Court File No. 35438

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Quebec)

BETWEEN:

ELLIOT C. WIGHTMAN, et al. (See Annex A)

Applicants
(Appellants)

AND:

ESTATE OF PETER N.T. WIDDRINGTON

Respondent
(Respondent)

RESPONDENT'S CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL

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FORM 25B

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IN THE SUPREME COURT OF CANADA
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ELLIOT C. WIGHTMAN, et al. (See Annex A)

Applicants
(Appellants)

AND:

ESTATE OF PETER N.T. WIDDRINGTON

Respondent
(Respondent)

CERTIFICATE COUNSEL OR AGENT OF THE RESPONDENT

I Robert E. Houston, Q.C., Ottawa Agent for the Respondent, hereby certify that:

(a) there is no sealing order or ban on the publication of evidence or the names or identity of a party or witness.

(b) there is no confidential information on the file that should not be accessible to the public by virtue of specific legislation and include a copy of the applicable provision of the legislation.

Dated at Ottawa this 27th day of September, 2013.

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PART I: OVERVIEW OF POSITION & STATEMENT OF FACTS

1. The judgment rendered by the Quebec Court of Appeal (the "**appeal judgment**") confirmed the liability of Applicants in the present case, substantially upholding the judgment rendered by the Quebec Superior Court (the "**trial judgment**").

2. In the event that this Court grants Applicants' Leave Application, which Respondent has contested, Respondent seeks leave to assert that the majority of the Court of Appeal erred in overturning the trial judgment on the issue of Applicants' liability for Respondent's loss of his second investment in Castor Holdings Ltd. ("**Castor**") made in October, 1991 in the amount of $292,560 (the "**Second Investment**"). Based on the trial judge's review of the factual evidence, she concluded that Respondent committed no fault and that the direct and immediate cause of his loss was Applicants' negligence.

3. Although the trial judge concluded that the faulty valuation letter dated October 22, 1991 issued by Coopers & Lybrand ("**C&L**") was the **critical factor** that impelled Respondent to make the Second Investment, the majority of the Court of Appeal concluded that Applicants were not liable because Respondent should have known better than to rely on it and because he was acting in solidarity with Castor's management to support Castor at a difficult time.

4. In dissent, Vézina J.C.A. disagreed with the majority, and adopted the findings of the trial judge. If leave is granted, Respondent will ask this Court to adopt the dissenting reasons of Vézina J.C.A. who held that there was ample evidence to support the trial judge's conclusions in respect of the Second Investment and therefore deference should be accorded to her decision.

PART II: QUESTIONS IN ISSUE

ISSUE 1: The role of an appellate court: When is it inappropriate for an appellate court to intervene on a question of fact?

ISSUE 2: Causation and apportioning liability: When is it appropriate to consider that the chain of causation has been broken?

PART III: STATEMENT OF ARGUMENT

ISSUE 1: The role of an appellate court: When is it inappropriate for an appellate court to intervene on a question of fact?

5. Although the majority of the Court of Appeal did not identify any palpable and overriding errors made by the trial judge, they overturned her assessment of the factual evidence related to the Second Investment.

6. In deciding that Respondent's decision to make the Second Investment was "*not because the documents prepared by appellants had convinced him that it was a good investment, but rather in solidarity with Castor's management and with his colleagues on the board of directors*"[1], the majority of the Court of Appeal reassessed the facts and arrived at their own factual conclusion.

7. In doing so, the majority emphasized a few details from a virtual mountain of evidence reviewed by the trial judge, and relied on a partial review of such evidence. After stating that on the issue of causality, deference to the trial judge is appropriate[2], the majority of the court below substituted their appreciation of the factual evidence for hers.

8. For example, the majority referred to certain extracts of the testimony of the expert Stephen Jarislowsky, who had not been mandated to opine on the Second Investment, but the majority did not refer to the evidence of another expert, Paul Lowenstein, whose opinion on that investment was accepted by the trial judge[3]. Mr. Lowenstein opined that a reasonable sophisticated investor could rely on the opinions of C&L in making the Second Investment. The trial judge specifically noted that, while Mr. Lowenstein testified that it was important for Respondent to know more about Castor as a director than as a shareholder, in his opinion "*a reasonable sophisticated high net worth private investor, when provided with the unqualified audited financial statements and the valuation letter by C&L, would*

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[1] Appeal Judgment §343 [Applicants' Record ("**AR**") **Tab 4C**].
[2] Appeal Judgment §§267-268 [**AR Tab 4C**].
[3] Trial Judgment §§3274, 3323-3344 [**AR Tab 4A**]. The Court of Appeal also relied on Mr. Lowenstein's opinion in respect of the first investment (§§284, 293) [**AR Tab 4C**].

have [...] supported the company and increased his investment in 1991, as Widdrington did"[4].

