2014 ONSC 594
Ontario Superior Court of Justice

Michipicoten First Nation v. Michipicoten First Nation Community Trust

2014 CarswellOnt 2774, 2014 ONSC 594, [2014] O.J. No. 1094, 238 A.C.W.S. (3d) 272, 99 E.T.R. (3d) 206

Michipicoten First Nation, Applicant and Michipicoten First Nation Community Trust, Respondent

Varpio J.

Heard: November 14, 2013; January 16, 2014
Judgment: March 10, 2014
Docket: 25964/12

Counsel: M. Allemano, for Applicant
B. Arkin, for Respondent

Subject: Civil Practice and Procedure; Estates and Trusts; Public

Related Abridgment Classifications

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Headnote

Aboriginal law --- Miscellaneous

First Nation settled land claim with federal government relating to certain surrenders of property — Federal government paid First Nation $8 million pursuant to terms of that agreement — Chief and council of First Nation established trust in order to ensure that $8 million was well spent — Relations between trustees and chief and council soured — Chief and council attempted to terminate trust via referendum, but were unable to secure enough votes to accomplish this aim — Chief and council brought application to force trustees to pass their accounts, and it was ordered that trustees pass their accounts for certain specified period — Chief and council brought application to prevent passing of accounts — Application dismissed — Chief and council had several objections, but their position in matter, coupled with clear meaning of trust agreement, demanded that accounts be passed in their entirety — Counsel for chief and council indicated that chief and council were not alleging fraud by trustees and were not asking that trustees reimburse trust — Trustees are held to standard of reasonably prudent person administering their own affairs and can be excused from errors in administering trust when said errors arise honestly and in good faith — It was believed that principle mandating that objection must be sufficiently specific to enable trustees to respond applied to non-estate trust litigation.

Estates and trusts --- Trustees — Powers and duties of trustees — Accounts — Miscellaneous

First Nation settled land claim with federal government relating to certain surrenders of property — Federal government paid First Nation $8 million pursuant to terms of that agreement — Chief and council of First Nation established trust in order to ensure that $8 million was well spent — Relations between trustees and chief and council soured — Chief and council attempted to terminate trust via referendum, but were unable to secure enough votes to accomplish this aim — Chief and council brought application to force trustees to pass their accounts, and it was ordered that trustees pass their accounts for certain specified period — Chief and council brought application to prevent passing of accounts — Application dismissed — Chief and council had several objections, but their position in matter, coupled with clear meaning of trust agreement, demanded that accounts be passed in their entirety — Counsel for chief and council indicated that chief and council were not alleging fraud by trustees and were not asking that trustees reimburse trust — Trustees are held to standard of reasonably prudent person administering their own affairs and can be excused from errors in administering trust when said errors arise honestly and in good faith

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— It was believed that principle mandating that objection must be sufficiently specific to enable trustees to respond applied to non-estate trust litigation.

Table of Authorities

Cases considered by *Varpio J.*:

Fales v. Canada Permanent Trust Co. (1976), [1976] 6 W.W.R. 10, 11 N.R. 487, (sub nom. *Wohlleben v. Canada Permanent Trust Co.*) 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302, 1976 CarswellBC 240, 1976 CarswellBC 317 (S.C.C.) — followed

Vano Estate, Re (2009), 2009 CarswellOnt 7651, 54 E.T.R. (3d) 280 (Ont. S.C.J.) — considered

Statutes considered:

Estates Act, R.S.O. 1990, c. E.21
s. 49(3) — considered

Trustee Act, R.S.O. 1990, c. T.23
s. 23 — considered

s. 23.1 [en. 2001, c. 9, Sched. B, s. 13(1)] — considered

s. 35(1) — considered

APPLICATION to prevent passing of accounts.

***Varpio J.*:**

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1 This Application to prevent the passing of accounts is brought by the Chief and Counsel of the Michipicoten First Nation on behalf of the beneficiaries of the Michipicoten First Nation Community Trust (the "Trust"). The Chief and Counsel have several objections, but, as will be seen below, the Chief and Counsel's position in this matter — coupled with the clear meaning of the trust agreement — demand that the accounts be passed in their entirety.

Facts

2 The Michipicoten First Nation ("MFN") is located in Northern Ontario, not far from Wawa. In 2003, the MFN settled a land claim with the federal government relating to certain surrenders of property. The federal government paid MFN $8 million pursuant to the terms of that agreement.

