ACTING FOR THE CAPITAL BENEFICIARY ON A PASSING OF ACCOUNTS[1]

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The beneficiaries of an estate or trust[2] share a common interest in ensuring that the trust which benefits them is administered prudently and in a timely and cost effective manner. While all beneficiaries share this common objective, the interests of particular classes of beneficiaries can often be at significant odds.

This paper highlights the issues most relevant to a capital beneficiary; issues which the solicitor advising that capital beneficiary should bear in mind when reviewing estate accounts, giving advice and drafting a Notice of Objection to Pass Accounts. It also touches upon certain of the cost considerations which are unique to capital beneficiaries and which drive their decision making on a passing of accounts.

As a fiduciary, an estate trustee owes a host of duties to the beneficiaries of the estate. They owe a duty to maintain records and to be in a position to account to the beneficiaries for their administration. They also owe a duty to act in good faith and in the interests of the beneficiaries. Of the many duties owed by trustees, the four discussed in greater detail below are particularly relevant to the capital beneficiary of an estate.

1. The Duty to Act Personally:

(a) An Overview:

As a general statement, a trustee must act personally and cannot delegate tasks which require them to exercise discretion in some manner. The prohibition against delegation is not absolute, however. Both the common law and the *Trustee Act*[3] permit delegation in certain areas of a trust administration.

Section 20 of the *Trustee Act*, for example, provides that a trustee may appoint a solicitor to act as agent in accepting and discharging monies. As significantly, section 27.1 of the *Trustee Act* provides that a trustee may delegate the investment of trust property provided the trustee approves an appropriate investment policy at the outset and regularly monitors the agent's performance.

The common law has also long recognized that delegation by a trustee is appropriate in certain circumstances. As noted by the Divisional Court in *Wagner v. van Cleeff*[4] while the general rule is that an administrator must perform the duties of the office requiring the

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[1] **DISCLAIMER**: The comments and opinions expressed in this paper are those of the author and are provided for informational purposes only. They do not constitute nor should they be relied upon as legal advice.

[2] The terms "estate" and "trust" will be used interchangeably in this paper as will the terms "estate trustee" and "trustee".

[3] R.S.O. 1990, c. 23.

[4] (1991), 43 E.T.R. 115, 5 O.R. (3d) 477 (Div. Ct.)

exercise of discretion they are permitted to select agents to perform certain tasks where it would be prudent for a person in the ordinary course of business to delegate the performance of these duties.[5]

(b) Relevance on a Passing of Accounts

When reviewing accounts on behalf of a capital beneficiary, you should seek to identify those tasks which the trustees delegated and consider whether the delegation of those specific tasks was reasonable in the circumstances. The reasonableness of the delegation will depend upon a number of factors including but not limited to:

(i) the express provisions of the will which may authorize delegation of certain tasks;

(ii) the size and complexity of the estate;

(iii) the nature of the estate asset the delegation relates to;

(iv) the expertise of the estate trustee *vis a vis* the estate asset;

(v) the physical location of the asset *vis a vis* the trustee; and

(vi) common business practice as it relates to the asset.

After assessing the reasonableness of the act of delegation, you should carefully review the accounts rendered by the agent to the estate trustee to satisfy yourself that the charges themselves are reasonable. You should also review the allocation of the agent's fees as between the capital and revenue accounts to satisfy yourself that the allocation is fair and equitable. In some cases, an allocation of 2/3rds to the capital account and 1/3rd to the revenue account is appropriate.[6] In other cases, an equal allocation as between the capital and revenue accounts is more reasonable.

If the delegation of tasks was unreasonable in the circumstances, you should consider arguing that the fees associated with the agent's work should be deducted from any claim to compensation the estate trustee might make. For example, where a solicitor/trustee has his assistant make deposits into an estate bank account (a task an executor is clearly responsible for), you may want to take the position that any fees paid to that assistant must be paid by the trustee out of his compensation.

