CITATION: The Herman Grad 2000 Family Trust v. Minister of Revenue, 2016 ONSC 2402
COURT FILE NO.: CV-15-10873-00CL, CV-15-10868-00CL, CV-10871-00CL

CITATION: The Marya Grad Spousal Trust v. Minister of Revenue, 2016 ONSC 2407
COURT FILE NO.: CV-15-10875-00CL, CV-15-10870-00CL,CV-15-10874-00CL, CV-1510872-00CL
DATE: 20161014

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)	
	)	
THE HERMAN GRAD 2000 FAMILY TRUST	)	*Matthew Williams* and *Tim Barrett*, for the Appellant
Appellant	)	
– and –	)	
	)	
THE MINISTER OF REVENUE	)	
Respondent	)	*Martin Gentile* and *Erin Strashin*, for the Respondent
AND BETWEEN:	)	
	)	
THE MARYA GRAD SPOUSAL TRUST	)	*Matthew Williams* and *Tim Barrett*, for the Appellant
Appellant	)	
– and –	)	
	)	
THE MINISTER OF REVENUE	)	*Martin Gentile* and *Erin Strashin*, for the Respondent
Respondent	)	
	)	
	)	**HEARD:** April 11,12,13,14 and 18, 2016

REASONS FOR JUDGMENT

WILTON-SIEGEL J.

[1] The appellants are two trusts. They were assessed provincial taxes as residents of Ontario pursuant to the *Income Tax Act*, R.S.O. 1990, c. I.2 (the "ITA (Ontario)" and the *Taxation Act*, S.O. 2007, c. 11, Sched. A (the "Taxation Act") (collectively "the Ontario Acts") for various

taxation years between 2006 and 2009, as set out below. The appellants appeal on the basis that they were not Ontario residents during the years at issue. The appellants assert that they were Alberta residents and, therefore, not liable for the Ontario provincial taxes levied.

Background

[2] The following facts are relevant to the issues herein. They are taken from an agreed statement of facts in this proceeding, or are otherwise not disputed.

The Parties

[3] Herman Grad ("Grad") is an individual resident in Ontario. Marya Grad ("Marya") is Grad's spouse and also resides in Ontario. At all material times, the issue of Grad were Rachel Grad ("Rachel"), Dalia Grad ("Dalia"), and Jennifer Grad ("Jennifer").

[4] The appellant, The Herman Grad 2000 Family Trust (the "Family Trust"), is a discretionary family trust established pursuant to a Deed of Settlement dated January 28, 2000 (the "Family Trust Deed").

[5] The other appellant, The Marya Grad Spousal Trust (the "Spousal Trust"), is a spousal trust established in Alberta pursuant to a Deed of Settlement dated August 17, 2006 (the "Spousal Trust Deed"). Grad settled the Spousal Trust for the benefit of Marya.

[6] Jeff Handelsman ("Handelsman") is an individual resident in Ontario. Handelsman was the chief financial officer of the Grad Group of Companies (defined below). He provided unremunerated services and advice described below to the Family Trust and the Spousal Trust.

[7] In these Reasons, the Family Trust and the Spousal Trust are collectively referred to as the "Trusts" or the "appellants," and individually as an "appellant" or a "Trust." The Family Trust Deed and the Spousal Trust Deed, in each case as amended to date, are collectively referred to as the "Trust Deeds."

The Grad Group of Companies

[8] The Grad group of companies included:

(i) Leisureworld Inc. ("Leisureworld"), a corporation which operated long-term care facilities throughout Ontario. It was incorporated under the laws of Ontario in 1966;

(ii) Herrad Corp. ("Herrad"), a holding corporation that was incorporated under the laws of Ontario in 1974; and

(iii) Markham Suites Hotel Limited ("Markham Suites" and, together with Herrad, the "Corporations"), a corporation owning and operating an all-suites hotel in Markham, Ontario. It was incorporated under the laws of Ontario in 2004.

[9] At all relevant times, Grad was the chief executive officer and the sole director of each of Leisureworld, Herrad, and Markham Suites (collectively, the "Grad Group of Companies"). As mentioned, until January 31, 2016, Handelsman was the chief financial officer of the Grad Group of Companies and reported directly to Grad. Handelsman testified that his duties as chief financial officer included: the provision of tax advice; the provision of treasury services, including the management of cash and investments; the provision of advice regarding investments for Grad; due diligence related to prospective transactions; the negotiation of various agreements; management of the financial aspects of Grad's operating companies; attendance to legal matters; and the provision of assistance to the external accountant for the Grad Group of Companies, Shimmerman Penn LLP ("Shimmerman Penn"), in connection with the preparation of tax returns.

[10] As at January 1, 2005,

(i) all of the common shares of Markham Suites were owned by the Family Trust;

(ii) all of the outstanding preference shares of Markham Suites were owned by Herrad; and

(iii) all of the common shares of Herrad were owned by Grad.

Sale of the Leisureworld Assets

[11] On March 18, 2005,

(i) Leisureworld executed a Purchase Agreement with Macquarie Senior Care LP ("Macquarie") to sell the assets of the company for $381,825,900; and

(ii) at the direction of Macquarie, Leisureworld rolled its assets into a partnership and received partnership units in exchange.

[12] On October 15, 2005, Leisureworld and Markham Suites amalgamated and continued as Markham Suites.

[13] Later in October 2005, Markham Suites disposed of the partnership units in the partnership that owned the Leisureworld assets.

[14] For its fiscal year ended September 30, 2006, Markham Suites reported a gain of $228,597,834 relating to the sale of the Leisureworld assets/partnership units.

Payments, Distributions, and Transactions Involving the Family Trust, Markham Suites, and Grad after the Leisureworld Sale

[15] On October 21, 2005, the Family Trust borrowed $60,574,177 from Markham Suites (the "Borrowed Funds").

[16] The Family Trust invested the Borrowed Funds in a portfolio of securities (the "Portfolio"). The Portfolio was managed by discretionary investment managers at Gluskin Sheff, Scotia Capital, HSBC and CIBC Woody Gundy. It is currently managed by discretionary investment managers at The Toronto-Dominion Bank ("T-D") and RBC Dominion Securities.

[17] On August 17, 2006:

(i) Grad, as sole director of Markham Suites, caused Markham Suites to declare dividends to its common shareholder, the Family Trust. The Family Trust received $72,898,348 of ordinary dividends and $9,000,000 in capital dividends;

(ii) The holder of the issued and outstanding Class C, Class D, and Class F shares of Markham Suites, being Herrad, waived any claim or entitlement to the dividends; and

(iii) The Family Trust repaid the Borrowed Funds to Markham Suites.

[18] Also, on August 18, 2006, Grad requested and received encroachments of the capital of the Family Trust totalling $23,600,000.

[19] On August 22, 2006, the Initial Trustees of the Family Trust caused the Family Trust to enter into a partnership agreement to form CAL Equities Limited Partnership ("CAL Equities"), a limited partnership formed under the laws of Alberta. The general partner of CAL Equities was 1261152 Alberta Limited ("126"), a corporation incorporated under the laws of Alberta by Grad on August 11, 2006. The head office of 126 was located at the same address as the Trustees (as defined below). 126 contributed $50 to the capital of CAL Equities and received one Class A partnership unit. The limited partner of CAL Equities was the Family Trust. The Family Trust made a contribution of $1,000 to CAL Equities and received one Class B partnership unit.

[20] Thereafter, 126 managed CAL Equities. At all relevant times, Grad was the sole director, officer, and shareholder of 126. 126 had no income or expenses of its own. The only asset it held was an account receivable of $10 and the one Class A unit in CAL Equities that it received on the formation of CAL Equities for $50.

[21] On September 8, 2006,

(i) Grad, as the sole director of Markham Suites, caused Markham Suites to declare a capital dividend of $27,000,000, which was paid to the Family Trust as the sole common shareholder of Markham Suites; and

(ii) the holder of the issued and outstanding Class C, Class D, and Class F shares of Markham Suites, being Herrad, waived any claim or entitlement to dividends.

[22] On September 12, 2006, Grad requested and received an encroachment of the capital of the Family Trust of $30,000,000.

The Family Trust

[23] Grad requested Syd Bojarski ("Bojarski") to settle the Family Trust in Ontario by contributing a silver coin for the benefit of Grad, Marya, and the issue of Grad. Bojarski executed the Family Trust Deed establishing the Family Trust on January 28, 2000.

[24] Bojarski was an accountant with Mintz & Partners LLP in Toronto, the accounting firm for the Grad Group of Companies until 2006. Bojarski is an individual resident in Ontario.

[25] The initial trustees of the Family Trust were Grad, Allan Leibel, and Elly Reisman. Albert Michaels subsequently replaced Elly Reisman as a trustee (the "Initial Trustees"). The Initial Trustees were all individuals resident in Ontario.

[26] The Family Trust Deed was amended by a deed of amendment dated January 12, 2006 (the "First Family Trust Deed Amendment") to give the trustees the power "to delegate management and authority to discretionary managers of investment funds as the Trustees determine appropriate, ... and such delegation does not require the Trustees to implement a written plan or strategy as contemplated by the Trustee Act."

[27] On September 13, 2006, the Family Trust Deed was further amended by a deed of amendment (the "Second Family Trust Deed Amendment"). Sections 8.4, 8.7, and 8.8 of the Second Family Trust Deed Amendment gave Grad the power to remove and replace the trustees of the Family Trust at any time, for any reason he deemed sufficient.

[28] On September 15, 2006, the Initial Trustees resigned as trustees of the Family Trust. On the same day, Sian Matthews ("Matthews") and John C. Armstrong, QC ("Armstrong") (collectively, the "Family Trust Trustees"), lawyers with Bennett Jones LLP in Calgary ("Bennett Jones"), were appointed by Grad as the new trustees of the Family Trust. Matthews had previously prepared the CAL Equities partnership agreement at the request of Grad's legal counsel at Thorsteinssons LLP ("Thorsteinssons") in Toronto. At all relevant times, Matthews and Armstrong were residents of Alberta.

[29] At the time that Matthews and Armstrong became the Family Trust Trustees, the property of the Family Trust consisted of:

(i) the settlement property (a silver coin);

(ii) the 100 outstanding common shares of Markham Suites;

(iii) one Class B partnership unit of CAL Equities;

(iv) the Portfolio, which was valued at approximately $40 million; and

(v) approximately $19 million in cash.

[30] During their term as the Family Trust Trustees, Matthews and Armstrong each received $3,750 per year in trustee fees.

[31] Matthews and Armstrong resigned as trustees of the Family Trust on November 30, 2009. Cidel Trust Company ("Cidel") was appointed by Grad as the sole trustee of the Family Trust on the same day. Cidel was resident in Alberta.

[32] At all relevant times, the Family Trust's legal advisors, Thorsteinssons and Goodmans LLP, resided in Ontario and also acted for Grad, the beneficiaries, and the Grad Group of Companies. Matthews also provided some legal services to the Family Trust in her capacity as a lawyer at Bennett Jones.

[33] The Family Trust filed each of its T3 returns for the years 2000 to 2005 as a resident of Ontario. Mintz & Partners in Toronto prepared the Family Trust's T3 returns for these taxation years. The Family Trust did not carry on any investment activity until 2005. Accordingly, for the 2000 to 2004 taxation years, the Family Trust filed nil T3 returns of income.

[34] Shimmerman Penn in Toronto was retained by the Family Trust Trustees to prepare the Family Trust's T3 returns for its 2006 to 2009 taxation years. Shimmerman Penn was also the external accountant for the Grad Group of Companies in these years.

[35] Handelsman provided services and advice to the Family Trust, as discussed below, but received no remuneration for doing so.

Family Trust Investment in CAL Equities LP

[36] On September 30, 2006,

(i) the Family Trust Trustees subscribed for 39,937.81843 Class B units of CAL Equities at $1,000 per unit (the "Class B units");

(ii) the Class B units were valued at $39,937,818.43 in the aggregate;

(iii) pursuant to subsection 97(2) of the ITA *Income Tax Act*, R.S.C. 1985, c. I (5th Supp.), as amended, (the "ITA"), the Family Trust transferred securities comprising a portion of the Portfolio to CAL Equities and received 31,928.12721 Class B units in consideration for the exchange;

(iv) the Family Trust transferred the remaining securities that it held in the Portfolio to Cal Equities in exchange for 7,651.35059 Class B units; and

(v) the Family Trust transferred other property it held to CAL Equities in exchange for 358.34063 Class B units.

[37] The securities comprising the Portfolio held by CAL Equities continued to be managed by discretionary investment managers in Toronto.

[38] The value of the Class B units was:

(i) $44,369,000 as at December 31, 2006,

(ii) $43,475,000 as at December 31, 2007, and

(iii) $23,336,000 as at December 31, 2008.

[39] The Family Trust also held cash and/or liquid securities during this period.

Family Trust Distribution on May 1, 2007

[40] In April, 2007, Grad, Dalia, and Jennifer requested an encroachment of the capital of the Family Trust of $3,000,000, which was paid to the equal benefit of each in the amount of $1,000,000 on May 1, 2007. The encroachment of $1,000,000 for the benefit of Rachel was received by Grad. This was done to avoid possible United States tax issues because Rachel was living in the United States at the time.

