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)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

FISHMAN FLANZ MELAND PAQUIN LLP
Barristers & Solicitors
1250 René-Lévesque Blvd. W. Suite 4100
Montréal, QC. H3B 4W8

Avram Fishman
Leonard W. Flanz
Mark E. Meland
Margo Siminovitch

Counsel for the Respondent
Tel: (514)932-4100
Fax: (514)932-4170
afsihman@ffmp.ca

BURKE-ROBERTSON LLP
Barristers & Solicitors
200 – 441 MacLaren Street
Ottawa, ON. K2P 2H3

Robert E. Houston, Q.C.

Ottawa Agent
Tel: (613)236-9665
Fax: (613)235-4430
rhouston@burkeroberston.com

HEENAN BLAIKIE LLP
Barristers & Solicitors
1250 René-Lévesque Blvd. W. Suite 2500
Montréal, QC. H3B 4Y1

Serge Gaudet
Counsel for the Applicants
Tel: (514)846-1212
Fax: (514)846-3427

SUPREME ADVOCACY LLP
Barristers & Solicitors
1- 397 Gladstone Avenue
Ottawa, ON. K2P 0Y9

Marie-France Major
Ottawa Agent
Tel: (613)695-8855
Fax: (613)695-8580

ANNEX A

RENÉ M. AUBRY
JOHN D. BALL
JEAN BEAUDRY
MARCEL BERTRAND
GEORGES F. FOURNIER
GILLES GAGNON
IAN GERGOVICH
PIERRE GILL
ANDRÉ A. GIROUX
MICHAEL J. HAYES
IAIN D. HUME
SEBASTIEN IANNITELLO
DENIS LANGELIER
BERNARD LAUZON
MICHAEL F. MACEY
ZYGMUNT MARCINSKI
JEAN-GUY MARTIN
PIERRE SECCARECCIA
BERNARD R. SMITH
JACQUES ST-AMOUR
NORAH K. TAYLOR
MICHAEL WHITWORTH
ELLIOT C. WIGHTMAN

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand and Laliberté Lanctôt Coopers & Lybrand, having a place of business at 1170, Peel Street, Suite 330, Montreal, Province of Quebec

-and –

MICHEL BÉDARD
FRANÇOIS BERNIER
WILLIAM G.K. BODEN
DENIS GIRARD
JAQUELIN LÉGER
JEAN PELLETIER
CHRISTIAN ROUSSEAU
MARC SHEEDY
LIONEL VÉZINA

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand and Laliberté Lanctôt Coopers & Lybrand, having a place of business at 2, Place Quebec, Room 536, in the City of Quebec, Province of Quebec

-and –

ROBERT M. BOSSHARD
SEAN R. CASEY
R. IAN COWAN
ROBERT G. GLENNY
GINO A. SCAPILLATI

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 21, King Street West, 2nd Floor, in the City of Hamilton, Province of Ontario

-and-

DAVID E. GRAHAM
BRYAN D. STEWART
TERRANCE G. WICHMAN

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 175 Columbia Street West, in the City of Waterloo, Province of Ontario

-and-

SPENCER H. CLARK
ROBERT B. LEMON
ALLAN A. MCDERMID
IAN D. MCINTOSH
JOHN M. SAVEL

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 275 Dundas Street, in the City of London, Province of Ontario

A. JOEL ADELSTEIN
TREVOR J. AMBRIDGE
DAVID H. ATKINS
SHARON BACAL
RONALD B. BLAINEY
HUGH J. BOLTON
J. DOUGLAS BRADLEY
DONALD A. BROWN
HAROLD A. BURKE
RICHARD S. BUSKI
TONY P. CANCELLIERE
DENNIS H. CARTWRIGHT

