasis added.]

- In an e-mail to Tommy on August 5, Eugene "did not pass on ... Mason's advice that Harold became a co-trustee upon Audrey's resignation." (Para. 153; my emphasis.) Eugene wrote to Ms. Mason on August 22 that he wanted to:

> avoid being a co-trustee upon Audrey's resignation so that Howard steps up for me and Audrey steps down. I do not know what Harold intends to do but at a minimum that would make Howard and Harold co-trustees would it not? ... Howard will accept for me (and Harold too if he steps down) ... [Emphasis added.]

- Ms. Mason responded that if Audrey stepped down and Eugene renounced his right to be a trustee and appointed Howard in accordance with the Revocation Letters, then Harold and Howard would be co-trustees "providing that Harold takes up his appointment." (Paras. 153-55; my emphasis.)

- For reasons that were unexplained, Ms. Mason did not prepare a "renunciation" for Harold with the other documents she forwarded to Eugene in September 2002 to reflect Audrey's resignation and Howard's appointment. Audrey's resignation had attached to it acknowledgments for signature by *inter alia* Harold and Eugene and contained the following recitals:

> AND WHEREAS paragraph 15 of the Trust Agreement provides that if I am unable to serve as trustee, then Harold D. Lewis and A. Eugene Lewis, or the survivor of them, shall be co-trustees;
>
> AND WHEREAS in accordance with paragraph 15 of the Trust Agreement, Harold D. Lewis and A. Eugene Lewis in their capacities as Grantors of the Trust, by way of a letter dated July 10, 1979, copies of which are attached as Schedule "A" hereto, each appointed Howard H. Hewitt to act in their stead as trustee in the event that either of them were unable to act as a successor trustee of the Trust;

> AND WHEREAS A. Eugene Lewis has tendered his Renunciation of Trusteeship dated September 18, 2002 to me, a copy of which is attached hereto as Schedule "B";

- Ms. Mason did not follow up to see if the documents were signed. Months later, she closed her file.

- Howard was "less than thrilled" about the prospect of becoming a trustee, but "accepted out of a sense of family obligation". (Para. 166.) The trial judge stated in later reasons (2010 BCSC 102) that Howard had decided to accept the appointment "with the best of intentions", and rejected the plaintiffs' allegation that Howard's conduct was motivated by a desire to help Eugene financially – the so-called "Liquidation Plan".

- Howard "must have realized", before he accepted the trusteeship, that Harold had not renounced his right to act as trustee: para. 365.

- Before accepting the position of trustee, Howard knew that "Harold had the right to become co-trustee". (Para. 366.) This finding was made independent of any adverse inference arising from Eugene's not appearing as a witness at trial, but the inference drawn by the Court was said to further strengthen that conclusion. (See also paras. 329 -37.)

- Harold had no conflicts that would have disqualified him from acting as a trustee in September 2002. (Para. 425.)

- On October 4, 2002, Eugene wrote to Lee Lewis, with a copy to Tommy, enclosing his own resignation documents, and said that Howard had replaced Audrey as trustee on September 30. (Para. 380.)

- Eugene did not disclose Ms. Mason's advice that Harold "had the right" to be a trustee and instead deliberately misled Tommy. As part of his deception, Eugene did <u>not</u> send a copy of the Trust Agreement and Revocation Letters to Tommy when requested on October 23, 2002 and instead sent a "fax, which stopped prior to the key documents being forwarded." Tommy emailed

back to say that not all the documents had been received, but Eugene did not send the rest of the documents. (Para. 404.)

- In early November 2002, Tommy wrote to Harold, stating that "Eugene was attempting to unilaterally appoint Howard as Audrey's successor relying entirely on the revocation of July 1979" and that Harold should "read carefully" Howard's acceptance document (prepared by Ms. Mason), which appeared to "contain a conflict." (Para. 181.)

- Harold was upset "when he learned of Howard's appointment."

- Tommy did not receive the Trust Agreement until "some time in 2003" and did not learn that Harold had the right to be a trustee until after the sale of the Big Nine shares. (Para. 395.)

- Harold did not have a copy of the Trust Agreement or the Revocation Letters in his possession and had "no recollection" of their terms. Moreover:

> He assumed that Howard had been properly appointed as trustee. He testified that he did not realize that he had a right to become co-trustee with Howard and says that if he had known he would have taken up the appointment immediately. [At para, 184.]

Sale of the Big Nine Shares

[17] The circumstances of the Trust's sale of its shares in Big Nine – the second chapter in this story – were described by the trial judge beginning at para. 196 of the main reasons. It is clear that Howard and Tommy had various discussions, some with Barry (the manager of the Big Nine business) and some with Eugene, about the future of Big Nine.

[18] The relationship between Tommy and Howard was rocky at this time, and at one point in March 2003 Tommy wrote to Howard complaining that:

> Big Nine Trust was created more than 20 years ago for a different set of reasons and a different set of beneficiaries. The naming of a successor Trustee did not follow the Trusts prescribed prescription and another person served as Trustee for some 20 years. Moreover at the time the Trust was formed there were five minor beneficiaries. Today and prior to the naming of

> you as a successor trustee, there are five (Harold, Lee, Davis, Gini, and Tom) of seven beneficiaries who, had they been asked, would oppose the naming of yourself as Trustee. And, that doesn't count me and I certainly think that you are the least qualified of all the adult beneficiaries because of your lack of knowledge and interest in these British Columbia interests.

Howard did not react, and suggested they should carry on notwithstanding their differences for the benefit of both sides of the family.

[19] In a report dated April 8, 2003 (the "April Letter"), Barry wrote that Big Nine's income from hunting had "peaked out", but that he hoped the company's eco-tourism business would offset the decline in business. He continued:

> ... There is no doubt our sheep quota will be reduced substantially in the near future. The prices we are charging on hunts are all the market will bear. The exchange rate between U.S. and Canadian dollars are decreasing and on top of all of this our expenses and costs of operating are increasing. In my opinion all partners should consider selling at this time.
>
> All is not doom and gloom, we are in good shape financially and we don't require anymore major capital expenditures after the Blue Lake Lodge. Our income will no doubt go down but our capital costs are all but over. We will still make money in the future but margins will be down. [Emphasis added.]

Barry attached a list of assets and infrastructure, with the amounts that had been spent on them by Big Nine since 1986. The total "Infrastructure Value" was shown as $2.795 million, "Total Assets" at $1.595 million, for a total cost figure of $4.39 million.

[20] Howard actively turned his mind to the affairs of Big Nine and became concerned about the company's dependence on Barry. (The business had suffered greatly when his predecessor, Gary, had been killed.) Howard learned that Barry was "somewhat discontented" with his position as a minority shareholder, and also began to wonder if the business should be sold. In his experience, businesses have a "life cycle" and the Big Nine business was "long in the tooth." Two meetings took place in the summer of 2003. As described by the trial judge:

> Tommy visited Big Nine in June 2003. It was his first visit in 13 years. He toured the property and spent time with Barry discussing Big Nine's operations. He learned from Barry that Big Nine was marginally profitable. Its significant investment in eco-tourism had yet to produce any revenue and the outlook for it to do so in the future was unclear. Big Nine was operating near

> capacity, but was realizing little to no return on capital. The future promised an increasingly challenging regulatory environment. He did not think Barry a good promoter of the business.
>
> In his discussions with Barry, Tommy learned of Barry's discontent as a minority shareholder. He wanted to own more or all of the company.
>
> At the August 15, 2003 meeting, Tommy reported to Howard and Eugene about his visit to Big Nine. During the meeting, they discussed a possible sale of Big Nine. I accept Tommy's evidence that during the meeting he discussed various ways of valuing a business, including cash flow, replacement cost and use of comparables. Tommy suggested that based on a multiple of cash flow basis Big Nine was worth more than $1 million and less than $2 million. Of the three individuals, Tommy was by far the most experienced in the buying and selling of businesses. He had sold over 60 businesses over the course of his career.
>
> At the meeting the parties discussed whether Barry would be prepared to buy Big Nine's shares. They had doubts whether Barry would be able to finance such a purchase. [At paras. 477-80; emphasis added.]

[21] No effort was made by Harold or Tommy to involve a professional appraiser to evaluate the business. Howard consulted an appraiser, Mr. Pomeroy, who told him that guide-outfitting businesses were difficult to evaluate, and that the replacement cost method or the use of a multiple of earnings were two possible methods. (Para. 481.) However, Mr. Pomeroy declined to do an evaluation. Barry also tried to find someone to evaluate the business, but also without success. A realtor told him that "little was moving." (Para. 225.) After he reported to the group in August that he was having problems in obtaining an appraisal and that interested buyers could not be easily found, Howard asked him if he would be interested in buying. (Para. 227.)

[22] Eventually, Barry made an offer on behalf of TRL to buy the Trust out for a price based on a total enterprise value of $1.6 million, payable over eight years. After discussing the offer with Tommy, Howard insisted on a cash deal. Barry managed to find financing, and agreed on a price of $888,889 (Cdn.) for the Trust's 55.5% share of the company, to be paid on or before February 15, 2004.

[23] Harold learned of the proposed sale when Davis came to Crying Girl at Christmastime of 2003 and was "upset". He felt the price was not reasonable based on other sales in the area. (Para. 246.)

[24] Eugene, who had initially not favoured any sale, took an active role in 'pushing' the deal through and both Howard and Barry testified that they relied on him to protect their respective interests. Eugene, to whom Howard looked to handle the closing on his behalf, contacted Ms. Mason, presumably to act for the Trust. (Para. 248.) In his e-mail to her, Eugene stated:

> Audrey stepped down as Trustee in September 2002 and Howard became the Trustee. The issue of Harold being a co-trustee has not arisen to this point and Howard has conducted all affairs for the Trust since September 30, 2002. We have little to no direct contact with Harold (who is living at Crying Girl – Graham River) but Howard has attempted to keep Tommy Bronson and Lee Lewis informed. [Para. 248; emphasis added.]

[25] Barry also retained a lawyer, Mr. Long, in connection with the purchase by TRL. In response to an inquiry from Mr. Long, Ms. Mason advised him that:

> Both Harold and [Eugene] signed the letter in February 1, 1978 indicating that they would appoint Howard Hewitt as trustee in the event they were not able to act as trustee (and renounced their future ability to appoint trustees – paragraph 15 provides that Harold and [Eugene] have the power to appoint trustees notwithstanding the listed successor trustees). In furtherance of their 1979 agreement, both Harold and Eugene irrevocably renounced their appointment in September 2002 and appointed Howard Hewitt as trustee. [At 254; emphasis added.]

At trial, Ms. Mason admitted that this was incorrect. She had no explanation for her misstatement and agreed at trial that she should have told Mr. Long that "Harold had not stepped up and accepted his appointment as a trustee." (Para. 256.)

[26] Eugene negotiated away Mr. Long's request for an opinion from the Trust's solicitors that Howard had the full power and authority to sell the Big Nine shares on behalf of the Trust, as well as a clause permitting the purchaser to hold back a portion of the purchase price pending the receipt of a clearance certificate from Revenue Canada. In return for the latter concession, Howard agreed to indemnify TRL in respect of any Canadian or U.S. tax that might be payable by the Trust or its beneficiaries as a result of the transaction. (Para. 267.)

[27] Ultimately, the closing was moved to the United States, and TRL paid the purchase price for the shares to the Trust in U.S. funds of $673,944.36.

The Distribution

[28] Beginning at para. 273, the trial judge described the "aftermath" of the share sale. Howard had formed the intention to terminate the Trust and wrote the "Distribution Letter" to the beneficiaries, advising them of the sale and of the GRO transaction (not relevant to these proceedings). His letter stated in part:

> I am pleased to report that the transaction between Tompkins Ranching Ltd. [TRL] and the Big Nine Trust was closed on February 13, 2004. Your share of the $889,000 sales price ($673,944.36 in US dollars), less a reserve for Trust closing and termination expenses, is set forth in Schedule A. Prior to the closing I reached an agreement with Barry Tompkins that if ... Tompkins Ranching sells [its] shares or if Big Nine Outfitters, Ltd. is sold at any time within 2 years from date of closing for an amount greater than the sales price and Tompkins Ranching Ltd.'s closing expenses of this transaction, the Trust will receive its pro rata share of any excess amount. I feel this provision adequately protects your interests in terms of "fairness."
>
> Enclosed is an Acknowledgment, Release and Indemnity form prepared by counsel to the Trust. I understand a similar form was signed by all of you in favor of Audrey Tompkins in connection with the Hall Transaction and the assignments by Lee and [Virginia] of a part of their interest in the Trust to Davis and Tommy Bronson.
>
> Upon receipt of the executed original Acknowledgement, Release and Indemnity Agreement, I will forward a check to you at the above address. This will constitute a complete distribution of your beneficial interest in Big Nine Outfitters Ltd.
>
> Hopefully you are as pleased about the outcome in this matter as I am for you based on all of the factors and concerns that have come to my attention regarding this investment since I became trustee that I have shared with all of you.
>
> ...
>
> In the event I do not receive an executed Acknowledgement, Release and Indemnity form within 30 days from the date hereof from any beneficiary, I will deal with the matter as advised by counsel for the Trust under British Columbia law. [Emphasis added.]

[29] Jennifer and Julie duly signed and returned their copies of the release in Howard's favour and each received a cheque in the amount of $132,000 (U.S.). Virginia, Lee and Tommy did not sign the release and never received funds; Davis signed the release and returned it to Howard, but then decided not to cash the cheque because "by that point he had come to believe that the BNO share transaction was improvident and he wanted to preserve his legal rights."

(Para. 282.) As a result, $396,000 (U.S.) of the proceeds remained in Howard's hands as trustee. (Evidently, the funds have been used to pay ongoing legal expenses arising from these proceedings. Para. 283.)) Howard does not challenge on appeal his obligation to pay the proceeds to Harold's children.

Trial Judge's Analysis and Conclusions

[30] The trial judge formulated the issues before him as follows:

> The disputed issues of fact and law are several and in many cases inter-related. They include the following:
>
> 1. matters concerning Howard's appointment as trustee, including when he was first approached, whether he discussed the appointment with Mason, whether he knew Harold could be co-trustee and whether he was in a disqualifying conflict;
> 2. matters concerning Harold as co-trustee, including whether Harold, his children, or Tommy knew he had the right to be co-trustee, whether Howard and Eugene failed to disclose information concerning Harold's right to be co-trustee, whether Harold was able to act as co-trustee and whether Harold ever became the co-trustee;
> 3. the reasons Howard accepted his appointment as trustee and the existence of the Liquidation Plan;
> 4. matters concerning the BNO Share Transaction, including whether the BNT Trust Agreement contained a power of sale, whether Howard had authority to sell the shares, whether Tommy agreed to the sale and whether the way the sale was carried out was reasonable;
> 5. whether Eugene or Mason knowingly assisted in a breach of trust;
> 6. whether the sale of the Big Nine shares was at an improvident price such that the plaintiffs suffered damages;
> 7. matters involving the GRO and the GRT, including the original beneficial ownership of the GRO shares and nature of the GRT;
> 8. matters concerning the distribution of the BNT and the GRT, including whether Howard could require a release before distributing the proceeds of the BNO Share Transaction, whether the BNO Share Transaction proceeds could be properly distributed to some but not all beneficiaries and whether Howard distributed the beneficial interest in the GRO shares;
>
> . . .
>
> 10. the validity of the Bronson and Davis Assignments;
> 11. whether Howard should be exonerated for any breaches of trust;
> 12. enforceability of the Davis Release;
> 13. the third party claim against Tommy; and

14. whether Howard should be removed as trustee. [At para. 339.]

Howard's Trusteeship – Conclusions

[31] I set out below the Court's substantive conclusions material to Howard's trusteeship, some of which have already been mentioned:

- Contrary to his recollection, Howard did not consult with Ms. Mason prior to agreeing to become a trustee. (Para. 349.)

- Howard took on the role of trustee because he "considered it a family obligation". He thought it was in the beneficiaries' best interest that he act as trustee and that he do so to the exclusion of Harold. (Para. 435.) He had questions about Harold's mental health. (Para. 435.)

- It was "beyond doubt" that no later than August 23, 2002, Eugene knew Harold "had the right to become co-trustee" (para. 361), and it was "inconceivable" that Eugene would not disclose Harold's "potential role" to Howard. (Para. 363.)

- It was "inherently improbable" that Howard did not know in September 2002 that Harold had the right to become a co-trustee. (Para. 366.)

- The indebtedness of Eugene and the Lewis Family Trust to Howard did not place him in a position of conflict that precluded him from becoming a trustee. (Para. 372.)

- Harold learned of Howard's appointment in November 2002 when Tommy sent him the documents relating to Eugene's resignation. (Para. 378.)

- Harold "did not know he was entitled to be trustee" and could not be expected to have remembered the terms of the Trust Agreement. If he had been told he was entitled to become a trustee, he would have done so. (Para. 379.)

- The Trust Agreement and Revocation Letters were not faxed to Tommy by Eugene on October 23, 2002. If they had been sent, "Tommy surely would have sent them off to Harold with the balance of the documents that he sent on November 5." (Para. 392.)

- Tommy did not receive a copy of the Trust Agreement until "sometime in 2003" and did not learn until after the closing of the share transaction that Harold "had the right to be trustee." Had he known this, he "surely would have taken action in January 2004 to prevent Howard from selling the shares. He cannot be faulted for failing to detect Howard and Eugene's subterfuge." (Para. 395.)

- Eugene and Howard deliberately set out to mislead the plaintiffs as to Harold's right to be a co-trustee and did so in the hopes that Harold would not become aware of his rights and accept the appointment. (Para. 397.)

- Ms. Mason was not asked to prepare the "renunciation" for Harold's signature when Audrey resigned. Instead, Eugene did so. The form prepared by Eugene contained the phrase "pursuant to my previous instructions I do hereby renounce ..." which must have been intended to create the impression that Harold was resigning in accordance with his previous instructions. (Para. 402.) (No finding was made as to the fate of this document or why Eugene had prepared it if he had no intention of asking Harold to sign it.)

- In March 2003, Eugene and Howard told Tommy that Howard had been appointed as a trustee but did not tell him that Harold had the right to become a co-trustee. The trial judge inferred this about the motives of Howard and Eugene:

> The only explanation for the failure to disclose to the plaintiffs that Harold could become trustee was the desire of Howard and Eugene to keep that knowledge from Harold. They did not want him to be trustee and the only way to accomplish that goal was to keep from Harold, his children and Tommy that

> Harold had the right to be trustee. Howard and Eugene hoped the plaintiffs would not determine the true situation and they in fact did not do so until well after Howard had sold the Big Nine shares.
>
> A close reading of the Eugene Resignation Document certainly raises potential questions concerning Harold's status. Tommy's memo of October 10, 2002 raised certain of those questions. His November 5, 2002 letter to Harold also indicated that he had doubts concerning the process that had been followed. [At paras. 406-07; emphasis added.]

- Howard and Eugene "misled" the beneficiaries concerning Harold's right to be a co-trustee (para. 411) and engaged in a "subterfuge" to "keep Harold's right to be a trustee secret from Tommy, Harold and his children." (Para. 410.)

- Harold was not "unable to act" as trustee, contrary to the defendants' argument. (Para. 425.)

- The trial judge rejected the plaintiffs' argument that Howard had been appointed and "acted throughout to preserve and advance Eugene's interests." (Para. 427.)

- Howard's decision to sell the Big Nine shares "evolved over time and was done because he believed it was in the best interests of the beneficiaries." (Para. 428.)

The Big Nine Share Sale – Conclusions

[32] With respect to the Trust's sale of the Big Nine shares to TRL, the trial judge formulated four issues before him as follows:

> The issues include whether the BNT Trust Agreement contained a power of sale, whether Howard could enter into the [Big Nine] Share Transaction without the consent of his co-trustee, whether Howard made the sale in good faith and whether the sale was at an improvident price. [At para. 439.]

(It will be noted that at this point, the trial judge referred to Harold as a co-trustee, not simply a person who had a right to become so.)