3 The Chief and Council of the MFN established the Michipicoten First Nation Community Trust (the "Trust") in 2003 in order to ensure that the $8 million was well spent. The purpose of the Trust is outlined in the preamble of the trust agreement:

> To ensure that the Compensation, and any accruals thereto are managed and invested prudently, and shall ensure to the benefit of the present and future generations of the Members of the First Nation.

4 This objective was further delineated in the trust agreement:

> 3.1 The First Nation and the Trustees agree that the Trust Property shall be held as a long-term trust fund for the use and benefit of the First Nation as beneficiary, to be administered by the Trustees upon the trusts set out in this Trust Agreement.
>
> 3.2 During consultation meetings with the Members leading to the November 1, 2003 referendum on the Settlement Agreement and this Trust Agreement, there was broad support for the following statement as a *general rule* (not binding) for the Trustees:
>
>> The Michipicoten First Nation Community Trust is intended to be used to provide social, economic and cultural benefits to all Members, no matter where they live, and to create a vibrant community so that any Member who wishes to do so may live,

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work or retire on the Reserve.

5 The trust agreement further provides:

1. Article 5.1 provides that there shall be a board of nine trustees (”Trustees”);

2. Article 5.4 provides that the original trustees are appointed by the Chief and Counsel with staggered terms and the new trustees will be elected for three-year terms thereafter;

3. Article 5.6 provides that at least five of the trustees must live on the reserve during their term;

4. Article 5.7 provides that at least one trustee must be a lawyer and need not be a member of the MFN;

5. Article 6.1 provides that:

> ”In addition to all other powers conferred upon them by the other provisions of this Trust Agreement, or by any statute or general rule of law, the Trustees, without the interposition of any person entitled hereunder and without application to or approval by any Court, shall have and are hereby given the power and authority in their absolute discretion at any time and from time to time to administer the Trust Property, in accordance with the provisions of this Trust Agreement, including without limiting the generality of the foregoing:
>
> > (a) Retain, hire, dismiss and replace lawyers, accountants, bookkeepers, investment advisors, investment counsel, realtors, appraisers, auctioneers, architects, engineers and other independent advisors or organizations qualified in the field for which their advice and opinions are sought, including a General Manager, to assist the Trustees in carrying out their responsibilities and duties under this Trust Agreement, but the Trustees shall not be bound to act upon such advice, and shall not be responsible for any loss caused by so acting or not so acting, provided the decision to act or not act was reasonably taken;
>
> . . .
>
> > (c) Make, and change from time to time, such rules as they deem appropriate and reasonable to govern their procedures, provided that such rules shall not be

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inconsistent with this Trust Agreement or any laws which govern trustees generally;

(d) Institute, prosecute, settle and defend any lawsuits or other proceeding affecting them as Trustees, or the Trust property or any part of it, and make application to any Court of competent jurisdiction in respect of this Trust Agreement;

(e) Pay reasonable salaries, wages, fees and costs for the services of the persons or organizations referred to in subparagraph (a) above;

(f) Pay out of Interest reasonable honoraria to Trustees for services provided under this Trust Agreement;

(g) Pay out of Interest reimbursement to Trustees of expenses reasonably incurred by them in carrying out the terms of this Trust Agreement;

(h) Engage a Financial Institution or other adviser or agent to carry out some or all of the directions set out in this trust Agreement, and compensate such person in such manner as the Trustees consider appropriate;

. . .

6. Article 10.1 and 10.2 state:

10.1 The Trustees shall not be liable or accountable for any loss or damage to the Trust Property, or any part thereof, resulting from the exercise of a discretion or authority conferred upon them by this Trust Agreement or any other statute or law as long as they are acting in good faith and honestly believe they are acting in the best interest of the First Nation.

10.2 One trustee shall not be accountable for the acts, neglects or defaults of any other Trustee and shall not in any case be liable, answerable or accountable for any loss of money or security or other property unless the same happens through his or her own fraudulent or negligent act. Due care and good faith of each Trustee shall be presumed unless it is rebutted by evidence to the contrary.