Family Trust Income Tax Filing and Assessment History

[41] In filing its T3 returns of income for its taxation years ended December 31, 2006 to December 31, 2009 (the "taxation years"), the Family Trust filed as a resident of Alberta, reporting taxable income as follows:

(i) $85,370,876 for its 2006 taxation year;

(ii) $252,591 for its 2008 taxation year; and

(iii) $1,099,124 for its 2009 taxation year.

[42] In respect of each of the taxation years, the Minister of National Revenue (the "Minister") reassessed the Family Trust as a resident of Ontario subject to Ontario provincial tax (the "Family Trust reassessments"). The Family Trust served notices of objection in respect of the Family Trust reassessments.

[43] The Family Trust reassessments are the subject matter of certain of these appeals. The difference in tax that would be payable if the Family Trust were resident in Ontario rather than Alberta for its 2006 to 2009 taxation years is $4,730,051.

Payments and Distributions from Herrad to Grad after the Leisureworld Sale

[44] On January 1, 2006, Grad, as sole director of Herrad, caused the declaration of a dividend of $12,000,000 on the common shares of Herrad. This amount was paid to Grad as the sole common shareholder of Herrad. On March 27, 2007, Grad, as sole director of Herrad, made an election for a capital dividend under subsection 83(3) of the ITA with respect to the $12,000,000 dividend.

[45] On August 17, 2006:

(i) Herrad filed Articles of Amendment to increase its authorized share capital by creating an unlimited number of Class A preference shares (the "Class A shares");

(ii) The Class A shares were voting, had no entitlement to dividends, and had a redemption value of $1 per share;

(iii) Herrad, which was the registered holder of 1,000 Class C shares of Markham Suites, redeemed 432 of its Class C shares for a redemption price of $18,267,984;

(iv) Grad, as the sole director of Markham Suites, authorized the redemption of the Class C shares;

(v) Grad, as the sole director of Herrad, declared a dividend of $18,267,984 on the common shares of Herrad to be paid out of Herrad's capital account. This amount was paid to Grad as the sole common shareholder of Herrad; and

(vi) Grad, as sole director of Herrad, made an election for a capital dividend under subsection 83(2) of the ITA with respect to the $18,267,984 dividend.

[46] Accordingly, during 2006, Grad received distributions from the Family Trust totalling approximately $53.6 million and distributions from Herrad, prior to the formation of the Spousal Trust, totaling approximately $30.3 million.

The Spousal Trust

[47] As mentioned, Grad executed the Spousal Trust Deed on August 17, 2006 and settled the Spousal Trust by contributing a silver coin for the benefit of Marya. On the settlement of the Spousal Trust, the only trust property was the settlement property.

[48] Marya was the sole capital and income beneficiary of the Spousal Trust during her lifetime. After Marya's death, the issue of Marya and Grad will be the beneficiaries of the Family Trust.

[49] Matthews and Armstrong (collectively the "Spousal Trust Trustees") were the initial trustees of the Spousal Trust. In these Reasons, Matthews and Armstrong, in their capacities as both the Family Trust Trustees and the Spousal Trust Trustees, are collectively referred to as the "Trustees."

[50] Grad was the "Protector" of the Spousal Trust pursuant to section 1(h) of the Spousal Trust Deed (the "Protector Clause"). Pursuant to section 18 of the Spousal Trust Deed, the Protector is entitled at any time, for any reason he deems sufficient, upon giving a trustee notice in writing, to remove any trustee. The removal of such trustee would be effective immediately upon the trustee receiving that notice and being fully paid all outstanding fees levied in accordance with section 24 thereof.

[51] On August 21, 2006, Grad transferred the 100 outstanding common shares of Herrad (the "Herrad common shares") by Deed of Gift for no consideration to Matthews and Armstrong in their capacities as the Spousal Trust Trustees. The Herrad common shares had a fair market value of $31,500,000 on that day. Thereafter, the assets of the Spousal Trust consisted of the

settlement property (a silver coin), the Herrad common shares, and cash and/or various short-term investments as discussed below.

[52] During their term as the Spousal Trust Trustees, Matthews and Armstrong each received $3,750 per year in trustee fees.

[53] Matthews and Armstrong resigned as trustees of the Spousal Trust on November 30, 2009. Cidel was also appointed the sole trustee of the Spousal Trust on the same day.

[54] At all relevant times, the Spousal Trust's legal advisors, who were also Thorsteinssons and Goodmans LLP, resided in Ontario and also acted for Grad and the Grad Group of Companies. Matthews also provided some legal services to the Spousal Trust in her capacity as a lawyer at Bennett Jones.

[55] Shimmerman Penn in Toronto was also retained by the Spousal Trust Trustees to prepare the Spousal Trust's T3 returns for its 2006 to 2009 taxation years. As mentioned, Shimmerman Penn was also the external accountant for the Grad Group of Companies.

[56] Handelsman also provided services and advice to the Spousal Trust, as discussed below, but received no remuneration for doing so.

Distributions of Income from the Spousal Trust

[57] On August 28, 2006, Grad, as the sole director of Herrad, caused Herrad to declare dividends of $13,943,436 and $1,000,000, respectively, on the Herrad common shares and Herrad issued non-interest-bearing promissory notes in the principal amount of the dividends. The promissory notes were signed by Grad in his capacity as president of Herrad.

[58] On August 29, 2006, Matthews and Armstrong, as the Spousal Trust Trustees, demanded payment on the promissory notes, directing that $14,543,436 be paid to Marya and that $400,000 be paid to the Spousal Trust. Herrad deposited $14,543,436 into Marya's bank account and, on September 6, 2006, deposited $400,000 into the Spousal Trust's bank account.

[59] On February 23, 2007, Grad, as the sole director of Herrad, caused Herrad to declare a dividend of $24,019,016 on the Herrad common shares. This amount was deposited into the Spousal Trust's bank account. No distribution was made to Marya in respect of this dividend.

[60] On or about August 30, 2007, Grad, as the sole director of Herrad, caused Herrad to declare a dividend of $1,500,000 on the Herrad common shares. This amount was deposited into the Spousal Trust's bank account. No distribution was made to Marya in respect of this dividend.

[61] On August 26, 2008, Grad, as the sole director of Herrad, caused Herrad to declare a dividend of $1,300,000 on the Herrad common shares. This amount was deposited into the Spousal Trust's bank account. No distribution was made to Marya in respect of this dividend.

Income Tax Filing and Assessment History

[62] In filing its T3 returns of income for its taxation years ended December 31, 2006 to December 31, 2008, the Spousal Trust elected to have the dividends on the Herrad common shares taxed under subsection 104(13.1) of the ITA in the following amounts:

(i) $14,947,519 in 2006;

(ii) $26,279,940 in 2007; and

(iii) $1,961,845 in 2008.

[63] In filing its T3 returns of income for the taxation years 2006 to 2009, the Spousal Trust filed as a resident of Alberta, reporting taxable income as follows:

(i) $19,530,521 in 2006;

(ii) $32,659,694 in 2007;

(iii) $2,286,845 in 2008; and

(iv) $1,342,000 in 2009.

[64] In respect of each of the taxation years, the Minister reassessed the Spousal Trust as a resident of Ontario subject to Ontario provincial tax (the "Spousal Trust reassessments"). The Spousal Trust served notices of objection in respect of the Spousal Trust reassessments.

[65] The Spousal Trust reassessments are the subject matter of the remainder of these appeals. The difference in tax that would be payable if the Spousal Trust were resident in Ontario rather than Alberta for its 2006 to 2009 taxation years is $2,818,181.

The Proceeding

[66] This proceeding was the subject of a trial at which the principal evidence was the oral testimony of Matthews and Armstrong. In addition, the appellants introduced affidavit evidence of each of: Grad, Marya, Handelsman, Tracy Thompson ("Thompson"), the administrative assistant of Matthews during most of the relevant period and subsequently a trust officer at Cidel, and Gordon Anderson, the current president of Cidel. Grad and Thompson were cross-examined on their affidavit evidence.

[67] There are a number of inconsistencies in Matthews' evidence. In particular, in her evidence at trial, Matthews testified that each investment of liquid funds by the Trusts was authorized in telephone calls between her and Lewis Davis ("Davis"), the trader at T-D in Toronto who effected the transactions. However, there is no evidence of any such telephone calls between Matthews and Davis. There is also no evidence from Armstrong that he had any contact with Davis in respect of the first such trade on September 25, 2007, in which he, rather than Matthews, was involved. Moreover, in her examination for discovery, Matthews testified that the

investments were authorized in telephone calls with Gayna Wong ("Wong"), the client representative for the Trusts at the T-D in Calgary, rather than Davis. In addition, Matthews testified in her examination for discovery that a T-D representative would call her as the maturity of an investment approached and offer rates for reinvestment. There is no evidence for — and, in her testimony at trial, Matthews denied — any such practice.

[68] Further, as noted below, Matthews testified that she personally caused HSBC Bank to transfer $1.5 million into the Family Trust bank account on or about April 23, 2007 when the Family Trust Trustees decided to make the $3 million distribution that was paid on May 1, 2007. This evidence is clearly incorrect, as discussed below, and casts significant doubt on Matthews' related testimony that Grad was upset about this requested distribution.

[69] In addition, neither Matthews nor Armstrong kept notes of their actions or decisions in respect of the Trusts, other than a few notes of Matthews addressed below. Matthews says that it was not her practice to take notes. She explained her position in the following terms:

> We weren't trying to prove anything to anybody or show something. We were just carrying on with being trustees, and it is my practice, is [*sic*] largely phone and trust and confidence based, frankly.

[70] Matthews' approach to note-taking is difficult to understand. She says she did not keep notes of conversations of importance such as, for example, the initial calls with Grad and Handelsman before her appointment, or the April 2007 call in which she says Grad expressed his disapproval of the proposed $3 million distribution. Matthews did, however, keep notes of non-contentious factual matters and more technical legal matters, including her conversations with Rachel's lawyer in the autumn of 2007. She explained that she did so because she recognized that there was a conflict in the family. Given this recognition, there is no explanation for her decision not to keep notes of the more important conversations that occurred as a result of, or pertained to, this family conflict.

[71] The respondent argues that the Court should find that Matthews is not a credible witness in view of the inconsistencies in her evidence noted above and the absence of any notes supporting her testimony. There was no reason not to keep notes and there would certainly have been some benefit to doing so, not only for purposes of the present litigation. However, while the absence of notes in the present circumstances is surprising, I cannot conclude on the evidence that the Trustees failed to keep notes for reasons that would justify an adverse inference in this litigation. On the other hand, the absence of notes clearly makes Matthews' reconstruction of events of seven to ten years ago more difficult and less reliable. Accordingly, for the foregoing reasons, I have generally accepted Matthews' testimony only where it was supported by documentary evidence or reasonable commercial practice.

Applicable Law

The Burden of Proof

[72] The following procedural discussion is taken from the respondent's factum and is not disputed by the appellant.

[73] An income tax appeal, whether to the Tax Court of Canada or the Superior Court of Ontario, is instituted by the taxpayer filing a Notice of Appeal: s. 23(3) of the ITA (Ontario) and s. 125(4) of the Taxation Act. In response, the Minister files a Reply to the Notice of Appeal (the "Reply"): s. 24(1) of the ITA (Ontario) and s. 126(1) of the Taxation Act. The Reply sets out the assumptions of fact made by the Minister in assessing the taxpayer (the "assumptions"). The facts pleaded as assumptions must be precise and accurate so the taxpayer knows exactly the case it has to meet: see *Anchor Pointe Energy Ltd v. Canada*, 2003 FCA 294, [2003] F.C.J. No. 1045, at para. 23. The Minister's assumptions are taken as fact unless they are disproved or it is established that the Minister did not make the assumptions which are said to have been made: see *Loewen v. Canada*, 2004 FCA 146, [2004] F.C.J. No. 638, at para. 8.

[74] The initial onus is on the taxpayer to "demolish" the Minister's assumptions: see *Johnston v. Canada (Minister of National Revenue - MNR.)*, [1948] S.C.R. 486, at p. 4. This initial burden is to demolish the Minister's exact assumptions and this onus is met where the taxpayer makes out at least a *prima facie* case: see *Hickman Motors Ltd. v. Canada*, [1997] S.C.R. 336, at paras. 92-93 [*Hickman*].

[75] In *House v. Canada*, 2011 FCA 234, [2011] F.C.J. No. 1220, at para. 57, the Federal Court of Appeal, citing an earlier decision of that court, set out what is required to establish a *prima facie* case in the context of an income tax appeal:

> ... a *prima facie* case is one supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by the evidence.

[76] Where the Minister's assumptions have been "demolished" by the taxpayer, the burden shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and to prove the assumptions: see *Hickman*, at para. 94. In other words, if the taxpayer discharges the initial burden, then the Minister must show that the assessment is valid: see *Northland Properties Corp. v. British Columbia*, 2010 BCCA 177, [2010] B.C.J. No. 627, at para. 35.