[33] The judge found that the terms of the Trust contained a power of sale by implication (para. 449). With respect to Howard's position as "sole trustee", he noted that trustees must act jointly in the execution of their office and that if Harold was in fact a trustee, Howard could not have acted without his consent. Thus in the trial judge's analysis, it was necessary to determine whether Harold had impliedly accepted this responsibility. (Para. 452.) He stated:

> In order to become co-trustee, Harold had to step up and accept the appointment. The office of trustee may be accepted expressly, constructively through the acts of the would be trustee or possibly through long acquiescence: Waters at 832. The latter point has been a matter of considerable controversy and the subject of commentaries in the relevant texts. Unfortunately, there is little case authority on point.
>
> Harold did not expressly or constructively through his actions accept the appointment. Indeed, he says, and I have found, that he did not know of this appointment. [At paras. 453-54; emphasis added.]

[34] With respect to the defendants' argument that Harold should be taken, through his inaction, to have effectively disclaimed his right to be a co-trustee, the Court noted in particular the following passage from Waters, Smith and Gillen, *Waters' Law of Trusts in Canada* (3rd ed, 2005):

> [I]t is hard to believe that one who has sat aside while the other trustee or trustees carried out the trust duties could later assert his right to act when he finds himself in disagreement with what the other trustees have done, or he decides that he would now like to act. [At 833, quoted by the trial judge at para. 458.]

In the judge's analysis, however, the difficulty with this submission was his finding that Harold had not known he was entitled to act as co-trustee. In the judge's words, "Lack of knowledge must displace any presumption of acceptance." (Para. 460.)

[35] Proceeding on the assumption that Harold never became a co-trustee (para. 461) but was a "presumptive trustee on Audrey's resignation," the Court observed that Howard's first duty to the Trust had been to determine whether Harold was going to accept his appointment – a duty he had clearly breached – and that:

> ... Howard did not have the right to act as sole trustee. He did not have the right to enter into the BNO Share Transaction and in so doing he committed a breach of trust. [Para. 467.]

(I pause to emphasize that in these proceedings, the plaintiffs did not purport to challenge the validity of the share sale to TRL as having been carried out without authority. TRL was not a defendant and as seen earlier, the plaintiffs in their pleading sought an accounting of the value of the beneficial interests of the plaintiffs in the Trust, the payment to them of equitable compensation, or alternatively, damages. Although we are now told that a proprietary remedy is being sought against TRL in other proceedings, counsel on this appeal proceeded on the basis that the shares were validly transferred to TRL (and by implication, that the remedies of an accounting, equitable compensation or damages were available and appropriate remedies against the defendants).)

[36] In connection with the reasonableness of the sale of the Big Nine Shares, the trial judge briefly reviewed the factual circumstances again, focusing on the roles of Howard and Tommy leading up to the decision to sell. The Court noted that prior to the meeting of August 15, 2003, Howard had spoken to Mr. Pomeroy, whom he hoped to retain to evaluate the Trust's interest in Big Nine. Despite Tommy's testimony that no appraisals were mentioned, the judge accepted Howard's evidence that he had told Tommy and Eugene about consulting Mr. Pomeroy. (Para. 483.)

[37] By the time of the August meeting, Tommy had formed the view that a sale of the shares was "the right thing to do". Howard was also "moving in this direction" in light of the ongoing conflict between the two sides of the Lewis family. The Court found that his decision finally to proceed with a sale was reasonable (paras. 484-94); but that the "manner of sale" was not, because Howard made only "minimal efforts" to determine the value of the shares before agreeing to sell to Barry. In the trial judge's analysis:

> Having decided to sell the shares, Howard made minimal efforts to determine the value of Big Nine before agreeing to sell the shares to Barry. He did speak to Mr. Pomeroy, but ignored his suggestion that the costs of replacing the assets was a basis to determine value. He gave no weight to Barry's comments in the letter that Big Nine's assets were valued in excess of $2.7 million or that Big Nine's infrastructure and support were "far better than any in our industry" or that Big Nine was the "best in the business". He contacted

> no realtors or others who might have experience in selling such properties to seek advice as to how to best sell the shares.
>
> Opinion evidence at trial indicates that to maximize value, a property like Big Nine needs exposure in the market place. No attempt was made to expose Big Nine to the market place. Nor were any enquiries made as to the price at which similar businesses had sold. As will be developed when I consider the evidence on valuation, the closest comparable to Big Nine was Muskwa Prophet. That business had sold in 1999 for $2.7 million. [At paras. 496-97; emphasis added.]

(I note that in the underlined sentence, the judge seems to accept Mr. Pomeroy's suggestion that the cost amounts of the assets listed in Barry's April Letter may indicate the market value thereof.)

[38] At para. 535, the Court turned to the question of the appropriate compensation for Howard's breach of trust by reason of his having sold the shares without determining whether Harold was "prepared to accept his appointment." In the trial judge's analysis:

> ... The plaintiff beneficiaries are entitled to be placed in the same position so far as possible as if there had been no breach of trust. The beneficiaries' actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight: *Canson Enterprises v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 555. In determining the proper measure of damages, evidence as to changes in the value of the property after the sale is properly taken into account: *Toronto Dominion Bank v. Uhren* (1960), 32 W.W.R. 61, 24 D.L.R. (2d) 203 (Sask. C.A.). [At para. 535.]

[39] The Court reviewed expert appraisal evidence adduced by both sides, concluding at para. 577 that the sale had been "improvident" and that:

> ... the Big Nine shares had a value of between $1,375,665 and $1,542,345. The Big Nine shares were sold for $888,889, leaving a shortfall of between $486,776 and $653,456. The plaintiffs held 60% of the beneficial interest. On the basis of these calculations, their loss is somewhere between $292,605 and $392,073.
>
> The court's task is to assess damages. Howard sold the Big Nine shares without authority and at an improvident price. If the shares had been properly marketed, the sales price would have been well in excess of what Barry paid. Damages are to be assessed, not calculated. It is impossible to know now what the sales price would have been. I assess the plaintiffs' damages for breach of trust arising from the Big Nine Share Transaction at $350,000.
>
> I have found that Eugene assisted in the breach of trust. Howard and Eugene are jointly and severally liable for the assessed damages, subject to

> consideration of Howard's submissions that he should be excused from any breach of trust. [At paras. 608-10; emphasis added.]

Pre-judgment interest was ordered to run on this amount (referred to in the Court's Order as the "Damage Award") from January 1, 2006, the second anniversary of the date of the sale. (The trial judge accepted expert evidence that it likely would have taken two years to market and sell the shares properly.)

Liability of Eugene and Ms. Mason

[40] Turning next to whether Eugene and Ms. Mason had "knowingly assisted" Howard in his breach of trust, the Court noted the leading Canadian authority, *Air Canada v. M & L Travel Ltd.* [1993] 3 S.C.R. 787. It confirmed that third parties who "knowingly participate" in a breach or who are reckless or willfully blind to the breach may be held personally liable. With respect to the burden of proof on a plaintiff, the trial judge quoted a passage from Underhill and Hayton, *The Law Relating to Trusts and Trustees* (17th ed., 2006 at 1177) to the effect that a claimant "must at least show that the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been", and that the defendant's action must have "some causative impact." Thus, the court below said, it was not necessary to show a "precise causal link between the assistance and the loss": para. 500.

[41] Applying the foregoing, the Court found that Eugene had had actual knowledge that Harold was entitled to act as co-trustee and therefore that Eugene had known Howard was acting in breach of trust. Thus Eugene had knowingly assisted in the breach. (Para. 501.)

[42] With respect to Ms. Mason, the Court agreed with the opinion of an expert trust law practitioner that in advising Howard (as trustee) regarding the share transaction, she had had a duty to ensure that he had the authority to sell the Big Nine shares on behalf of the Trust. Thus, the Court said, Ms. Mason should have sought confirmation that Harold had "formally renounced" his trusteeship and should not have told Mr. Long that both Harold and Eugene had irrevocably renounced their appointments as trustees in September 2002.

[43] The trial judge found that Ms. Mason's conduct failed to meet the applicable standard of care, but the question for determination here was whether she had been reckless or willfully blind, and therefore could be said to have knowingly assisted in the breach of trust. (Para. 522.) The Court accepted that Ms. Mason had likely not recognized the co-trustee problem because the file was "of such minor importance that she never critically considered the matter." She had adopted a "*laissez faire*" attitude toward the file in 2004 and remained oblivious to the question of Howard's authority to sell the shares. Nonetheless, it had not been shown she had acted with a "want of probity" that would make her personally liable. The plaintiffs' claims against her and her firm were dismissed.

The Distribution – Conclusions

[44] The third major chapter in the trial judge's reasons and in this appeal concerns the distribution – or attempted distribution – of the share sale proceeds by Howard as trustee to the beneficiaries of the Trust. The trial judge's conclusions on this topic began at para. 639 of his reasons.

[45] He noted first the terms of the Trust with respect to distributions. He found that although the trustees had a discretion as to whether to distribute or accumulate income and principal, once a decision was made to distribute, the trustees were required to do so in equal shares to the beneficiaries. (Para. 643.)

[46] It will be recalled that when Howard purported to advise the Lewis children about the sale, he asked each of them to execute a release in his favour, following which he would then forward a cheque. This practice of requiring a release had been followed when Audrey had resigned as a trustee and Ms. Mason had prepared a form of release and indemnity to be signed by each beneficiary: see para. 159. It will also be recalled that Tommy, Lee and Virginia did not sign their releases and that although Davis signed his and received a cheque, he never cashed it. The Court found at para. 699 that Harold was not entitled to rely on the signed releases that he did receive.

[47] The trial judge reviewed the case authority with respect to the right of a trustee to demand a release as a condition to beneficiaries' receipt of a distribution of the trust estate. Although seeking a release in these circumstances was and is a common practice (para. 658), the trial judge found that under the terms of this trust, it was not open to Howard to distribute only to some beneficiaries and not to others. Thus the judge concluded:

> By paying certain beneficiaries and not others, Howard breached the terms of the BNT. As soon as Howard paid certain beneficiaries, he was legally obliged to pay the others, regardless of whether or not they were prepared to sign the Release. Although he may have been entitled to hold all of the funds pending a passing of accounts, what he could not do, given the terms of this trust, was to pay some beneficiaries and not others.
>
> It is a principle of equity that equity will not suffer a wrong to be done without a remedy: John McGhee, *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2005). Having paid Jennifer and Julie the proceeds of the BNO Share Transaction, Howard had to pay the balance of the BNO Share Transaction funds to the plaintiff beneficiaries. He was not entitled to use those monies for any other purposes, including the paying of his legal costs. Subject to the question of exoneration, he must pay to those beneficiaries their respective shares of the BNO Share Transaction. In the case of Lee, Virginia and Davis, that sum is $66,000 USD. In the case of Tommy, it is $198,000 USD. Those funds must be paid together with interest from March 3, 2004, being the date that payments were made to Jennifer and Julie. [At paras. 663-64.]

(As will be seen later in these reasons, the Court later changed the currency in which the "Proceeds Award" was payable, to Canadian dollars.)

Exoneration

[48] Howard sought to be exonerated from his liability for the consequences of the improvident sale of the Big Nine shares, relying on Article 13 of the Trust Agreement. It stated:

> Exoneration of Trustee – No trustee provided he act in good faith, shall be held liable for any loss occasioned to the trust property except for loss caused by his own dishonesty, gross negligence or willful breach of trust.

Alternatively, Howard relied on s. 96 of the *Trustee Act*, R.S.B.C. 1996, c. 464, which provides:

> If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

(Counsel in this court were in agreement that Article 13 "prevails" over s. 96, so that if Howard had met the requirements of the exoneration clause, he would have been properly excused. By this I believe counsel meant that Article 13 is couched in mandatory terms, while s. 96 requires the exercise of the Court's discretion. (See generally *Armitage v. Nurse* [1998] Ch. 241 (C.A.).)

[49] The trial judge did not find it necessary to choose between the two provisions, observing that both were premised on the trustee's acting in good faith. He endorsed statements in *Fales v. Canada Permanent Trust Co.* [1977] 2 S.C.R. 302 and *Langley v. Brownjohn* 2007 BCSC 156, to the effect that the Act requires that the trustee have acted honestly and reasonably and "ought fairly to be excused" – wording not present in Article 13. Then followed what is perhaps the judge's most significant finding for purposes of this appeal. He stated:

> If I had accepted Howard's evidence that he was unaware of Harold's right to become trustee, I would be inclined in the circumstances of this case to excuse Howard for the loss caused by the improvident sale. He entered into the sale in good faith. Tommy, a beneficiary and experienced businessman, had agreed to the method of sale and the sale price.
>
> The difficulty with Howard's submission, however, is that I cannot find that he acted in good faith. For reasons that have been set out, I have found that he knew that Harold had the right to be co-trustee and he embarked on a course of action with Eugene to conceal that information from Harold and the beneficiaries. In such circumstances, I cannot find that Howard acted honestly or in good faith in selling the Big Nine shares. Honesty and good faith are a prerequisite to exoneration under either the terms of the BNT Trust Agreement or s. 96 of the *Act*. Howard's application to be relieved from liability is dismissed. [At paras. 694-95; emphasis added.]

In addition, he ruled that Howard's refusal to distribute to the beneficiaries who did not sign releases was a breach that did not arise "in good faith", but arose because Howard had put his self-interest before the interests of the beneficiaries.

Accordingly, the Court declined to exonerate Howard from that breach as well. (Para. 697.)

Claim Against Tommy

[50] At para. 701, the Court dismissed a third party claim brought by Howard against Tommy, claiming damages for breach of warranty of authority. Howard asserted that he had relied on Tommy's representations that he, Tommy, had had the authority to act for Harold's children in connection with the share sale. However, the Court found that "to the extent that" Tommy concurred in the sale and "may have indicated that his concurrence was also that of Lee, Virginia and Davis", his actions had been founded on "Tommy's erroneous understanding that Howard had the legal authority as trustee to sell the Big Nine shares." Had Tommy known that Howard did not have the authority to sell the shares without Harold's concurrence as a trustee, Tommy would not have "consented" to the sale, given Harold's opposition thereto. The third party claim was dismissed. (Para. 701.)

Future of the Trust

[51] The final substantive topic addressed in the trial judge's main reasons was the plaintiffs' application for the removal of Howard as trustee and the appointment of Virginia in his place. Normally, Howard's removal would follow in light of the Court's findings, but the judge was reluctant to make that order without further submissions. In his analysis:

> ...I note that as a result of the decisions made in these reasons the entire *corpus* of the BNT has been distributed. Whether a trust remains to be administered would appear to be a live question. Further, Howard has been in negotiations with Revenue Canada concerning certain matters. The status of those discussions has not been disclosed to the Court and I do not know whether Howard's removal would prejudice those discussions.
>
> I should say that I am not inclined at this stage to confirm Harold as a trustee. Although I have found that Harold was entitled in 2002 to become a trustee, given the events of the last several years I am not certain that it would now be appropriate for him to take up that mantle. Jennifer and Julie are beneficiaries of this trust, and given the now further exacerbated enmity between Harold and their father, they may have some legitimate concerns concerning that appointment. Virginia's appointment as sole trustee might

> possibly raise similar concerns. A possible solution might be to appoint Virginia and either Jennifer or Julie as co-trustees.
>
> I will leave it to the parties to consider whether, in light of these reasons, it is necessary to remove Howard as trustee and, if he is removed, who should replace him. [At paras. 703-05; emphasis added.]

Disposition

[52] In the result, the trial judge ordered that the Damage Award in respect of the improvident sale of the Big Nine shares, which he had assessed at $350,000 (Cdn), was payable jointly and severally by Howard and Eugene directly to Tommy, Lee, Virginia and Davis in proportion to their respective interests. With respect to the undistributed share sale proceeds, Howard was ordered to pay $522,000 (Cdn) in total (the "Proceeds Award"), being $66,000 to each of Lee, Virginia and Davis and $198,000 to Tommy, plus prejudgment interest from March 3, 2004. The Court deferred issues regarding costs, the removal of Howard as a trustee, whether a new trustee was required and other matters arising, pending further submissions if they became necessary.

Fresh Evidence Applications: 2010 BCSC 871

[53] As mentioned earlier, fresh evidence applications were made a few months later by Howard and Eugene, in conjunction with applications to reopen the trial. The fresh evidence (referred to by the Court as "new" evidence) consisted of three affidavits from Mr. White (Eugene's law partner in Florida), an affidavit of a computer consultant, and an affidavit of Eugene himself. Attached to Eugene's affidavit was a copy of an "auto activity report" from his law firm's fax machine that showed that a fax of 17 of 38 pages had been sent to Tommy on October 23, that a fax of one page had been received from his number on October 23, and that a further fax of 23 pages was sent to Tommy on October 24. The trial judge observed:

> Mr. White, in his first affidavit, submits that after he read the reasons for judgment he searched the fax logs of the law firm and found the auto activity report. His second affidavit attaches a copy of the fax machine user manual and his third affidavit sets out that the auto activity report generated from the fax logs was kept in the ordinary course of the law firm's business.

> Mr. Lee's affidavit discusses the operation of the fax machine and explains the auto activity report. Based on the report, he opined that the two transmissions were successfully sent to Tommy's fax number. In the first transmission on October 23, 2002 only 17 of 38 pages were transmitted. On October 24, 2002, 23 pages were successfully sent.
>
> Mr. Dives advises that he did not know of the existence of the fax activity report until February 2010. He candidly acknowledges that the report existed and was available before trial. [2010 BCSC 871 at paras. 18-20.]

[54] Since the order after trial had not yet been entered, the trial judge observed that he had an "unfettered discretion" to reconsider or revise any aspect of his decision. He noted that in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59, the Supreme Court had impliedly approved a two-part test for the admission of what was variously referred to as "new" evidence and "fresh" evidence. Under that test, new evidence may be admitted only if it would probably have changed the result and if it could not have been obtained by reasonable diligence before trial. (Para. 28.) In *Sagaz,* the Supreme Court disagreed with the Ontario Court of Appeal's reversal of the trial court's ruling that the evidence of a person described as a "recanting liar" would not have changed the result. (Para. 63.) Thus the Court of Appeal had erred in ordering the re-opening of the trial.

[55] The trial judge in the case at bar noted that subsequent cases had differed concerning the significance of the due diligence branch of the test, but he took the following principle from the authorities:

> ... new evidence will only be admissible on a reconsideration application if it would likely change the result and, except in exceptional circumstances, the evidence could not have been obtained by reasonable diligence before the trial. In exceptional circumstances, in order to prevent a miscarriage of justice, fairness may dictate that new evidence will be admissible even though the evidence may have been discoverable prior to trial. New evidence will generally not be admissible in situations where the evidence was not called at trial because of tactical considerations. [2010 BCSC 871, at para. 33.]

[56] With respect to whether the "new" evidence would probably have changed the result at trial, the judge accepted the submissions of Howard and Eugene that "the only logical inference was that the October 24 fax contained the balance of the documents sent incompletely on October 23", including the Trust Agreement and the

Revocation Letters. (Para. 36.) As well, he agreed that the October fax 'undermined' his earlier finding (at para. 398 of the main reasons) that there was no evidence Eugene had forwarded the balance of the documents to Tommy. However, the judge continued:

> ... It does not, however, affect my finding that Tommy did not receive the BNT Trust Agreement until the summer of 2003. Tommy's April 27 letter confirms that finding. That the October 24 fax did not come to Tommy's attention may not be the fault of either Howard or Eugene. Eugene, however, knew by Tommy's letter of November 4, 2002, that as of that date Tommy did not have all of the information he had sought. Eugene did not follow up to determine what information was missing or confirm with Tommy that he had received the October 24 fax.
>
> Howard and Eugene submit the fact that the BNT Trust Agreement and the Revocation Letters were sent to Tommy on October 24, 2002, means that I must reconsider my conclusion that Howard and Eugene misled the plaintiffs as to Harold's right to be trustee. They submit the fax exchanges of October 23, 2002 were key to that finding and that finding was essential to the subsequent determination that Howard acted in bad faith and was not entitled to be relieved from the consequences of his breach of trust. They submit that if the evidence concerning the October 24 fax had been introduced at trial it probably would have changed the trial result.
>
> I do not agree with that submission. As previously discussed, the October 23 fax was considered in the context of Tommy's knowledge. That section concluded at para. 395 where I said:
>
> > I accept Tommy's evidence that he did not receive the BNT Trust Agreement until sometime in 2003 and that he did not learn until after the closing of the BNO Share Transaction that Harold had the right to be trustee. If it was otherwise, he surely would have taken action in January 2004 to prevent Howard from selling the shares. He cannot be faulted for failing to detect Howard and Eugene's subterfuge.
>
> The key disclosure was not the BNT Trust Agreement but Harold's right to be trustee. That is what Howard and Eugene did not disclose. They failed to tell Harold, Tommy or the other beneficiaries of Harold's right to be trustee. Their failures in this regard are set out in detail at paras. 396 to 411 of the judgment and are not limited to the failure to send Tommy the BNT Trust Agreement and Revocation Letters.
>
> As set out at paras. 465 to 467, Howard had a duty to determine whether or not Harold was going to accept his appointment as trustee. He failed to disclose Harold's rights and in those circumstances he did not have the right to act as sole trustee or enter into the BNO Share Transaction. [At paras. 37-41; emphasis added.]