PAUL G. CHERRY
CHRISTIE J.B. CLARK
GRAHAME J. CLIFF
JAMES S. COATSWORTH
GEOFFREY A. COOKE
WILLIAM J. COTNAM
PAUL W. CURRIE
RICHARD C. CURTIS
KEVIN J. DANCEY
ALEXANDER M. DAVIDSON
ALAN G. DRIVER
J. PETER ECCLETON
H. GLENN FAGAN
BRIAN C. FOLEY
DAVID FORSTER
STEPHEN H. FREEDHOFF
A. RIK GANDERTON
ANTHONY F. GIBBONS
PAUL B. GLOVER
J. BRYAN GRAHAM
GARY J. HASSARD
BRENT D. HUBBARD
ROBERT M.C. HOLMES
BRENDA J. HUMPREYS
ROBERT H. JOHNSON
ROBERT E. LAMOUREUX
PETER K. LANE
DEAN R. LEVITT
ROBERT E. LOWE
C. ANDREW MCASKILE
JILL H. MCALPINE
ISRAEL H. MIDA
PAUL J. MURPHY
ROBERT J. MUTER
BARRY J. MYERS
GABRIEL NACHMAN
BERNARD J. NISKER
RICHARD C. PETIT
W. DAVID POWER
RICHARD ROHDE
JAMES S. SALOMAN
CHARLES L. SEGUIN
Alan Smith, in his quality of Executor and Trustee of the Estate of the Late
CHRISTINE E. SINCLAIR
DAVID W. SMITH
ROBERT J. SPINDLER

A. DEAN SUMMERVILLE
MICHAEL A. TAMBOSSO
MICHAEL R. VAN EVERY
DEREK W. WILLIAMS
LAURENCE H. WRAGG

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 145 King Street West, in the City of Toronto, Province of Ontario

-and –

ALAN FREED
RONALD G. JACKSON
JOHN J. LISOWSKI
ALLAN D. LUMSDEN
J. DAVID SCHIJNS
RICHARD A. VICKERS

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 55 Metcalfe Street, 12th Floor, in the City of Ottawa, Province of Ontario

-and –

ANTHONY J. PANICCIA
PAUL J. CHARKO
LORIS MACOR

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 500 Ouellette Avenue, in the City of Windsor, Province of Ontario

-and –

RAYMOND A. CADIEUX
ANDRE G. COUTURE
DAVID J. DRYBROUGH
FREDERICK M. FLORENCE
JAMES R. HOLLAND
SERENA H. KRAAYEVELD
DAVID LOEWEN
GERALD F. PYLE
GERALD H. RODRIGUE
CAROL L. STOCKWELL
PAUL D. WRIGHT

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 2300 Richardson Building, One Lombard Place, in the City of Winnipeg, Province of Manitoba

-and –

FRANKLIN M. BALDRY
MONTE F. GORCHINSKI
GERALD P. SCHERMAN

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 500 – 123-2nd Avenue South, in the City of Saskatoon, Province of Saskatchewan

-and –

JUSTIN FRYER
RONALD P. GRATTON
C. ROY KRAKE
JOHN E. LAWRENCE
GERARD A.M. LUIKX
RODERICK W. MACLEAN
DALE S. MEISTER
WILLIAM E. PATTERSON
BRIAN K. PAWLUCK

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 2400 Bow Valley Sq. III, 255-5th Avenue S.W., in the City of Calgary, Province of Alberta

-and –

A.W. KEITH ANDERSON
DANIEL J. BLOCK
WILLIAM D. BURCH
BARRY L. JAMES
DONALD A. MACLEAN
JOHN A. MACNUTT
MELVIN J. MAJEAN
ALAN D. MARTIN
FREDERICK M. PARTINGTON
JOSEPH F. PRESTON
KENNETH D. RAWSON
N. DAVID ST. PETER
JOHN M. TWEEDLE

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 2700 Oxford Tower, 10235 – 101 Street, in the City of Edmonton, Province of Alberta

-and –

ERIC S.Z. ANDREW
RODNEY C. BERGEN
LENARD F. BOGGIO
JOHN H. BOWLES
DAVID P. BOWRA
CRAIG G. BUSHELL
W. JOHN DAWSON
DARRYL R. EDDY
RODNEY B. JOHNSTON
JOHN C. KAY
PATRICIA J. LAJOIE
JOHN E. LARSEN
LEDFORD G. LILLEY
MARTIN A. LINSLEY
JOHN D. PETERS
PIROOZ POURDAD
GARY D. POWDROZNIK
C. DOUGLAS PROCTOR
PETER J. SPEER

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 111 West Hastings Street, in the City of Vancouver, Province of British Columbia

-and –

ELAINE S. SIBSON
GARY R. STAFFORD
MARCUS A. WIDE
J. HAP WRIGHT

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 1701 Hollis Street, Suite 1200, in the City of Halifax, Province of Nova Scotia

-and –

LAWRENCE R. COSMAN
HUGH R. TIDBY

R. DALE URQUHART
PETER WILSHAW
Ms. L.G. Wittrien in her quality of Executor and Trustee of the Estate of the Late
GLENN L. WITTRIEN

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 801 Brunswick House, 44 Chapman Hill, in the City of Saint John, Province of New Brunswick