[77] In this case, the Minister's assumptions are largely non-contentious and form part of the agreed facts set out above. The disputed assumptions are essentially that, at all relevant times,:

(1) the Trustees were nominees of Grad acting on his direction and instruction;

(2) all decisions regarding the appellants were made in Ontario by Grad, or by Grad's professional advisors or Handelsman, acting on the direction and instruction of Grad;

(3) the Trustees provided only administrative services based on instructions and directions received from Grad, Handelsman on Grad's behalf, or Grad's professional advisors;

(4) the investment activities of the appellants were directed by Grad or Handelsman, in his capacity as chief financial officer of the Grad Group of Companies; and

(5) the mind and management of the appellants resided in Ontario with Grad.

The assumptions in items (1) to (4) constitute the basis for the conclusion in (5), which is the ultimate issue in these appeals as it is determinative of the residence of the appellants in the relevant taxation years, as discussed below.

[78] The appellants submit that the assumptions in items (1) to (4) are incorrect and that the mind and management of the appellants resided with the Trustees in Alberta. The Minister submits that these assumptions are correct. Both the appellants and the Minister argue that the evidence establishes their respective positions regarding the assumptions in items (1) to (4) on a balance of probabilities. Accordingly, the issue of the burden of proof is not meaningful in this proceeding. The Court's determination of the parties' submissions on these matters will determine the issue in this proceeding.

Taxation of a Trust

[79] The Ontario Acts impose income tax on every "individual" who was resident in Ontario on the last day of the taxation year: see s. 2(a) of the ITA (Ontario) and s. 4(1) of the Taxation Act. For this purpose, the Ontario Acts define an "individual" to include a trust referred to in subdivision k of Division B of Part I of the ITA. Included in that subdivision of the ITA is section 104(2) which deems a trust to be an individual for income tax purposes with respect to its property. The definition of "individual" in s. 1 of the Ontario Acts therefore includes a trust, by virtue of the cross-reference therein to the ITA, with the result that the Ontario Acts impose income tax on a trust that was resident in Ontario on the last day of the taxation year.

The Residence of a Trust

[80] The Supreme Court has upheld a Federal Court of Appeal decision that the residence of a trust for Canadian tax purposes is determined through the "central management and control" test that has historically applied to corporations, that is, where the central management and control of the trust actually takes place: *Fundy Settlement v. Canada*, 2012 SCC 14, 1 S.C.R. 520, at para. 15 [*Fundy*], affirming *St. Michael Trust Corp., as Trustee of the Fundy Settlement, v. Her Majesty the Queen*, 2010 FCA 309, 2 F.C.R. 374 [*St. Michael*].

[81] In *St. Michael*, the Federal Court of Appeal held, at para. 62, that courts should "undertake a fact driven analysis with a view to determining the place where the central

management and control of the trust is actually exercised." This analysis requires the Court to examine who, in reality, exercised the powers and discretions vested in the trustee by the trust deed and where that person resides. The relevant powers and discretions are those regarding the management and control of the trust property, as opposed to more incidental, administrative decisions. If it is established that management and control over the trust property is, in fact, exercised by someone other than the trustee, the trust will be resident where the actual decision-maker resides.

Position of the Appellants

[82] The appellants say, in reliance on *Fundy*, that the Trusts were resident in Alberta if it is established that:

1. the Trust Deeds gave the Trustees authority to manage and control the Trusts;

2. the Trustees in fact exercised these powers in accordance with the Trust Deeds; and

3. the Trustees exercised these powers in Alberta.

The appellants say that all three requirements are established in this case.

[83] There is no dispute that the Trust Deeds gave the Trustees, as trustees of the Family Trust and the Spousal Trust, the authority to manage and control the Trusts and that, insofar as the Trustees exercised such powers, they did so in Alberta. The principal issue is whether management and control of the Trusts was exercised by the Trustees in Alberta or by Grad and/or Handelsman in Ontario. In respect of this issue, the appellants say that courts have developed the following principles, upon which they rely in this case, to assist in locating "central management and control" of a trust.

[84] First, the appellants rely upon a recognized distinction between situations where a shareholder makes recommendations to a board of directors and has an expectation that the recommendation will be accepted, and situations where a shareholder dictates the decisions of the board: see *Wood v. Holden (Inspector of Taxes)*, [2006] EWCA Civ 26, at paras. 27 and 41 (C.A.) [*Wood*]. The appellants say an outside party may intend, and expect, that a board of directors will make a particular decision, and that something more is required for the outside party to usurp the board's control, namely the outside party must dictate the decision that the board must make: see *Wood* at paras. 40-41, cited with approval at paras. 177-180 of the trial court decision in *Fundy* which is indexed as *Myron A. Garron and Berna V. Garron, as Trustees of the Garron Family Trust, v. Her Majesty the Queen*, 2009 TCC 450, 2 C.T.C. 2346, aff'd 2010 FCA 209, 2 F.C.R. 374, and 2012 SCC 14, [2012] 1 S.C.R. 520 [*Garron*]. The appellants submit that, similarly, in the trust context, beneficiaries may "take it on themselves" to request or urge a trustee, however strongly, to make a particular decision without assuming management and control, provided the trustee is, in the end, the one making the decision: see *St. Michael*, at paras. 67-68.

[85] Second, the appellants submit that the appointment of trustees with little investment experience to a trust that "requires the [trust] property to be invested" is not a significant factor in determining residence, provided that the trustees can retain others to provide advice and are ultimately making the decisions: see *St. Michael*, at para. 67.

[86] Third, the appellants say that it is appropriate, and a "common" characteristic of "ordinary trusts", for the trustees and beneficiaries to employ common advisors: see *St. Michael*, at para. 67.

[87] Fourth, the appellants argue that the independence of trustees is maintained by their review of any particular transaction, acquiring an explanation sufficient that an informed decision can be made, and ensuring that the decision has no negative consequence and is in the best interests of the beneficiaries: see *Discovery Trust v. Canada (National Revenue),* 2015 NLTD(G) 86, 5 C.T.C. 13, at para. 41.

[88] The appellants also argue that the present circumstances are distinguishable from those in *Fundy* in two significant respects.

[89] First, they say that in *Fundy*, shortly after the trusts were formed, the trustee prepared internal memoranda setting out the intentions of the trustee which made it clear that there was an understanding that the trustee's role would be more limited than that contemplated by the trust documents, specifically, that the trustee would act only in an administrative capacity with respect to the sale of the only asset of the trust and would not make distributions to the family members without their consent. The appellants say that the absence of any such documentation is significant in the present case.

[90] Second, the appellants argue that, in this case, unlike the trustee in *Fundy*, the Trustees were experienced and qualified trustees who were aware of their fiduciary obligations to the beneficiaries of the Trusts. The appellants suggest that the Court should adopt the view of Woods J. in *Garron*, at para. 255, that it may make sense to create a presumption that, when trustees have "significant experience and expertise in managing trusts", the trustees did what was necessary in order to ensure that the transactions undertaken by them were in the best interests of the beneficiaries.

Position of the Respondent

[91] The respondent relies on the following considerations referred to in *St. Michael* bearing on the presence or absence of management and control of a trust by the trustees thereof:

1. the existence of a "protector clause" in the trust documents providing for the removal of a trustee by one of the beneficiaries;

2. the use of the same investment advisors and tax advisors by the trustees and the beneficiaries of a trust with the result that investment and tax decisions of the beneficiaries are dictated to the trustees;

3. whether the trustees took any active role in managing the trust or any involvement in the affairs of the trust, other than in executing documents and carrying out incidental administrative matters; and,

4. whether the actions ratified by the trustees concerning actions to be taken by the trust were actually understood by the trustees, and ratified based on substantive knowledge of the transactions.

Preliminary Observations and Conclusions Regarding the Applicable Legal Principles

[92] The following observations and conclusions inform the decisions reached in these Reasons.

[93] First, insofar as the management and control of a trust is to be analogized to that of a corporation, the relevant analogy in the present case is to an investment corporation. In such a context, the principal decisions taken by the directors of the corporation pertain to the investment of the assets of the corporation and distributions to shareholders. Similarly, the principal decisions taken by trustees pertain to the investment of the assets of the trust and distributions to beneficiaries. Certain administrative decisions — pertaining to the audit function for the entity, tax filing and preparation, and the authorization and payment of professional fees —may be subject to the control of the directors or trustees. However, such control is not of sufficient significance to offset evidence that management and control in respect of the investment and distribution functions has been exercised by parties other than directors or trustees. Similarly, given the tax purpose of establishing the residence of the Spousal Trust in Alberta, the annual decision to make the necessary election under the ITA specific to that Trust in furtherance of that purpose is not of any material significance in establishing the locus of management and control of the Trust.

[94] Second, the appellants place considerable weight on the fact that, unlike the trustee in *Fundy*, the Trustees were experienced and qualified trustees who were aware of their fiduciary obligations to the beneficiaries of the Trusts. While this is not disputed, it is equally important to note, for the reasons discussed below, that the Trustees were not skilled in investment matters and did not profess any skill in this regard. Accordingly, in respect of the investment function, the Trustees were not any more experienced or qualified than the trustee in *Fundy*.

[95] The approach of the Federal Court of Appeal in *St. Michael* to this consideration, at para. 67, is instructive:

> Some of the factors listed above are common characteristics of ordinary trusts and, considered in isolation, would not be sufficient to locate the management and control of the Trusts anywhere but the residence of the [the trustee]. ... The same could be said of the fact that [the trustee] and the beneficiaries employ common advisers, or the fact that the beneficiaries took it on themselves to advise [the trustee] and even urged [the trustee], however strongly, to undertake a particular transaction. Indeed, the appointment of a trustee with little investment experience in a trust that requires the property to be invested might not be significant,

> *provided that the trustee has the power to retain others for advice and, in the end, is the one making the decisions* [emphasis added].

[96] From the italicized language, it is clear that management and control of a trust may rest with a trustee who has little investment experience provided that the trustee has the power to retain others for advice and remains the ultimate decision-maker. The central issue is the relationship between the Trustees and the parties retained by the Trustees for advice: which of the parties was the effective decision-maker as a factual matter?

[97] In this case, the issue of the locus of decision-making regarding the investments of the Trusts arises in respect of three principal matters: (1) the investment of the Portfolio by the Family Trust; (2) cash management of the liquid assets of the Trusts; and (3) the investment decision to continue to hold the common shares of Markham Suites and Herrad by the Family Trust and the Spousal Trust, respectively.

[98] Third, as a related matter, while there is a significant degree of overlap in respect of a number of the matters dealt with below, the issue of the locus of management and control is distinct and separate from the issue of whether, in respect of any of the actions of the Trustees, the Trustees satisfied their fiduciary duties, i.e. acted in accordance with the best interests of the Trusts and their beneficiaries. In these Reasons, I deal only with the former issue and make no comment on the latter.

[99] Further, and more significantly, I do not accept the appellants' position that, effectively, demonstration that the Trustees satisfied their fiduciary duties is sufficient to establish that the Trustees exercised management and control of the Trusts.

[100] In this case, the Trustees had the power to delegate the investment function to third parties. As mentioned, the Family Trust Deed Amendment gave the Family Trust Trustees the power to delegate management and authority to discretionary managers of investment funds. Similarly, the broad powers granted to the Spousal Trust Trustees in s. 15 of the Spousal Trust Deed were supplemented by specific language in Schedule A. These latter provisions gave the Spousal Trust Trustees the power to engage the services of investment counsel "to advise the Trustees in respect of the investment and reinvestment of the Trust Fund with power to the Trustees to delegate to the [investment counsel] discretion to manage all or any part of the assets of the Trust Fund as may be directed by the Trustees..." Schedule A further provided, for clarity, that the Spousal Trust Trustees had the authority, among other things, "to delegate to the [investment counsel] any or all discretionary powers respecting investments".

[101] Provided any such delegation was exercised with the care and skill required of trustees, the Trustees were therefore able to satisfy their fiduciary responsibilities notwithstanding delegation of the day-to-day investment decision-making to third parties.

[102] However, the parties have fundamentally different positions with respect to the legal significance of such delegation of day-to-day investment responsibilities. The appellants say, in effect, that if the Trustees responsibly exercised their powers of delegation in respect of investment of the Trusts' assets, and retained the authority to retract such delegation if the

delegee's performance proved unsatisfactory, the Court should find that the Trustees continued to exercise management and control of the investment function. The respondent says that, if the delegation of the Trustees' powers in respect of such investment function had the result that the delegee exercised such powers, the delegee exercised management and control in respect of the investment function notwithstanding that the Trustees satisfied their fiduciary obligations in respect of the Trusts.

[103] In my view, the mere retention by trustees of the ability to retract a prior delegation of investment decision-making authority is not sufficient to establish that management and control of the investments of the trust is exercised by the trustees where investment decisions are actually taken on a day-to-day basis by, or are otherwise subject to the control of, the delegee.

[104] To be clear, I do not suggest that, in all circumstances, delegation of investment decision-making to discretionary investment managers constitutes the relinquishment of management and control of the investment function. Whether a trustee has retained management and control in such circumstances requires a factual analysis. However, to establish that the trustees retained management and control, it will be necessary to demonstrate active supervision of the investment managers. This might include, for example, setting investment targets, defining the investment criteria for the investment managers, and actively reviewing the performance of the invested portfolio and the reasons for the economic performance. In addition, the significance of the power to retract any delegation of investment authority will depend, among other things, upon whether the actual exercise of the power of retraction would be meaningful.