[57] Further, in response to Howard's reliance on para. 694 of the Court's earlier reasons (quoted above at para. 49 of these reasons), the trial judge observed:

> That submission misses the point of para. 694. At trial, Howard testified that he did not know that Harold had the right to be trustee. I did not accept that evidence. The point being made in para. 694 was that if I had accepted Howard's evidence that he was not aware of Harold's right to be trustee, I would likely have excused him for the loss caused by the improvident sale. Having, however, not accepted his evidence, I was not prepared to do so.
>
> If the evidence of the October 24, 2002 fax had been before the court, I would not have excused Howard's breach. The fundamental failure remained. Howard knew Harold had the right to be trustee but did not disclose that information to Harold, Tommy or Harold's children. As I noted at para. 411:
>
> > The fact that Tommy and Harold did not see through the deception provides no defence to Howard and Eugene. Howard and Eugene from the outset misled the beneficiaries concerning Harold's right to be co-trustee. It does not lie in their mouth to suggest that Tommy and Harold should have seen through their deception.
>
> For the reasons set out, I cannot find that the new evidence would probably have led to a different result. No miscarriage of justice will result if the evidence is not admitted. On that basis alone, the new evidence is not admissible. [At paras. 43-5.]

[58] The Court also ruled that the 'due diligence' requirement had not been met, finding that Howard and Eugene had 'chosen' not to lead evidence that would have bolstered their submissions regarding the sending of the second fax. Eugene, for example, could have testified but (the Court inferred) counsel had chosen for tactical reasons not to call him.

[59] In the result, Howard's application for the admission of the fresh evidence was dismissed.

Eugene's Application

[60] Eugene's application was broader in scope and not entirely dependent on the admissibility of the fresh evidence. In particular, he suggested that in giving as much emphasis as he had to the plaintiffs' "Liquidation Plan" theory, the trial judge had overlooked evidence that made it unlikely Eugene had deliberately kept from Tommy, Harold and the other plaintiffs the fact that Harold "could become trustee".

This evidence included his statement to Ms. Mason that he did not want Harold to become a trustee, the contents of the Resignation Documents, his advice to the beneficiaries on October 2, 2002 to contact Ms. Mason if they had any questions regarding the Documents, and the (re-)sending of the Trust documents to Tommy on October 24, 2003. (Para. 53.) Further, Eugene argued that the Court had failed to differentiate between Howard's role as a trustee and Eugene's role as a stranger to the Trust. In the absence of advice from Ms. Mason that Harold was entitled to be a trustee, Eugene argued, he had had no reason to believe that not advising Harold was a breach of trust. As well, Eugene relied on financial reasons for his failure to appear at trial, such that the adverse inference drawn by the trial judge should not have been drawn.

[61] The trial judge rejected all these submissions. Under the heading "Concealment", he said the record did "not disclose why Eugene made the disclosures he did." The judge noted that in fact, Eugene had been told by Ms. Mason in August 2002 that Harold had the right to become a trustee, but Eugene never disclosed that fact to Harold or the beneficiaries, even when it became clear that they opposed the sale of the Big Nine shares.

[62] Under the heading "Knowing Assistance", the trial judge then expressed the following key conclusions regarding Eugene's conduct:

> ... He contacted Ms. Mason to confirm the trustee line of succession. He instructed her to prepare the resignation documents and then undertook their execution. He procured Howard's agreement to act as trustee and advised the other beneficiaries of Howard's appointment. What he did not do was tell any of the beneficiaries or Harold of Mason's advice that Harold had the right to act as trustee.
>
> In January 2004, he retained Ms. Mason to act on Howard's behalf in closing the BNO Share Transaction. He advised her that the issue of Harold being co-trustee had not arisen, but he did not tell her that Harold had not been told of his right to be co-trustee. Nor did he seek her advice whether or not in those circumstances Howard had the right to sell the trust property.
>
> Before the BNO Share Transaction closed, Eugene knew that Tommy, Harold and Harold's children all opposed the sale. He redrafted the closing documents to remove the provision requiring Howard's solicitors to provide an opinion that Howard had the full power and authority to sell the Big Nine shares.

> On this application, Eugene submits that Ms. Mason was negligent in not advising him that Howard did not have the right to sell the shares. As Ms. Mason's counsel points out, Eugene never asked or sought her advice on Howard's right to sell. More importantly, he never disclosed to Ms. Mason that Harold had not been told that he had the right to act as trustee.
>
> The closing documents as originally drafted contemplated that Ms. Mason would have to opine on Howard's right to sell the shares. Before that opinion could be prepared, Eugene had that provision deleted from the agreement. His removal of that provision leads to the inference that he knew that Howard lacked the authority to sell the shares and that a sale would be in breach of trust. Alternatively, it supports an inference of wilful blindness or recklessness. [At paras. 59-63; emphasis added.]

While accepting counsel's statement that the decision not to call Eugene at trial had been made for financial reasons, the trial judge also remained of the view that an adverse inference could nevertheless be drawn against him for the purposes of assessing his credibility. (Para. 65.)

[63] Accordingly, Eugene's application for the re-opening of the trial was also dismissed.

Further Reasons: 2010 BCSC 1638 and 2011 BCSC 102

[64] In further reasons dated November 19, 2010, the trial judge rejected an application brought by the plaintiffs for relief directly against Eugene's children, Jennifer and Julie – i.e., an order that they pay back to the Trust the share proceeds they had received in March 2004, with interest. This had not been pleaded or sought at trial, and it was now too late to seek such recourse. Other questions were also posed for the Court going to the question of remedies. In the interests of time, they were put over until another scheduled hearing date.

[65] There followed two sets of supplementary reasons dealing mainly with costs, which I will address at the close of these reasons. The judgment dated January 28, 2011, however, also dealt with substantive "remedy" issues beginning at para. 55. The "point of departure" here, the trial judge said, was whether the Damage Award and the Proceeds Award should be paid to the Trust or to the individual plaintiff beneficiaries directly. The plaintiffs asserted that Howard should restore to the Trust

what it had lost as a result of the improvident sale, while Howard and Eugene submitted that in this instance, there were no future beneficiaries who would be adversely affected and that payment to Harold's children directly would appropriately account to them for the loss they had suffered. (Para. 57.)

[66] The trial judge cited a passage from the judgment of Lord Browne-Wilkinson in *Target Holdings Ltd. v. Redferns* [1995] 3 All. E.R. 785 (H.L.). On this point his Lordship observed that in respect of "traditional trusts" (in which "the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there"), the basic rule is that "a trustee in breach of trust must restore or pay to the trust estate either the assets that have been lost to the estate by reason of the breach or compensation for such loss". In cases on the other hand where the trust has come to an end, he wrote:

> The beneficiary's right is no longer simply to have the trust duty administered: he is, in equity, the sole owner of the trust estate. Nor, for the same reason, is restitution to the trust fund necessary to protect other beneficiaries. Therefore, although I do not wholly rule out the possibility that even in those circumstances an order to reconstitute the fund may be appropriate, in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of such compensation is the same, i.e., the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust. [At 794; emphasis added.]

[67] The trial judge also considered *Potter v. Bank of Canada* 2007 ONCA 234 and *Canson Enterprises Ltd. v. Boughton & Co.* [1991] 3 S.C.R. 534, where both the majority, *per* LaForest J. and the minority *per* McLachlin J. (as she then was) emphasized the "flexibility" of equitable remedies in the modern context. The judge concluded that the question was one of fairness and justice in the specific circumstances before the Court. In his view, the circumstances here militated in favour of the payment of the Proceeds Award directly to the beneficiaries, a result also consistent with what the plaintiffs had sought throughout the trial.

[68] Similar considerations led him to conclude that the Damage Award should properly be paid to the plaintiff beneficiaries to compensate them for their loss. The

existence of a potential income tax liability with respect to the sale of the Big Nine shares and other matters, did not require the continuation of the Trust: it was open to the Minister of National Revenue under the *Income Tax Act* to collect unpaid tax from a trustee in Howard's position. (Para. 782.) Further, payment to the beneficiaries directly would avoid the "interminable legal squabbles" among the parties. Such squabbles had already consumed more than 145 days in court and legal costs in excess of $3 million. (Para. 73.)

Further Supplementary Reasons: 2011 BCSC 1115

[69] The trial judge's final supplementary reasons of August 17, 2011 addressed whether the Trust still existed, or should still exist, and who the trustee(s) thereof should be. The plaintiffs sought Howard's removal as a trustee, an order that he pass his accounts, and an order that Harold and Tommy be "confirmed" as trustees. (Since Howard had been absent from British Columbia for 12 months, it was said that Harold was entitled to appoint Tommy as an additional trustee pursuant to s. 27(1) of the *Trustee Act*.) The defendants opposed these orders, submitting that because the assets of the Trust had been distributed, there was no trust remaining. In the alternative, if the Trust still existed, they argued that none of the parties to the litigation should be appointed as a trustee. (Para. 26.)

Existence of Trust

[70] The trial judge noted – correctly – that a trust is not a separate legal entity but a "relationship". He cited the following passage from *Waters, supra*:

> A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out. As we have seen, the terms may be of the simplest, requiring for instance the holding of land until the beneficiary is of age, or more complex, as when the trust creates a number of successive interests and confers upon the trustee extensive discretions and duties additional to those which are imposed by law. But whatever the terms, and in practice in almost all cases there is an instrument creating the trust which will contain those terms, the natural end of the trust is the moment when the trustee has properly transferred to beneficiaries all the remaining trust property in his name and possession, and has had his final accounts passed. [At 1173-74.]

(See also Underhill and Hayton, *supra,* at 385-6 and E.E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed., 2005) at 85: "A trust cannot exist without trust property ...".)

[71] The trial judge reasoned that once Jennifer and Julie had received their share of the Big Nine share proceeds, the remaining proceeds were then held not under the Trust but on a bare trust in favour of the plaintiffs. That bare trust was subsequently "enforced" by the Proceeds Award. He continued:

> As of March 2004 the Trust was without property. This was some 21 months before Harold first indicated an intention to step up and act as trustee. As noted in the passage in Gillese a trust cannot exist without property. By November 2005 the BNT no longer existed. There was no trust for Harold to administer and in the circumstances Harold never became trustee. As Harold never became trustee, his purported appointment of Tommy as co-trustee pursuant to s. 27 of the *TA* is of no force and effect. I need not decide whether the Revocation Letters ousted Harold's right to appoint a trustee. [At para. 37; emphasis added.]

[72] Nor did the trial judge accept the plaintiffs' argument that a new trustee was necessary for their pursuit of their action in the Supreme Court of British Columbia against TRL. He noted that it was open to beneficiaries to pursue a proprietary claim to trust property or its proceeds or to sue a third party who knowingly participated in a breach of trust. Further questions regarding the TRL action would have to await the trial thereof.

[73] Finally, the Court dealt with certain 'housekeeping' matters. Howard was ordered to pass his accounts as trustee, but the order was stayed until 90 days following the exhaustion of all appeals or other agreement of the parties. (Para. 53.)

On Appeal: Substantive Issues

[74] In this part of my reasons, I propose to deal with the substantive issues raised on the appeals of Howard and Eugene and the plaintiffs' cross appeal, leaving to one side non-substantive issues relating to currency and costs.

[75] In his factum on appeal, Howard asserts that the trial judge failed to consider his liability "having regard to the terms of the mandatory exoneration clause under

the Trust Agreement" and in failing to relieve him of liability for the $350,000 Damage Award, assessed for the improvident sale. Howard emphasizes that the Court's unwillingness to exonerate him was based on the conclusion that he had committed an inexcusable breach of trust by "dishonestly concealing Harold's potential right to be co-trustee." Howard submits that this conclusion resulted from a "series of errors", including:

> (i) Misdirecting himself on the applicable legal duty and thus assessing Mr. Hewitt's conduct against an overly rigorous standard;
>
> (ii) Drawing the inference that Mr. Hewitt took part in a common dishonest scheme with Eugene without evidence from which such an inference could properly be drawn;
>
> (iii) Overlooking material evidence in concluding that Harold's potential right to be co-trustee had been dishonestly concealed;
>
> (iv) Drawing an adverse inference against Mr. Hewitt for failing to call Eugene as a witness; and,
>
> (v) Refusing Mr. Hewitt's application to admit new evidence that the judge found would demonstrate that Harold's potential right to be co-trustee had in fact been disclosed at an early date.

Howard does not seek to be relieved from liability for the Proceeds Award, but submits that it should have been payable in U.S. currency as a result of the application of s. 1 of the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155.

[76] Eugene asserts overlapping grounds in his factum:

> The learned Trial Judge erred in finding a breach of trust on the part of Howard Hewitt. [Here, the factum refers to both breaches – the "withholding" of information from Harold, and the sale of Big Nine shares.]
>
> In the alternative, the learned Trial Judge erred in finding a knowing assistance in breach of trust on the part of Eugene Lewis.
>
> The learned Trial Judge erred in applying an adverse inference against Eugene Lewis and in using the adverse inference to reverse the onus of proof and to create evidence which did not exist.

[77] On their cross appeal, the plaintiffs assert the following grounds:

> The trial judge erred in law and in principle in awarding the Direct Payment of the Proceeds Award and the Damage Award to the Plaintiff Beneficiaries.
>
> The trial judge erred in law in finding the Trust had ceased to exist and then further erred in failing to consider and then confirm Harold as a co-trustee of

> the trust, to remove Howard as a co-trustee of the Trust, and to confirm the appointment of Tommy as a co-trustee of the Trust.

[78] The trial judge's findings of 'collusion' and subterfuge on the part of Howard and Eugene to conceal from Harold his "right to become a trustee" lie at the heart of most, if not all, of these stated grounds of appeal. There are in my respectful view several defects in the reasoning on which this conclusion was based. I will describe some of these below; but even if one accepts what counsel referred to as the 'conspiracy of silence' theory, there is in my opinion also an overarching flaw in the judge's legal analysis that cannot stand. Here I refer to the Court's conflating the alleged 'concealment' of Harold's right to be a trustee, with the improvident sale of the Big Nine shares, resulting in the Court's refusal to apply the (mandatory) exoneration clause to the Damage Award – despite the fact that Howard was found to have entered the sale in good faith and with the concurrence of Tommy, the informal representative of Harold and his children.

[79] The trial judge said at para. 694 of his main reasons that he would have excused Howard but for the fact he had "embarked on a course of action with Eugene to conceal" Harold's right to be a trustee from him. Thus the honesty and good faith required by Article 13 of the Trust Agreement were lacking. This 'coupling' of the "subterfuge" with the improvident sale and the compensation payable therefor constitutes a leap in logic that overlooks the purpose of both the exoneration clause and the Damage Award.

[80] Obviously, the purpose of Article 13 was to excuse a trustee, provided he or she had acted in good faith, from loss "occasioned" to trust property, other than loss caused by dishonesty, gross negligence or willful breach. The Damage Award was ordered to make restitution for the shortfall found to exist between the fair market value of the Big Nine shares, as found by the trial judge, and the sale price. Both Article 13 and the Damage Award, then, incorporate the notion of a causal connection between the breach of trust and the loss suffered by the Trust (and indirectly, the plaintiffs). As noted by McLachlin J. in *Canson Enterprises, supra* (quoted by Lord Browne-Wilkinson at pp. 797-8 of *Target Holdings, supra*):

> While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution *in specie* is limited to the property under the trustee's control, so equitable compensation must be limited to loss flowing from the trustee's acts in relation to the interest he undertook to protect. Thus, Davidson [in "The Equitable Remedy of Compensation' (1982) 3 *Melb ULR* 349 at 345] states "It is imperative to ascertain the loss *resulting from breach of the relevant equitable duty*." ...
>
> . . .
>
> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, *on a common sense view of causation*, were caused by the breach.' (See 85 DLR (4th) 129 at 160, 162-63; emphasis added.)

[81] In a similar vein, the House of Lords in *Target Holdings* stated:

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (see *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39 *per* Lord Blackburn). Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. [At 792; emphasis added.]

(See also *Nestle v. National Westminster Bank plc* [1994] 1 All ER 118 (C.A.) at 132 and 140 ("A breach of duty will not be actionable ... if it does not cause loss."))

[82] In this case, the Damage Award was assessed as the amount necessary to make up the "shortfall" resulting from the improvident sale – not to compensate for the 'subterfuge' found on Howard's and Eugene's parts. In respect of that breach, no financial loss was asserted by the beneficiaries or found by the trial judge. It was

the sale, not the alleged subterfuge, that the Damage Award was intended to make good. It was the sale that should have been subjected to the test of good faith by the trial judge for purposes of Article 13.

[83] Counsel drew our attention to the definition of "good faith" adopted in *Nystad v. Harcrest Apartments Ltd.* (1986) 3 B.C.L.R. (2d) 39 (S.C.), where McEachern C.J.S.C. (as he then was) stated:

> "Good faith" according to *Black's Law Dictionary*, 5th ed. (1979), has no technical meaning but is a term used "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation", or "An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious". [At para. 19.]

More recently, in *Armitage v. Nurse, supra,* Millet J. (as he then was) indicated in this context that "good faith" involves an honest belief that a course of action ought to be taken in the beneficiary's interest. (At 252.)

[84] As I read the trial judge's reasons, that is what he found in terms of Howard's intentions in carrying out the sale of the Big Nine shares. The judge rejected the "Liquidation Plan" theory and stated that Howard's decision to sell was made "because he believed it was in the best interests of the beneficiaries" – a view apparently shared by Tommy. This being the case, it seems to me that we should accept and apply the Court's statement that it would have excused Howard for the improvident sale 'but for' the subterfuge regarding Harold's position. (Indeed, Article 13 was not discretionary, as noted earlier.) I would allow Howard's appeal and declare that he is entitled to be excused from liability for the Damage Award pursuant to Article 13 of the Trust Agreement, which requires that a trustee who has acted in good faith be excused unless the loss in question was caused by his or her own dishonesty, gross negligence or wilful breach of trust. I infer that the trial judge did not find gross negligence or wilful breach of trust, nor dishonesty relating to the sale.

[85] Another error – clearly one of law – that pervaded the trial judge's reasons concerns what he (and counsel) referred to as Harold's "right to become" a trustee. In fact, Harold became a trustee, without more, on Audrey's resignation. No authority was cited for the proposition that Eugene, who renounced his own trusteeship, had a duty to "notify" Harold of anything. Howard's situation, on the other hand, was very different: there is no doubt that on his appointment by Eugene, he was under a duty to familiarize himself with the terms of the Trust and that the two trustees together were then required to act in concert. But this was a responsibility of Harold's as much as a "right", and his trusteeship was certainly not an "appointment" that lay in anyone's power to make. Viewed from this perspective, Harold's assertion that he forgot he was "entitled to become" a co-trustee is less relevant than his failure to investigate his position upon Audrey's resignation, and to object to Howard's acting alone as soon as Harold became aware in November 2002 that he was doing so. This responsibility was not discharged by Tommy's apparent and unexplained failure to read the Trust documents sent to him by Eugene on October 24.

[86] The trial judge's misapprehension of Harold's position in law was compounded in my view by his failure to consider various possibilities that were alternatives to the "subterfuge" conclusion. Notably, the Court seems to have assumed that Harold was not aware Howard was acting as a trustee and could not have been expected to find out that he was; and that Harold could not have been expected to take action long before the share sale closed in March 2004. Both of these assumptions were, with respect, incorrect.