6 Within two years of the creation of the trust, relations between the trustees and the Chief and Counsel soured. While the reasons behind the deterioration are immaterial to my analysis, it is clear that from the middle of the last decade onwards, the Trustees and the Chief and Counsel

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have been unable to see eye-to-eye regarding the Trust and any allocation of funds.

7 In 2010, the Chief and Counsel attempted to terminate the Trust via a referendum but they were unable to secure enough votes to accomplish this aim.

8 The Chief and Counsel brought an Application to force the Trustees pass their accounts. On February 13, 2012, my brother Justice McMillan ordered that the Trustees pass their accounts for the period commencing January 1, 2008 ending December 31, 2010 (the "Accounting Period"). On June 6, 2013, Justice McMillan made a subsequent procedural Order whereby the parties were to choose whether or not to rely on written materials and make other such decisions. The parties chose to file materials in support of their positions and have not cross-examined upon same. As such, I must accept what has been filed as being both factually accurate and authentic as per paragraph 3 of Justice McMillan's June 6, 2013 Order.

9 During argument, counsel for Chief and Counsel indicated that the Chief and Counsel is not alleging fraud by the Trustees and is not asking that the Trustees reimburse the Trust. Further, counsel for the Chief and Counsel indicated that the objection to passing of accounts is merely a precursor to a larger Application that will be brought to have the Trust wound up by the Courts.

The Law

Procedure

10 Sections 23 and 23.1 of the *Trustees Act* describes some of the procedure to be used on a passing of accounts in a non-estates situation:

> 23. (1) A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court. R.S.O. 1990, c. T.23, s. 23 (1); 2000, c. 26, Sched. A, s. 15 (2).

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(2) Where the compensation payable to a trustee has not been fixed by the instrument creating the trust or otherwise, the judge upon the passing of the accounts of the trustee has power to fix the amount of compensation payable to the trustee and the trustee is thereupon entitled to retain out of any money held the amount so determined. R.S.O. 1990, c. T.23, s. 23 (2).

23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,

(a) pay the expense directly from the trust property; or

(b) pay the expense personally and recover a corresponding amount from the trust property. 2001, c. 9, Sched. B, s. 13 (1).

(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust. 2001, c. 9, Sched. B, s. 13 (1).

11 Section 49(3) of the *Estates Act* stated:

49.(3) The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appeal. R.S.O. 1990, c. E.21, s. 49 (3).

Standard of Care

12 Section 35(1) of the *Trustees Act* states:

If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be

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> 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, the court may relieve the trustee either wholly or partly from personal liability for the same.

13 The courts have interpreted this "good faith" standard of care owed by both professional and non-professional trustees in managing trust assets. Specifically, the Supreme Court of Canada in *Fales v. Canada Permanent Trust Co.* stated that the standard is that of a person of ordinary prudence in managing his or her own affairs. *Fales* dealt with a case involving the sale of certain shares and the nature of the duty owed to maximize the value of said share sale:

> Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs (*Learoyd v. Whiteley* [(1887), 12 App. Cas. 727.], at p. 733; Underhill's Law of Trusts and Trustees, 12th ed., art. 49; Restatement of the Law on Trusts, 2nd ed., para. 174) and traditionally the standard has applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous. There has been discussion of the question whether a corporation which holds itself out, expressly or impliedly, as possessing greater competence and ability than the man of ordinary prudence should not be held to a higher standard of conduct than the individual trustee. It has been said by some that a higher standard of diligence and knowledge is expected from paid trustees: Underhill's Law of Trusts and Trustees, art. 49, relying upon obiter of Harman J. in Re Waterman's Will Trusts; *Lloyds Bank, Ltd. v. Sutton* [[1952] 2 All E.R. 1054.], at p. 1055, and upon dicta found in *National Trustees Co. of Australasia v. General Finance Co. of Australasia* [[1905] A.C. 373 (P.C.), a case which did not turn upon the imposition of a greater or lesser duty but upon the relief to which a corporate trustee might be entitled under the counterpart of s. 98 of the Trustee Act of British Columbia, to which I have earlier referred.
>
> In the case at bar the trial judge held that the law required a higher standard of care from a trustee who charged a fee for his professional services than from one who acted gratuitously. Mr. Justice Bull, delivering the judgment of the Court of Appeal, was not prepared to find, and held it unnecessary to find that a professional trustee, by virtue of that character and consequential expertise, had a greater duty to a cestui-que trust than a lay trustee.
>
> The weight of authority to the present, save in the granting of relief under remedial legislation such as s. 98 of the Trustee Act, has been against making a distinction between a widow, acting as trustee of her husband's estate, and a trust company performing the same role. Receipt of fees has not served to ground, nor to increase exposure to, liability. Every trustee has been expected to act as the person of ordinary prudence would act. This

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standard, of course, may be relaxed or modified up to a point by the terms of a will and, in the present case, there can be no doubt that the co-trustees were given wide latitude. But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

Fales v. Canada Permanent Trust Co. (1976), [1977] 2 S.C.R. 302 (S.C.C.), at 315.