[105] Fourth, pursuing the analogy of a corporation, while there is a recognized distinction between shareholder recommendations to a board of directors, with an expectation of acceptance, and shareholder dictation of board decisions, there is no clear dividing line between these two situations.

[106] The issue was addressed in *St. Michael* at para. 68 as follows:

> On one side of the line are recommendations, even strong ones, by the beneficiaries to the trustee, leaving the trustee free to decide how to exercise the powers and discretions under the trust. In that case, the trustee is still managing and controlling the trust. On the other side of the line the beneficiaries are really exercising the powers and discretions under the trusts, managing and controlling the trusts, and displacing the appointed trustee. As mentioned above, on which side of the line a case falls is a factual question, requiring consideration of the evidence in its totality.

[107] Factors which influence the determination of whether a shareholder has dictated a board decision include: the extent of the shareholder's ownership in the corporation, the professional expertise of the directors, the shareholder's ability to replace the board of directors, and the shareholder's ability to assume directly the role of the directors under the governing corporate legislation.

[108] In this case, the issue of whether Grad in fact exercised the powers and discretion under the Trusts and effectively displaced the Trustees arises in two contexts. First, the issue arises most directly in respect of the decisions respecting distributions from the Trusts. Second, it also arises in respect of certain specific investment decisions of the Trusts. These include the decisions to invest in asset-backed paper of the T-D on September 25, 2007, upon the alleged recommendation of Grad, and the decision to invest in a two-year GIC on January 30, 2009. Second, the issue is also presented in the context of the investment decisions pertaining to the Portfolio and the investment of the liquid funds of the Trusts generally. In these contexts, the issue of direction to the Trustees overlaps with the issue of delegation of the Trustees' authority. In the analysis below, I have concentrated on the latter issue, delegation of the Trustees' authority, with respect to the distribution and investment decisions, apart from certain specific exceptions.

[109] Fifth, the appellants place great weight on the absence of any internal memoranda similar to the memoranda in *St. Michael*. While the presence of such a memorandum might indicate that the Trustees did not exercise management and control of the Trusts, the absence of any such memorandum in the present case is not sufficient to establish the converse, i.e. that the Trustees did, in fact, exercise management and control.

[110] In this case, it is also significant that the Trustees apparently chose to keep no notes of the conversations between themselves, of their conversations with Grad and the other beneficiaries, or of their joint decisions as trustees, apart from some very limited exceptions. Whatever the reason for this failure to keep notes, the consequence is that the Trustees have no evidence, apart from their oral representations, that they turned their minds to a number of significant matters and independently made informed decisions with respect to such matters.

[111] Sixth, the use of the same tax advisors and accountants by the Trusts, Grad personally, and the Grad Group of Companies is not, on its own, dispositive. Such an arrangement is of probative value only to the extent that the reasons for such joint arrangements, and the implementation of such arrangements, involved actual management and control by Grad. In the present case, the use of the same accountants, in particular, was efficient given the investments of the Family Trust in Markham Suites and CAL Equities, and of the Spousal Trust in Herrad. Further, the involvement of the tax advisors to Grad and the Grad Group of Companies essentially pre-dated the involvement of the Trustees. Accordingly, I am not persuaded that any of the foregoing arrangements are a material consideration in respect of the issue of management and control of the Trusts.

[112] Seventh, the issue of management and control of the Trusts must be analysed separately for each of the taxation years. It is also theoretically possible that the conclusion could differ between the Family Trust and Spousal Trust in any given taxation year. In the present circumstances, however, I conclude that the evidence demonstrates that the approach of the Trustees, and of Handelsman and Grad, to management and control of the Trusts was the same for each Trust in each of the taxation years. This is reflected in a number of factors, including: essentially similar provisions in the Trust Deeds regarding the powers of the Trustees and the right of Grad to replace the trustees of each Trust; a similar relationship of Grad to each of the Trusts as the sole director of the major asset of each Trust; the common approach to the

investment of the liquid assets of the Trusts, which generally rolled over at the same time and were the subject of common emails between Handelsman and the Trustees; and the common approach of the Trustees to execution of corporate and trust documentation, which also generally occurred at the same time in the case of the trust documentation.

[113] As a consequence, I am of the view that evidence of the manner in which management and control of one trust was exercised in any given taxation year also reflects, to a certain extent, the manner in which management and control of the other trust was exercised in the same year. This presumption is stronger where there is an absence of any actual investment or distribution activity in respect of such latter trust in such year.

[114] Eighth, the evidence discussed below indicates that Grad provided directions to the Trustees through Handelsman on a limited number of occasions. In addition, in certain instances, Handelsman appears to have acted as Grad's agent in his interactions with the Trustees. Consequently, it can be argued that, insofar as Handelsman exercised management and control of the Trusts, his actions should be regarded as actions of Grad.

[115] However, such a finding is not strictly necessary for the purposes of this proceeding. The issue in this trial is whether management and control of the Trusts was exercised in Ontario, and it is acknowledged that Handelsman resided in Ontario. It is therefore not necessary to determine with any precision whether Handelsman's actions in respect of any particular matter reflected actual directions from Grad or were taken independently pursuant to the general authority vested in him by Grad. Accordingly, I have proceeded on the basis that actions by Grad, either directly or through Handelsman, or by Handelsman independent of Grad's involvement, are equally relevant for the determination of the locus of management and control of the Trusts.

[116] Ninth, as noted above, Cidel became the trustee of both the Family Trust and the Spousal Trust effective November 30, 2009. The appellants do not submit, however, that Cidel took any actions in December 2009 in respect of either of the Trusts that would affect the management and control of the Trusts in 2009. There are also no facts in evidence that would suggest otherwise. Neither Trust took any action in respect of a distribution. In respect of investments of the Portfolio of the Family Trust, the arrangements pertaining to CAL Equities continued unaffected by the change in the trustees of the Trust. Similarly, the arrangements pertaining to cash management of the Trusts, including the involvement of Handelsman, continued in the same manner, subject to one matter discussed below which supports the conclusion reached regarding Handelsman's management of the investment of the liquid funds of the Trusts.

[117] Lastly, it is trite law but it bears stating that there is nothing improper about arranging the affairs of the Trusts to reduce tax otherwise payable by the Trusts or their beneficiaries. Accordingly, the fact that the Trustees were appointed pursuant to tax planning that was directed toward reducing the tax otherwise payable in respect of income earned by the Trusts is not a consideration in reaching the determinations herein. The issue for the Court is more simply whether the Trusts were, in fact, conducted in such a manner as to satisfy the requirements for treatment of the Trusts as residents of Alberta.

Analysis and Conclusions

[118] I propose to address the issue of the residence of the Trusts in three parts. First, I will address, on an individual basis, the principal transactions and other matters upon which the appellants rely as evidence that the Trustees exercised management and control of the Trusts. On the basis of these observations and conclusions, I will then review the evidence as a whole and set out my conclusions regarding the locus of the management and control of the Trusts for each of the taxation years. I will then set out the Court's determinations regarding the residence of the Trusts in each of the taxation years and the disposition of the appeals, which necessarily follow from the foregoing conclusions.

Principal Matters Involving the Family Trust

[119] The following actions of the Trustees in respect of the Family Trust bear on the management and control of the Family Trust.

The Cal Equities Limited Partnership

[120] The formation of CAL Equities, and the transactions on September 30, 2006 by which the Family Trust acquired Class B units in the limited partnership in exchange for the Portfolio, have been described above. Thereafter, the Portfolio continued to be managed by the discretionary investment managers located in Toronto who had managed the Portfolio immediately prior to the transactions.

[121] The creation of CAL Equities was undertaken by counsel for Grad as part of the tax planning pertaining to the investment of the sales proceeds from the sale of Leisureworld. The Trustees say that they regarded investment of the Portfolio in Class B units of CAL Equities as an opportunity presented to them by Grad which they were not obligated to accept. Matthews testified that the Trustees decided to accept the opportunity because it ensured top-level investment management of the Portfolio by the discretionary investment managers and because CAL Equities' ownership of the Portfolio addressed their concern that they had neither the capacity nor the time to supervise the activities of the investment managers. They considered such supervision was necessary, among other reasons, to ensure that the Portfolio was not over-weighted in any particular security as well as to monitor relative performance of each of the managers, personnel changes at the managers, and the fee structures of the managers.

[122] I have the following observations regarding this arrangement.

[123] First, the transaction did not affect, in any way, the arrangements regarding the investment management of the securities comprising the Portfolio that existed as of the date of the transfer of the Portfolio. At that time, the discretionary investment management arrangements described above had been in place for some time and they continued unaltered after CAL Equities acquired the Portfolio. Under these arrangements, the day-to-day investment decisions respecting the Portfolio were made by the discretionary investment managers. The trustees of the Family Trust retained only an oversight responsibility for the investment managers. These arrangements continued upon the appointment of the Trustees.

[124] Second, it is important to note that CAL Equities was not, in any meaningful sense, an investment vehicle in which the Family Trust invested funds even if the intention at the time of the creation of CAL Equities was otherwise. At all times, the only investments of CAL Equities were the securities constituting the Portfolio. Consequently, the value of the Class B units in CAL Equities held by the Family Trust was determined solely by the market value of the Portfolio. In such circumstances, the Class B units were merely an intermediate holding between the Family Trust and the securities comprising the Portfolio. It is artificial to regard the Family Trust's acquisition of the Class B units as an investment separate and distinct from its investment in the securities comprising the Portfolio. For present purposes, the investment decisions that are relevant to a determination of the locus of the management and control of the Family Trust are the investment decisions regarding the funds comprising the Portfolio.

[125] Third, the effect of the CAL Equities transaction was to place oversight responsibility for the investment managers firmly in the hands of Grad. He was the sole shareholder, director, and officer of 126 which, as the general partner of CAL Equities, controlled CAL Equities and made all decisions on behalf of the limited partnership, including all decisions with respect to its assets. Matthews in fact acknowledged that the CAL Equities transaction transferred oversight of the investment managers from the Family Trust Trustees to Grad. However, Grad also had a significant interest in the Family Trust. Given this fact, and his control of 126, these arrangements gave Grad, rather than the Family Trust Trustees, effective control of the Portfolio as the party who could engage, and terminate the engagement of, the discretionary investment managers, as Handelsman acknowledged.

[126] Fourth, while the Trustees retained management and control over the Class B units of CAL Equities which the Family Trust received on the transfer, this control is not meaningful for two reasons. First, as discussed above, ownership of the Class B units did not constitute substantive control of the invested assets of the Trust. Second, the right of redemption of the Class B units was also not meaningful given the Trustees' own motivation in transferring the Portfolio to CAL Equities.

[127] As mentioned, the only assets of CAL Equities were the securities comprising the Portfolio. While the Trust had the right to redeem the Class B units in return for a re-transfer the Portfolio by way of an *in specie* transfer or the value of the portfolio on liquidation, practical considerations prevented the exercise of such right. Given the costs of liquidating the Portfolio, it was unrealistic to expect that the Trustees would redeem the Class B units held by the Family Trust. In addition, because any *in specie* redemption would have required the Trustees to assume the oversight responsibility for the investment managers that they were not prepared to assume, for want of both time and expertise, such a redemption was not a realistic possibility.

[128] Based on the foregoing, I make the following three findings with respect to the management and control of the Portfolio. First, the actual decision-making regarding the investment of the assets comprising the Portfolio rested with the discretionary investment managers. Second, the oversight authority in respect of such investment managers rested with Grad through his control of 126. Third, the Family Trust Trustees' control over the Class B units in CAL Equities did not constitute control of significant assets of the Family Trust that was meaningful in the context of the management and control of the Trust.

Distributions from the Family Trust

[129] As set out above, the Trustees authorized a distribution of $3 million from the Family Trust on April 23, 2007, which was paid on May 1, 2007. The distribution was requested by, and paid in equal amounts to, each of Grad (for transmission to Rachel to avoid potential tax consequences under United States tax legislation), Dalia, and Jennifer. The appellants say that the distribution was made by the Trustees in the exercise of their discretion in the face of opposition by Grad. The evidence on this issue is, however, contradictory.

[130] There is documentary evidence to establish that approximately $1.5 million was paid from an account at HSBC into the Family Trust bank account on April 10, 2007, bringing the amount in the account above $3 million and thereby enabling the distribution. The evidence also establishes that Rachel called Matthews on April 11, 2007. Whether she requested a distribution in her favour in that telephone call or later is unclear. There is, however, no evidence of any earlier telephone conversation between Rachel and Williams.

[131] The only unequivocal evidence of Grad's alleged opposition to the distribution in May 2007 is Matthews' oral testimony. However, Matthews' very sparse notes of her telephone conversations with Rachel and Grad regarding this distribution do not provide any supporting evidence of Grad's opposition.

[132] Further, as noted above, the $1.5 million that was transferred from an HSBC account into the Family Trust account to enable the Family Trust to fund the distribution was transferred before, rather than after, Matthews' conversation with Rachel on April 11, 2007. This casts serious doubt on Matthews' recollection that she requested that HSBC transfer the additional moneys into the bank account of the Family Trust after the Trustees decided to make the distribution on or about April 23, 2007.

[133] Lastly, Grad's own evidence casts further doubt on his claimed hostility to the distribution in two respects. First, he acknowledged that he might personally have caused the transfer of the $1.5 million into the Family Trust account. If so, that would suggest that he had resolved to authorize the distribution before the Trustees became involved.