Harold's Knowledge

[87] It appears that Audrey's resignation was signed on or about September 30, 2002 (para. 165). The trial judge did not refer to any evidence as to when Harold became aware that Audrey was unable to continue as trustee, but it is reasonable to assume that Tommy or one of Harold's children would have told Harold. The fax

machine episode took place in late October and the trial judge wrote that in early November 2002:

> Tommy wrote a number of letters to Harold enclosing various materials including the Eugene Resignation Document. He suggested that they not sign the Audrey Indemnity and should consider taking steps to void Howard's appointment as trustee, or have Lee or Tommy appointed as co-trustee as a compromise to avoid protracted legal action. He indicated that Eugene was attempting to unilaterally appoint Howard as Audrey's successor relying entirely on the revocation of July 1979. He told Harold he should read carefully the second paragraph of the Acceptance because it appeared to be in conflict with the first paragraph.
>
> In a second letter to Harold of November 6, 2002, he discussed the forestry potential at GRO. He indicated to Harold that they should "keep the forestry potential to themselves" and suggested ways of getting Eugene's family out of GRO.
>
> Harold was upset when he learned of Howard's appointment. He was angry at Howard because of assistance he had given to Susan during their divorce proceedings. He was also upset that Lee, Virginia and Davis had signed the Audrey Indemnity and Howard Indemnity. [At 181-83; emphasis added.]

[88] Harold's anger was apparent in a letter dated December 20, 2002 which he faxed to his children with a copy to Tommy. In it he recited the purposes for the establishment of the Trust, and added in a footnote:

> HAL [Harold] stands by above 1975 Purpose with every ounce of energy he has left from his and [Harold's] family B/9 interest/viewpoint. – I do not care how AEL [Eugene] ... chose to portray and/or use control of the B/9 trust against [Harold]. After way AEL/HH Hewitt did me as my power of attorney and chapter 765, F.S. Florida Health Care proxy, no way will I ever consent to AEL/Hewitt being Trustee of B/9 Trust. PERIOD.!!

[89] By this time, Harold should clearly have been asking questions about the trusteeship, and could easily have ascertained that he was a trustee. The fact he may not have had a copy of the Trust Agreement at Crying Girl does not mean he could not have contacted various people – including his local lawyer, Mr. McAdam – for the necessary information. Yet he did nothing to inform himself of his legal position or to challenge Howard's authority and was seemingly content for Tommy to represent him and his children in dealing with matters relating to the Trust. On November 5, 2002, Tommy had written to him about Big Nine and advised at para. 12:

I think we should:

a) Not sign Audrey's "blanket" indemnification. I would consider signing an appropriate indemnification i.e., "all lawful acts, no excused gross negligence, malfeasance, misfeasance, or improper wasting of corp. assets."

b) Move to either void Howard's app't or have Lee or me appointed as co-trustees as a compromise to avoid protracted legal action.

...

f) Step up the pressure on Howard as to his fiduciary duties.

...

We probably should not do all these at once, but in lock step, and not necessarily in the order above, by any means. [Emphasis added.]

(The same items had appeared in another letter in evidence dated November 2.)

[90] There is also in evidence a second letter dated November 5, 2002 from Tommy to Harold in which he stated:

> You will see that [Eugene] is attempting to unilaterally appoint Howard as Audrey's successor relying entirely on your and Gene's renouncement of July 1997 of any interest in the B-Nine trust. Read carefully the second paragraph since it seems to be in conflict with the first paragraph. I don't know where we are legally on all the questions. [Emphasis added.]

This is presumably a reference to the Revocation Letters and it is obvious that Harold had a copy – quite apart from the fact he had signed one in 1979 and would, one would have thought, have had some memory of it. Still, he did nothing.

[91] The trial judge's finding at para. 378 that Harold "did not know" he was entitled to be a trustee did not refer to any point in time. As we have seen, Harold was aware that Eugene had appointed Howard by late November 2002 – long before a possible sale of the Big Nine shares was raised. If Harold was sufficiently competent to be a trustee, he should, with respect, have been competent enough to read the Trust documents and the Revocation Letters himself or to seek legal advice concerning his own position. The trial judge gave no consideration to Harold's inaction, nor to whether it amounted to a renunciation of his trusteeship.

[92] In saying this, I am mindful of a case relied on by the plaintiffs, *Re Montagu's Settlement Trusts* [1992] 4 All E.R. 308 (Ch. D.), which involved "massive litigation" over a multi-generational family trust, and the state of knowledge of its terms (and their meaning) on the part of the tenth Duke of Manchester. Megarry V.-C. noted that the law was "not clear and something of a muddle" and declined to impute knowledge to the Duke, so as to fix him with a constructive trust over certain chattels he had received. The Vice-Chancellor also said this about "forgetfulness":

> Little was said about this in argument; but in a case in which at one time the true position was known to Mr. Lickfold, and possibly to the duke, I must say something about it. If a person once has clear and distinct knowledge of some fact, is he to be treated as knowing that fact for the rest of his life, even after he has genuinely forgotten all about it? To me, such a question almost answers itself. I suppose that there may be some remarkable beings for whom once known is never forgotten; but, apart from them, the generality of mankind probably forgets far more than is remembered. [At 329.]

[93] I regard *Montagu's* case as very different from this one: what was 'forgotten' by Harold was not an obscure legal point, but the fact he was a trustee under a trust he and his brother had established for the benefit of his children; Harold was a lawyer (unlike the tenth duke); and more than enough information had come to his attention that should have set him on a course of enquiry.

Tommy's Knowledge or Means of Knowledge

[94] It will be recalled that the trial judge dismissed the fresh evidence applications regarding the 23 pages faxed to Tommy on October 24, 2002 by Eugene. The Court accepted the submission that "the only logical inference is that the October 24 fax contained the balance of the documents sent on October 23" and that the 23 pages included the Trust Agreement and the Revocation Letters. The Court ruled, however, that this did not affect the earlier finding that "Tommy did not receive the BNT Trust Agreement until the summer of 2003" (para. 37). The judge declined to reconsider his conclusion that Howard and Eugene had "misled the plaintiffs as to Harold's right to be trustee." (2010 BCSC 871, para. 38.) In his analysis:

> ... They submit that if the evidence concerning the October 24 fax had been introduced at trial it probably would have changed the trial result.

> I do not agree with that submission. As previously discussed, the October 23 fax was considered in the context of Tommy's knowledge. That section concluded at para. 395 where I said:
>
> > I accept Tommy's evidence that he did not receive the BNT Trust Agreement until sometime in 2003 and that he did not learn until after the closing of the BNO Share Transaction that Harold had the right to be trustee. If it was otherwise, he surely would have taken action in January 2004 to prevent Howard from selling the shares. He cannot be faulted for failing to detect Howard and Eugene's subterfuge.
>
> The key disclosure was not the BNT Trust Agreement but Harold's right to be trustee. That is what Howard and Eugene did not disclose. They failed to tell Harold, Tommy or the other beneficiaries of Harold's right to be trustee. Their failures in this regard are set out in detail at paras. 396 to 411 of the judgment and are not limited to the failure to send Tommy the BNT Trust Agreement and Revocation Letters. [At paras. 38-40.]

[95] With respect, the Trust Agreement and the Revocation Letters were the only information needed to show Harold's "right to be a trustee" or more properly, Harold's position as a trustee. It is difficult to see how it can be said Eugene and Howard "concealed" this from Harold and Tommy when the latter were aware, or should have been aware, no later than November 2002 of the terms of the Trust and the Revocation Letters, which were sent by Eugene to Tommy on October 24, 2002. The trial judge had at para. 392 suggested that if they had been sent, "Tommy surely would have sent them off to Harold with the balance of the documents that he sent on November 5." The fact that Harold was a trustee would have been crystal clear from a simple reading of Article 15 of the Trust Agreement.

[96] The conclusion that Howard participated in a "subterfuge" is also difficult to square with the trial judge's findings that Howard's decision to become a trustee was "made with the best of intentions" (para. 433), that he was told by Eugene that "he and Harold had appointed him in 1979 as successor trustee" (para. 433), his lack of any personal interest in the Trust or its property, and his acting out of a sense of "family obligation". (Para. 166.) In hindsight, it is clear that Howard should not have accepted Eugene's word that he and Harold had appointed him as their successor trustee. (This of course was true only in the limited sense each had appointed Howard as his successor in the event that either was "unable to act".) Howard

testified that he telephoned Ms. Mason to see if his appointment was in order and was told "he would be the sole trustee", but Ms. Mason denied speaking to him about his appointment and had no notes of such a conversation. (Para. 168.) The trial judge disbelieved Howard on this point, even though he found that Ms. Mason told Mr. Long exactly the same thing in early 2004.

[97] At the end of the day, it must be said that the trial judge's finding of a scheme between Eugene and Howard to "conceal" what the trial judge erroneously referred to as Harold's right to become a co-trustee, rests on shaky foundations indeed. Again, there is no doubt Howard should have determined that Harold was his co-trustee and that in acting alone, Howard breached the terms of the Trust. But it is also clear from the trial judge's findings that Howard was relying on what he was told by Eugene (if not by Ms. Mason). He took on the trustee's role out of a sense of obligation, and he was found to have been acting in what he saw as the beneficiaries' best interests. There is no finding that he (as opposed to Eugene) concealed anything from Harold or his children. He told Tommy that he valued and wanted his input although, he said, "I might not take your advice, as I try to exercise my fiduciary duties to all members of the trust." (Para. 192.) He consulted with Tommy in connection with the proposed sale of the Big Nine shares (of which Harold was aware by December 2002) and there is no finding that Tommy told him of Harold's opposition to it.

[98] I am, of course, aware that we are required to extend a high degree of deference to the trial judge's findings of fact and may interfere only if such a finding has been shown to be clearly and palpably wrong. The Supreme Court of Canada has said that a "palpable" error is one that can be easily seen or known: *Housen v. Nikolaisen* 2002 SCC 33 at para. 5. The finding of a "subterfuge" in the case at bar rested on a set of inferences none of which is easily seen or known: one party to the 'subterfuge' may have been relying on misleading advice (that Harold would have to 'step up') and was under no duty to wake the sleeping dog (Harold); while the other party was under a duty to inform himself of the Trust terms but failed to do so on the advice of his friend (Eugene, a lawyer) and may well have been lulled into

the share sale by the apparent approval of Tommy, Harold's proxy. In these circumstances, it was in my opinion incumbent on the trial judge to consider whether the situation was (to borrow a term from *Montagu*'s case) a "muddle" rather than a conspiracy and whether Howard simply stumbled into his role and into the share sale, seeking in good faith to further the interests of all the beneficiaries rather than to accomplish some nefarious purpose.

[99] Given the errors of law described above, however, it is not necessary to base my conclusion that Howard's appeal should be allowed, on errors in the Court's findings of fact. I would allow Howard's appeal with respect to the payment of the Damage Award on the bases that no causal connection existed between the "subterfuge" (if one existed) and the improvident sale, and that the Court erred in failing to apply Article 13 to Howard's obligation to pay the Damage Award.

Eugene's Position

[100] On the same basis, I would also allow Eugene's appeal from the order that he was liable jointly and severally with Howard to pay the Damage Award. Again, even if one were to accept that there was a conspiracy on the part of Howard and Eugene to prevent Harold from acting as a trustee, and even if Harold was not aware that Howard was acting as trustee and that the shares were going to be sold – which is not the case – no loss to the Trust or the Trust property was shown to have resulted from the "collusion" found by the court below.

[101] In his factum, Eugene also advanced the argument that the trial judge had erred in finding that the "manner of sale" of the Big Nine shares by the Trust constituted a breach of the Trust because Howard failed to expose the property (i.e., the shares of Big Nine) to the market. Since I have already allowed Eugene's appeal from the order directing him and Howard to pay the Damage Award to the plaintiffs, it is not necessary to deal with this submission.

The Plaintiffs' Cross Appeal

[102] Howard has not appealed his liability to pay the Proceeds Award totalling $522,000, which under the terms of the main reasons was to be paid in Canadian funds to Lee, Virginia, Davis and Tommy. On their cross appeal, however, the plaintiffs submit the Award should have been made to the Trust, which they say continued and continues to exist. Thus they challenge the ruling that the proceeds were held on a bare trust in favour of the plaintiff beneficiaries once Jennifer and Julie received their shares of the proceeds. In support, the trial judge cited the following passage from Underhill and Hayton, *supra,* as follows:

> 27.2 Because a trust of property cannot exist unless there is property held on a trust, once a trust has been duly emptied of all of its assets, there is no trust .... In the case of a discretionary trust to distribute capital amongst a class of beneficiaries alive at the end of the trust period, the trust terminates once all the trust assets have been transferred by the trustee to such beneficiaries as they have selected in their discretion, a temporary bare trust arising of identified property that the trustees have decided to transfer to our particular beneficiaries but have not yet transferred to him. [At 385-6; emphasis added.]

and from Gillese and Milczynski, *The Law of Trusts* (2nd ed., 2005) the following:

> Distribution occurs when all of the trust assets have been paid out or transferred to the beneficiaries. Obviously, once distribution occurs and the required counting takes place, the trust comes to an end. A trust cannot exist without trust property. [At 85.]

[103] In the case at bar the trustees did not have a discretion to distribute the Trust property to the beneficiaries in anything other than equal shares. But it cannot be said that the "distribution" was or is completed. The plaintiff beneficiaries' share of the Big Nine sale proceeds remain notionally in the Trust. Howard, purporting to act as a sole trustee, made the decision to distribute those proceeds to the beneficiaries. Although he obviously cannot make decisions in future as the sole trustee, the order of the Court that he pay the Proceeds Award will operate to insulate him from any further challenge from the beneficiaries or settlors in this regard. Following that payment, Howard must pass his accounts in accordance with s. 99 of the *Trustee Act* and will have to ensure that all taxes are properly paid. At

that point, the Trust will cease to exist – unless it is entitled to any other property or right.

[104] I agree, then, with the plaintiffs that the Trust remains in existence, although in practice it is likely very near the end of its life. At the same time I believe it was open to the trial judge to order that the Proceeds Award be paid to the plaintiff beneficiaries directly rather than to the Trust. This case would seem to fall more clearly in the second group of cases discussed by Lord Browne-Wilkinson in *Target Holdings, supra*, rather than the first, given that no future beneficiaries can arise under the Trust. Here, in Lord Browne-Wilkinson's words, it is not the case that "the only way in which all the beneficiaries' rights can be protected is to restore to the trust what ought to be there." (At 793.) The plaintiff beneficiaries will, upon their receipt of the Proceeds Award, have received what they were entitled to receive from the Trust, just as Jennifer and Julie have done. I also note that in their written argument below, the plaintiffs purported to invoke *Saunders v. Vautier* (1841) 49 E.R. 282, *aff'd* 49 E.R. 482 and asserted that they were "absolutely entitled to terminate the Trust and direct the payment by Mr. Hewitt of the Plaintiffs' Funds either to themselves or to whom they may direct." They should not now be permitted to insist on the opposite position.

[105] Accordingly, I would not accede to the plaintiffs' first ground of cross appeal. I make no comment on the assertion that the Trust continues to include: (i) the Big Nine shares (because, the plaintiffs now assert (in other proceedings), Howard did not have the authority to convey beneficial ownership of those shares to TRL); (ii) a claim against TRL for "knowing receipt of trust property"; (iii) the sale proceeds that were paid by Howard to Jennifer and Julie (because, the plaintiffs now say, Howard did not have the power to convey the beneficial interest in those proceeds to them); and (iv) a claim against Jennifer and Julie for "improper receipt" of those proceeds. I say only that if and when these claims are tried, the court will have to consider whether having received judgment for the proceeds of the share sale, it is open to the plaintiffs to advance a claim *in rem* against other parties in respect of the shares or their proceeds.

[106] This brings us to the plaintiffs' second ground of appeal, which is that the trial judge erred in "failing to consider and then confirm Harold as a co-trustee of the Trust, to remove Howard as a co-trustee of the Trust, and to confirm the appointment of Tommy as a co-trustee of the Trust." If nothing else is clear from these proceedings, it is that the two sides of the Lewis family are unlikely, and perhaps unable, to deal with each other on a reasonable basis. The original intention of having one co-trustee from each side would clearly not work in the circumstances that now exist; nor would it be appropriate to appoint Harold or a nominee of his, to act alone. What is needed is one trustee – perhaps a professional trust company – who is untainted by any previous dealings with the parties and who is willing to make prudent decisions in the interests of the beneficiaries.

[107] I would therefore ask that counsel for Howard and counsel for the plaintiff beneficiaries attempt to identify such a trustee as soon as possible, and I would direct that in the meantime, Howard proceed with the passing of his accounts. If counsel are unable to agree on a trustee within 60 days of the date of this court's order, I would order them to make written submissions to this court, which will make the appointment.

Remaining Issues on Appeal

[108] It will be recalled that the trial judge ordered that the Proceeds Award should be paid to Tommy, Lee, Virginia and Davis in U.S. dollars. In supplementary reasons indexed as 2011 BCSC 102, the Court addressed the plaintiffs' application that the award instead be made in Canadian currency. Apparently this submission was made because as of March 3, 2004 (the date of the share sale), $396,000 U.S. was equivalent to $533,649.60 Cdn. Howard submitted on the other hand that the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155 applied. Section 1(1) thereof states:

> If, before making an order for the payment of money arising out of a claim or a loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money

> payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

[109] Writing on January 28, 2011, the trial judge noted that the question was "not a matter of little moment", since Canadian and American dollars were then trading almost at par. (The trial judge agreed with previous authority that interpreted the reference in s. 1(1) to "conversion date" to mean as of the date of payment of the judgment: see *Litecubes, L.L.C. v. Northern Lights Product, Inc.* 2009 BCSC 427 and see *Law Reform Commission of British Columbia, Report on Foreign Money Liabilities* (1983) discussed at para. 80 of the trial judge's reasons.)

[110] The judge stated that when he had made the Proceeds Award in U.S. dollars in his main reasons, he had not considered whether the plaintiffs would be "most truly and exactly compensated" if paid in American currency and he had overlooked their submissions in favour of an award in Canadian currency. As well, he said:

> ... I did not give any consideration as to whether Howard's decision to pay out in American funds should dictate the currency of the judgment or whether the *FMCA* applied. It is necessary now, however, that I do so.
>
> The BNT was a trust established in British Columbia and governed in all aspects by British Columbia law. Big Nine was a British Columbia incorporated company. Howard entered into an agreement to sell the Big Nine shares for $889,000. The Damage Award was calculated in Canadian dollars.
>
> Schedule A to the Distribution Letter set out the distribution of the proceeds in Canadian dollars and then converted that distribution to American currency based on the exchange rate as of February 12, 2004. The Schedule indicates that Jennifer's and Julie's interest were each valued at $174,000 which was then converted to $132,000 USD. Lee, Virginia and Davis's interest were each shown to be $87,000 which converted to $66,000 USD, while Tommy's interest was $261,000 which converted to $198,000 USD.
>
> The plaintiff beneficiaries did not request or seek that their interest be converted into American dollars. Although the plaintiff beneficiaries are all residents of the United States, residency does not trigger the application of the *FMCA*. If it did, then the Damage Award should also be converted to USD funds. No one has suggested that that would be appropriate.
>
> I find that plaintiff beneficiaries were entitled to receive their proportionate share of the sale of a Canadian asset in Canadian currency. Howard's decision to convert the funds into American dollars does not change that

> fundamental point or lead to the conclusion that the plaintiffs would be most truly and exactly compensated if the award is measured in USD currency. In the circumstances of this case the *FMCA* does not apply. [At paras. 85-9; emphasis added.]

[111] On appeal, Howard asserts that the trial judge here overlooked the evidence as to where the closing of the share sale occurred and the currency in which Julie and Jennifer received their shares of the proceeds; and did not consider the 'windfall' effect of the order on the plaintiff beneficiaries.

[112] Normally, the question of whether a statute applies to a given case would be a question of law, but here the question depends on whether the plaintiff beneficiaries would "be most truly and exactly compensated" if another currency were used for the Proceeds Award. I regard this as a question of mixed fact and law.