14 Thus, trustees are held to the standard of a reasonably prudent person administering their own affairs and can be excused from errors in administering the trust when said errors arise honestly and in good faith.

Need for Specificity in Objections

15 While a beneficiary has the right to object to the passing of accounts, a beneficiary appears to have a concomitant duty to ensure that her/his objections are sufficiently specific to enable trustees to answer the objections in a meaningful fashion. In *Vano Estate, Re*, Brown J. indicated to the objector that the nature of his objections were insufficiently specific to enable the trustees to make meaningful reply. Such a failure can lead to the dismissal of that objection:

I will give Mr. Vano one more chance to do that which the *Rules of Civil Procedure* require him to do — to give notice to the applicant trustee of the specifics of each objection made to the accounts and the adjustments he seeks to the filed accounts. Accordingly, Mr. Vano is to serve counsel for the Estate Trustee During Litigation, no later than February 26, 2010, with a revised Issues List with Columns C and D properly completed to identify each reduction sought to the accounts and the reason for each reduction. To give Mr. Vano some guidance: if he objects, for example, to a disbursement of $2,000 shown in the accounts, he must identify that line item in Column B, then state in Column C the reduction to the item he seeks (e.g. a reduction from $2,000, to $1,750), and finally give the reasons for the reduction sought in Column D. Only by completing the Issues List in that way will the judge hearing the contested application understand what relief Mr. Vano will be seeking at the hearing...

The applicant is entitled to have its application heard. The only delay at this point is the inability of Mr. Vano to articulate his objections. If he cannot state his objections with the precision required by the *Rules of Civil Procedure*, I will have to consider further directions

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regarding the hearing of the application, including whether Mr. Vano's notice of objection should be allowed to stand.

Vano Estate, Re, [2009] O.J. No. 5228 (Ont. S.C.J.) at paras 4 and 6.

16 I believe that the principle mandating that an objection must be sufficiently specific to enable trustees to respond applies to non-estate trust litigation. Were that not the case, the vaguest of objections could unduly interfere with the proper administration of a validly constituted and efficiently administered trust. Thus, the Objectors in the case before me must provide sufficient specificity to their objections or they run the risk of having those objections struck and the accounts passed.

The Objections

17 Several objections were listed in the two notices of objection before me. It should be noted that several of the objections were such that, upon reading of same, I was uncertain as to their specific contentions. Nonetheless, during argument, counsel for the Chief and Counsel limited the objections to the following objections:

A. Objection

18 In 2010, the Trustees purchased property at 16 Whitesands Drive, on the MFN Reserve in order to house the offices of the Trust. The Trustees had been renting facilities at the band office but, as a result of the aforementioned dispute between the Trustees and the Chief and Counsel, the Chief and Counsel terminated the Trust's lease and caused the Trust to have no facilities from which to operate. The Trustees paid $15,000 for the acquisition of the Certificate of Possession attached to 16 Whitesands Drive. The Certificate of Possession was purchased from a former trustee and the trustee's spouse but the paperwork evidencing the transaction appears to be a boilerplate agreement of purchase and sale for fee simple, which by definition does not apply to lands located on reserves.

19 The Objectors take issue with the following:

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1. The trust agreement does not allow for the purchase of real estate;

2. The Trustees completed no due diligence to ensure that the purchase price was fair market value;

3. The transaction was not properly recorded as evidenced by the above-referenced paperwork.

4. A report prepared by Mr. Sam Butkovich — a licensed real estate agent - assessing the fair market value of 16 Whitesands is flawed since (a) it is not a properly tendered expert report; and (b) the comparables used by Mr. Butkovich are properties in Wawa, and not reserve properties; and

5. Paragraph 2(q) of the trust agreement does not permit the purchase of real estate.

20 The Trustees states that:

1. Paragraphs 2, 6.1, 6.2 and 11.4 of the Trust agreement enable such a purchase;

2. Mr. Butkovich's expert report indicates that fair market for 16 Whitesands Drive was between $12,300 and $14,500 as of the date of purchase; and

3. The Trustees had no other option but to purchase the property since there was no other place to house the affairs of the trust.