[134] Second, while Grad testified in the Grad Affidavit that he asked Matthews not to make a distribution to his daughters after she advised him of the request, there is no evidence of this apart from Matthews' testimony which, as mentioned, is in conflict with the timing of the transfer of monies into the Family Trust's bank account. Further, on Matthews' evidence, her conversation with Grad occurred on or after April 11, 2007. The appellants suggest that Grad not only dropped his opposition to the proposed distribution but also agreed to participate actively to address a tax concern that was apparently raised, and for which a solution was found, within the very short period of less than two weeks. There is, however, no evidence, or even any mention, of any such activity.

[135] Based on the foregoing, I conclude that it is unlikely that the version of events implied by the testimony of Grad and Matthews is complete and, in particular, that it is unlikely that Grad opposed the distribution in April 2007.

[136] In addition, while Grad says in his affidavit that he asked Matthews not to make a distribution to his daughters in their telephone conversation, he also stated in the same paragraph that he asked Matthews not to give too much information about the Family Trust to his daughter. However, Matthews made no mention of this additional request and the documentary evidence indicates that these instructions were given in October 2007, not in April or May 2007. At that time, as described below, Grad sought to instruct the Trustees through Handelsman to refrain from providing Rachel, Dalia, and Jennifer with information regarding the Family Trust. This apparent conflation of events suggests that Grad had an imperfect memory of the events in April 2007 and that he did not oppose the distribution in May 2007.

[137] Viewed collectively, I do not think that the foregoing evidence establishes, on a balance of probabilities, that Grad orchestrated or directed the May 2007 distribution. On the other hand, I also do not think it establishes that Grad opposed such distribution. At most, the evidence establishes that, at the request of Rachel, the Trustees authorized a distribution to the three Grad daughters to which Grad assented and in which he voluntarily participated. On this basis, I conclude that the Family Trust Trustees exercised their decision-making authority in respect of this distribution.

Appropriation of Capital by Grad

[138] Section 5.2 of the Family Trust Deed grants the trustees of the Trust broad powers to encroach on capital:

> 5.2 If neither of the said HERMAN GRAD or MARYA GRAD is acting as a Trustee, the Trustees may, *subject to any appointment by the said HERMAN GRAD*, by Deed or Will, pay or transfer to or for the Beneficiaries or any one or more of them, exclusive of the other or others, in such manner and subject to such terms and conditions, such portions of the capital of the Trust Fund as the Trustees in their absolute discretion determine from time to time; provided that the aggregate of any such encroachments during any calendar year shall not exceed ten percent (10%) of the fair market value of the capital of the Trust Fund at the time of any such encroachment. [Italics added.]

[139] The italicized phrase constitutes a significant limitation of the Family Trust Trustees' powers in favour of Grad, which Grad chose to exercise in 2008 in the following circumstances.

[140] In an email dated May 19, 2008 to Matthews, Grad, and Marya, Rachel requested a further distribution of $2 million. In apparent response, Grad exercised the power of appointment of capital, contemplated by section 5.2, in his favour by deed of appointment dated May 21, 2008 (the "Deed of Appointment"). By the Deed of Appointment, Grad appointed the whole of the trust fund of the Family Trust in his favour. The Deed of Appointment provided that the trust fund was "payable after December 31, 2010 unless the appointment is revoked prior to that date." The Deed of Appointment also reserved a right in favour of Grad to revoke such appointment on or before December 31, 2010. In fact, Grad revoked the appointment on April 12, 2010, with the result that the capital of the Trust was not payable to him after December 31,

2010 in accordance with the Deed of Appointment. However, the revocation occurred after the last of the taxation years at issue in this proceeding.

[141] The effect of the Deed of Appointment was to preclude any exercise of the Trustees' discretion to encroach on capital for the benefit of the beneficiaries of the Family Trust during the 2008 and 2009 taxation years. Matthews acknowledged that her understanding was that Grad did not want the Family Trust Trustees to be making further appointments of capital to the Grad daughters and, by making this appointment, was precluding them from taking any such steps. Grad himself testified that he took this action because he was afraid that the Trustees would make the distribution requested by Rachel. Accordingly, Grad effectively determined that the Trustees would make no distributions to any of the beneficiaries during 2008 and 2009 and, through the Deed of Appointment, removed any discretion of the Trustees under the Family Trust Deed to take a contrary decision if the Trustees considered that such action would have been in the best interests of the beneficiaries.

[142] I note the Grad explained his decision by reference to a "strained" relationship between Rachel, Grad, and Marya. He testified that he hoped that execution of the Deed of Appointment "would motivate Rachel to contact us and, from there, would begin to try and repair our relationship". While Grad's purpose in executing the Deed of Appointment may have been directed towards personal matters unrelated to tax considerations, his motivation, however meritorious, is irrelevant for present purposes.

Provision of Information Regarding the Family Trust to the Beneficiaries

[143] On October 10, 2007, Handelsman sent the following email to Matthews under the subject line "Rachel Grad":

> Hi Sian,
>
> Hope things are well with you
>
> Rachael Grad, Herman Grad's daughter has retained a lawyer to assist her in matters regarding The Herman Grad 2000 Family Trust. Her lawyer has contacted Paul Gibney. Paul has advised the lawyer that his instructions from Mr. Grad are that Mr. Grad's children must obtain all information regarding the trust from their father. In the event that Mr. Grad's children or their representatives contact you or any of your associates at Bennett Jones please do not provide them any information. Simply advise them, as Paul Gibney has done that your instructions from Mr. Grad are that Mr. Grad's children must obtain all information regarding the trust from their father.
>
> Please confirm receipt.
>
> Thanks,
>
> Jeff

[144] Matthews says that she called Grad after receiving this email and told him that the Trustees could not comply with this request as it was contrary to their fiduciary responsibilities to the beneficiaries of the Family Trust. The Trustees did not, however, have to do anything further in regard to this matter until Matthews received a telephone call from Rachel's lawyer on November 26, 2007, in which the lawyer apparently requested information regarding the Family Trust on behalf of Rachel. Matthews then called Handelsman and discussed this matter. It was apparently agreed in that telephone conversation that Handelsman would provide the requested information on behalf of the Family Trust.

[145] This arrangement was put in writing in the following letter dated November 11, 2007 to Handelsman signed by the Trustees:

> Dear Mr. Handelsman:
>
> Re: The Herman Grad 2000 Family Trust
>
> You have been retained by the trustees of the above-noted trust to provide us with financial reporting and tax return services. Further to our telephone discussion this morning, please accept this as authorization from the trustees to provide Ms. Sheila Crummey, solicitor for Rachel Grad, with financial information concerning the trust and its assets.
>
> Thank you for your assistance. Please contact us if you have any questions or concerns.
>
> Yours truly,
>
> Sian M. Matthews
>
> John C. Armstrong. Q.C.

[146] The Minister suggests that, through this arrangement, the Family Trust Trustees did indirectly what Grad asked them to do directly. As mentioned, Handelsman was the chief financial officer of the Grad Group of Companies and, in that capacity, was subject to Grad's control and paid by such companies. Matthews justified the Trustees' action of "engaging" Handelsman in this manner on the grounds of efficiency, given that Handelsman had access to all of the information regarding the Trust. I accept that this arrangement was efficient for this reason. However, the effect of this arrangement was that the Trustees put the ultimate control over disclosure of information regarding the Family Trust in the hands of Grad.

[147] The significance of this evidence for either position in this litigation should, however, not be overstated. The Handelsman email does evidence a belief on Grad's part that he, rather than the Trustees, was entitled to control the distribution of information regarding the Family Trust to the beneficiaries of that Trust. Matthews therefore had to walk a fine line between discharging her responsibilities as a trustee and wanting to satisfy Grad. Grad's belief is not, however, relevant on its own for present purposes.

[148] In proposing that Handelsman handle the information requests, the Family Trust Trustees did put Grad in a position in which he could assert actual control over the distribution of information. Whether such control was meaningful, however, would have required an actual conflict between Grad and the Family Trust Trustees. There is, however, no evidence that Rachel or her lawyer were denied any information that they requested. Accordingly, the potential conflict inherent in this arrangement never became a live issue. The need for Handelsman to provide this information does, however, reflect on the extent to which the Family Trust Trustees were actively involved in the management and control of the Family Trust.

[149] I conclude that the evidence regarding the purpose and operation of this arrangement is not of great weight in establishing either that management and control of the Family Trust rested with the Family Trust Trustees or that it rested with Grad.

Principal Matters Involving the Spousal Trust

[150] The following actions of the Trustees pertaining to distributions from the Spousal Trust bear on the management and control of the Spousal Trust.

[151] As described above, the Spousal Trust Trustees authorized a distribution of $14.5 million by the Spousal Trust to Marya Grad on August 29, 2006, which was paid on September 6, 2007. The sources of funds for this distribution were the dividends totalling $14.9 million on the Herrad common shares, which Grad approved as the director of Herrad. Grad requested a distribution from the Spousal Trust of the full amount of $14.9 million on behalf of Marya, who, pursuant to article 7 of the Spousal Trust Deed, was entitled to all income of the Spousal Trust during her lifetime. The Trustees resolved to make a distribution of $14.5 million and to retain $400,000 to cover further expenses of the Trust.

[152] All communications regarding this distribution were conducted between Grad and the Trustees. Grad made the request on behalf of Marya. The Trustees did not contact Marya to ascertain whether she wanted or needed the distribution. In any event, this would not have been a meaningful exercise. In her affidavit, Marya states that she does not recall any conversation with Grad regarding this distribution. There is, in fact, no evidence whatsoever that, prior to this litigation, Marya was ever aware of this distribution that was allegedly made to her.

[153] The real purpose of this distribution was to transfer monies to Grad. In this regard, Grad stated explicitly that the purpose of the distribution was to put him in possession of the monies because he wanted the funds for an investment or investments that he personally intended to make. To this end, the money was placed in the joint bank account of Grad and Marya. Moreover, Grad communicated with Matthews regarding the proposed dividend of Herrad and the requested distribution at the same time. They were linked at all times and, given the ultimate recipient, would not have proceeded if Grad was not certain that the distribution would proceed as requested.

[154] The Trustees say that they made an independent decision to implement this distribution. They rely in part on their decision to retain $400,000. They also argue that what Grad and Marya agreed with respect to the eventual recipient of the monies distributed directly to Marya from the

Spousal Trust is irrelevant for present purposes. Essentially, however, the Trustees resolved to make the distribution principally on the basis that Marya was entitled to it under the Spousal Trust Deed.

[155] I would note, in addition, that this distribution occurred only twelve days after the appointment of Armstrong and Matthews as the Spousal Trust Trustees. It also occurred shortly before Grad received a $30 million capital encroachment from the Family Trust, which was paid to him three days before Armstrong and Matthews became the trustees of the Family Trust. These distributions, and another from the Family Trust of $23.6 million and a dividend from Herrad to Grad of $18,267,984 earlier in August 2006, were all done in implementation of the larger tax and financial planning of Grad's affairs by Thorsteinssons, with whom Matthews had been in regular contact. In these circumstances, I think it is inconceivable that Matthews and Armstrong would have assumed the role of trustees of the Spousal Trust without some knowledge of the proposed distribution. I also think that it is highly unlikely that, in any event, they would have considered that they had any independent decision-making discretion or authority with respect to this distribution.

[156] Given the foregoing, I find that, at all times, Grad controlled the distribution by making the request on behalf of Marya and ensuring that the monies were placed in an account so that he could access them.

[157] Subsequently, the Spousal Trust received dividends from Herrad in February 2007 of $13 million, in August 2007 of $1.5 million, and in August 2008 of $1.5 million. No distributions were made to Marya out of this income despite her entitlement to the income of the Spousal Trust. Instead, on each of these occasions, the dividend monies were deposited in the Spousal Trust bank account and accumulated interest on an overnight interest rate basis until September 2007, at which point Handelsman became involved with the cash management of the Trusts as described below.

[158] As noted above, article 7 of the Spousal Trust Deed provides that, until the Time of Division, while Marya is alive, the Trustees will hold the Trust Fund and "will pay or transfer to or apply for the benefit of Marya exclusively all of the Income of the Trust annually..." There is, however, no evidence of any formal decision on the part of the Trustees to refrain from making a distribution to Marya or any direction from Marya to the Trustees to retain the monies for her benefit.

[159] Article 7 provides for two possible courses of action – pay or transfer to Marya all of the income in the year, or apply for Marya's benefit all of such income. Armstrong testified that he considered that the Trustees had complied with article 7 by "applying" these monies for the benefit of Marya. There is, however, no evidence, and no suggestion from the Trustees, of any formal decision to such effect, let alone any documentation that purports to make these monies payable to Marya upon her request. Armstrong testified instead that he considered that the Trustees were applying the income of the Spousal Trust for Marya's benefit "by actually continuing to invest those funds for her benefit within the Spousal Trust, paying tax within the T3 return ... and making the appropriate election under the *Income Tax Act* to do so".