[113] As I understand it, TRL paid the purchase price for the Big Nine shares in U.S. funds. Certainly Howard forwarded cheques to Julie and Jennifer in U.S. funds. I do not read anything sinister into this fact – the children all resided in the United States and if they had received Canadian funds, would likely have made the exchange immediately to U.S. funds. More importantly for our purposes, the Trust Agreement required that the beneficiaries all be treated equally. Thus if Howard had acted properly, he would not have required an indemnity and release and would have made the payments to Tommy, Lee, Virginia and Davis in U.S. funds. The purpose of the Proceeds Award is to require him to complete the distribution and thus restore the equality of the beneficiaries' respective positions. It follows in my view that the court below erred in concluding that an award in Canadian currency would "most truly and exactly compensate" the plaintiff beneficiaries.

[114] I would allow the appeal on this point and order that the Proceeds Award be the amount of Canadian currency that is necessary to purchase the following amounts of U.S. currency at a chartered bank in British Columbia at the close of business on the conversion date:

Tommy	$198,000
Lee	66,000
Virginia	66,000
Davis	66,000

and that the Award be paid in Canadian funds to the plaintiff beneficiaries as above.

Interest

[115] The trial judge ordered that pre-judgment interest on the Proceeds Award be paid in accordance with the *Court Order Interest Act* from March 3, 2004 to the date of judgment and that post-judgment interest be paid from February 9, 2010 to August 17, 2011 in the amounts set forth in his order and thereafter, to the date of payment.

[116] In his oral argument, Mr. DeFilippi on behalf of the plaintiffs acknowledged that the question of compounding interest had not been raised directly by counsel in argument below. However, Mr. DeFilippi submitted in this court his clients are entitled to 'every possible cent' and thus seek an order that compound interest, rather than simple interest as contemplated by the Act, be paid. In this regard, counsel drew our attention to *Enbridge Gas Distribution Inc. v. Marinaccio et al.* 2012 ONCA 650, where the Court said this in the context of a fraud case:

> At para. 17 of his supplementary endorsement, the motion judge explained why he awarded compound interest:
>
> > Courts of equity have always exercised the power to award compound interest whenever a wrongdoer deprives a company of money which it uses in its business. On general principles it should be presumed that had the business not been deprived of the money, it would have made the most beneficial use of it available to it. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. [Internal citations omitted.]
>
> I agree. I would simply add that this court has consistently approved of the trial court's exercise of discretion to award compound interest for breach of fiduciary duty or breach of trust: see *Kooner v. Kooner*, 2006 CarswellOnt 5884 (C.A.), at para. 2; *Waxman v. Waxman*, 2008 ONCA 426, at para. 5; and *Brock v. Cole* (1983), 40 O.R. (2d) 97 (Ont. C.A.), at p. 103. [At paras. 56-7.]

[117] Consistent with the Ontario Court of Appeal's decision, the Supreme Court of Canada in *Air Canada v. Ontario (Liquor Control Board)* (1997) 2 S.C.R. 581 cited *Wallersteiner v. Moir (No. 2)* [1975] 1 All E.R. 849 (C.A.), in which the Court had noted that whenever a wrongdoer deprives a company of money for which it needs for use in its business, interest is awarded in Equity. The Supreme Court in *Air Canada* agreed, stating:

> The provincial liquor authorities deprived the airlines of money that they almost certainly could have used in the conduct of their business. The presumption is hardly unreasonable that if the airlines had had the money, they would have put it to good use. In short, what the airlines lost to the provincial authorities was not just money, but the future value of that money. Therefore compound interest might have been appropriate. [Para. 85.]

[118] However, because the awarding of compound interest was discretionary, the Court declined to order compound interest. Iacobucci J. explained:

> Because it cannot be said that the trial judge misdirected himself on any applicable principle of law or that his exercise of discretion was so clearly wrong as to amount to an injustice, his refusal to award punitive damages or compound interest should be allowed to stand. [Para. 86.]

The same circumstances apply here, and in addition, the trial judge below was not even asked to make an exception to the usual court order interest award. Given the result in *Air Canada*, it is not open to us now to interfere in the circumstances of this case.

Special Costs

[119] The plaintiffs assert that the trial judge erred in failing to award them special costs against Howard and Eugene. The plaintiffs cited two main reasons why special costs should have been awarded. First, Howard had acted in breach of trust in seeking to "extort" from the plaintiff beneficiaries an indemnity or relief of his duties as a trustee and had been found to be guilty of "subterfuge". The plaintiffs also alleged that Howard had intended to mislead the Court in his testimony to the effect he had been unaware that Harold "had the right to be" a co-trustee and that Howard had only assumed the office based upon Ms. Mason's advice. Overall, the

plaintiffs argued, the trial judge erred in principle "in not giving effect to the fiduciary relationship between Howard and the plaintiff beneficiaries" and instead approached the beneficiaries' claim as if it were one in tort or contract.

[120] Second, the plaintiffs contend that Howard unreasonably refused to make admissions at trial that he should have and that counsel were unresponsive to Notices to Admit a large number of documents. The trial judge stated in his reasons indexed as 2011 BCSC 102 that if the admissions had been made before trial, his job would have likely been more difficult than it was because the Court would have had "no context from any of the facts and admissions", and that the extent to which documents could be admitted for their truth in whole or in part often turned out to be a contentious question. Nevertheless, the plaintiffs argue on appeal that to give effect to Howard's reasons for his denials would emasculate R. 7-7 of the *Supreme Court Civil Rules* and run contrary to the object and purposes of the Rules as set forth in R. 1-3(1).

[121] The reasonableness or unreasonableness of responses to Notices to Admit and of counsel's conduct generally at trial is something the trial judge is uniquely positioned to assess. Counsel's arguments were considered at length in more than one set of reasons and I am not persuaded that the trial judge erred in the exercise of his discretion by applying a wrong principle or in bringing about an unjust result regarding costs.

[122] With respect to the arguments based on the "subterfuge" which the trial judge found had been engaged in by Howard and Eugene, it will be apparent from these reasons that in my view, the finding rests on shaky grounds. But even the trial judge was not convinced that the conduct he had found warranted special costs. Again, I cannot say that he erred in the exercise of his discretion on this issue.

Bullock and Sanderson Orders

[123] Finally, the plaintiffs submit that the trial judge erred in declining to make a Bullock order and a Sanderson order in respect of the special costs that they were

ordered to pay, and have paid, to Ms. Mason. The trial judge dealt with this issue beginning at para. 130 of his reasons indexed as 2011 BCSC 102. He stated in part:

> The plaintiffs acknowledge that Howard and Eugene cannot be required to reimburse them for special costs that they are ordered to pay Mason. In the course of oral argument, they submitted that if the plaintiffs were ordered to pay special costs to Mason, the Court could still make a Sanderson or Bullock order against Howard and Eugene, but limit such order to the costs that would have been payable to Mason pursuant to Scale C. The plaintiffs provided no authorities that would justify such an order. I do not believe that it is a proper order to make. In my opinion, if a party is ordered to pay special costs, that party is not entitled to seek indemnity for a portion of those costs from other parties to the litigation. Accordingly, the plaintiffs' application for a Bullock or Sanderson order is dismissed.
>
> I should note that even if I had limited Mason's costs to Scale C, I would not in the circumstances of this case have made either a Bullock or Sanderson order. [At paras. 132-33.]

[124] The Court noted that a party seeking a Bullock order must satisfy a two-part test: "It must be reasonable for the plaintiff to have sued the successful defendant and there must be something that the unsuccessful defendant did to warrant being made liable to reimburse the plaintiff for the successful defendant's costs." (Citing *Grassi v. WIC Radio Ltd.* 2001 BCCA 376). The judge stated that the bringing of the claim against Ms. Mason in conjunction with the claims against Howard and Eugene was reasonable, but that Howard and Eugene had not done anything to warrant their being made liable to reimburse the plaintiffs for Ms. Mason's costs. In his analysis:

> ...The plaintiffs acknowledge that at the time they commenced the claim against Mason there was nothing that Howard and Eugene had done to warrant the plaintiffs bringing Mason into the litigation. They submit, however, that this changed when Howard testified at his examination for discovery that Mason had told him in the fall of 2002 that he was entitled to act as the sole trustee. Mason denied this conversation and at trial I did not accept Howard's evidence that such a conversation took place.
>
> The difficulty with the plaintiffs' reliance on the alleged 2002 conversation is that that conversation did not form any part of the plaintiffs' claim against Mason. Its import in the litigation was that if I had held that Mason had so advised Howard, it might well have strengthened Howard's case that he should be exonerated under the *Trustee Act* for his breach of trust.
>
> The plaintiffs did not need to bring an action against Mason or continue their claim against her in order to challenge Howard's assertion. Regardless of whether Mason was a party at the trial, she was clearly going to be a witness.

> The question of the 2002 conversation could have been resolved in the context of her giving evidence as a witness. It did not necessitate her being a defendant in the litigation or justify the plaintiffs continuing their claim against Mason once examinations for discovery were complete.
>
> I find that there was nothing that Howard and Eugene did that warrants them being made liable to pay Mason's costs. That finding is fatal to a Bullock or a Sanderson order and I would not have made such an order even if I had limited Mason's costs to Scale C. [At paras. 135-39.]

[125] In this court, the plaintiffs contend that the alleged conversation between Howard and Ms. Mason in 2002 had much broader implications than indicated by the trial judge: if he had believed that the conversation actually took place, the plaintiffs would likely have lost their case against Howard and, the plaintiffs say, "[Ms.] Mason would have had a motive for telling '... [Mr.] Long that Howard became trustee in September 2002 upon Harold and Eugene renouncing their appointments ...'."

[126] In response, Howard submits that the alleged telephone call in 2002 was never part of the plaintiffs' case against Ms. Mason and indeed that they never accepted that it had occurred. More to the point, Ms. Mason was not required to be a defendant in order to testify as a witness as to whether it had occurred. The question of the telephone call did not necessitate an action against her, or the continuation of the action once discoveries were complete.

[127] I agree with Howard's submission on this point and see no error in the trial judge's conclusion that "there was nothing that Howard and Eugene did that warrants [their] being made liable to pay [Ms.] Mason's costs." (Para. 139.) I would dismiss the cross appeal.

Disposition

[128] In the result, I would:

- allow the appeals of Howard and Eugene and delete paras. 1 and 2 of the trial judge's Order and replace them with the following:

> In failing to inform himself of the terms of the Trust and in particular of Harold D. Lewis' position as a co-trustee with him, and in carrying out the sale of the shares in Big Nine Outfitters Ltd. on behalf of the Big Nine Trust without the agreement of Harold Lewis, Howard Hewitt failed in his obligations as a trustee;

- add to the end of para. 3 of the Order the words "by reason of his failure to expose the shares to the market or to obtain an expert evaluation of the shares;"

- declare that Howard is entitled to be exonerated pursuant to Article 13 of the Trust Agreement from his liability for the Damage Award in respect of the improvident sale of the shares and that Eugene is not liable therefor;

- delete paras. 4, 5, 6, 7 and 21 of the Order;

- revise para. 8 of the Order as indicated at para. 114 of these reasons and revise paras. 9 and 10 of the Order to refer to amounts equivalent to those stated in U.S. currency as appropriate;

- delete from para. 28 of the Order the phrase "but reconsideration is refused except that the currency of the Proceeds Award is changed from United States to Canadian dollars";

- delete paras. 36 and 39 of the Order;

- order that if counsel are unable to agree, within 60 days of this court's order, on a trustee of the Trust, they shall apply immediately to this division of the Court for an appointment to be made.

In all other respects, I would dismiss the appeals and cross appeal.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Chiasson"

I Agree:

"The Honourable Madam Justice A. MacKenzie"

Schedule A

WHEREFORE THE PLAINTIFFS, AND EACH OF THEM, CLAIM AGAINST THE DEFENDANTS, HOWARD H. HEWITT, A. EUGENE LEWIS, JENNIFER LEWIS BROWNING, AND JULIE ANNE LEWIS, AND EACH OF THEM, AS FOLLOWS:

(a) an Order that Harold be confirmed as a trustee of the Big Nine Trust;

(b) an Order that Hewitt be removed as a trustee of the Big Nine Trust;

(c) an Order that Virginia be appointed as the or a trustee of the Big Nine Trust; without security, in substitution for Hewitt;

(d) an Order that all assets, real and personal, and all other property of the Big Nine Trust be vested in Virginia, as the or a trustee;

(e) Special Costs;

(f) Such further and other relief as this Honourable Court may determine appropriate.

WHEREFORE THE PLAINTIFFS, THOMAS E. BRONSON, J. TOM BRONSON, LEE B. LEWIS, VIRGINIA L. SHAFFER AND H. DAVIS LEWIS, JR., AND EACH OF THEM, CLAIM AGAINST THE DEFENDANTS, HOWARD H. HEWITT, A. EUGENE LEWIS, MARGARET H. MASON, BULL, HOUSSER, TUPPER AND BULL, HOUSSER AND TUPPER LLP, EACH OF THEM, AS FOLLOWS:

(a) an account of the value of the Trust Property in February of 2004, or such other date as this Honourable Court may determine appropriate, and of the value of the Trust Property as at the date of trial, or such other date as this Honourable Court may determine appropriate;

(b) an account of the value of the proportionate share of beneficial interests in the Trust Property of Lee, Virginia, Davis and Tommy in February of 2004, or such other date as this Honourable Court may determine appropriate, and the value of the proportionate share or beneficial interests in the Trust Property of Lee, Virginia, Davis and Tommy as at the date of trial, or such other date as this Honourable Court may determine appropriate;

(c) an Order directing that Hewitt, Eugene, Mason, BHT and BHT LLP, and each of them, pay to Lee, Virginia, Davis and Tommy, and each of them, Equitable Compensation;

(d) in the alternative, or in addition, Damages;

(e) in the alternative, or in addition, Punitive and Exemplary Damages;

(f) in the alternative, or in addition, Aggravated Damages;

(g) an Order for the disgorgement of the benefits received by Eugene and Hewitt, and each of them, from the Big Nine Trust;

(h) an Order directing that Hewitt, Eugene, Mason, BHT and BHT LLP, and each of them, pay Interest at such rates for such periods as this Honourable Court may determine appropriate;

(i) in the alternative, Interest pursuant to the *Court Order Interest Act* (B.C.);

(j) Special Costs;

(k) Such further and other relief as this Honourable Court may determine appropriate.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bronson v. Hewitt,*
2013 BCCA 367

Date: 20131108
Dockets: CA037941; CA037947; CA038299

Docket CA037941

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis,
Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis, Sr.

Respondents
(Plaintiffs)

And

Howard H. Hewitt

Appellant
Respondent by Cross Appeal
(Defendant)

And

A. Eugene Lewis

Respondent by Cross Appeal
(Defendant)

And

Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins,
Trustee of the Graham River Trust, Graham River Outfitters Ltd.,
Margaret H. Mason, Bull, Housser & Tupper and Bull, Housser & Tupper LLP

(Defendants)

- and -

Docket: CA037947

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr.

Respondents
(Appellants by Cross Appeal)

And

A. Eugene Lewis

Appellant
(Respondent by Cross Appeal)

And

Howard H. Hewitt, Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, in his capacity as Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper, and Bull, Housser & Tupper LLP

(Defendants)

- and -

Docket: CA038299

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis, Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr.

Respondents
(Plaintiffs)

And

Howard H. Hewitt

Appellant
(Defendant)

And

A. Eugene Lewis, Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins, Trustee of the Graham River Trust, Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper, and Bull, Housser & Tupper LLP

(Defendants)

Corrected Judgment on November 8, 2013: J.G. Dives, Q.C. is Counsel for the Respondent by Cross Appeal, A.E. Lewis (Page 3); at para. 48 the citation for *Armitage v. Nurse* is corrected to read [1998] Ch. 241 (C.A.); and at para. 114, the amounts listed should be as follows:

Tommy	$198,000
Lee	$66,000
Virginia	$66,000
Davis	$66,000

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice A. MacKenzie

On Appeal from the Supreme Court of British Columbia (*Bronson v. Hewitt*)
February 8, 2010, 2010 BCSC 169 (Main Reasons)
June 21, 2010, 2010 BCSC 871
November 19, 2010, 2010 BCSC 1638
January 28, 2011, 2011 BCSC 102
April 15, 2011, 2011 BCSC 482
August 17, 2011, 2011 BCSC 1115
(Vancouver Registry L052583)

Counsel for the Appellant H. Hewitt:	W.G. MacLeod S. Field
Counsel for the Respondent by Cross Appeal, A.E. Lewis:	J.G. Dives, Q.C
Counsel for the Respondents:	R.R.E. DeFilippi C. Kim
Place and Date of Hearing:	Vancouver, British Columbia June 10, 11 & 12, 2013
Place and Date of Judgment:	Vancouver, British Columbia August 14, 2013

Corrigendum to Written Reasons by:
The Honourable Madam Justice Newbury
(Page 3; Page 30, Para. 48; Page 57, Para. 114)

Reasons for Judgment of the Honourable Madam Justice Newbury:

[129] J.G. Dives, Q.C. is Counsel for the Respondent by Cross Appeal, A.E. Lewis.

[130] The citation at para. 48 for *Armitage v. Nurse* is corrected to read [1998] Ch. 241 (C.A.).

[131] Paragraph 114 is corrected to read:

> I would allow the appeal on this point and order that the Proceeds Award be the amount of Canadian currency that is necessary to purchase the following amounts of U.S. currency at a chartered bank in British Columbia at the close of business on the conversion date:
>
> | | |
> |---|---|
> | Tommy | $198,000 |
> | Lee | 66,000 |
> | Virginia | 66,000 |
> | Davis | 66,000 |
>
> and that the Award be paid in Canadian funds to the plaintiff beneficiaries as above.

The Honourable Madam Justice Newbury

TAB 5

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 30th DAY
	)	
JUSTICE CAMPBELL	)	OF JUNE, 2010

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

D&O CLAIMS ORDER

THIS MOTION made by Grant Forest Products Inc. ("**GFPI**"), Grant Forest Products Sales Inc. and, Grant Alberta Inc., (collectively, the "**Remaining Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for *inter alia* an order substantially in the form of the draft order attached as Schedule "B" to the Notice of Motion dated June 22, 2010 approving the D&O Claims Process as set out in the draft order, including the provision

that any Claims against a Director or Officer (as those terms are defined below) not asserted in accordance with this Order by August 16, 2010 be forever extinguished, barred and released and deemed to have been fully and finally released and discharged, was heard on this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Hap Stephen sworn June 21, 2010, the fifteenth report to the Court of Ernst & Young Inc. in its capacity as court-appointed Monitor of the Remaining Applicants dated June 28, 2010 and on hearing the submissions of counsel for the Remaining Applicants, the Monitor, First Lien Lenders' Agents, the independent directors of Grant Forest Products Inc., Cyrus Capital Partners, L.P. et al., and no one else appearing although duly served as appears from the affidavit of service of Laura Bowles-Dove sworn June 22, 2010

Georgia-Pacific LLC

Service and Filing

1. **THIS COURT ORDERS** that the time for service and filing of the notice of motion and the Remaining Applicants' motion record is hereby abridged so that this motion is properly returnable today.