21 Paragraph 2(q) of the trust agreement states provides that the following instruments are permitted investments for the Trust:

i. Publicly traded Canadian and non-Canadian common stocks and convertible debentures;

ii. Bonds, debentures, notes or other debt instruments of Canadian and non-Canadian governments;

iii. Mortgages secured upon real property;

iv. Private placements, or debt or equity, of Canadian agencies or corporations;

v. Guaranteed Investment Contracts or equivalent;

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vi. Mutual or pooled funds of the above listed Permitted Investments;

vii. Without limitation by subparagraphs (i) through (vi), any investment in any Band Company, or development, or project recommended by Council which is deemed by the Trustees to provide sufficient guarantee and rate of return to the Trust, so as not to abrogate from the duties, responsibilities, and authority of the Trustees, as herein contained, and

viii. Such other investments as are consistent with an investment policy to be recommended by Investment Counsel and approved by the Trustees.

22 Article 6.2 of the trust agreement states:

Subject to Article 11 and Article 12, the Trustees are permitted to purchase Permitted Investments from Trust Property and to dispose of such Permitted Investments, as the Trustees in their absolute discretion consider appropriate from time to time including without limiting the generality of the foregoing:

(i) To use their discretion in the realization of any property of the Trust Property and to see, call in and convert into money any part of the Trust Property not consisting of money at such time or times and in such manner and upon such terms and either for cash or credit or for part cash and part credit, as the Trustees may decide upon, or to postpone such conversion of any such property or part or parts thereof for such length of time as they consider available; and

(j) To incorporate and organize a corporation or corporations under the law of any jurisdiction in Canada or elsewhere at the expense of the Trust Property for the purpose of investing the whole or any part of the Trust Property in shares or other securities of such corporation or corporations, as they may in their absolute discretion deem to be in the best interest of the Trust Property and the First Nation.

23 Article 11.4(b), (h) and (s) state:

Trust Property recorded in the Revenue Account shall only be expended on:

. . .

(b) Constructing and maintaining homes, elders residences, schools, roads, bridges, ditches,

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water-courses, fences, buildings or permanent improvements, works or infrastructure on the Reserve;

. . .

(h) Acquiring land to be held for investment or development purposes, whether or not the land is to be added to the Reserve;

. . .

(s) Paying the expenses of the Trustees and the Michipicoten First Nation Community Trust in connection with the administration and operation of the Trust.

24 As a guiding principle, it must be stated that the Chief and Counsel do not allege any fraud or bad faith in purchasing the 16 Whitesands. This was a good tactical decision by counsel given that such a suggestion would fly in the face of the evidence that the Trust needed to move as a result of a decision taken by the Chief and Counsel (i.e. the decision to terminate the Trust's tenancy in the band offices).

25 I thus find that the Trustees acted in good faith in purchasing the 16 Whitesands.

26 Having made that determination, and in light of the fact that the Chief and Counsel are not seeking to have the Trustees repay any monies as a result of this Application, I will pass the accounts with respect to the 16 Whitesands. It occurs to me that, were I not to pass the accounts, the Trust may not have a location from which to operate. Such a result would obviously run afoul of the guiding principles of the Trust as outlined above.

27 Article 11.4(h) of the Trust Agreement appears to permit the acquisition of lands for investment purposes although paragraph 2(q) fails to mention real estate as a permissible trust property. This discrepancy ought to be resolved but I am unwilling to decide this issue in a situation where the Chief and Counsel are not seeking reimbursement of funds.

B. Objection

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28 The Objectors state that the expenses associated with operating the Trust were simply too high. In support of this contention, the Objectors state that the investment income during the Accounting Period was $752,548 and that $554,138 of that income was used on operating expenses leaving a net profit of only $207,655, or 27% of net income.

29 In support of this contention, the Objectors stated that there were an excessive number of meetings during the Accounting Period and that the payment of Honoraria was excessive.