-and –

G. COLIN BAIRD
CHARLES M. FOLLET
JAMES A. KIRBY
RONALD J. WALSH

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 235 Water Street, 7th Floor, in the City of St. John, Province of Newfoundland

-and-

DAVID G. ARSENAULT
C. MARY H. BEST
BRIAN W. CAMERON
IRWIN W. ELLIS
RALPH H. GREEN
J. WALTER MACKINNON
JOHN M. MULLIGAN
MICHAEL L. O'BRIEN

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand – Chartered Accountants, having a place of business at 134 Kent Street, 6th Floor, in the City of Charlottetown, Province of Prince Edward Island

-and-

COOPERS & LYBRAND – CHARTERED ACCOUNTANTS, a professional partnership carrying on the profession of chartered accountancy and having its head office at 145 King Street West, in the City of Toronto, Province of Ontario

TABLE OF CONTENTS

Tabs

FORM 25B

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)

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.

FISHMAN FLANZ MELAND PAQUIN LLP
Barristers & Solicitors
1250 René-Lévesque Blvd. W. Suite 4100
Montréal, QC. H3B 4W8

Avram Fishman
Leonard W. Flanz
Mark E. Meland
Margo Siminovitch

BURKE-ROBERTSON LLP
Barristers & Solicitors
200 – 441 MacLaren Street
Ottawa, ON. K2P 2H3

Robert E. Houston, Q.C.

PART I: STATEMENT OF FACTS AND OVERVIEW

A. OVERVIEW – APPLICANTS' MISCHARACTERIZATION OF THE FACTS, ISSUES AND FINDINGS OF THE COURTS BELOW

1. Applicants assert that, "*at its core, this test case is about corporate governance in Canada*"[1]. In fact, as the courts below determined, the essence of the dispute is *"one concerning professional liability for negligence"*[2]. The lower courts found that the negligence of Coopers & Lybrand ("**C&L**", or the "**Applicants**") was egregious, that the Applicant Wightman was a co-conspirator ("*un comparse*"), that the wrongful activity occurred in Quebec and that Quebec civil law was the applicable law to determine Applicants' liability for their professional negligence. In their Leave Application, Applicants raise all of the same arguments that were considered and rejected by the trial judge and the unanimous appellate court.

2. This action was commenced nearly 20 years ago. The lower courts made their determinations after two trials lasting more than a decade[3], in which evidence of more than 75 witnesses, including 14 experts[4], was heard, encompassing more than 100,000 pages of transcript. The trial courts had before them more than 18,000 exhibits[5]. There were more than 40 interlocutory appeals. The 752 page trial decision is a reflection of the breadth and depth of the factual analysis undertaken by the trial judge. The court of appeal, in its 113 page decision, noted it was not possible to summarize the facts found by the trial judge "*without betraying [her] thinking and intellectual progression*".

3. The Leave Application does not raise issues of national or public importance:

---

[1] Para. 1 of Applicants' Leave Application ["**Leave Application**"].
[2] CA Judgment §113 [Applicants' Record ("**AR**") **Tab 4C**].
[3] The original trial before Justice Paul Carrière consumed approximately 8 years before it was aborted due to the illness of the Judge. The subsequent trial before Justice Marie St-Pierre [the "**trial judge**"], which imported much of the evidence from the first trial, consumed more than two and a half years.
[4] Trial Judgment §23 (footnotes 9-13) [**AR Tab 4A**].
[5] The trial judge referred to "*more than 5,000 exhibits representing several hundred thousand pages*" [Trial Judgment §23 [**AR Tab 4A**]]; many exhibits were divided into sub-exhibits incorporating the same exhibit number, such that there were more than 18,000 separate exhibits produced into the Court record.

(i) the legal issues raised by Applicants are so intimately entrenched in the unique and exceptional facts of this case that they cannot be disassociated from those facts. This is not an appropriate case for this Court to hear;

(ii) the trial judge determined, based on the particular factual matrix and applying the well-established authorities in both Quebec civil law and Canadian common law (which was in evidence before her), that the liability of Applicants would be engaged regardless of which law applied, such that the legal issues raised are purely academic;

(iii) the decisions of the courts below relevant to the Quebec civil law are based on the provisions of the Civil Code of Lower Canada ("**CCLC**") as it existed up to 1994, and thus have limited relevance today; and

(iv) the courts below followed and applied the decisions of this Court in the resolution of the legal issues before them.