Claims Process

2. **THIS COURT ORDERS** that, for purposes of this Order and the D&O Claims Process, the following terms shall have the following meanings:

(a) "Applicant" means Grant Forest Products Inc., Grant Forest Products Sales Inc., Grant Alberta Inc., Grant U.S. Holdings GP, Southeast Properties LLC, Grant Clarendon LP, Grant Allendale LP, Grant US Sales Inc., Grant Newco LLC and Grant Excluded GP;

(b) "Additional Applicant" means Grant U.S. Holdings GP, Southeast Properties LLC, Grant Clarendon LP, Grant Allendale LP, Grant US Sales Inc., Grant Newco LLC and Grant Excluded GP;

(c) "Business Day" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Toronto, Ontario;

(d) "Claim" means any right or claim of any Person, whether arising by statute, at law or in equity, now or hereafter existing or hereafter arising, whether or not asserted, in connection with any indebtedness, liability, obligation, right or thing of any nature or kind whatsoever, whether or not reduced to judgment, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, foreseen or unforeseen, or arising by guarantee, surety or otherwise, and whether or not such liability is executory or anticipatory in nature, including any right of any Person to advance a claim for contribution, subrogation or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which right, claim, indebtedness, liability, obligation, right or thing is based in whole or in part on facts existing or any act or omission, transaction or dealing or other occurrence existing or taking place on or prior to the Claims Record Date and, without limitation, including any claim arising from or relating to any indebtedness, liability, obligation, right or thing of any kind of any Applicant, howsoever arising, including pursuant to the terms of, or the breach, termination, repudiation, rescission or cancellation of, any contract, arrangement or agreement or by reason of the commission of any tort, any breach of duty (including any legal, statutory, equitable or fiduciary duty), any right of ownership of or title to any property or asset, or any trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) and, in relation to any of the above, any interest that may accrue thereon for which there is an obligation to pay, and costs which such Person would be entitled to receive;

(e) "Claimant" means a Person who has asserted a D&O Claim or could have asserted a D&O Claim, but for the provisions herein concerning the Claims Bar Date;

(f) "Claims Bar Date" means 5:00 p.m. (Toronto time) on August 16, 2010;

(g) "Claim Package" means the document package to be sent by the Monitor pursuant to paragraph 5 and 6 hereof, which shall include the Instruction Letter, a Proof of Claim and such other materials that the Monitor may consider necessary or appropriate;

(h) "Court" means the Ontario Superior Court of Justice;

(i) "Claims Record Date" means July 1, 2010 other than in respect of the Additional Applicants and means May 25, 2010 in respect of the Additional Applicants;

(j) "D&O Claim" means any Claim of any Person against a Director and/or Officer of an Applicant in his or her capacity as such Director or Officer or as a fiduciary in respect of an Applicant including, without limitation, any such Claim which is indemnified by the Applicants (or any of them) pursuant to paragraph 27 of the Initial Order or paragraph 18 of the Supplemental Initial Order;

(k) "D&O Claims Process" means the process established by this Order for identifying and/or barring a D&O Claim;

(l) "Director" means anyone who was, or may be deemed to have been, a director of an Applicant;

(m) "Excluded Claims" means Claims against any of the Applicants or any Person other than a Director or an Officer in relation to a D&O Claim

(n) "Initial Order" means the order of the Honourable Justice Newbould made in these proceedings on June 25, 2009;

(o) "Instruction Letter" means the instruction letter to creditors regarding completion of a Proof of Claim, substantially in the form attached hereto as Schedule "B";

(p) "Monitor" means Ernst & Young Inc. in its capacity as court-appointed monitor of the Applicants;

(q) "Officer" means anyone who was, or may be deemed to have been, an officer of an Applicant;

(r) "Person" means any individual, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government or any agency, officer or instrumentality thereof or any other entity;

(s) "Proof of Claim" means the form to be completed and filed by a Claimant setting forth the Claimant's purported D&O Claim in accordance with paragraph 8 hereof, substantially in the form attached hereto as Schedule "C";

(t) "Public Notice" means the notice of this Claims Process to be published, posted or sent in accordance with paragraphs 3 and 4 hereof, substantially in the form of the notice attached hereto as Schedule "A";

(u) "Purchase and Sale Agreement" means the agreement of purchase and sale dated as of January 8, 2010 originally among the Applicants and GP International Acquisition III, Ltd. Georgia-Pacific LLC and GP Palmetto Holding LLC, approved by the Order of the Honourable Mr. Justice Campbell dated March 30, 2010 and as amended;

(v) "Supplemental Initial Order" means the order of the Honourable Justice Campbell made in these proceedings on March 30, 2010; and

(w) "Unasserted Claim" has the meaning ascribed thereto in paragraph 9 hereof.

Publication of Notice

3. **THIS COURT ORDERS** that the Monitor shall take all reasonable steps to cause the Public Notice to be published in each of the Globe and Mail (National Edition) and the Temiskaming Speaker and the State within seven (7) Business Days after the date hereof, or as soon as practicable thereafter.

4. **THIS COURT ORDERS** that the Monitor shall cause the Public Notice to be posted on the Monitor's website from the date of this Order until at least ten Business Days after the Claims Bar Date.

Claim Package

5. **THIS COURT ORDERS** that the Monitor shall send a copy of the Claim Package by prepaid ordinary mail (except as otherwise provided below) to each of the Persons (where applicable, addressed to the last known address of such Person as shown in the books and records of the Applicants):

(a) Listed in the accounts payable register of any Applicant as being a creditor of such Applicant as at June 25, 2009 or at any time during the period from June 25, 2009 to the applicable Claims Record Date;

(b) identified in a schedule provided by the Applicants as being an employee or independent contractor performing services for an Applicant as at June 25, 2009 or at any time during the period from June 25, 2009 to the applicable Claims Record Date;

(c) identified to the Monitor by the Applicants as having an existing or threatened litigation claim against an Applicant as at the applicable Claims Record Date;

(d) which is a governmental agency listed on Schedule "**D**" attached hereto; and

(e) included in the service list in these proceedings by electronic transmission,

and the Monitor shall be entitled to rely on schedules, records and other information provided to it by the Applicants as to the Persons entitled to receive the Public Notice and the Monitor shall have no liability with respect to its failure to send a Public Notice to any Person.

6. **THIS COURT ORDERS** that the Monitor shall send a Claim Package to:

(a) each Person who has notified the Monitor in writing before the Claims Bar Date of a potential D&O Claim; and

(b) any Person who makes a request to the Monitor for a Claim Package before the Claims Bar Date.

7. **THIS COURT ORDERS** that the Monitor shall post a copy of the Claim Package on its website from the date of this Order until at least ten Business Days after the Claims Bar Date.

Claims Bar Date

8. **THIS COURT ORDERS** that any Claimant wishing to assert a D&O Claim shall deliver a completed and signed Proof of Claim specifying such D&O Claim to the Monitor so that the Proof of Claim is received by the Monitor on or before the Claims Bar Date.

9. **THIS COURT ORDERS** that any Claimant that does not deliver a Proof of Claim completed and signed in accordance with the Instruction Letter specifying a D&O Claim to the Monitor on or before the Claims Bar Date shall be and is hereby forever barred from making or enforcing such D&O Claim against any Director or Officer and that any such D&O Claim (each, an **"Unasserted Claim"**) shall be forever extinguished, barred and released and all such Claimants shall be deemed to have fully and finally released and discharged all Unasserted Claims against each and every Director and Officer.

Determination of D&O Claims

10. **THIS COURT ORDERS** that the Monitor shall be entitled to bring a motion seeking approval of a procedure to evaluate and adjudicate whether any D&O Claims that are filed in accordance with the D&O Claims Process are indemnified by the Applicants (or any of them) pursuant to paragraph 27 of the Initial Order or paragraph 18 of the Supplemental Initial Order, which procedure shall be developed by the Monitor in consultation with the Applicants, any Directors or Officers with respect to which a D&O Claim has been asserted, any applicable insurer and their respective counsel. For greater certainty, the filing of a Proof of Claim with respect to a D&O Claim does not, absent further Order of the Court, act to perfect or otherwise replace any other steps which must by law or contract be taken to assert such D&O Claim.

11. **THIS COURT ORDERS** that any D&O Claim denominated in any currency other than Canadian dollars shall, for the purposes of the D&O Claims Process, be converted to and constitute obligations in Canadian dollars, such calculation to be done by the Monitor using the Bank of Canada noon spot rate on the applicable Claims Record Date.

12. **THIS COURT ORDERS** that the Monitor shall maintain a summary of all Proof of Claims received by it, and such shall include the name of the Claimant, the name of any Director or Officer in respect of whom the applicable D&O Claim is made, and the amount of the D&O Claim, the nature and particulars of the D&O Claim. The Monitor shall be permitted to provide copies of such summary and of the Proofs of Claim it has received to the Applicants, and copies of the Proofs of Claim to any Director or Officer in respect of whom the D&O Claim was made, and their respective counsel.

General Provisions

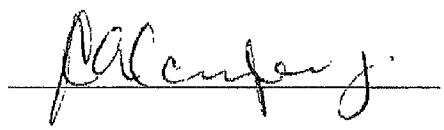
13. **THIS COURT ORDERS** that nothing in this D&O Claims Process shall prejudice or otherwise affect the rights and remedies of any Person under any existing insurance policy.

14. **THIS COURT ORDERS** that nothing in this D&O Claims Process shall affect any Excluded Claim.

15. **THIS COURT ORDERS** that the provisions of this Order concerning D&O Claims including, without limitation, the provisions concerning the Claims Bar Date and its effect, and the determinations of the Monitor, the Applicants and the Court in respect thereof, shall survive the bankruptcy of any of the Applicants, and shall be binding on any trustee in bankruptcy appointed in respect of any of the Applicants.

16. **THIS COURT ORDERS** that the Monitor and the Applicants may apply to this Court for advice and direction in connection with the discharge or variation of their respective powers and duties under or otherwise in relation to this Order.

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All court, tribunals, and regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Applicants, the Monitor, the Directors and the Officers, as may be necessary or desirable to give effect to this Order.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 30 2010

PER / PAR: JSN

SCHEDULE "A"

PUBLIC NOTICE
IN THE MATTER OF THE *COMPANIES' CREDITORS* ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

NOTICE OF CLAIMS BAR DATE FOR CLAIMS AGAINST CERTAIN PARTIES PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT ("CCAA")

NOTICE IS HEREBY GIVEN that, pursuant to an Order of the Ontario Superior Court of Justice made on June 30, 2010 (the "**D&O Claims Order**"), a claims process was approved for the identification of certain claims (collectively, the "**D&O Claims**") of any person against former directors and officers of GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (collectively, the "**Applicants**").

PLEASE TAKE NOTICE that the claims process only addresses claims against former directors and officers of the Applicants. THIS CLAIMS PROCESS DOES NOT DEAL WITH, OR REQUIRE THE FILING OF, ANY CLAIMS AGAINST ANY APPLICANT.

THE CLAIMS BAR DATE IS 5:00 P.M. (TORONTO TIME) ON **AUGUST 16, 2010**. PROOFS OF CLAIM RELATING TO D&O CLAIMS AGAINST FORMER DIRECTORS OR OFFICERS MUST BE FILED WITH THE MONITOR ON OR BEFORE THE CLAIMS BAR DATE, FAILING WHICH ALL SUCH CLAIMS WILL BE BARRED AND FOREVER EXTINGUISHED.

The Monitor will send a Claim Package to persons referenced in the D&O Claims Order in accordance with such order including each Person who has notified the Monitor of a D&O Claim or requested a Claim Package before the Claims Bar Date. Persons requiring information regarding the claims process or claim documentation may contact Ernst & Young Inc., the Court-appointed Monitor of the Applicants, Attention: Franca Mazzulla (Telephone: 1-877-533-6946, Fax: 416-943-3300, E-mail: gfp@ca.ey.com). Forms are also available on the Monitor's website at www.ey.com/ca/gfp.

SCHEDULE "B"

INSTRUCTIONS TO CREDITORS

July <>, 2010

TO: Creditors of the former directors or officers of Grant Forest Products Inc., Grant Forest Products Sales Inc., Grant Alberta Inc., Grant U.S. Holdings GP, Southeast Properties LLC, Grant Clarendon LP, Grant Allendale LP, Grant US Sales Inc., Grant Newco LLC and Grant Excluded GP (collectively, "**Grant Forest Products**")

RE: Claims against any of Grant Forests Products' directors or officers or former directors or officers, **NOTE: Claims Bar Date is August 16, 2010 at 5:00 PM (Toronto Time)**

We enclose copies of the following documents:

1. Public Notice; and

2. Blank form of Proof of Claim.

The purpose of these materials is to provide you with the information required to file a Proof of Claim in respect of any D&O Claim(s) you may have against Grant Forest Products' former directors or officers which are the subject matter of the Order of the Ontario Superior Court of Justice dated June 30, 2010 (the "**D&O Claims Order**").

PROVIDING A PROOF OF CLAIM

NOTE: THIS FORM IS NOT TO BE USED TO ASSERT A CLAIM AGAINST GRANT FOREST PRODUCTS. IT IS ONLY TO BE USED IF YOU HAVE A CLAIM AGAINST A FORMER DIRECTOR OR OFFICER OF GRANT FOREST PRODUCTS.

Please review all the enclosed documents carefully.

If you have a D&O Claim against any of Grant Forest Products' former directors or officers, you must complete, sign and provide to the Monitor, so that it is received by the Monitor on or before the Claim Bar Date, a Proof of Claim with respect to such D&O Claim. Otherwise such D&O Claim against any of Grant Forest Products' former directors or officers will be forever barred.

When submitting a Proof of Claim, you must attach any documents that support the D&O Claim and provide a description of the basis for the D&O Claim.

A completed and signed Proof of Claim may be provided to the Monitor by mail, corrier, fax or email (by attached pdf) at the following address, fax number or email address.

FURTHER INFORMATION

If you have any questions regarding the process or any of the enclosed forms, please contact Ernst & Young Inc. at the following address:

ERNST & YOUNG INC.
Monitor of Grant Forest Products Inc. et al.
P.O. Box 251
Ernst & Young Tower
Toronto, Ontario M5K 1J7
Canada
Attention: Franca Mazzula
Telephone: 1-877-533-6946
Fax: 416-943-3300
Email: gfp@ca.ey.com

You can view copies of documents relating to this process on the Monitor's website – www.ey.com/ca/gfp

Sincerely,
ERNST & YOUNG INC. in its capacity
as court-appointed Monitor of Grant Forest
Products Inc. et al.

SCHEDULE "C"

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

PROOF OF CLAIM AGAINST DIRECTOR(S)/OFFICER(S)

NOTE: THIS FORM IS NOT TO BE USED TO ASSERT A CLAIM AGAINST GRANT FOREST PRODUCTS INC OR ANY OF THE OTHER APPLICANTS. IT IS ONLY TO BE USED IF YOU HAVE A CLAIM AGAINST A FORMER DIRECTOR OR OFFICER OF GRANT FOREST PRODUCTS INC OR ANY OF THE OTHER APPLICANTS.

Instructions: Please complete, sign and send to the Monitor a separate Proof of Claim for each Claim.

A. DETAILS OF CREDITOR:

(1) Full Legal Name of Creditor: _____

(2) Full Mailing Address of Creditor: _____

_____

_____

_____

_____

(3) Telephone Number of Creditor: _____

(4) Facsimile Number of Creditor: _____

(5) E-mail Address of Creditor: _____

(6) Attention (Contact Person): _____

_____

_____

_____

B. CLAIM:

I, _____, [name of Creditor or authorized representative of the Creditor], do hereby certify that:

(a) I am making [or I hold the position of _____ with _____ which is making] a D & O Claim against one or more of the former directors or officers of an Applicant and have knowledge of all the circumstances connected with the D&O Claim described herein.

(b) The Creditor makes the following Claim against one or more of the former directors or officers of:

GRANT FOREST PRODUCTS INC. ☐

GRANT FOREST PRODUCTS SALES INC ☐

GRANT ALBERTA INC ☐

GRANT U.S. HOLDINGS GP	☐
SOUTHEAST PROPERTIES LLC	☐
GRANT CLARENDON LP	☐
GRANT ALLENDALE LP	☐
GRANT US SALES INC.	☐
GRANT NEWCO LLC	☐
GRANT EXCLUDED GP	☐

Names of Director(s) and/or Officer(s) in respect of whom a D&O Claim is being filed:

_____

Amount of D&O Claim: $ (Cdn.)

C. DETAILS OF CLAIM:

The details of the undersigned's Claim or Claims are attached.

Provide full particulars of the Claim or Claims for which you are delivering this Proof of Claim with copies of all supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to each Claim, the former director or officer against whom the Claim is made, copies of any applicable documentation, particulars of all credits, etc. claimed, and whether a Claim is a contingent claim.

D. DETAILS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:

(1)	Have you acquired this Claim by Assignment or Transfer? (if yes, attach copies of documents evidencing assignment or transfer)	Yes ☐ No ☐
(2)	Is the Assignment or Transfer absolute or intended as security?	Absolute ☐ Intended as security ☐
(3)	Full Legal Name of original Creditor(s):	_____

E. EXCHANGE RATE INFORMATION:

Claims in a foreign currency are to be converted to Canadian dollars at the Bank of Canada noon rate of exchange as at the applicable Claims Record Date.

This Proof of Claim must be provided to and received by the Monitor on or before **AUGUST 16, 2010**, the Claims Bar Date, at the following address:

ERNST & YOUNG INC.
Monitor of Grant Forest Products Inc. et al.
P.O. Box 251
Ernst & Young Tower
Toronto, Ontario M5K 1J7
Canada
Attention: Franca Mazzulla
Telephone: 1-877-533-6946
Fax: 416-943-3300
Email: gfp@ca.ey.com

DATED this day of , 2010.

(Print name of Creditor or, if the Creditor is a corporation, the name of the Creditor and the name of the authorized signing officer of the corporation)

(Signature of Creditor or, if the Creditor is a corporation, the signature of the authorized signing officer of the corporation)

Schedule "D"
List of Governmental Agencies

Government Payments Lists with Addresses

ALBERTA FOREST PRODUCTS ASSOCIATION
#200, 11738 KINGSWAY AVENUE
EDMONTON AB
T5G 0X5

ALBERTA HEALTH AND WELLNESS
P.O. BOX 2411, STN.M
CALGARY ON
T2P 4B4
CA

ALBERTA RESEARCH COUNCIL
250 KARL CLARK ROAD
EDMONTON AB
T6N 1E4
BRUCE MALLAS
Telephone: (780) 450-5111
Facsimile: (780) 450-5333
E-mail: arc_finance@arc.ab.ca

ALBERTA RESEARCH COUNCIL
250 KARL CLARK ROAD
EDMONTON AB
T6N 1E4
Telephone: (780) 450-5111
Facsimile: (780) 450-5333

ARIZONA DEPARTMENT OF REVENUE
P.O. BOX 29079
PHOENIX AZ
85038
Telephone: (800) 352-4090

ARIZONA HIGHWAYS
P.O. BOX 6077
PHOENIX AR
85005 6077 US
Telephone: (800) 543-5432

ARIZONA PUBLIC SERVICE (APS)
BOX 2907
PHOENIX AZ
85062-2907
Telephone: (602) 371-7171

ARIZONA SYSTEMS DESIGN & DEVELOPMENT
BOX 10375
PHOENIX AZ
85064

ARIZONA SYSTEMS DESIGN & DEVELOPMENT
BOX 10375
PHOENIX AZ
85064 US

CANADA BORDER SERVICES AGENCY
P.O. BOX 126
ZIMMERMAN AVENUE
NIAGARA FALLS ON
L2E6T1

CANADA CUSTOMS AND REVENUE AGENCY TAX CENTRE
P.O. BOX 6000 STN MAIN
SHAWINIGAN-SUD QU
G9N 7W2

CANADA CUSTOMS AND REVENUE AGENCY
TECHNOLOGY CENTRE
875 HERON RD
OTTAWA, ON
K1A 1B1

CANADA REVENUE AGENCY
275 POPE ROAD SUITE 103
SUMMERSIDE, PE
C1N 6A2

CANADIAN ENVIRONMENTAL REGULATION & COMPLIANCE NEWS
131 BLOOR ST. WEST
STE. 200-206
TORONTO, ON
M5S 1R8

CANADIAN STANDARDS ASSOC.
P.O. BOX 1924
POSTAL STATION A
TORONTO, ON
M5W 1W9
178 Rexdale Boulevard
TORONTO, ON
M9W 1R3
Telephone: (416) 747-4044
Facsimile: (416) 747-2475

CSA GROUP
P.O. BOX 1924
POSTAL STATION A
TORONTO, ON
M5W 1W9
Telephone: (416) 747-4000
Facsimile: (416) 747-4149

DELAWARE RIVER & BAY AUTHORITY
P.O. BOX 568
WILMINGTON, DE
19899
Telephone: (302) 571-6322
Facsimile: (302) 571-6367

DELAWARE SECRETARY OF STATE
PO BOX 11728
NEWARK, NJ
07101-4728
401 FEDERAL STREET
SUITE 4
DOVER, DE
19901

DELAWARE SECRETARY OF STATE
PO BOX 11728
NEWARK, NJ
07101-4728

DELAWARE SECRETARY OF STATE
REGISTERED AGENT 9000014
CORPORATION SERVICE COMPANY
2711 DENTERVILLE ROAD
SUITE 400
WILMINGTON, DE
19808