30 This objection fails for a variety of reasons.

31 Firstly, as per *Vano Estate, Re*, this objection is simply too vague. The Trustees could not reasonably respond to this objection without further specificity.

32 Secondly, there is no evidence before me to suggest that the use of 73% of investment income for operating expenses is excessive, especially when I consider the fact that the Accounting Period encapsulates the stock market crash of 2008 and the ensuing recession.

33 Thirdly, counsel for the Trustees suggest that, had Trustee remuneration been calculated according to certain common law methodologies, the Trustees' compensation would have exceeded the Honoraria paid. As such, the Honoraria may not be inherently excessive.

34 Fourthly, Paragraph 4 of the trust agreement states that the Trustees are to hold a minimum of four meetings per annum in administering the Trust. The trust agreement does not specify where the meetings are to be held, the maximum amounts to be spent on meetings or the maximum number of times the Trustees can meet per annum. While I agree that the location of the meetings seemed to be somewhat expensive given that closer locations (i.e. Wawa) may have substantially reduced costs (to say nothing of the savings engendered by teleconferences), I note that the Objectors are not asking for any monies to be returned and, as such, I will not say any more about this point.

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35 Given the foregoing, I reject this objection.

C. Objection

36 The Objectors used a sampling method to suggest that the record-keeping of the Trustees was sufficiently shoddy so as to prevent the passing of accounts. As an example, the Objectors pointed to payments made to Angela Carter for even numbered expenses (i.e. $2,500). These payments amounted to several thousand dollars.

37 The Trustees submit that these payments were actually pre-paid expense payments. For example, the Trust pre-paid Ms. Carter $2,500 to be used on office supplies. Ms. Carter would remit invoices to the Trust and a subsequent reconciliation would occur. Counsel for the Trustees indicated - and counsel for the Objectors agreed - that once all reconciliations for all prepayments to all Trustees were considered, an overall discrepancy of only $565 remains for the Accounting Period.

38 With respect to the "pre-payment" issue, I agree that the form of accounting (i.e. pre-payment) is indeed odd. However, the Objectors were once again clear that they were not alleging fraud in the instant proceedings and were not looking for any monies to be repaid. Given that fact and given the relatively small discrepancy as agreed to by the parties, I reject this objection.

39 The Objectors also stated that there were instances where source documentation was insufficient to justify expenses paid but failed to indicate the exact nature of said insufficiency prior to the Application date. The failure to specify this ground of objection prior to the hearing date did not provide the Trustees with sufficient ability to respond. Accordingly, being guided by the principle culled from *Vano Estate, Re*, I reject this objection as being too imprecise and untimely.

D. Objection

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40 The next objection relates to payments for administration expenses. Specifically, the Objectors claim:

a. That the Trustees had the ability to hire a General Manager as per Article 6.1 of the Trust Agreement but could not hire themselves to perform administrative acts;

b. Even if the Trustees could perform administrative acts, invoices submitted by the Trustees were in round numbers (i.e. 5.0 hours) with no partial times allotted. The Objectors indicate that such numeric values reflect the Trustees "rounding up" their time. The accounts are therefore inflated. The accounts should not be passed as a result; and

c. Even if a. and b. above fail, the Trustees passed a motion to pay individuals $20/hr to perform administrative duties but several Trustees submitted Honoraria in the amount of $400/day for the performance of administrative duties. As such, the Trustees ran afoul of their own resolutions as they charged the Trust too much for administrative work. The Honorarium rate ($400/day) exceeds the daily work rate approved by the Trustees (8 hours × $20/hr = $160/day). It should be noted that this point arose for the first time in oral argument.

41 As always, the Objectors do not allege fraud and do not wish to have the Trustees reimburse any funds.

42 With respect to point (a), while it is true that the Trustees had explicit authority to hire a General Manager, Article 6 of the Trust Agreement enables the Trustees to engage in reasonable expenses for the administration of the Trust. Angela Carter's evidence makes clear that the Trustees at various times needed to perform administration work. I find nothing unreasonable in this phenomenon despite the lack of specific delineation in the Trust Agreement permitting same, especially since the Trustees are permitted to hire a General Manager to perform, *inter alia*, administrative duties.