[160] Armstrong's interpretation of "application" of monies for Marya's benefit means no more than holding the monies in the Trust. I do not accept that the mere act of retention of monies in the Spousal Trust bank account, without any decision on the part of the Spousal Trust Trustees, constitutes the "application" of income of the Spousal Trust in favour of Marya. Paragraph 7(i) must be read together with paragraph 10 of the Spousal Trust Deed, which provides that "[a] Beneficiary is entitled to, and may enforce payment of any amount of the Income derived from the Trust Fund that the Trustees have made payable to the Beneficiary". Paragraph (i) of article 7 contemplates an action on the part of the Trustees. These two considerations suggest that, to the extent that the income of the Spousal Trust is not paid or transferred to Marya in any year, the Spousal Trust Trustees must either make such income payable to her, or pay it to a third party on her behalf. In any event, it requires that the Spousal Trust Trustees turn their minds to the question of the appropriate disposition of the funds, given the terms of the Spousal Trust Deed.

[161] Matthews was more direct in her explanation for the absence of any distribution. She said simply that Marya had not made any request for a distribution.

[162] I find that the Trustees proceeded on the basis that they did not need to turn their minds to the possibility of any action in respect of these subsequent dividend monies, other than to invest them in cash or cash equivalents, unless and until they received a request or direction from Grad or Marya. While there is no evidence of any direction or instruction from Grad to retain the monies, he made the decision, as the director of Herrad, to transfer monies from Herrad to the Spousal Trust. Based on his involvement in the earlier distribution, the Trustees would have understood from the absence of any request for a distribution that they were to retain the monies in the Trust. In this regard, it is significant that the Trustees did not seek out Marya to determine whether she wished to receive any of these monies. In fact, there is no evidence that Marya knew of the dividends from Herrad to the Spousal Trust in 2007 and 2008 and the consequential opportunity for further dividends to her from the Spousal Trust.

[163] Based on the foregoing circumstances, I find that the evidence, viewed collectively, indicates that the Trustees proceeded on the basis of an understanding with Grad that any distributions out of the Family Trust would be made as and when he requested a distribution on behalf of his wife, subject to making provision for anticipated expenses of the Spousal Trust, and that any such distribution would be paid in such manner as he directed. On this basis, I find that Grad, rather than the Trustees, made the decisions regarding distributions from the Spousal Trust during the years 2006 to 2009.

Matters Common to Both the Family Trust and the Spousal Trust

[164] The following actions of the Trustees and other matters, which are common to both Trusts, also bear on the management and control of the Trusts.

Cash Management for the Trusts

[165] When Matthews and Armstrong became the Trustees of the Trusts, the Family Trust had only a modest amount of cash after payment of a tax installment due shortly after their appointment. This amount was further reduced after payment of the distribution in May 2007

described above. The Spousal Trust also had a modest amount of cash, which was retained for future expenses, until receipt of the dividend from Herrad in February 2007 described above. The evidence indicates that, until September 2007, the Trustees retained all such cash of the Trusts in the respective bank accounts of the Trusts. Given overnight interest rates in the range of 4% at the time, such action made financial sense, particularly given the relatively small amounts involved.

[166] In September 2007, Handelsman became involved in the cash management of both Trusts. On September 24, 2007, he advised Matthews by email that the interest rate environment had changed and that bankers' acceptances were providing a higher yield than overnight interest rates. He inquired as to the requirements for the Trustees to invest in bankers' acceptances on behalf of the Trusts.

[167] This was followed by an email dated September 25, 2007 of Handelsman to Matthews which read as follows:

> Hi Sian,
>
> Mr. Grad is recommending that you purchase, on behalf of the Marya Grad Family Trust [sic], $21 million of TD Asset Based Securities.
>
> This investment is extremely secure. It is rated R1 High by DBRS.
>
> By response to myself and Lewis Davis (the TD trader) please confirm purchase of these securities and the authorization of TD to debit the Marya Grad Spousal Trust Account of 0220-5213517. I would appreciate a response to Lewis and myself as soon as possible.
>
> Thanks,
>
> Jeff

[168] The urgency in Handelsman's request for a letter of authorization reflected the fact that the T-D was holding the proposed investment for the account of the Spousal Trust at Handelsman's request. In Matthews' absence, Thompson took this matter to Armstrong who responded by providing a letter of authorization for the proposed investment within fifteen minutes. At the time, Armstrong did not know the term of the proposed investment that Handelsman had arranged with Davis, although he did know the amount. Armstrong testified that he was satisfied with the investment based on Handelsman's representation regarding its rating. On this basis, Armstrong did not consider that it was necessary to do anything further before providing his letter of authorization respecting the investment. In particular, he had no direct communication with anyone at the T-D regarding the quality of this investment and its appropriateness for the Spousal Trust.

[169] While the language of this letter expresses Grad's position as a recommendation, it is clear from Matthews' actions that he understood Grad to be communicating directions which he implemented. Moreover, Handelsman's email leaves no room for any independent decision to

the contrary. Instead, he limited his request to a confirmation as soon as possible of a transaction that Handelsman had already negotiated, the terms of which were unknown to Armstrong, at least in respect of the maturity of the investment. The email also reveals the fact that the Trustees' decision to expand the class of acceptable investments for the liquid funds of the Trusts was not taken by the Trustees but was directed by Grad, as is discussed further below.

[170] Armstrong's actions in respect of this investment became the pattern of behaviour of the Trustees thereafter on a monthly basis, without any express direction from Grad.

[171] Under the informal arrangements with Handelsman, as the money market investments of the Trusts matured, the usual practice was that Handelsman would determine the best available investment and request letters of authorization from the Trustees addressed to the T-D. These letters of authorization were prepared in general form, executed by one of the Trustees, and sent to Handelsman who provided them to Davis as confirmation of the trades. As mentioned, while Matthews says that each investment also involved a telephone authorization with Davis, there is no evidence of such telephone calls. Moreover, as mentioned, Matthews' evidence varied between trial and her examination for discovery. At trial, she testified to calls from Davis. On discovery, she spoke of calls with, and often from, Wong.

[172] The evidence further indicates that the parties departed from their usual practice on at least four occasions in 2008, involving seven transactions, which are significant for present purposes. On these occasions, the T-D appears to have acted entirely on the basis of authorizations from Handelsman in implementing the purchase of money market instruments on behalf of one or both of the Trusts.

[173] On one of these occasions in January 2008, transactions were effected for each of the Trusts two weeks before the applicable letters of authorization were delivered. There is no evidence of any oral authorizations by the Trustees at the time of the transactions. In June 2008, transactions for each of the Trusts were made without evidence of any written letters of authorization of the Trustees ever being delivered to the T-D. There is also no evidence of any oral authorizations of these transactions by the Trustees. The evidence further suggests that Handelsman authorized trades for each of the Trusts on October 7, 2008 for which he did not request, or receive, written letters of authorization for delivery to the T-D until the following day, October 8, 2008. As Handelsman's email to Thompson regarding these transactions is the first notice to the Trustees of these transactions, there is also no evidence of any authorization by the Trustees of these transactions on October 7, 2008. (The additional transaction is not relevant for this purpose.) Lastly, on September 2, 2008, Handelsman arranged for the Spousal Trust to invest $1.3 million, representing the funds received from Herrad as a dividend on August 26, 2008. Handelsman requested a letter of authorization on a retroactive basis in an email dated September 2, 2008. However, there is no evidence of any such letter of authorization from, or any oral authorization of, the Spousal Trust Trustees in respect of this transaction.

[174] Matthews says that Handelsman acted as an advisor to the Trusts with regard to the investment of the liquid funds of the Trusts. The Trustees characterized Handelsman's communications as advice or recommendations. There was, however, no occasion on which the Trustees failed to follow such advice or recommendations. Nor were the Trustees in a position to

make an informed decision to reject any particular recommendation and to invest maturing funds on a different basis. Under the arrangements, the Trustees provided Handelsman with the authority not only to negotiate but also to confirm the trades with Davis through their provision of the letters of authorization to Handelsman. As mentioned, there is no evidence of direct contact between the Trustees and Davis, much less any discussion with him regarding the appropriateness of the particular trades.

[175] Accordingly, I think it is clear that, while the Trustees retained signing authority over all monies in the bank accounts of the Trusts, the Trustees effectively outsourced responsibility for the investment of such monies to Handelsman. I note that, as mentioned above, as the issue on these appeals is one of residence only, it is not material whether Handelsman was acting on his own without specific direction from Grad or was acting under the direction of, or as agent for, Grad.

[176] To be clear, I do not suggest that the Trustees acted improperly, or in breach of any fiduciary duties, in outsourcing the responsibility for cash management of the Trusts' available funds to a third party. As set out above, the Trustees had the authority to delegate the responsibility for investment of the assets of the Trusts by the First Family Trust Deed Amendment and the Spousal Trust Deed. Further, such an arrangement was eminently reasonable given the capabilities of the Trustees and the amount of money involved. Nor was it unreasonable from the perspective of the investment of the Trusts' monies to engage Handelsman to perform this function, as it allowed the Trusts to get the benefit of Grad's negotiating power with the T-D, based on his aggregate holdings, as well as ensuring co-ordination with Shimmerman Penn to identify future cash needs of the Trusts on an on-going basis. The fact that this arrangement also provided for a co-ordinated supervision of all of Grad's investments in the person of Handelsman is also unobjectionable.

[177] The issue for the Court, however, is whether the arrangements described above had the result that the decisions respecting the cash management of the Trusts' liquid funds were effectively directed by Handelsman, or by Grad through Handelsman, rather than the Trustees. I find on the evidence that it was directed by Handelsman, or by Grad through Handelsman, for three principal reasons.

[178] First, I find that, on three occasions, the Spousal Trust Trustees implemented instructions of Grad with respect to the investment of monies of the Trusts.

[179] As described above, the evidence is that the Trustees effectively implemented a direction of Grad to invest $21 million of the Spousal Trust in asset-backed commercial paper of the T-D in September 2007. Matthews suggested that the investment decisions of the Trusts respecting their liquid funds were straightforward and did not require any formal decision-making on the part of the Trustees as they involved only high-grade money market investments (term deposits, bankers' acceptances, and commercial paper). This retrospective description of the permissible investments fails to reflect the fact that the Trustees relied on directions from Grad and Handelsman regarding the class of investments that were acceptable for such investments.

[180] As mentioned, Matthews did not take any notes of the telephone conversation she had with Grad, or the two conversations she had with Handelsman, prior to the appointment of Armstrong and Matthews as the Trustees of the Trusts. However, I think that the evidence before the Court indicates that the parties discussed, and thereafter understood, that the Trustees were to have no responsibility for investment of any assets of the Trusts other than placing any liquid funds in the bank accounts of the Trusts to receive overnight interest from their banker. There was, therefore, at least an understanding with Grad, if not actual direction from him, that the Trustees were to have no role in selecting other asset classes for the investment of such funds.

[181] This understanding was reflected in the position of the Trustees with respect to their responsibility for the investments of the Portfolio and supervision of the discretionary investment managers engaged for such purpose. It is also reflected in the manner in which, after approximately one year, the Trustees decided to depart from this investment policy with respect to the liquid funds of the Trusts and to invest in other money market instruments, initially asset-backed paper of T-D. This action was only taken after, and in implementation of, Grad's specific "recommendation" of such an investment through Handelsman in the latter's email of September 25, 2007. There is no evidence of any prior consideration by the Trustees of departing from a policy of overnight interest even though, as Matthews was aware, interest rates had fallen by September 2007.

[182] As a result, in engaging Handelsman to oversee the cash management of the Funds, the Trustees were implicitly accepting Grad's direction that the available funds of the Trusts were to be kept in liquid form in money market instruments selected by Handelsman rather than either continuing to receive overnight interest from the Trusts' banker or being invested in other asset classes. Essentially, the Trustees acquiesced in an arrangement under which the funds of the Trusts were kept liquid in anticipation of the possible need for cash funds by Grad for investment purposes. There is no evidence that the Trustees ever addressed the issue of whether investment of the cash of the Trusts in some other form of investment would have been in the best interests of the Trusts and their beneficiaries.

[183] The second occasion on which the Spousal Trust Trustees implemented a direction of Grad was their decision on or about January 30, 2009 to convert one-month term deposits of the Spousal Trust valued at $17.7 million, representing substantially all of the monies of the Spousal Trust at the time, into a two-year guaranteed investment certificate of the T-D. This was done entirely on the basis of an email from Handelsman to Matthews' assistant requesting "approval," by which I understand him to mean the usual letters of authorization.

[184] There is no evidence of any meeting of the Trustees to consider this request, which represented a major departure from the practice to that time of monthly maturities. Nor is there any evidence that Marya, as the beneficiary of the Spousal Trust, was consulted with respect to this decision. In fact, there is no evidence whatsoever to explain this decision. Matthews testified that she might have had a telephone conversation about this trade, which she described as "a little out of the ordinary", but she could not remember any details of any such conversation. I find that the only possible inference in these circumstances is that the two-year maturity represented a direction of Grad through Handelsman that reflected Grad's assessment of his likely need for these funds over that period. I note as well that the timing of this investment

relative to the date of the letter of authorization, which was dated February 2, 2009, is unclear as the banking account documentation for the Spousal Trust for 2009 is not in evidence.