GEORGIA DEPARTMENT OF REVENUE CORPORATE TAX DIVISION
1800 CENTURY BLVD. N.E.
#8107
ATLANTA, GA
30345
US

INDUSTRY CANADA
INDUSTRY CANADA ALS FINANCIAL CENTRE
POSTAL STATION D, BOX 2330
OTTAWA, ON
K1P 6K1

SPECTRUM MANAGEMENT
421 BAY ST., P.O. BOX 727
SAULT STE. MARIE, ON
P6A 5N3

KENTUCKY STATE TREASUREY
1050 US HIGHWAY 127 SOUTH, SUITE 100
FRANKFORT, KENTUCKY
40601

MASSACHUSETTS DEPARTMENT OF REVENUE
PO BOX 9557
BOSTON, MA
02114-9557

MINISTER OF FINANCE
P.O. BOX 62033 KING STREET WEST
OSHAWA, ON
L1H 8E9
Attention: MINISTER OF FINANCE REVENUE OPER PST

MINISTER OF FINANCE
C/O MOE - ENVIRONMENTAL ASSESSMENT AND APPROVAL BRANCH
2 ST/CLAIR AVE, WEST #12-A
TORONTO, ON
M4V 1L5

MINISTER OF FINANCE
MOTOR FUELS AND TOBACCO TAX BRANCH
P.O. BOX 62033 KING STREET WEST
OSHAWA, ON
L1H 8E9

MINISTER OF FINANCE ONTARIO
MINISTRY OF THE ENVIRONMENT
ENVIRONMENTAL MONITORING & REPORTING
AREA M
135 ST. CLAIR AVENUE WEST
TORONTO, ON
M4V 1P5

MINISTER OF FINANCE
MINISTRY OF TRANSPORTATION
704024 ROCKLEY ROAD
NEW LISKEARD, ON
P0J 1P0
Telephone: (705) 647-6761
Facsimile: (705) 647-4571

MINISTER OF FINANCE
MINISTRY OF LABOUR PUBLICATIONS
400 UNIVERSITY AVENUE, 7TH FLOOR
TORONTO, ON
M7A 1T7

MINISTER OF FINANCE
C/O MINISTRY OF NATURAL RESOURCES
P.O. BOX 3090, HWY 101EAST
SOUTH PORCUPINE, ON
P0H 1H0

MINISTER OF FINANCE
777 BAY STREET
3RD FLOOR
TORONTO, ON
M5G 2E5
Attention: MINISTRY OF MUNICIPAL AFFAIRS & HOUSING

MINISTER OF FINANCE
C/O MINISTRY OF ATTORNEY GENERAL
720 BAY ST., 3RD FLOOR
TORONTO, ON
M5G 2K1

MINISTER OF FINANCE
MINISTRY OF TRANSPORTATION
COCHRANE OFFICE, 50 3RD AVENUE
COCHRANE, ON
P0L 1C0

MINISTER OF FINANCE
MINISTRY OF NATURAL RESOURCES
3301 TROUT LAKE ROAD
NORTH BAY, ON
P1A 4L7

MINISTER OF FINANCE
TAX AND REVENUE ADMINISTRATION
9811 109 STREET
EDMONTON, AB
T5K 2L5
CA

MINISTER OF FINANCE
P.O. BOX 521
VERNER, ON
P0H 2M0
Attention: ONTARIO MINISTRY OF AGRICULTURE AND FOOD

MINISTER OF FINANCE TAX AND REVENUE ADMINISTRATION
9811 109 STREET
EDMONTON, AB
T5K 2L5
CA

MINISTER OF FINANCE (MNR)
PO BOX 7000
5TH FLOOR SOUTH, SOUTH TOWER
300 WATER STREET
PETERBOROUGH, ON
K9J 8M5
Attention: LOUISE MCWHIRTER, LAND MANAGEMENT
Telephone: (800) 667-1940

MINISTER OF FINANCE/MTO
1201 WILSON AVE., E BLDG.
DOWNSVIEW, ON
M3M 1J8

MINISTER OF FINANCE/MTO
301 ST PAUL ST
3RD FLOOR, M.V.I.S. UNIT
ST CATHERINES, ON
L2R 7R4
Telephone: (800) 387-7736

MINISTERE DU REVENUE QUEBEC
CENTRE DE PERCEPTION FISCALE
1600 RENE-LEVESQUE OUEST
SECTEUR R42CPF, 3 ETAGE
MONTREAL, QC
M3H 2V2

MINISTRELLI BUILDERS LLC
11969 TULLYMORE DRIVE
STANWOOD, MI
49346
US

MINISTRY OF FINANCE
OTTAWA REGIONAL TAX OFFICE
COLLECTION DEPARTMENT
1400 BLAIR PLACE
OTTAWA, ON
K1J 9B8

MINISTRY OF FINANCE
MINISTRY OF TRANSPORTATION
COCHRANE AREA OFFICE
74 2ND STREET, BOX 5000
COCHRANE, ON
P0L 1C0

MINISTRY OF NATURAL RESOURCE
SERVICE MANAGEMENT SECTION
P.O. BOX 8000
300 WATER STREET, 3RD FLOOR NORTH
PETERBOROUGH, ON
K9J 8N7

ONTARIO MINISTER OF FINANCE
MINISTRY OF FINANCE
CORPORATION TAX BRANCH.
BOX 642, 33 KING ST. W.
OSHAWA, ON
L1H 8T1

ONTARIO MINISTER OF FINANCE
MINISTER OF FINANCE CORPORATIONS TAX
BOX 620, 33 KING STREET WEST
OSHAWA, ON
L1H 8E9

ONTARIO MINISTER OF FINANCE
MINISTRY OF THE ENVIRONMENT
ENVIRONMENTAL ASSESSMENT & APPROVALS
2 ST. CLAIR AVE. WEST, FLOOR 12A
TORONTO, ON
M4V 1L5

ONTARIO MINISTER OF FINANCE
MINISTER OF THE ENVIRONMENT
2 ST. CLAIR AVE. WEST FLOOR 12A
TORONTO, ON
M4V 1L5
Attention: PERMIT TO TAKE WATER; DIRECTOR, ENV

REVENUE SERVICES OF BRITISH COLUMBIA
PO BOX 9085 STN PROV GOVT
VICTORIA, BC
V8W 9E4

SECRETARY OF STATE
ENTITY CONTROL NO. 0514430
ANNUAL REGISTRATION FILINGS
P.O. BOX 23038
COLUMBUS, GA
31902-3038

STATE OF MICHIGAN
MICHIGAN DEPT. OF TREASURY
AUSTIN BUILDING
430 W. ALLEGAN STREET
LANSING, MI
48922
US

STATE OF MICHIGAN WITHHOLDING
MICHIGAN DEPT. OF TREASURY
DEPARTMENT 77889
DETROIT, MI
48277-0889

TENNESSEE DEPARTMENT OF REVENUE
ANDREW JACKSON BUILDING
5000 DEADERICK ST.
NASHVILLE, TN 37242

TREASURER OF ALBERTA
SIR FREDERICK W. HAULTAIN BLDG.
9811-109 STREET
EDMONTON, AB
T5K 2L5

TREASURER OF STATE OF OHIO
OHIO DEPARTMENT OF TAXATION
P.O. BOX 27
COLUMBUS, OH
43216-0027
US

TREASURER OF STATE OF OHIO
OHIO DEPARTMENT OF TAXATION
COMMERCIAL ACTIVITY DIVISION
30E. BROAD STREET, 19TH FLOOR
COLUMBUS, OH
43215

TREASURER OF STATE OF OHIO
OHIO DEPARTMENT OF TAXATION
COMMERCIAL ACTIVITY DIVISION
30E. BROAD STREET, 19TH FLOOR
COLUMBUS, OH
43215

TREASURER STATE OF TENNESSEE
C/O DEPT. OF ENVIRONMENT AND CONS.
540 MCCALLIE AVE, SUITE 550
CHATTANOOGA, TN
37402

U.S. CUSTOMS & BORDER PROTECTION
P.O BOX 70946
CHARLOTTE, NC
28272

USDA, APHIS,AQI
P.O. BOX 979044
ST.LOUIS, MO
63197-900

WORKERS HEALTH & SAFETY CENTRE
1780 REGENT STREET SOUTH
TIME SQUARE MALL
SUDBURY, ON
P3E 3Z8
Telephone: (705) 522-8200
Facsimile: (705) 522-8957

WORKER'S HEALTH & SAFETY CENTRE
15 GERVAIS DRIVE SUITE 802
DON MILLS, ON
M3C 1Y8
Telephone: (416) 441-1939

WORKPLACE SAFETY & INSURANCE BOARD
P.O. BOX 4115
STATION A
TORONTO, ON
M5W 2V3

WORKPLACE SAFETY AND INSURANCE BOARD
ACCOUNT 4711-062901
POLICY PUBLICATIONS
200 FRONT STREET WEST, 18 FLOOR
TORONTO, ON
M5V 3J1

WORKPLACE SAFETY AND INSURANCE BOARD
33 CEDAR STREET
SUDBURY, ON
P3E 1A4
Attention: VIVIAN GAUTHIER

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

D&O CLAIMS ORDER
(June 30, 2010)

FRASER MILNER CASGRAIN LLP
1 First Canadian Place
100 King Street West,
Toronto, Ontario M5X 1B2

Lawyer: Daniel R. Dowdall /
Jane O. Dietrich
LSUC: 16737D / 49302U
Email: daniel.dowdall@fmc-law.com /
jane.dietrich@fmcolaw.com /

Telephone: 416 863-4700 / 416 863-4467

Facsimile: 416-863-4592

Lawyers for Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

30 JUNE 2010

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

and

THE TORONTO-DOMINION BANK, in its capacity as agent for secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security (the "Respondents")

June 30/10.

Hearing read the motion record & heard from Counsel for the applicants the monitor & Agents Counsel & am satisfied that the orders sought be issued as signed

1. Approval + Vesting order
2. CRO Appointment
3. DIP Charge order.

all as unopposed.—

The 15th ~~Quarterly~~ Report to be sealed with respect to Take Charge until closing

Campbell J.

8523207_2.DOC

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

MOTION RECORD
(Returnable June 30, 2010)

FRASER MILNER CASGRAIN LLP
1 First Canadian Place
100 King Street West
Toronto, Ontario M5X 1B2

Lawyer: Daniel R. Dowdall / Jane O. Dietrich
LSUC: 16737D / 49302U
Email: daniel.dowdall@fmc-law.com / jane.dietrich@fmcolaw.com

Telephone: 416 863-4700 / 416 863-4467
Facsimile: 416-863-4592

Lawyers for the Applicants Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

TAB 6

Court File No. 31-2084381
Estate No. 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THURSDAY, THE 11th
	)	
JUSTICE NEWBOULD	)	DAY OF AUGUST, 2016

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

ORDER
(D&O Claims Procedure)

THIS MOTION made by KSV Kofman Inc. (the "**Trustee**"), in its capacity as Trustee in Bankruptcy of Danier Leather Inc. (the "**Debtor**"), for an order establishing a claims procedure for the identification and determination of certain claims against the former directors and officers of the Debtor was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Third Report of the Trustee dated July 26, 2016, and the appendices thereto, and on hearing the submissions of counsel for the Trustee and counsel for the Directors and Officers (each as defined below), and on being advised that all persons on the service list were served with the materials filed in connection with this motion as appears from the affidavit of service, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS AND INTERPRETATION

2. The following terms shall have the following meanings ascribed thereto:

(a) "Bankruptcy Proceedings" means the proceedings in the Court under Court File No. 31-2084381;

(b) "BIA" means the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended;

(c) "Business Day" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Toronto, Ontario;

(d) "Claim" means any right or claim of any Person that may be asserted or made in whole or in part against the Debtor, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA;

(e) "Claimant" means any Person having a D&O Claim and includes the transferee or assignee of a D&O Claim transferred and recognized as a Claimant in accordance with paragraphs 26 and 27 hereof or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

(f) "Claimants' Guide to Completing the D&O Proof of Claim" means the guide to completing the D&O Proof of Claim form, in substantially the form attached as Schedule "E" hereto;

(g) "Claims Bar Date" means September 12, 2016;

(h) "Court" means the Ontario Superior Court of Justice (Commercial List);

(i) "D&O Claim" means (i) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers that relates to a Claim for which such Directors or Officers are by law liable to pay in their capacity as Directors or Officers, or (ii) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers, in that capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof, is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity from any such Directors or Officers or

otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, and any interest accrued thereon or costs payable in respect thereof;

(j) "D&O Proof of Claim" means the proof of claim in substantially the form attached as Schedule "D" hereto to be completed and filed by a Person setting forth its purported D&O Claim and which shall include all supporting documentation in respect of such purported D&O Claim;

(k) "D&O Proof of Claim Document Package" means a document package that includes a copy of the Notice to Claimants, the D&O Proof of Claim form, the Claimants' Guide to Completing the D&O Proof of Claim form, and such other materials as the Trustee may consider appropriate or desirable;

(l) "Directors" means anyone who was, or may be deemed to have been, whether by statute, operation of law or otherwise, a director or *de facto* director of the Debtor;

(m) "Dispute Notice" means a written notice to the Trustee, in substantially the form attached as Schedule "B" hereto, delivered to the Trustee by a Person who has received a Notice of Revision or Disallowance, of its intention to dispute such Notice of Revision or Disallowance;

(n) "Filing Date" means March 21, 2016;

(o) "Government Authority" means a federal, provincial, territorial, municipal or other government or government department, agency or authority (including a court of law) having jurisdiction over the Applicant;

(p) "Notice of Revision or Disallowance" means a notice, in substantially the form attached as Schedule "A" hereto, advising a Person that the Trustee has revised or disallowed all or part of such Person's purported D&O Claim set out in such Person's D&O Proof of Claim;

(q) "Notice to Claimants" means the notice to Claimants for publication in substantially the form attached as Schedule "C" hereto;

(r) "Officers" means anyone who was, or may be deemed to have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of the Debtor;

(s) "Person" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Government Authority or any agency, regulatory body, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status, and whether acting on their own or in a representative capacity;

(t) "Proven Claim" means the amount of a D&O Claim of a Claimant as determined in accordance with this Order;

(u) "Service List" means the service list in the Bankruptcy Proceedings posted on the Trustee's Website, as amended from time to time; and

(v) "Trustee's Website" has the meaning set forth in paragraph 12(a) of this Order.

3. THIS COURT ORDERS that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

4. THIS COURT ORDERS that all references to the word "including" shall mean "including without limitation".

5. THIS COURT ORDERS that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

GENERAL PROVISIONS

6. THIS COURT ORDERS that the Trustee is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may, where it is satisfied that a D&O Claim has been adequately proven, waive strict compliance with the requirements of this Order as to completion

and execution of such forms and to request any further documentation from a Person that the Trustee may require in order to enable it to determine the validity of a D&O Claim.

7. THIS COURT ORDERS that if any purported D&O Claim arose in a currency other than Canadian dollars, then the Person making the purported D&O Claim shall complete its D&O Proof of Claim indicating the amount of the purported D&O Claim in such currency, rather than in Canadian dollars or any other currency. The Trustee shall subsequently calculate the amount of such purported D&O Claim in Canadian Dollars on the Filing Date.

8. THIS COURT ORDERS that a Person making a purported D&O Claim shall complete its D&O Proof of Claim indicating the amount of the purported D&O Claim without including any interest and penalties that would otherwise accrue after the Filing Date.

9. THIS COURT ORDERS that the form and substance of each of the Notice of Revision or Disallowance, Dispute Notice, Notice to Claimants, the D&O Proof of Claim, and the Claimants' Guide to Completing the D&O Proof of Claim, substantially in the forms attached as Schedules "A", "B", "C", "D", and "E", respectively to this Order are hereby approved. Notwithstanding the foregoing, the Trustee may from time to time make minor non-substantive changes to such forms as the Trustee considers necessary or advisable.

TRUSTEE'S ROLE

10. THIS COURT ORDERS that the Trustee, in addition to its prescribed rights, duties, responsibilities and obligations under the BIA, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order or incidental thereto.

11. THIS COURT ORDERS that (i) in carrying out the terms of this Order, the Trustee shall have all of the protections given to it by the BIA and this Order, or as an officer of the Court, including the stay of proceedings in its favour, (ii) the Trustee shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, (iii) the Trustee shall be entitled to rely on the books, records and information of the Debtor without independent investigation, and (iv) the Trustee shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

NOTICE TO CLAIMANTS

12. THIS COURT ORDERS that:

(a) the Trustee shall no later than five (5) Business Days following the making of this Order, post a copy of the Proof of Claim Document Package on its website at http://ksvadvisory.com/insolvency-cases-2/danier-leather-inc/ (the "**Trustee's Website**");

(b) the Trustee shall no later than five (5) Business Days following the making of this Order, cause the Notice to Claimants to be published in The Globe and Mail newspaper (National Edition) on one such day;

(c) the Trustee shall, provided such request is received by the Trustee prior to the Claims Bar Date, deliver as soon as reasonably possible following receipt of a request therefor, a copy of the Proof of Claim Document Package to any Person requesting such material; and

(d) the Trustee shall send to any Director or Officer named in a D&O Proof of Claim received by the Claims Bar Date a copy of such D&O Proof of Claim as soon as practicable, with a copy to counsel for the Directors and Officers.

13. THIS COURT ORDERS that, except as otherwise set out in this Order or other orders of the Court, the Trustee is not under any obligation to send notice to any Person holding a D&O Claim, and without limitation, the Trustee shall have not have any obligation to send notice to any Person having a security interest in a D&O Claim (including the holder of a security interest created by way of a pledge or a security interest created by way of an assignment of a D&O Claim), and all Persons shall be bound by any notices published pursuant to paragraphs 12(a) and 12(b) of this Order regardless of whether or not they received actual notice, and any steps taken in respect of any D&O Claim in accordance with this Order.

14. THIS COURT ORDERS that the delivery of a D&O Proof of Claim by the Trustee to a Person shall not constitute an admission by the Trustee of any liability of any Director of Officer to any Person.

CLAIMS BAR DATE

15. THIS COURT ORDERS that D&O Proofs of Claim shall be filed with the Trustee on or before the Claims Bar Date. For the avoidance of doubt, a D&O Proof of Claim must be filed in respect of every D&O Claim, regardless of whether or not a legal proceeding in respect of a D&O Claim has been commenced.

16. THIS COURT ORDERS that any Person that does not file a D&O Proof of Claim as provided for herein such that the D&O Proof of Claim is received by the Trustee on or before the Claims Bar Date (a) shall be and is hereby forever barred from making or enforcing such D&O Claim against any Directors or Officers, and all such D&O Claims shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such D&O Claim as against any other Person who could claim contribution or indemnity from any Directors or Officers; (c) shall not be entitled to receive any distribution in respect of such D&O Claim; and (d) shall not be entitled to any further notice in the BIA Proceedings in respect of such D&O Claim.

D&O PROOFS OF CLAIM

17. THIS COURT ORDERS that each Person shall include any and all D&O Claims it asserts against one or more Directors or Officers in a single D&O Proof of Claim, provided however that where a Person has taken assignment or transfer of a purported D&O Claim after the Filing Date, that Person shall file a separate D&O Proof of Claim for each such assigned or transferred purported D&O Claim.

REVIEW OF PROOFS OF CLAIM

18. THIS COURT ORDERS that the Trustee (in consultation with the Directors and Officers named in the D&O Proof of Claim and their counsel), shall review all D&O Proofs of Claim filed, and at any time:

(a) may request additional information from a purported Claimant;

(b) may request that a purported Claimant file a revised D&O Proof of Claim;

(c) may attempt to resolve and settle any issue arising in a D&O Proof of Claim or in respect of a purported D&O Claim, provided that if a Director or Officer disputes all or any portion of a purported D&O Claim, then the disputed portion of such purported D&O Claim may not be resolved or settled without such Director or Officer's consent or further order of the Court;

(d) may accept (in whole or in part) the amount of any D&O Claim, provided that if a Director or Officer disputes all or any portion of a purported D&O Claim against such Director or Officer, then the disputed portion of such purported D&O Claim may not be accepted without such Director or Officer's consent or further order of the Court; and

(e) may by notice in writing revise or disallow (in whole or in part) the amount of any purported D&O Claim.

19. THIS COURT ORDERS that where a D&O Claim has been accepted by the Trustee in accordance with this Order, such D&O Claim shall constitute such Claimant's Proven Claim. The acceptance of any D&O Claim or other determination of same in accordance with this Order, in full or in part, shall not constitute an admission of any fact, thing, liability, or quantum or status of any claim by any Person, save and except in the context of the BIA Proceedings.