43 With respect to point (b), the round numbers submitted again do not appear to be unreasonable. I believe that I can take judicial notice of the fact that some businesses pay employees for whole hours when only partial hours are worked. Accordingly, I see nothing inherently unreasonable in submitting receipts for whole hours.

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44 With respect to point (c), had the Objectors indicated that they sought reimbursement from the Trustees for overpayment, I likely would have agreed with their position since the Trustees who were paid honoraria for administrative work clearly over-charged the Trust as per the Trustee's own resolution. Nonetheless, since the Objectors are not alleging fraud and do not seek repayment, I will pass these accounts despite my misgivings.

E. Objection

45 The Objectors state that the failure of the Trustees to produce T-4 slips and financial statements in a timely fashion as outlined by the trust agreement disentitles the Trustees to a passing of accounts.

46 In regards to the T-4 issue, the Trustees have produced payroll summaries outlining the amounts paid to each Trustee for the Accounting Period. Even though discrepancies exist in the sums listed in the financial statements, it is admitted by the Objectors that all but one of the discrepancies was minor: the Objectors point to a $1555.42 difference between the amounts shown in the payroll summary and a T-4 given to Sharon Derasp as being a major discrepancy. Again, given the fact that the Objectors do not wish to have the Trustees reimburse the Trust and given its size, I do not see how a $1,555.42 discrepancy can be characterized as anything other than minor. I will thus pass the accounts in this regard rather than unduly limit the operation of the Trust.

47 As for the Trustees' failure to provide its financial statements and T-4's in a timely fashion, tardy production that has been subsequently rectified should not inherently delay the passing of accounts without evidence of some prejudice. Further, even if some T-4's have yet to be produced, I am satisfied that the payroll summaries are sufficient evidence to permit the Objectors to understand the payments and thus the failure to produce a T-4 should not prevent the passing of accounts. Any issues with T-4's will obviously be an issue for Revenue Canada but I leave that to them.

48 As such, I reject this objection.

F. Objection

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49 The Objectors object to the passing of accounts on the basis that certain portions thereof utilize an incorrect method of recognizing revenue and expenses. While this assertion may be true, the Objectors provided no expert evidence in support of this contention.

50 The Trustees indicated that an initial Draft Order placed before the Court contained errors that originate from a misapplication of Generally Accepted Accounting Principles (”GAAP”) but that a subsequent and rectified Draft Order now appears before the Court.

51 It is the Objectors’ duty to demonstrate to the Court the reason that the accounts may not be passed and, absent any expert testimony regarding GAAP or any other accounting methodology, I hereby pass the accounts as I have no expert evidence before me to indicate that the accounts failed to comply with appropriate standards.

Costs

52 The Trustees seek remuneration for increased costs in the amount of $181,499.84 to be paid out of the Trust. They base their submissions on the following:

1. Paragraphs 4 and 5 of Justice McMillan’s Order of February 13, 2012 mandates such a result;

2. The costs are reasonable given:

    a. The need to reply to vague objections;

    b. The necessary lawyer’s costs associated with point a. above;

    c. The accounting and real estate fees associated with responding to point (a) above;

    d. The value of the Trust mandates such detailed work; and

    e. The volume of materials necessary to argue the Application, and the level of

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preparation necessary therefor was reasonable.

53 The Objectors state that the costs sought are excessive and reflect "over-lawyering" of the file. Further, the Objectors state that I should depart from the Order of Justice McMillan and discount the quantum of costs to be paid out of the Trust.

54 Justice McMillan's Order states:

> 4. THIS COURT ORDERS that the full indemnity legal costs and disbursements of the Trustees related to the passing of accounts application shall be paid out of the assets of the Michipicoten First Nation Community Trust.
>
> 5. THIS COURT ORDERS that the costs of the accountant retained to prepare the trust accounts, Avi Dahary of Account Trust shall be paid for out of the assets of the Michipicoten First Nation Community Trust by the Trustees.

55 I agree with the Trustees that the wording of Justice McMillan's Order is clear and unambiguous: The Trustees' costs are to be paid from the assets of the Trust. Further, I also accept the Trustees position that the costs are reasonable for the reasons outlined in paragraph 52. As such, I order that the Trustee's costs of this Application, in the amount of $181,499.84 inclusive of disbursements and HST, be payable out of the assets of the Trust.

56 I leave it to the parties to forward the appropriate Order for signature.

Application dismissed.

End of Document

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