2. <u>The Duty to Act Prudently in Investing the Trust Assets</u>

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[5] See also *Miller Estate (Re)* (1987), 26 E.T.R. 188 (Ont. Surr. Ct) where the Court held that while the executors were within their power to retain investment counsel and charge the cost of such counsel to the estate they were nonetheless responsibility for making the ultimate investment decisions (NOTE: Amendments to the *Trustee Act* since provide for the delegation of the investment power provided certain conditions are met).

[6] The care and management fee is now typically charged 2/3rds as to capital and 1/3rd as to income see *Re Jones* (1973), 1 E.T.R. 88 (Ont. Surr. Ct.) and *Re Cohen* (1977), 1 E.T.R. 80 (Ont. Surr. Ct.)

(a) Overview

A capital beneficiary will be concerned with the manner in which the estate trustee has administered the property entrusted to them and, in particular, how they have invested the trust assets. The capital beneficiary wants to ensure that the capital of the trust is secure and likely to grow in value.

Section 27(1) of the *Trustee Act* sets out the standard to which estate trustees and trustees will be held accountable and contemplates that estate trustees and trustees must exercise the “care, skill, diligence and judgment” of a “prudent investor”. Section 27(5) sets out seven criteria which a trustee MUST consider in addition any existing common law considerations. The seven considerations are as follows:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall trust portfolio.
5. The expected total return from income and the appreciation of capital.
6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

As outlined in the previous section, a trustee is entitled in appropriate circumstances to delegate tasks to an agent. Section 27.1(1) of the *Trustee Act* relates to the investment function and provides that a trustee may authorize an agent to exercise functions relating to the investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would. The delegation must be made pursuant to a written plan for investment of property which complies with section 28 of the *Trustee Act* and is in the best interests of the beneficiaries of the trust. The estate trustee must exercise prudence both in the appointment and the monitoring of the agent.

On the issue of the standard required of trustees in investing trust property, Madam Justice Greer’s decision in *Re Jackson*[7] should be noted. The wife of the deceased in that case was an estate trustee and the income beneficiary of the estate. She applied to have her co-trustees, her step-children and capital beneficiaries of the estate, removed on the basis they were not acting in the best interests of the beneficiaries. She also sought a determination of the amounts owing to her under her husband’s will. The deceased’s will provided that the wife was

[7] [2004] O.J. No. 547.

to receive a life interest in their home and the income from the estate. On the wife's death, the capital of the estate was to pass to her step-children. Justice Greer granted the application and ordered the removal of the step-children as trustees. She further ordered that the wife was entitled to the sum of $64,000 payable out of the capital of the estate to compensate her for income and capital she should have been paid from the estate. Justice Greer held that the step-children had failed to maintain an even hand between the income and capital beneficiaries of the estate. More specifically, they failed to follow their late father's expressed intentions in his will by refusing to give his wife the income to which she was entitled or to encroach on capital for her benefit.

Justice Greer was particularly critical of the manner in which the trustees (in particular the deceased's son) had invested the estate assets. At the son's behest, investments which had been generating a fair return for the wife were sold and replaced by speculative equities which did not generate dividend income. In Justice Greer's opinion, no prudent investor would have over weighted the portfolio with speculative stock, as the son and daughter had done.

Madam Justice Haley's 2001 decision in *Re Flaska Estate*[8] should also be noted on the issue of the proper investment of trust property. A litigious estate administration from the outset, concerns about the investment of the estate assets and the issue of the estate trustees' duty to maintain an even hand as between the classes of beneficiaries arose on the third passing of accounts. The capital beneficiaries of the estate, represented by the Children's Lawyer on behalf of the minor and unascertained beneficiaries and the Public Guardian and Trustee on behalf of the charitable interests, argued that the estate trustees had failed to properly diversify the estate assets thereby depriving the capital beneficiaries of the prospect of any capital growth. Mrs. Flaska had died in 1986. Her will directed that, after the fulfillment of specific gifts, three quarters of the residue of the estate was to be divided in equal shares between the testatrix's children and the income generated by the shares paid to them during their lifetime. On the death of the respective children, the capital of their share was to be paid to their issue then living. The remaining quarter of residue was to be invested with income paid in equal amounts to Mrs. Flaska's two children. On the death of the survivor of her two children, the capital of the remaining quarter of residue was to be paid to charitable institutions.