[185] The last occasion pertains to the action of the Trustees in February 2007, after the Spousal Trust received a dividend of approximately $24 million from Herrad. Matthews says the Trustees considered investing the funds in CAL Equities but decided not to do so. Matthews could not remember the reason for not doing so but acknowledged that the dividend funds were received prior to the crash of late 2007 and 2008, so the crash was therefore not the explanation. According to Matthews, CAL Equities was established to be "a pool of capital available to a number of different Grad members and structures". As there is no evidence of any decision of the Spousal Trust Trustees regarding these funds, I conclude that the decision to retain this large amount in cash, rather than to invest it in securities by way of an investment in CAL Equities or otherwise, was not a decision of the Spousal Trust Trustees but a direction of Grad, implemented through Handelsman's management and control of the liquid funds of the Spousal Trust.

[186] The second principal reason for the finding of the Court regarding the direction of cash management of the Trusts is that, after the transactions on or about September 25, 2007, Handelsman did not merely advise on, but in fact made all the decisions regarding, the manner in which maturing funds of the Trusts were to be reinvested on a monthly basis. The pattern of behaviour respecting the reinvestment of cash of the Trusts as current investments matured was described above. The Trustees relied entirely on his advice or recommendations and made no effort to verify, either before or after any particular decision, whether Handelsman's decisions constituted the best investment option for the Trusts. More significantly, on a number of occasions, the correspondence indicates that the Trustees were not aware of the term or the rates of the proposed investments which they were authorizing. The letters of authorization represented a "rubber-stamping" of decisions taken by Handelsman and were no more than a necessary formality required by the T-D rather than evidence of the exercise of management and control by the Trustees over these investment decisions.

[187] In addition, the mechanic by which the letters of authorization were delivered in executed form to Handelsman, for delivery to the T-D at or after the time of confirmation of the trades that he had already negotiated, reinforces the conclusion that the Trustees gave Handelsman the authority to effect the trades on behalf of the Trusts. They do not evidence, nor is there any other evidence of, any formal decision-making by the Trustees. This conclusion is reinforced by the fact that, as set out above, on a number of occasions, the Trustees failed to execute any letter of authorization for trades which nevertheless proceeded on the basis of Handelsman's authorization to the T-D.

[188] The appellants, and the Trustees, placed great reliance on the fact that the Trustees were the only authorized signatories of the bank accounts for the Family Trust and the Spousal Trust. This is not disputed. However, it is the manner in which the Trustees gave Handelsman the authority to negotiate and effect trades on behalf of the Trusts that is significant for present purposes. In this respect, as a practical matter, it appears to be relevant that Handelsman generally communicated through Thompson, Matthews' assistant, who prepared the necessary letters of authorization for Matthews' signature and then forwarded them to Handelsman. From her testimony, Matthews appears to have been under the impression that the letters of

authorization were delivered directly to Davis because they were addressed to him. It is possible that Matthews was unaware that the letters were sent to Handelsman as part of the arrangements described above and were delivered by Handelsman to the T-D after the actual effective time of the trades that he had negotiated. If that is the case, the intention and the reality may have been different. However, for present purposes, the relevant consideration is the manner in which the investment function was actually conducted, not any different intention on part of the Trustees.

[189] Further, Matthews testified that she confirmed every trade with Davis at the T-D by telephone call after the principal amount was fixed. There is no evidence to support this evidence and Davis did not testify at the trial. Given the inconsistencies in Matthews' testimony on this issue, as discussed above, and the other considerations set out above, I do not accept her evidence.

[190] The third principal reason for the finding of the Court herein is that the evidence does not indicate that the circumstances changed in any material respect for any of the four trades that were effected in December 2009 upon the appointment of Cidel. Cidel did execute minutes of a meeting of its trustee committee, held on December 7, 2009, in which it approved T-D term deposits as reasonable and prudent and in the best interest of the Trusts and their beneficiaries and further approved the reinvestment by the Trusts of maturing term T-D term deposits in other term deposits.

[191] However, the manner in which the trades in December 2009 actually proceeded suggests that the arrangements pertaining to the investment of liquid assets of the Trusts, under which Handelsman effected the trades and obtained letters of authorization for delivery after the fact, did not change with the appointment of Cidel. With respect to a reinvestment by the Spousal Trust on December 10, 2009, Handelsman requested a letter of authorization in an email dated the day before the transaction to Thompson at Bennett Jones. There were also three other transactions involving either the Family Trust or the Spousal Trust in December 2009 for which there are no similar emails. However, Armstrong provided the letters of authorization for each of these transactions. In the absence of any evidence to the contrary, given the established practice, I think it is reasonable to infer that Armstrong provided these letters of authorization to Handelsman in the usual manner. I would observe as well that the appellants did not argue that the involvement of Cidel as the trustee of the Trusts as of December 31, 2009 had any impact on the issue of the management and control of the Trusts in the 2009 taxation year.

[192] Based on the foregoing, I find that the decisions regarding the investment of the liquid funds of the Trusts were taken by Grad, by Handelsman, or by Handelsman on behalf of Grad, rather than by the Trustees during the 2007, 2008, and 2009 taxation years.

The Common Shares of Markham Suites and Herrad

[193] As set out above, the Family Trust held all the outstanding common shares of Markham Suites and the Spousal Trust held all of the outstanding shares of Herrad. In their capacities as the sole shareholders of these corporations, the Family Trust and the Spousal Trust annually elected Grad as the sole director of Markham Suites and Herrad, respectively.

[194] Matthews says that Grad was a successful business person and, for this reason, she was confident that he would manage Markham Suites and Herrad in a successful fashion. The reality is that, as a holding corporation, there was no active management of Herrad. More importantly, Grad was elected the sole director of each corporation consistent with the intention of the Trusts to maintain family ownership of each Corporation.

[195] The Trusts say that the Trustees retained the power to manage and control the shares of the Corporations through their shareholdings in the Corporations and through their power under the Trust Deeds to sell such shares.

[196] With respect to the former, as shareholders of the Corporations, the Trustees were in a position to control, or at least influence, distributions from the Corporations to the Trusts, subject to the best interests of the Corporations. However, the Trustees effectively chose not to exercise these powers. By appointing Grad the sole director of Markham and Herrad, the Trustees effectively gave Grad the power to control the payment of any distributions from Markham Suites and Herrad and, therefore, the power to control the principal sources of income of the Family Trust and the Spousal Trust, respectively.

[197] With respect to the Trustees' power to sell the shares of the Corporations, there is no evidence in the record that the Trustees ever specifically turned their minds to the question of whether the sale of the shares of Markham Suites or of Herrad would have been in the best interests of the beneficiaries of the Family Trust or the Spousal Trust, respectively.

[198] The appellants rely upon the annual resolutions, described below, that were passed by the Trustees in respect of each of the Trusts as evidence that the Trustees turned their minds to the merits of the continued holding of the shares of Markham Suites and Herrad. However, given the limited information regarding Markham Suites and Herrad received by the Trustees, there is no basis on which they could have reached an informed financial decision regarding these investments. There was, therefore, no standard available to the Trustees against which they could assess the appropriateness of the common shares of Markham Suites and Herrad as investments of the Trusts. Accordingly, the Trustees were not in a position to engage in any consideration of the best interests of all of the beneficiaries of the Family Trust or the Spousal Trust in any meaningful way as they purported to do in their annual resolutions.

[199] Further, while the Trustees had the legal power under the Trust Deeds to sell the shares of the Corporations, the evidence indicates that there was an understanding between the Trustees and Grad that they would not do so without Grad's generation of the sale opportunity and approval. In other words, I think it is clear that any sale of the shares of the Corporations was to be controlled by Grad. As the appellants acknowledge, the Trustees considered it was in the best interests of the Trusts to retain these shareholdings based on the expressed strong preferences of Grad.

[200] The appellants suggest that such an understanding between a settlor and the trustees of a family trust or a spousal trust would not be unusual. As Matthews testified, the purpose of the Family Trust was to hold the assets of the Trust over the long term, particularly the shares of Markham Suites, for the benefit of the Grad family. The same can be said of the shares of Herrad

held by the Spousal Trust. I accept that this is correct and that, accordingly, implementation of such an understanding would not necessarily raise any issues of compliance with a trustee's fiduciary obligations.

[201] However, in the present circumstances, the following factors had the practical result that the Trustees effectively delegated the exercise of their rights as shareholders to Grad: the vesting of control of the income of the Trusts in the hands of Grad, as the sole director of each of the Corporations, the inability of the Trustees to make informed decisions regarding the shareholdings of the Trusts in the Corporations, and the Trustees' understanding with Grad that the shares of the Corporations would only be sold with his approval. In these circumstances, Grad, rather than the Trustees, made all decisions relative to the dividend income of the Trusts, and the investment decisions of the Trusts to hold, rather than sell, the common shares of Markham Suites and Herrad that were held by the Family Trust and the Spousal Trust, respectively.

The Power to Replace Trustees

[202] As noted above, each of the Trust Deeds contained provisions allowing Grad to remove any of the Trustees of the Trusts at his will and to fill the vacancies arising in such event. The appellants argue, in reliance on a statement of the Federal Court of Appeal in *Garron*, at para. 67, that a "protector" having the power to remove and appoint trustees is a "common" characteristic of "ordinary trusts" and should be regarded, on its own, as a neutral fact.

[203] In the present circumstances, while Grad had the power to replace the Trustees of the Trusts, he did not exercise that power, nor is there any evidence that he proposed or threatened to do so at any time. Moreover, there is no evidence that the Trustees benefitted financially in any significant manner from their involvement as Trustees such that the power of replacement would have influenced their actions for financial reasons.

[204] Accordingly, while the existence of the power of replacement could be a factor in the determination of whether a third party directed, rather than merely suggested, a course of action regarding investment and distribution of the assets of a trust, I am not persuaded that such power is of material relevance in the present circumstances.

Annual Resolutions of Trustees

[205] On an annual basis, the Trustees executed certain resolutions dated January 1, 2007, 2008, and 2009 in respect of both Trusts. The appellants submit that these resolutions evidence that the Trustees actively managed the Trusts.

[206] The resolutions authorized the following matters:

(1) the payment of annual fees of $3,750, plus GST and disbursements to each of Matthews and Armstrong for their services as trustees;

(2) the payment of Shimmerman Penn's professional fees for the preparation of the Trusts' tax returns for the year ended December 31 of the previous year;

(3) the payment of the reasonable professional fees of Bennett Jones and Shimmerman Penn for services rendered to the Trusts; and

(4) the submission of the tax returns for the previous taxation year for the Trusts, as prepared by Shimmerman Penn, on or before March 31 in the year together with payment of any taxes owing.

These resolutions are of a simple, administrative nature. They are not, on their own, supportive of any management role on the part of the Trustees.

[207] In addition, as mentioned, the annual resolutions included a resolution that the Trustees had reviewed the investments of the Trusts as of December 31 of the preceding year and confirmed that, in their discretion, such investments continued to be appropriate and advisable.

[208] The basis on which the Trustees made this determination annually in respect of the Trusts is not in evidence to any extent. The Trustees kept no notes of any meetings they may have held, including any meeting at which these resolutions were addressed and executed.

[209] With respect to the Family Trust, as mentioned, the Trustees had no basis for assessing the economic attractiveness of the common shares of Markham Suites relative to alternative investments available to the Trust. By way of contrast, Gordon Anderson, the current president of Cidel, testified in his affidavit that Cidel's annual review consists of a review of the financial statements of Markham Suites and that he has personally visited the Markham Suites hotel.

[210] Similarly, as also discussed above, the Spousal Trust Trustees had no basis for such an assessment of the common shares of Herrad. While there are documents entitled "Acknowledgement and Waiver" signed by Grad and the Spousal Trust Trustees, as the shareholders of Herrad, that state that the shareholders received annual financial statements of Herrad for 2006 and 2008, there is no evidence that the Spousal Trust Trustees did so in fact. Additionally, neither Matthews nor Armstrong mentioned ever having seen, reviewed, or relied upon any such financial statements. With respect to the Family Trusts' limited partnership interest in CAL Equities, such an assessment could only be made by reference to the underlying Portfolio. The Trustees acknowledged, however, that supervision of investment management by the discretionary investment managers was not a skill they professed. Similarly, as discussed above, the Trustees did not have an active role, and did not profess any skill, with respect to the money management of the cash balances of the Trusts.

[211] On Matthews' own testimony, the determination of the Trustees in the annual resolutions was more narrowly limited to a consideration of whether the assets of the Trusts continued to serve the purposes of the Trusts. She testified elsewhere that the purpose of the Trusts was, in each case, "a long-term hold for the benefit of the Grad family" and a consideration of whether there was sufficient liquidity to meet anticipated tax and other needs in the foreseeable future.

[212] I find that, at best, these annual determinations of the Trustees constituted no more than declarations that nothing had come to the attention of the Trustees that suggested that either: (1) the investments of the Trusts were in some manner inappropriate or inadvisable; or (2) the

beneficiaries had objected to the Trusts continuing to hold such investments. Accordingly, these annual resolutions of the Trustees do not constitute evidence of any active role of the Trustees in the management and control of the Trusts.

Conclusions Regarding the Management and Control of the Trusts

[213] Although the parties made submissions that did not differentiate by years, I have approached the issues in this proceeding on the basis that the management and control of each of the Family Trust and the Spousal Trust must be analysed separately for each of the relevant taxation years.