B. FACTS – THE ENORMOUS RECORD REVEALS HIGHLY UNUSUAL FACTS

4. Applicants assert that the facts in this case "*mirror the typical situation*"[6] in an auditor's negligence case. On the contrary, there is absolutely nothing typical about the facts of this case. The courts below recognized the exceptional and disturbing facts giving rise to Applicants' liability as follows:

(i) Castor Holdings Limited ("**Castor**") was a "*Ponzi scheme*" where the enterprise's prosperity as depicted in the professional opinions issued by C&L "*was just an illusion*" and where "*the reality was disastrous*"[7];

(ii) the engagement partner of C&L, responsible for the audits and other professional services performed for Castor, was a "*co-conspirator*"[8];

[6] Para. 48 of Leave Application.
[7] CA Judgment §§57-69 **[AR Tab 4C]**.
[8] CA Judgment §§71-72 **[AR Tab 4C]**.

(iii) "*Stolzenberg* [Castor's President and CEO] *was the engine of the fraud, but it would not have worked so well without the lubricant provided by* [Applicant] *Wightman*"[9];

(iv) the fault of C&L "*went well beyond its work as auditor*"[10] and "*the shortcomings noted in the auditing work per se*"[11] and "*also concerned the obligations they assumed over the years in becoming involved in Castor's governance and multiplying contacts with third-party investors*"[12];

(v) "*the auditing work was botched*" and "*Wightman lost the independence required of an auditor; he was unable to keep a healthy distance from his client; he was too implicated in the client's business 'far beyond his role as Castor's auditor'*"[13];

(vi) Applicants knew and agreed that investors like Respondent relied on C&L's audit reports[14] and that the share valuation letters issued by C&L were used to recruit new investors[15];

(vii) Applicants were "*well aware*" that Castor required audited financial statements in order to obtain and maintain the financing required to meet its current obligations[16]. Applicants *"knew full well that their auditing reports and other accounting opinions would be read by third-party potential investors and taken into consideration in their decision-making process*"[17] and Applicants were "*aware of and approved*" that Castor's financial statements were prepared for purposes other than a statutory audit[18]; and

[9] CA Judgment §94 [**AR Tab 4C**].
[10] CA Judgment §§155 [**AR Tab 4C**].
[11] CA Judgment §93 [**AR Tab 4C**].
[12] CA Judgment §96 [**AR Tab 4C**].
[13] CA Judgment §73 [**AR Tab 4C**].
[14] CA Judgment §80 [**AR Tab 4C**].
[15] CA Judgment §83 [**AR Tab 4C**].
[16] Trial Judgment §3510 [**AR Tab 4A**].
[17] CA Judgment §249 [**AR Tab 4C**].
[18] Trial Judgment §§3362, 3523, 3524 [**AR Tab 4A**].

(viii) Applicant Wightman "*directly solicited*" investments in Castor and used its audited financial statements for such purpose[19].

5. In short, this case has a unique set of facts that are unlikely in the extreme to be replicated in any other litigation. The issues of professional negligence that were addressed in the courts below go far beyond the typical role of auditor and involve a situation where, as determined, the Applicants, through the C&L engagement partner, understood and accepted the uses to which C&L's professional opinions were being put by third-party users, such as Respondent.

6. The Court of Appeal noted that the facts were powerfully set out in the 752 page trial judgment and that it is not possible to summarize them "*without running the risk of betraying the thinking and intellectual progression of the trial judge*"[20]. The Applicants are in effect urging this Court to revisit this enormous court record and to reverse the countless findings of fact made by the trial judge.

7. The Applicants attempt to downplay what they term the "*Quebec connection*" in their Leave Application. In fact[21]:

(i) Castor's executive office and principal place of business, from where its activities were managed and directed, was always in Montreal. The resolutions of the committees of directors were signed in Montreal, and the proxies for the annual meetings of shareholders of Castor were to be returned to Castor in Montreal. The loans made by Castor were administered by the Montreal office. The decisions with respect to all loans were made by Stolzenberg (the CEO) in Montreal;

(ii) the offices of Castor's corporate lawyers were in Montreal and the Minute Books of the company were maintained in Montreal; and

[19] Trial Judgment §3524 [**AR Tab 4A**].
[20] CA Judgment §28 [**AR Tab 4C**].
[21] CA Judgment §§106-110 [**AR Tab 4C**]; Trial Judgment §§3354-3361 [**AR Tab 4A**].