The evidence lead on the passing of accounts confirmed that while the estate trustees had considered implementing an investment policy which would have diversified the estate investments, they never did so. They opted instead to follow an investment strategy which involved investing in questionable investments (including promissory notes and other short term paper) with a view to avoiding the wrath of the income beneficiary. The Court concluded that the "executors had no reasoned policy for the investment of the trust monies" and chose to consult with the income beneficiary while ignoring the interests of the capital beneficiaries. In so doing, they failed in their duty towards the capital beneficiaries.

(b) Relevance on a Passing of Accounts

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[8] [2001] O.J. No. 2176 (Sup. Ct).

In reviewing the estate accounts on behalf of a capital beneficiary, you will want to satisfy yourself that the estate trustee acted as a prudent investor would in respect of the investment of the assets of the estate. You should ensure that they took into account the statutory considerations set out in section 27(5) of the *Trustee Act* and invested the trust property with an eye to their common law duties. In short, you will want to confirm that the investment policy undertaken by the estate trustees was reasonable in the circumstances.

You should examine the opening and closing capital balances carefully. If the capital of the estate has eroded in real dollars terms or did not grow at an acceptable rate, you should make further inquiries to determine if an investment policy was developed, was reasonable and was adhered to.

If it appears that the investment function was delegated to a third party, you will want to satisfy yourself that the delegation made "business sense" and that the choice of agent was prudent. You should also assess whether the delegation occurred in accordance with a written investment policy (as required by the *Trustee Act*), that the agent adhered to the policy and that the trustee regularly monitored the agent's performance *vis a vis* the policy.

3. The Duty to Covert – The Rule in *Howe v. Lord Dartmouth*

The rule in *Howe v. Lord Dartmouth*[9], also referred to as the "duty to convert", is an extension of the duty to maintain an even hand, discussed in greater detail below. The rule states that a trustee is under an implied duty to convert wasting or unproductive personalty into authorized investments.

The rule was specifically approved by the Supreme Court of Canada in the 1980 decision of *Lottman v. Stanford*[10]. As set out in that decision, the rule operates to compel, where such operation is not excluded by the testator, a conversion of wasting or unproductive personalty and the investment of the proceeds of such conversion in trustee investments". The rule does not extend to real property, however.

The rule in *Howe v. Lord Dartmouth* is subject to the intention of the testator and can be ousted by specific terms contained in the will or trust instrument. For example, where it is clear based on the wording of the will that the testatrix intended that an asset was to be enjoyed *in specie*, the Court will not challenge the estate trustee's decision to retain an unproductive asset.

The rule in *In re Earl of Chesterfield's Trusts* should also be noted as it provides that where there is a delay in the conversion of a wasting or unproductive asset the income beneficiary is deemed to be entitled to a portion of the proceeds of that asset when it is unlimited converted.[11]

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9 (1802), 7 Ves. Jun 137, 32 E.R. 56 (Ch.).

10 [1980] 1 S.C.R. 1065, 107 D.L.R. (3d) 28, revg 2 E.T.R. 1 (Ont. C.A.).

11 (1883), 24 Ch. D. 643.