The 2006 Taxation

The Family Trust

[214] During the 2006 taxation year, the investments of the Family Trust consisted principally of the Portfolio, which was managed by the discretionary investment managers subject to the supervision and control Grad as described above. These circumstances argue in favour of a conclusion that management and control of the Family Trust resided with Grad.

[215] There were no distributions out of the Family Trust subsequent to the appointment of Matthews and Armstrong as the Family Trust Trustees because the Initial Trustees had distributed the remaining capital in the Family Trust by way of capital encroachments to Grad. Insofar as the Ontario Acts require a consideration of the actions of the individuals who were trustees at the end of the 2006 taxation year, the evidence regarding distributions of the Trust is therefore not a consideration of any significance in this taxation year.

[216] Apart from these matters, the only other considerations bearing upon the issue of the management and control of the Family Trust in the 2006 taxation year are: (1) the continued investment of the Family Trust in the shares of Markham Suites; (2) the provisions of the Second Family Trust Deed Amendment giving Grad the power to remove and replace the trustees of the Family Trust; and (3) the administrative activities of the Family Trust Trustees, principally related to the payment of the tax installments.

[217] With respect to the Family Trust's continued holding of the shares of Markham Suites, I consider that the mere fact of a continued holding of the shares of a family-held corporation — a holding that was received on the creation of a family trust or a spousal trust — where the principal beneficiaries did not wish to have the shares sold, would not be a material indication of management and control by any of the beneficiaries, provided the trustees retained the ability to exercise their rights a shareholders. However, in the present case, as described above, the Family Trust Trustees effectively acquiesced in Grad's control over Markham Suites, which also included his control over the income of the Family Trust because Grad was the sole director of Markham Suites. In such circumstances, I think this factor, while not determinative, is supportive of the conclusion that Grad exercised management and control of the Trust.

[218] The provisions in the Second Family Trust Amendment granting Grad the power to remove and replace trustees, while a factor that evidences some indirect control of the Family

Trust by Grad, do not constitute a material factor for the reasons discussed above. The evidence establishes that the Family Trust Trustees retained management and control of the administrative activities of the Trust, principally involving the execution of the annual resolutions for the Family Trust referred to above and implementation of the matters referred to therein, including the calculation and payment of the income tax payable by the Family Trust. However, such activity is not of any material weight for present purposes.

[219] On balance, I consider that Grad's control of the investment of the Portfolio and his control of the income of the Family Trust through control of Markham Suites, which the Trustees enshrined, outweighs the other considerations discussed above evidencing the involvement of the Family Trust Trustees in the management and control of the Family Trust. Based on such assessment, I find that Grad exercised management and control of the Family Trust during 2006.

The Spousal Trust

[220] During the 2006 taxation year, the investments of the Spousal Trust consisted solely of the investment of a small amount of cash deposited in the Trust's bank account. As discussed above, the evidence indicates an understanding between the Trustees and Grad that the Trustees were to invest any liquid assets of the Spousal Trust in such manner. Accordingly, this factor weighs in favour of Grad's management and control of the Spousal Trust. I do not, however, place any significant reliance on this factor, given the small amount involved and the absence of any actual exercise of control by Grad in 2006.

[221] The evidence with respect to the distribution to Marya in September 2006 has been discussed above. For the reasons set out therein, I conclude that Grad directed and controlled this distribution.

[222] The other considerations respecting the locus of management and control of the Spousal Trust are: (1) the continued investment of the Spousal Trust in the shares of Herrad; (2) the existence of the Protector Clause in the Spousal Trust Deed giving Grad the power to remove and replace the trustees of the Spousal Trust; and (3) the administrative activities of the Spousal Trust Trustees, which were modest during 2006.

[223] The Court's view of the relative significance to be attached to the continued holding of the shares of Herrad is the same as its view expressed above with respect to the continued holding of the shares of Markham Suites by the Family Trust. Similarly, the Court's view of the significance of the Protector Clause is the same as the view expressed with respect to the comparable provisions in the Second Family Trust Amendment. In view of the very modest administrative activity of the Spousal Trust Trustees in 2006, as well as the nature of such activity, I consider this factor to be of little relevance for the reasons expressed above in respect of the similar activity pertaining to the Family Trust.

[224] On balance, while I acknowledge that the issue is much closer in respect of the Spousal Trust for the 2006 taxation year, I consider that the foregoing considerations, in particular the finding that Grad directed and controlled the distribution to Marya in September 2006, indicate that Grad exercised management and control of the Spousal Trust during 2006.

The 2007 Taxation Year

[225] The Minister reassessed the Spousal Trust, but not the Family Trust, for the 2007 taxation year. I find that the factors upon which the Court concluded that Grad exercised the management and control of the Spousal Trust in 2006 continued to operate during 2007. The following additional considerations are also relevant for the issue of the management and control of the Spousal Trust in 2007.

[226] First, and most important, for the reasons set out above, I have concluded that Handelsman, and Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Spousal Trust commencing in 2007 and continuing for the 2008 and 2009 taxation years.

[227] Second, for the reasons set out above, I have concluded that Grad, rather than the Trustees, controlled the decisions regarding distributions from the Spousal Trust during the years 2006 to 2009.

[228] While not directly pertaining to the Spousal Trust, I have also considered the probative value of the circumstances surrounding the $3 million distribution to the beneficiaries of the Family Trust in May 2007. I have concluded above that the Family Trust Trustees exercised their decision-making authority with respect to this distribution. However, I have also concluded above that there is no evidence of any objection on the part of any of the beneficiaries of the Family Trust, including Grad, to such distribution. Accordingly, I do not place any significant weight on this factor as demonstration of independent management and control by the Family Trust Trustees. On the other hand, I also do not think that this evidence is sufficient to displace the evidence regarding Grad's control of the distribution decisions of the Spousal Trust in 2006 and 2007, as discussed above.

[229] Third, while the Spousal Trust Trustees were more actively involved in 2007 in attending to various administrative actions, principally related to the calculation and payment of income taxes and the payment of professional fees, as well as execution of the annual resolutions of the Spousal Trust, I do not consider such activities to be a material consideration for present purposes.

[230] Based on the foregoing, I find that Grad continued to exercise management and control of the Spousal Trust during 2007, with the qualification that Handelsman, as well as Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Spousal Trust commencing in 2007, as discussed above.

The Family Trust

[231] While the appellants have not appealed the Minister's assessment for the 2007 taxation year in respect of the Family Trust, a finding of the management and control of the Family Trust during 2007 is necessary for the findings below regarding subsequent years. In this regard, I find that the factors upon which the Court concluded that Grad exercised management and control of the Family Trust in 2006 continued to operate during 2007.

[232] For the reasons set out above in addressing the Spousal Trust, I am not persuaded that the evidence regarding the involvement of the Family Trust Trustees in the $3 million distribution to the beneficiaries of the Family Trust in May 2007 should be accorded any significant weight. Accordingly, such evidence is not sufficient to override (1) the evidence regarding Grad's control of the investment of the Portfolio, as well as (2) the evidence regarding the involvement of Handelsman, and Grad through Handelsman, in the investment of the liquid funds of the Family Trust in 2007 and subsequent years.

[233] On the basis of the foregoing considerations, I find that Grad continued to exercise management and control of the Family Trust during 2007, with the qualification that Handelsman, as well as Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Family Trust commencing in 2007, as discussed above.

The 2008 Taxation Year

The Family Trust

[234] I find that the factors upon which the Court concluded that Grad exercised management and control of the Family Trust in 2006 and 2007 continued to operate during 2008. In addition, Handelsman, as well as Grad through Handelsman, continued to exercise management and control of the investment of the liquid funds of the Family Trust in the manner that commenced in 2007.

[235] Further, as described above, the evidence supports a finding that Grad reinforced his control of all income and distributions of the Family Trust in 2008 and throughout 2009 by virtue of the combined effect of the Deed of Appointment executed on May 21, 2008, together with Grad's control of the oversight of the Portfolio as described above, and Grad's control over the income of the Family Trust as the sole director and officer of Markham Suites. In short, in addition to the control previously exercised in the 2006 and 2007 taxation years in respect of the investment of the Family Trust's assets comprising the Portfolio and its liquid funds, Grad extended his control over any distributions of the Trust.

[236] Based on the foregoing, I find that Grad continued to exercise management and control of the Family Trust during 2008, with the qualification that Handelsman, as well as Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Family Trust.

The Spousal Trust

[237] I also find that the factors upon which the Court concluded that Grad exercised management and control of the Spousal Trust in 2006 and 2007 continued to operate during 2008. In addition, as in the case of the Family Trust, Handelsman, as well as Grad through Handelsman, continued to exercise management and control of the investment of the liquid funds of the Family Trust in the manner that commenced in 2007.

[238] In addition, the clear message from Grad's execution of the Deed of Appointment in respect of the Family Trust was that Grad also intended to control distributions of the Spousal Trust to the extent that there was any room for doubt on this matter based on his previous actions. In the absence of any evidence of any independent action on the part of the Spousal Trust Trustees in respect of distributions from the Spousal Trust in 2008 or 2009, I find that the Spousal Trust Trustees understood and accepted this additional assertion of control over distributions on the part of Grad as confirmatory of his control over distributions from the Spousal Trust in the 2008 and 2009 taxation years.

[239] Based on the foregoing, I find that Grad continued to exercise management and control of the Spousal Trust during 2008, with the qualification that Handelsman, as well as Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Spousal Trust.

The 2009 Taxation Year

Family Trust

[240] I also find that the factors upon which the Court concluded that Grad exercised management and control of the Family Trust in 2006, 2007, and 2008 continued to operate during 2009. In addition, Handelsman, as well as Grad through Handelsman, continued to exercise management and control of the investment of the liquid funds of the Family Trust during 2009 in the manner that commenced in 2007 and continued through 2008.

[241] The foregoing evidence establishes that, in respect of the Family Trust in 2009, Grad exercised management and control over the investments of the Family Trust's assets comprising the Portfolio and over all distributions of the Trust. In addition, Handelsman, as well as Grad through Handelsman, exercised management and control over the investment of the liquid funds of the Family Trust. There were no events or actions on the part of the Family Trust Trustees that give rise to factors for consideration in respect of this taxation year in addition to the factors considered above in respect of previous taxation years.

[242] In this regard, as mentioned above, the appellants do not argue that, after the change of trustees of the Family Trust as of November 30, 2009, Cidel took actions in December 2009 that are relevant for the issue of the management and control of the Trust during 2009. In fact, the interim arrangements that Cidel put in place regarding the reinvestment of the funds of the Trusts effectively maintained Handelsman's management and control of the investment of such funds.

[243] Based on the foregoing, I find that Grad continued to exercise management and control of the Family Trust during 2009, with the qualification that Handelsman, as well as Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Family Trust.

Spousal Trust

[244] I also find that the factors upon which the Court concluded that Grad exercised management and control of the Spousal Trust in 2006, 2007, and 2008 also continued to operate

during 2009. In addition, Handelsman, as well as Grad through Handelsman, continued to exercise management and control of the investment of the liquid funds of the Spousal Trust during 2009 in the manner that commenced in 2007 and continued through 2008.

[245] For the reasons set out above, I have concluded above that on one occasion, on or about January 30, 2009, Handelsman's investment of $17.7 million was made on the direction of Grad through Handelsman. This event reinforces the Court's conclusions regarding Grad's management and control of the investment of the liquid funds of the Spousal Trust during 2009 based on such activity in the previous taxation years. Apart from this event, there were no events or actions on the part of the Spousal Trust Trustees that give rise to factors for consideration in respect of this taxation year in addition to the factors considered above in respect of previous taxation years.

[246] For the same reasons as applied to the Family Trust, I also find that the interim arrangements that Cidel put in place regarding the reinvestment of the funds of the Trusts effectively maintained Handelsman's management and control of the investment of such funds.

[247] Based on the foregoing, I find that Grad continued to exercise management and control of the Spousal Trust during 2009, with the qualification that Handelsman, as well as Grad through Handelsman, exercised management and control of the investment of the liquid funds of the Spousal Trust.

Conclusions Regarding the Appeals

[248] Based on the foregoing, I find that management and control of both the Family Trust and the Spousal Trust was exercised by individuals resident in Ontario, being Grad and Handelsman during each of the taxation years. Accordingly, the appeals of each of the appellants are hereby denied.

Wilton-Siegel J.

Released: October 14, 2016

CITATION: The Herman Grad 2000 Family Trust v. Minister of Revenue, 2016 ONSC 2402
COURT FILE NO.: CV-15-10873-00CL, CV-15-10868-00CL, CV-10871-00CL

CITATION: The Marya Grad Spousal Trust v. Minister of Revenue, 2016 ONSC 2407
COURT FILE NO.: CV-15-10875-00CL, CV-15-10870-00CL,CV-15-10874-00CL, CV-1510872-00CL
DATE: 20161014

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE HERMAN GRAD 2000 FAMILY TRUST

Appellant

– and –

THE MINISTER OF REVENUE

Respondent

AND BETWEEN:
THE MARYA GRAD SPOUSAL TRUST

Appellant

– and –

THE MINISTER OF REVENUE

Respondent

REASONS FOR JUDGMENT

Wilton-Siegel J.

Released: October 14, 2016