9. Consequently, as found by Vézina J.C.A., there was ample evidence to support the trial judge's conclusions, and therefore there was no justifiable reason for the majority to overturn them.

10. In this case, the majority disagreed with the trial judge's weighing of the evidence, for which appellate intervention is not permitted. As this Court has explained, an *"appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts"*[5].

ISSUE 2: Causation and apportioning liability: When is it appropriate to consider that the chain of causation has been broken?

11. On the facts of the case, and with the ample evidence in the record, the trial judge concluded that Respondent's loss of his Second Investment was caused by his reliance on the faulty professional opinions issued by the Applicants[6]. The majority of the Court of Appeal did not call into question the trial judge's findings of fact that led to such conclusion. These factual findings include the finding that:

> *C&L's valuation letter dated October 22, 1991 which Widdrington received at the Board meeting of October 24, 1991[...] was the* ***critical factor*** *which impelled him to make his second equity investment*[7]. [emphasis added]

12. Consequently, it was an error for the majority to substitute their opinion as to the direct and immediate cause of the loss once fault, damage and the "*critical impact*"[8] of Applicants' fault on the damage had been established.

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[4] Trial Judgment §§3274, 3278 [**AR Tab 4A**].
[5] *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), at para. 23 [Respondent's Book of Authorities ("**RBOA**") **Tab 2**].
[6] Appeal Judgment §322 [**AR Tab 4C**].
[7] Trial Judgment §3241 [**AR Tab 4A**], referred to in the Appeal Judgment at §322 [**AR Tab 4C**].
[8] At §332 of the Appeal Judgment, the majority recognizes, and does not dispute, the trial judge's finding in this regard, but concludes that Widdrington had to "*do more*" [**AR Tab 4C**].

13. In addition, the facts described in the judgments below establish that Castor's principal committed a fraud and C&L's engagement partner was a "*co-conspirator*"[9]. As such, even if Respondent committed a fault by failing to ask more questions before he made his Second Investment (which conclusion was rejected by the trial judge and the dissenting appellate judge), there is no link between that fault and his loss, since there is absolutely no evidence in the record to suggest that had Respondent asked questions, he would have received truthful answers from any person in a position to provide him with accurate information and that he would not have sustained his loss. In fact, the evidence establishes the opposite[10].

14. The Court of Appeal has recently held[11] that where the faults of the victim were merely circumstances that were not the actual cause of its loss, the chain of causation is not broken.

15. Finally, even if Respondent committed a fault (which the majority never explicity held) that contributed to the loss, at best, same should have led the court below to consider apportioning liability between Applicants and Respondent in accordance with Article 1478 CCQ, which codifies the existing jurisprudence as at 1991[12]. No such apportionment was made by the majority.

PART IV: SUBMISSIONS ON COSTS

16. The Respondent requests costs in the cause.

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[9] Appeal Judgment §72 [**AR Tab 4C**].
[10] Appeal Judgment §80: when questions were asked, Castor's management and Applicants' engagement partner advised a third party lender in July 1991 that the audited financial statements accurately reflected the reality of Castor [**AR Tab 4C**]; and Trial Judgment §2575: both Castor and Applicants knew that there were at least $275 million of problem loans in February 1991, but the 1990 audited financial statements were issued without qualification and Applicants issued share valuation letters in March and October 1991 that were not only unqualified, but were optimistic about Castor's future [**AR Tab 4A**].
[11] *Banque de Montréal/Bank of Montreal c. Banque de Nouvelle-Écosse/Bank of Nova Scotia*, 2013 QCCA 1548 (CanLII) at para. 144 [**RBOA Tab 1**].
[12] Ministère de la Justice, *Commentaires* du *ministre de la Justice - Le Code civil du Québec*, t. 1, Québec, Les Publications du Québec, 1993. Article 1478 CCQ was published in 1991 but only came into force in 1994 [**RBOA Tab 3**].

PART V: ORDERS SOUGHT

17. In the event that this Court grants Applicants' Application for Leave to Appeal (which Respondent submits it should not), Respondent requests that this Conditional Cross-Appeal Leave Application should be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of September, 2013

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PART VI: TABLE OF AUTHORITIES