A helpful review of the rules in *Howe v. Lord Dartmouth* and *In re Earl of Chesterfield's Trusts* is contained Justice Rosenberg's dissenting opinion in *Josephs v. Canada Trust Co.*[12], an opinion which was ultimately accepted by the Ontario Court of Appeal on further appeal. The testator in that case appointed his wife, solicitor and a trust company as executors and trustees of his estate. He gave his wife a life interest in the residue of the estate and the trustees a power to encroach on capital in her favour. One of the assets held in the estate was a mortgage on a 50 acre parcel of land which did not produce any income. When the mortgaged property was sold many years later, the wife inquired as to whether the proceeds of the sale would be apportioned between her interest and the capital interest. After obtaining legal advice, the trustees refused to apportion any amount of the sale proceeds in favour of the wife. The wife raised the issue on the next subsequent passing of accounts.

Justice Rosenberg held that the rule in *Howe v. Lord Dartmouth*, which requires conversion of wasting and unproductive residuary personalty, when applied together with the related rule in *In re Earl of Chesterfield's Trusts* required an apportionment between capital and income of the proceeds of conversion. The trustees had a duty in his mind to maintain an even hand as between the wife and the capital beneficiaries; a duty which required them to obtain a reasonable income for the life tenant while preserving the capital for the capital beneficiaries. Justice Rosenberg specifically held that the trustees were under a duty to convert the unproductive 50 acre parcel to make it productive and thereby produce income for the wife. Since the conversion was delayed, the trustees were obliged to apportion the proceeds as between the wife and capital beneficiaries on conversion. The fact that the wife did not need or seem to want additional income was irrelevant, in Justice Rosenberg's opinion.

In contrast, Justice Sheard held in *Ball v. Ball Ryer*[13] that while a will conferred a power upon the estate trustees to convert real property, it did not impose a duty upon them to do so. Is somewhat similar circumstances, he held that the estate trustees had no obligation to credit the income beneficiary of the estate with notional income when unproductive real property was disposed of after an extended period of time.

(a) Relevance on a Passing of Accounts

When reviewing estate accounts on behalf of a capital beneficiary, you will want to identify, where possible, any wasting or unproductive personalty held by the estate trustees. You should then satisfy yourself that the assets were dealt with in accordance with the provisions of the will or trust instrument or, to the extent such documents are silent, were converted to productive assets within a reasonable period of time. If you conclude that the trustees delayed in the conversion of any particular asset and that the delay was unreasonable, you should consider arguing on your client's behalf that the trustee should pay any portion of the proceeds that must be shared with the income beneficiary out of its compensation.

4. <u>The Duty to Maintain an Even Hand</u>

(a) Overview

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[12] (1992), 90 D.L.R. (4th) 242, 45 E.T.R. 162 (Ont Div. Ct.) revd 106 D.L.R. (4th) 384n (C.A.)

[13] [1997] O.J. No. 1443 (Ont. Ct. Gen. Div.).

Sometimes referred to as the "duty to act impartially", the duty to maintain an even hand requires an estate trustee to treat classes of beneficiaries in an even and fair manner. The duty is subject to the provisions of the will or trust instrument. Accordingly, where a testator or testatrix clearly directs or authorizes an estate trustee to prefer the interests of one class of beneficiaries over those of another their actions will not generally speaking be subject to judicial review.

Examples of clauses which permit or authorize differential treatment of classes of beneficiaries include:

(i) A clause directing the estate trustees to "maintain a spouse in the manner in which she/he was accustomed to living in" prior to the testator/testatrix's death;

(ii) A clause authorizing the estate trustees to make capital encroachments in favour of a beneficiary in a generous manner indicating a desire to exercise the discretion if there is any doubt;

(iii) A clause expressly preferring the interests of one class of beneficiaries over another; and

(iv) A clause permitting capital encroachments to be made but only in exceptional circumstances.

The fact that an estate trustee owes a duty to maintain an even hand as between classes of beneficiaries will influence the manner in which they exercise the powers and discretions contained in a will or trust instrument. The extent of that influence will depend upon the specific wording of the will or trust instrument.