20. THIS COURT ORDERS that where a purported D&O Claim is revised or disallowed (in whole or in part), the Trustee shall deliver to the purported Claimant a Notice of Revision or Disallowance, attaching the form of Dispute Notice.

21. THIS COURT ORDERS that where a purported D&O Claim has been revised or disallowed (in whole or in part), the revised or disallowed purported D&O Claim (or revised or disallowed portion thereof) shall not be a Proven Claim until determined otherwise in accordance with the procedures set out in this Order or as otherwise ordered by the Court.

DISPUTE NOTICE

22. THIS COURT ORDERS that a purported Claimant who intends to dispute a Notice of Revision or Disallowance shall file a Dispute Notice with the Trustee as soon as reasonably

possible but in any event such that such Dispute Notice shall be received by the Trustee on the day that is ten (10) Business Days after such purported Claimant is deemed to have received the Notice of Revision or Disallowance in accordance with paragraph 30 of this Order. The filing of a Dispute Notice with the Trustee within the period specified in this paragraph shall constitute an application to have the amount of such claim determined as set out in paragraph 25 of this Order.

23. THIS COURT ORDERS that where a purported Claimant that receives a Notice of Revision or Disallowance fails to file a Dispute Notice with the Trustee within the time period provided therefor in this Order, the amount of such purported Claimant's purported D&O Claim shall be deemed to be as set out in the Notice of Revision or Disallowance and such amount, if any, shall constitute such purported Claimant's Proven Claim, and the balance of such purported Claimant's purported D&O Claim shall be forever barred and extinguished.

RESOLUTION OF D&O CLAIMS

24. THIS COURT ORDERS that as soon as practicable after the delivery of the Dispute Notice to the Trustee, the Trustee , in accordance with paragraph 18(c), shall attempt to resolve and settle the purported D&O Claim with the purported Claimant.

25. THIS COURT ORDERS that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Trustee and the applicable Claimant, the Trustee shall seek a motion to have the dispute resolved by the Court.

NOTICE OF TRANSFEREES

26. THIS COURT ORDERS that Trustee shall not be obligated to send notice to or otherwise deal with a transferee or assignee of a D&O Claim as the Claimant in respect thereof unless and until (i) actual written notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received by the Trustee, and (ii) the Trustee shall have acknowledged in writing such transfer or assignment, and thereafter such transferee or assignee shall for all purposes hereof constitute the "Claimant" in respect of such D&O Claim. Any such transferee or assignee of a D&O Claim, and such D&O Claim shall be bound by all notices given or steps taken in respect of such D&O Claim in accordance with this Order prior to the written acknowledgement by the Trustee of such transfer or assignment.

27. THIS COURT ORDERS that if the holder of a D&O Claim has transferred or assigned the whole of such D&O Claim to more than one Person or part of such D&O Claim to another Person or Persons, such transfer or assignment shall not create a separate D&O Claim and such D&O Claim shall continue to constitute and be dealt with as a single D&O Claim notwithstanding such transfer or assignment, and the Trustee shall in each such case not be bound to acknowledge or recognize any such transfer or assignment and shall be entitled to send notice to and to otherwise deal with such D&O Claim only as a whole and then only to and with the Person last holding such D&O Claim in whole as the Claimant in respect of such D&O Claim. Provided that a transfer or assignment of the D&O Claim has taken place in accordance with paragraph 26 of this Order and the Trustee has acknowledged in writing such transfer or assignment, the Person last holding such D&O Claim in whole as the Claimant in respect of such D&O Claim may by notice in writing to the Trustee direct that subsequent dealings in respect of such D&O Claim, but only as a whole, shall be with a specified Person and, in such event, such Claimant, transferee or assignee of the D&O Claim shall be bound by any notices given or steps taken in respect of such D&O Claim by or with respect to such Person in accordance with this Order.

28. THIS COURT ORDERS that the transferee or assignee of any D&O Claim (i) shall take the D&O Claim subject to the rights and obligations of the transferor/assignor of the D&O Claim, and subject to the rights of the Director or Officer against any such transferor or assignor, including any rights of set-off which the Director or Officers had against such transferor or assignor, and (ii) cannot use any transferred or assigned D&O Claim to reduce any amount owing by the transferee or assignee to the Director or Officer, whether by way of set off, application, merger, consolidation or otherwise.

DIRECTIONS

29. THIS COURT ORDERS that the Trustee and any Person (but only to the extent such Person may be affected with respect to the issue on which directions are sought) may, at any time, and with such notice as the Court may require, seek directions from the Court with respect to this Order and the claims process set out herein, including the forms attached as Schedules hereto.

SERVICE AND NOTICE

30. THIS COURT ORDERS that the Trustee may, unless otherwise specified by this Order, serve and deliver the Proof of Claim Document Package, and any letters, notices or other documents to Claimants, purported Claimants, or other interested Persons, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission to such Persons (with copies to their counsel as appears on the Service List if applicable) at the address as last shown on the records of the Debtor or set out in such Person's D&O Proof of Claim. Any such service or notice by ordinary mail, courier, personal delivery or electronic or digital transmission shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by electronic or digital transmission by 6:00 p.m. on a Business Day, on such Business Day, and if delivered after 6:00 p.m. or other than on a Business Day, on the following Business Day. Notwithstanding anything to the contrary in this paragraph 30, Notices of Revision or Disallowance shall be sent only by (i) facsimile to a number that has been provided in writing by the purported Claimant, (ii) courier, or (iii) email, provided that the Trustee receives confirmation of receipt from the recipient of the email.

31. THIS COURT ORDERS that any notice or other communication (including D&O Proofs of Claims and Notices of Dispute) to be given under this Order by any Person to the Trustee shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery or electronic or digital transmission addressed to:

KSV Kofman Inc.
Trustee in bankruptcy of Danier Leather Inc.
150 King Street West, Suite 2308
Toronto, Ontario M5H 1J9

Attention: Noah Goldstein
Telephone: (416) 932-6207
E-mail: ngoldstein@ksvadvisory.com

Any such notice or other communication by a Person shall be deemed received only upon actual receipt thereof during normal business hours on a Business Day, or if delivered outside of a normal business hours, the next Business Day.

32. THIS COURT ORDERS that if during any period during which notices or other communications are being given pursuant to this Order a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of the Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or electronic or digital transmission in accordance with this Order.

MISCELLANEOUS

33. THIS COURT ORDERS that notwithstanding any other provision of this Order, the solicitation of D&O Proofs of Claim and the filing by a Person of any D&O Proof of Claim shall not, for that reason only, grant any Person any standing in the BIA Proceedings or rights to any distribution thereunder.

34. THIS COURT ORDERS that nothing in this Order shall prejudice the rights and remedies of any Directors or Officers or other persons under any existing Director and Officers or other insurance policy or prevent or bar any Person from seeking recourse against or payment from any Director's and/or Officer's liability insurance policy or policies that exist to protect or indemnify the Directors and/or Officers or other persons, whether such recourse or payment is sought directly by the Person asserting a D&O Claim from the insurer or derivatively through the Director or Officer; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter any defence to such claim available to the insurer pursuant to the provisions of any insurance policy or at law.

35. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any other foreign jurisdiction, to give effect to this Order and to assist the Trustee and its agents in carrying out the

terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Trustee, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Trustee in any foreign proceeding, or to assist the Trustee and its agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

AUG 11 2016

PER / PAR:

SCHEDULE "A"

NOTICE OF REVISION OR DISALLOWANCE

For Persons that have asserted D&O Claims against the Directors or Officers of Danier Leather Inc.

Claim Reference Number: _____

TO: _____
(Name of purported claimant)

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed in the Order of the Ontario Superior Court of Justice dated August 11, 2016 (the "D&O Claims Procedure Order"). **All dollar values contained herein are in Canadian dollars unless otherwise noted.**

Pursuant to paragraph 20 of the D&O Claims Procedure Order, the Trustee hereby gives you notice that it has reviewed your D&O Proof of Claim and has revised or disallowed all or part of your purported D&O Claim. Subject to further dispute by you in accordance with the D&O Claims Procedure Order, your Proven Claim will be as follows:

	Amount as submitted		**Amount allowed by Trustee**
	(original currency amount)	**(in Canadian dollars)**	**(in Canadian dollars)**
D&O Claim	$	$	$

Reasons for Revision or Disallowance:

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must, no later than 5:00 p.m. (prevailing time in Toronto) on the day that is ten (10) Business Days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with paragraph 30 of the D&O Claims Procedure Order), deliver a Dispute Notice to the Trustee by registered mail, courier, personal delivery or electronic or digital transmission to the address below. In accordance with the D&O Claims Procedure Order, notices shall be deemed to be received upon actual receipt thereof by the Trustee during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day. The form of Dispute Notice is enclosed and can also be accessed on the Trustee's website at http://ksvadvisory.com/insolvency-cases-2/danier-leather-inc/.

KSV Kofman Inc.
Trustee in bankruptcy of Danier Leather Inc.
150 King Street West, Suite 2308
Toronto, Ontario M5H 1J9

Attention: Noah Goldstein
Telephone: (416) 932-6207
E-mail: ngoldstein@ksvadvisory.com

IF YOU FAIL TO FILE A DISPUTE NOTICE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED at Toronto, this day of , 2016.

KSV Kofman Inc., solely in its capacity as Trustee in Bankruptcy of Danier Leather Inc. and not in its personal or any other capacity

Per: Noah Goldstein

SCHEDULE "B"

DISPUTE NOTICE

With respect to Danier Leather Inc.

Claim Reference Number: _____

1. **Particulars of Claimant:**

Full Legal Name of claimant (include trade name, if different):

_____

_____

(the "Claimant")

Full Mailing Address of the Claimant:

_____

_____

Other Contract Information of the Claimant:

Telephone Number: _____

Email Address: _____

Facsimile Number: _____

Attention (Contact Person): _____

2.

Particulars of original Claimant from whom you acquired the D&O Claim:

Have you acquired this purported D&O Claim by assignment?

Yes: ☐ No: ☐

If yes and if not already provided, attach documents evidencing assignment.

Full Legal Name of original Claimant(s): _____

3.

Dispute of Revision or Disallowance of D&O Claim:

For the purposes of the D&O Claims Procedure Order only, claims in a foreign currency will be converted to Canadian dollars at the exchange rates set out in the D&O Claims Procedure Order.

The Claimant hereby disagrees with the value of its D&O Claim as set out in the Notice of Revision or Disallowance and asserts a D&O Claim as follows:

	Amount allowed by Trustee: (Notice of Revision or Disallowance) (in Canadian dollars)	**Amount claimed by Claimant: (in Canadian Dollars)**
D&O Claim	$	$

REASON(S) FOR THE DISPUTE:

_____

_____

_____

_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute a Notice of Revision or Disallowance, you must, by no later than the date that is ten (10) Business Days after the Notice of Revision or Disallowance is deemed to have been received by you (in accordance with paragraph 30 of the D&O Claims Procedure Order), deliver to the Trustee this Dispute Notice by registered mail, courier, personal delivery or electronic or digital transmission to the address below. In accordance with the D&O Claims Procedure Order, notices shall be deemed to be received upon actual receipt thereof by the Trustee during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

KSV Kofman Inc.
Trustee in bankruptcy of Danier Leather Inc.
150 King Street West, Suite 2308
Toronto, Ontario M5H 1J9

Attention: Noah Goldstein
Telephone: (416) 932-6207
E-mail: ngoldstein@ksvadvisory.com

DATED this _____ day of _____, 2016.

Name of Claimant: _____

_____
Witness

Per: _____
Name:
Title:
(please print)

SCHEDULE "C"

NOTICE TO CLAIMANTS
AGAINST THE DIRECTORS AND OFFICERS OF DANIER LEATHER INC.
(hereinafter referred to as the "Debtor")

RE: NOTICE OF CLAIMS PROCEDURE

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made on August 11, 2016 (the "D&O Claims Procedure Order"). Claimants may obtain the D&O Claims Procedure Order and a D&O Proof of Claim Document Package from the website of the Trustee at http://ksvadvisory.com/insolvency-cases-2/danier-leather-inc/, or by contacting the Trustee by telephone (416-932-6207).

D&O Proofs of Claim must be submitted to the Trustee for any claim against any former officer or director of the Debtor. Please consult the D&O Proof of Claim Document Package for more details.

Completed Proofs of Claim must be received by the Trustee by 5:00 p.m. (prevailing Eastern Time) on September 12, 2016. It is your responsibility to ensure that the Trustee receives your D&O Proof of Claim by that date.

The D&O Claims Procedure Order only related to claims against the former directors and officers of the Debtor; not claims against the Debtor itself.

D&O CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

DATED at Toronto this • day of •, 2016.

SCHEDULE "D"

PROOF OF CLAIM AGAINST DIRECTORS OR OFFICERS OF DANIER LEATHER INC.

This form is to be used only by Claimants asserting a claim against any former director and/or officers of Danier Leather Inc., and NOT for claims against Danier Leather Inc. itself.

1. Original Claimant Identification (the "Claimant")

Legal Name of Claimant _____ Name of Contact _____

Address _____ Title _____

_____ Phone # _____

_____ Fax # _____

City _____ Prov / State ____ e-mail _____

Postal/Zip code _____

2. Assignee, if D&O Claim has been assigned

Full Legal Name of Assignee _____ Name of Contact _____

Address _____ Phone # _____

_____ Fax # _____

City _____ Prov / State ____ e-mail _____

Postal/Zip code _____

3. Amount of D&O Claim

The Director or Officer was and still is indebted to the Claimant as follows:

☐ I/we have a claim against a Director(s) and/or Officer(s)

Name(s) of Director(s) and/or Officer(s)	Currency	Original Currency Amount	Amount of Claim

4. Documentation

Provide all particulars of the D&O Claim and supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the D&O Claim.

5. Certification

I hereby certify that:

1. I am the Claimant, or authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this D&O Claim.
3. Complete documentation in support of this D&O Claim is attached.

Name _____

Title _____

Dated at _____

Signature _____

this _____ day of _____ 2016

Witness _____

6. Filing of D&O Claim

This D&O Proof of Claim **must be received by the Trustee by no later than 5:00 p.m. (prevailing Eastern Time) on September 12, 2016,** by registered mail, courier, personal delivery or electronic or digital transmission at the following address:

KSV Kofman Inc.
Trustee in bankruptcy of Danier Leather Inc.
150 King Street West, Suite 2308
Toronto, Ontario M5H 1J9

Attention: Noah Goldstein
Telephone: (416) 932-6207
E-mail: ngoldstein@ksvadvisory.com

An electronic version of this form is available at http://ksvadvisory.com/insolvency-cases-2/danier-leather-inc/

SCHEDULE "E"

GUIDE TO COMPLETING THE D&O PROOF OF CLAIM FOR CLAIMS AGAINST FORMER DIRECTORS OR OFFICERS OF DANIER LEATHER INC.

This Guide has been prepared to assist Claimants in filling out the D&O Proof of Claim against any Directors or Officers of Danier Leather Inc. (the "Debtor"). If you have any additional questions regarding completion of the D&O Proof of Claim, please consult the Trustee's website at http://ksvadvisory.com/insolvency-cases-2/danier-leather-inc/ or contact the Trustee, whose contact information is shown below.

The D&O Proof of Claim is to be used only by Claimants asserting a claim against a former director and/or officer of Danier Leather Inc., and NOT for claims against Danier Leather Inc. itself.

Additional copies of the D&O Proof of Claim may be found at the Trustee's website address noted above.

Please note that this is a guide only, and that in the event of any inconsistency between the terms of this guide and the terms of the D&O Claims Procedure Order made on August 11, 2016 (the "D&O Claims Procedure Order"), the terms of the D&O Claims Procedure Order will govern.

SECTION 1 - ORIGINAL CLAIMANT

1. A separate D&O Proof of Claim must be filed by each legal entity or person asserting a claim against any Directors or Officers of the Debtor.

2. The Claimant shall include any and all D&O Claims it asserts in a single D&O Proof of Claim.

3. The full legal name of the Claimant must be provided.

4. If the Claimant operates under a different name, or names, please indicate this in a separate schedule in the supporting documentation.

5. If the D&O Claim has been assigned or transferred to another party, Section 2 must also be completed.

6. Unless the D&O Claim is assigned or transferred, all future correspondence, notices, etc. regarding the D&O Claim will be directed to the address and contact indicated in this section.

SECTION 2 - ASSIGNEE

7. If the Claimant has assigned or otherwise transferred its D&O Claim, then Section 2 must be completed.

8. The full legal name of the Assignee must be provided.

9. If the Assignee operates under a different name, or names, please indicate this in a separate schedule in the supporting documentation.

10. If the Trustee is satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc. regarding the D&O Claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 3 - AMOUNT OF CLAIM OF CLAIMANT AGAINST DIRECTOR OR OFFICER

11. Indicate the amount the Director or Officer is claimed to be indebted to the Claimant and provide all other request details.

Currency, Original Currency Amount

12. The amount of the D&O Claim must be provided in the currency in which it arose.

13. Indicate the appropriate currency in the Currency column.

14. If the D&O Claim is denominated in multiple currencies, use a separate line to indicate the Claim amount in each such currency. If there are insufficient lines to record these amounts, attach a separate schedule indicating the required information.

15. D&O Claims denominated in a currency other than Canadian dollars will be converted into Canadian dollars in accordance with the D&O Claims Procedure Order.

SECTION 4 - DOCUMENTATION

16. Attach to the claim form all particulars of the D&O Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) or breach(es) giving rise to the D&O Claim.

SECTION 5 - CERTIFICATION

17. The person signing the D&O Proof of Claim should:

(a) be the Claimant, or authorized representative of the Claimant.

(b) have knowledge of all the circumstances connected with this D&O Claim.

(c) have a witness to its certification.

18. By signing and submitting the D&O Proof of Claim, the Claimant is asserting the claim against the Directors and Officers identified therein.

SECTION 6 - FILING OF CLAIM

19. The D&O Proof of Claim must be received by the Trustee by no later than 5:00 p.m. (prevailing Eastern Time) on September 12, 2016. D&O Proofs of Claim should be sent by

prepaid ordinary mail, courier, personal delivery or electronic or digital transmission to the following address:

KSV Kofman Inc.
Trustee in bankruptcy of Danier Leather Inc.
150 King Street West, Suite 2308
Toronto, Ontario M5H 1J9

Attention: Noah Goldstein
Telephone: (416) 932-6207
E-mail: ngoldstein@ksvadvisory.com

Failure to file your D&O Proof of Claim so that it is received by the Trustee by 5:00 p.m., on September 12, 2016 will result in your claim being barred and you will be prevented from making or enforcing a D&O Claim against any former directors or officers of the Debtor. In addition, you shall not be entitled to further notice in and shall not be entitled to participate as a D&O claimant in these proceedings.

Court File No. 31-2084381
Estate No. 31-2084381

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

O R D E R
(D&O Claims Procedure)

BENNETT JONES LLP
3400 One First Canadian Place
Toronto, ON M5X 1A4
Fax: (416) 863-1716

Sean Zweig (LSUC #57307I)
Tel: (416) 777-6254
Fax: (416) 863-1716

Counsel to the Trustee in Bankruptcy,
KSV Kofman Inc.

IN THE MATTER OF THE BANKRUPTCY OF DAN LEATHERS

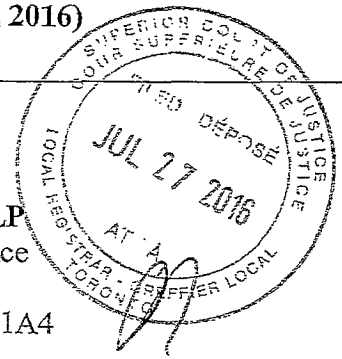
Aug 11/16.

Court File No.: 31-2084381
Estate No.: 31-2084381

August 11/16
relief not granted. Order to go.
Dunphy J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

MOTION RECORD
(Returnable August 11, 2016)



BENNETT JONES LLP
3400 First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Sean Zweig (LSUC#57307I)
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Fax: (416) 863-1716

Counsel to the Trustee in Bankruptcy,
KSV Kofman Inc.