The issue of the proper scope of the duty to maintain an even hand was at the forefront of the Ontario Court of Appeal's decision in *Re Smith*[14], a case relating to the administration of an inter-vivos trust by a trust company. The trust deed gave the trustee the power (but not a positive duty) to retain the trust property in its then present form. It also gave the trustee the power to "sell and convert into money any shares from time to time in its hands and to invest the proceeds". The trust company, after consulting with the settlor, interpreted the document to mean that it was obliged to retain the property (in the form of Imperial Oil shares) in its original form. The trustees continued to do so even after it was suggested that the income beneficiary would realize a higher return if the Imperial Oil shares were sold and the proceeds invested in other assets.

The trial judge and the Court of Appeal agreed that the trustee was obliged to maintain an even hand as between the respective interests of both classes of beneficiaries and had failed to do so by refusing to convert the shares to income producing property. As the Court of Appeal noted:

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[14] [1971] 2 O.R. 541, 18 D.L.R. (3d) 405

> ".. this was not a case where the trustee, having discretion to retain or sell some or all of the Imperial Oil Ltd. shares, considered its respective obligations to the life tenant and the remainderman and exercised its discretion by a decision not to sell. There is no evidence the trustee put its mind to the question of what it should do to carry out those obligations."

It is clear from reviewing the decision that the Court of Appeal was particularly concerned by the trustee's clear failure to turn its mind to its discretionary powers and to exercise those discretionary powers in a *bona fides* manner to sell the shares in question.

The impact of the duty to maintain an even hand upon the exercise of discretion was addressed again in the later decision of Madame Justice Greer in *Re Carley Estate*[15]. The testatrix in that case had two sons. Her will provided that one half of the residue of her estate would paid over to one son. The other half of the residue was to be held in trust during the other son's lifetime. The income of the trust was to be paid to the second son and the executors were given broad powers to encroach on capital for his benefit. On the second son's death, the capital of his share was then to be divided between those of his children then living. Following the death of the second son (the income beneficiary), the executors sought to pass their accounts for a 30 year period. The granddaughter, a capital beneficiary, raised numerous objections concerning the accounts including an allegation that capital encroachments had not been made in accordance with the terms of her grandmother's will. She also questioned the investment policy followed by the executors.

On the issue of capital encroachments, the Court held as a matter of fact that the executors had been entirely focused throughout the administration of the estate on keeping the income beneficiary out of debt. The Court further held that having regard to the spendthrift clause in the will which directed that payment of income from the trust would cease if the income beneficiary became bankrupt or assigned, charged or encumbered the income, the executors had acted unreasonably in paying the income beneficiary's debts to prevent him from making an assignment in bankruptcy or from being petitioned into bankruptcy. While the executors had a power to encroach on capital, they had a duty in exercising that power to consider the interests of the capital beneficiaries. The Court went on to order that the executors reimburse the capital of the estate in respect of their unauthorized capital encroachments.

The fact that a will or trust instrument permits or authorizes the trustees to treat beneficiaries in a differential manner does not entirely insulate their actions or inactions from review. They must exercise their powers and discretions in a *bona fides* manner at all times. This point was made clear by Justice Rutherford in *Re Hopkins*[16] and by Justice Dilks in the later decision of *Crawford v. Jardine*[17]. In the former case, the testatrix expressed the wish in her will that schools she operated during her lifetime be carried on by her trustees until such time as the "entire operation" could be turned over to a charitable educational foundation. The testatrix also

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[15] 2 E.T.R. (2d) 142 (Ont Ct. (Gen.Div.).

[16] (1982), 11 E.T.R. 27, 35 O.R. (2d) 403, 132 D.L.R. (3d) 671 (Ont. H.C.).

[17] 20 E.T.R. (2d) 182 (Ont. Ct.(Gen. Div.)). See also *Lee v. Young* (1843), 2 Y. & C.C.C. 532, 63 E.R. 238 (Eng. V.C.).

expressed the wish that after the payment of legacies some property of her estate be invested and the income from such investments paid to certain family members.

The testatrix's will directed the trustees to transfer all real property on which the schools were located to an educational foundation at a specific time if certain conditions were met. The will also conferred upon the trustees a discretionary power with respect to conversion and postponement of conversion of assets of the estate. The trustees were concerned about the effect of these provisions. If they retained the real property until the time of division they had a duty to transfer the property to the educational foundation. However, if they exercised their power to sell the property before the time of division the proceeds of the sale would ultimately flow to other residual beneficiaries. Confused as to how to proceed, the executors and trustees brought a court application for a proper interpretation of the will.

Justice Rutherford went on to hold in that case that while the rule in *Howe v. Lord Dartmouth* did not apply (because the asset at issue was real property), the trustees nonetheless had a duty in dealing with the real property to maintain an even hand between the classes of beneficiaries, albeit subject to the provisions of the will. In determining the scope of the duty to maintain an even hand, Justice Rutherford felt that it was appropriate to take into account the testatrix's devotion to her schools. He went on to state that in his opinion the will created an absolute trust to retain the real property to which was added a discretionary power to convert. Significantly, the trustees were not excused from their duty to act impartially between the beneficiaries simply because the will imposed upon them a basic duty to retain real property. They were obliged to carry out their duty *vis a vis* the real property in a fair and impartial manner. It was not for the Court to instruct the trustees as to how they should exercise their discretionary powers.

(b) Relevance on a Passing of Accounts

In reviewing accounts on behalf of a capital beneficiary, you should pay particular attention to the directions and discretionary powers contained in the will or trust instrument, especially those which expressly or through their application may have a differential impact upon classes of beneficiaries. You should also identify those specific instances where the executors appear to have exercised discretion in a manner which preferred the interests of one class of beneficiaries over another (e.g. to make capital encroachments). In each case, you want to satisfy yourself that the estate trustees/trustees exercised their powers and discretions in a manner that was both consistent with the terms of the will or trust instrument and otherwise fair and reasonable.

5. Cost Considerations

The fact that a beneficiary has a vested but contingent interest in the capital assets of an estate or trust rather than a fixed interest has a significant impact upon that beneficiary's willingness to pursue a contested passing of accounts. You must recognize that a beneficiary who has not yet received any of the trust property may have limited financial resources to fund a costly contested passing of accounts. You must also recognize that depending upon the wording of the will or trust instrument, the client's contingent interest in the estate or trust may be subject to divestment (e.g. if they were to pre-decease the income beneficiary). You may find it difficult

to persuade your client to pursue objections, even blatant ones, except in the rarest of circumstances.

You should ensure that the capital beneficiary understands and appreciates that if they choose not to object to estate accounts and the estate trustees' actions or inactions as reflected in those accounts, they will be precluded from challenging those decisions or the compensation paid to the estate trustees at any point in the future.

6. Analyzing the Estate Accounts on behalf of a Capital Beneficiary

A checklist setting out the steps to be taken in reviewing accounts on behalf of a capital beneficiary is attached as Schedule "A".

7. Drafting Considerations when preparing a Notice of Objection to Pass Accounts

If your client's concerns cannot or have not be addressed informally and you are forced to prepare a Notice of Objection to Pass Accounts, you should:

(a) Be general but surgical in your drafting of the Notice of Objection.

(b) To the greatest extent possible, identify the specific entries in the estate accounts that are of concern to your client.

(c) Where appropriate, draft your client's objections in a general manner. Offer examples, but do not be limited by them.

(d) Clearly distinguish in your Notice of Objection between concerns relating to the estate trustees' claim to compensation and your concerns relating to the accounts themselves.

(e) Ensure that your client recognizes the risks associated with pleading generally in the Notice of Objection. Pleading generally may result in an unnecessarily lengthy reply process. It may also result in the matter being converted to a trial of an action pursuant to section 49(4) of the *Estates Act*.

(f) Recognize your client's unique situation as contingent capital beneficiary of the estate or trust. They may not have the financial resources to see a contested passing through to completion and this fact may impact significantly upon your strategic approach to the case.

(g) If the actions of the trustees have caused the estate/trust significant damages (e.g. where the trustees have clearly engaged in breach of trust) consider proceeding by way of action pursuant to section 49(3) of the *Estates Act* rather than participating in a lengthy contested passing of accounts which will only be converted to an action at a later date. While an action will almost certainly take longer to litigate than an application, it would afford your client an opportunity to secure full documentary and oral discovery.

A sample Notice of Objection to Accounts identifying some, but certainly not all, of the issues a capital beneficiary might conceivably raise is attached as Schedule “B”.

SCHEDULE "A"

ESTATE ACCOUNTING CHECKLIST : ACTING FOR A CAPITAL BENEFICIARY

1. Secure a copy of the trust document (will or trust deed).

2. Is there a memorandum of wishes? If so, try to secure a copy of that document as well.

3. Make note of key dispositive provisions, powers and discretions contained in the trust document.

    (a) When are income distributions to be made? To whom?

    (b) Are income distributions mandatory or discretionary?

    (c) If income distributions are discretionary, what factors are the trustees to consider?

    (d) Is there a power of encroachment on capital? If so, for whose benefit?

    (e) Are capital distributions mandatory or discretionary?

    (f) If capital distributions/encroachments are discretionary, what factors are the trustees to consider?

    (g) What powers, discretions to the estate trustees have *vis a vis* the estate assets?

    (h) Is the trustee directed to prefer the interests of one beneficiary over another?

    (i) Is the trustee entitled to prefer the interests of one beneficiary over another?

    (j) Is compensation fixed? If so, how is it to be calculated?

    (k) Do the trustees have power to pre-take compensation?

    (l) Do the trustees have the power to delegate functions? If so, on what basis?

    (m) Are the trustees empowered to retain experts to assist them? If so, on what basis?

4. Review the estate accounts in a preliminary manner.

    (a) Identify transactions which seem out of the ordinary.

    (b) Do all of the original assets appear to be accounted for?

    (c) Do the values ascribed to the original assets appear to be reasonable?

    (d) What original assets remain at the end of the period of the accounts?

(e) Is the fact that some are not yet realized upon reasonable?

(f) Were legacies paid in a reasonable period of time?

(g) Do the income distributions make sense?

(h) Have there been any encroachments on capital?

(i) Do the investments generally make sense?

5. Review the estate accounts in a more detailed manner.

(a) Review all income distributions to ensure they accord with the provisions of the will or trust instrument.

(b) Identify and consider all capital encroachments.

(c) Review the investments. Are there any wasting or non-productive assets?

(d) Does the choice of assets seem reasonable for the trust or estate?

(e) Did the trustee delegate tasks? If so, was the delegation permitted or reasonable?

(f) Are the expenses in order? Do they appear to be with arms length third parties?

(g) Were tax liabilities paid in a reasonable period of time?

(h) Do the legal and accounting fees appear reasonable?

(i) Have the expenses been properly allocated as between capital and revenue?

6. Review claim to compensation carefully.

(a) Review the provisions of the will to ensure that any legacies paid to the estate trustee were intended to be lieu of compensation.

(b) Verify that the common law tariff has been applied correctly.

(c) Ensure that the appropriate entries have been backed out before the calculation is undertaken (e.g. for payments to estate trustees, compensation pre-taken etc).

(d) Ensure that if a care and management fee is claimed, it is reasonable (e.g. it is not claimed for the first year of the administration – the calculation of the average value of assets under administration is fair and reasonable).

(e) Was compensation pre-taken? If so, was the pre-taking authorized by the will or trust instrument? If not, interest should be repaid to the Estate.

(f) Is a special fee claimed? If so, on what basis and is the claim reasonable?

(g) Does the conduct of the estate trustees justify a reduction in compensation?

7. Prepare a detailed list of concerns and forward it to counsel for the estate trustee.

8. Ask for an opportunity to review the back up vouchers and other supporting documents personally. Narrow the list of concerns, if possible.

9. If the concerns relate to the exercise of discretion, ask for a written explanation as to how and why discretion was exercised or not exercised.

10. Set out any remaining concerns in the Notice of Objection to Pass Accounts.

11. Consider cross-examining the estate trustee on their affidavit to pass accounts – perhaps even in advance of finalizing the Notice of Objection to Pass Accounts.

SCHEDULE “B”

Court file no. <*>

IN THE ESTATE OF ROBERT C. SMITH, Deceased

NOTICE OF OBJECTION TO ACCOUNTS

1. **I, JOANNE SMITH**, a capital beneficiary of the estate of Robert C. Smith (the “Estate”), object to the amount of compensation claimed by the estate trustee, Trust Company of Canada (the “Estate Trustee”) on the following grounds:

   (1) The magnitude of the Estate does not warrant the quantum of compensation claimed by the Estate Trustee.

   (2) The Estate Trustee failed to demonstrate the level of care and responsibility required of a professional trustee and the Estate has suffered a considerable financial loss as a result.

   (3) The Estate Trustee has not demonstrated that the time spent in administering the Estate warrants the quantum of compensation claimed.

   (4) The Estate Trustee failed to exercise the level of skill and ability required of a professional trustee in administering the assets of the Estate. Among other things, the Estate Trustee failed to realize upon the Estate’s significant position in Nortel Networks in a prudent manner.

   (5) The administration of the Estate was straight-forward and there were no issues to justify the awarding of a “success fee”.

   (6) The Estate Trustee has over-stated its claim to a care and management fee insofar as:

      (A) the Estate Trustee has applied a percentage in excess of the normal percentage of 2/5ths of 1% of the value of assets under administration without the consent of the beneficiaries and in the absence of justification; and

      (B) the Estate Trustee has applied a percentage against the value of assets under administration during two separate periods and not as against the average value of assets under administration using the opening balance as at the beginning and at the end of the accounts.

   (7) The Estate Trustee retained agents to undertake executor tasks in the absence of an express power and in circumstances where it was unreasonable to do so. The expenses associated with the retainer of those agents are properly deducted from the Estate Trustee’s compensation.

(8) The Estate Trustee has pre-taken compensation in the absence of a power to do so. The pre-taking of compensation was inappropriate, especially have regard to the Estate Trustee's failure to pass its account in a timely manner. Interest should be deducted in respect of all compensation pre-taken.

(9) The Estate Trustee failed to administer the Estate in a prudent or timely manner. Among other things, the Estate Trustee failed to file the terminal tax return and on-going trust returns in a timely manner. The interest and penalties associated with the late filing of the tax returns should be deducted from the Estate Trustee's compensation.

(10) The Estate Trustee has acted in conflict of interest and profited by its administration of the Estate to the detriment of the beneficiaries. [**Further specifics are required]**

(11) The Estate Trustee failed to maintain an even hand as between the income and capital beneficiaries of the Estate. Among other things, the Estate Trustee pursued an investment policy which has had the effect over the period of the Accounts of preferring the interest of the income beneficiaries to the detriment of the capital beneficiaries.

2. **I, JOANNE SMITH,** object to the accounts of the Estate Trustee on the following grounds:

(1) **[Set out specific concerns with respect to the accounts themselves]**.

(2) The Estate Trustee has failed to allocate expenses as between the capital and revenue accounts in a manner which is fair and reasonable. **[Give specific examples, where possible].**

(3) The method employed by the Estate Trustee in calculating the care and management fee is improper.

(4) Neither the compensation pre-taken by the Estate Trustee nor the interest thereon appears to have been deducted before the "usual percentages" were applied to calculate the claim for compensation resulting in an over-statement of compensation claimed.

DATE: November <*>, 2007

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