(iii) with respect to the activities of Applicants: (a) the C&L engagement partner, the second partner, the audit manager and all of the audit staff (except for one person who was brought in from the C&L Halifax office for the 1990 audit) were from the Montreal office of C&L; (b) the contract between C&L and Castor was entered into in Montreal; (c) the entire coordination of the audits was performed in Montreal; (d) the audit consolidation took place in Montreal; (e) the overseas audit work was performed by audit staff sent from C&L Montreal; (f) the second partner review took place in Montreal; (g) the wrap-up meetings with Castor's principals were conducted at the latter's offices in Montreal; (h) the C&L reports and opinions (including their valuation letters and legal-for-life certificates) were issued in Montreal on C&L's Montreal office letterhead and remitted to Castor in Montreal; (i) C&L's invoices were delivered to Castor in Montreal and payment for them was made to the Montreal office of C&L; and (j) neither the financial statements nor the audit reports mentioned that Castor was a New Brunswick corporation.

8. Consequently, it would be *"chaotic to say the least"*[22] if the liability of Quebec auditors and accountants for work performed in Quebec was determined in accordance with the standards of a foreign jurisdiction. The Court of Appeal held that it would be *"incongruous"* to apply Canadian common law to faults committed by professionals who performed their work in Quebec[23]. The Court of Appeal further pointed out that *"it is not surprising to note that the appellants' two experts referred to the Québec code of ethics in analyzing Coopers' conduct"*[24]. The faults of Applicants result from non-compliance with the applicable professional standards in Quebec and do not arise from non-compliance with New Brunswick statutory requirements as argued by Applicants[25].

[22] CA Judgment §192 **[AR Tab 4C]**.
[23] CA Judgment §§190-192 **[AR Tab 4C]**.
[24] CA Judgment §110 **[AR Tab 4C]**.
[25] Para. 23 of Leave Application.

9. Applicants' argument - that the law of the place of incorporation of Castor (the common law of New Brunswick) should govern their negligent conduct in Quebec towards third parties - is contrary to the private international law of Quebec, especially in a situation where **none** of the impugned professional services was performed in New Brunswick. The **delictual** conduct of a director/officer of a company that carries on its activities in Quebec is clearly not a matter of "*status and capacity*"[26]. Applicants' argument, that the auditor is an officer of the corporation, was the basis upon which they attempted to characterize the legal issue as one of status and capacity. This argument was dismissed by the Court of Appeal as "*more one of semantics than of substance*"[27].

10. Regarding Applicants' subsidiary argument that the common law of Ontario should be the applicable law, the Court of Appeal, in interpreting article 6 CCLC, applied the reasoning of this Court in *Tolofson*[28] with respect to the *lex loci delicti* rule and held that it "*is quite obvious that the place where the activity occurred is the place where the faulty behaviour occurred*"[29] [emphasis in original].

11. The Court of Appeal stated that it "*cannot fail to mention the strategic nature of the position adopted by the appellants regarding the law applicable to the dispute*"[30]. The Respondent took his action a few years before this Court rendered its decision in *Hercules*[31]. It was only after *Hercules* was issued that Applicants amended their plea and, for the first time, invoked the question of the applicable law. The use of litigation strategy by the "*perpetrators of the fault*"[32] to attempt to defeat the rightful claim of the victim of a delict is not a matter which raises issues of national or public importance.

---

[26] J. Talpis & J.-G. Castel, "*Interprétation des règles du droit international privé*", in La réforme du Code civil, tome II, 1993. P.U.L., no. 365 at para. 137 [Respondent's Book of Authorities ("**RBOA**") **Tab 16**].
[27] CA Judgment §134 [**AR Tab 4C**].
[28] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 [Applicants' Book of Authorities ("**ABOA**") **Tab 24**].
[29] CA Judgment §162 [**AR Tab 4C**].
[30] CA Judgment §§193-194 [**AR Tab 4C**].
[31] *Hercules Management Ltd.* c. *Ernst & Young*, [1997] 2 RC.S. 165 [**ABOA Tab 11**].
[32] CA Judgment § 194.

12. Applicants use speculative rhetoric to assert, without any evidentiary foundation, that the differences between Quebec civil law and Canadian common law *"leaves little choice for Quebec auditors – they will move their services and therefore availability away from the province of Quebec"*[33]. However, there has been no deluge of auditor's negligence suits in Quebec and the Court of Appeal has clearly held that the Quebec civil law concept of causation is a sufficient limiting device in respect of the extra-contractual liability of auditors, like that of any other professional[34]. To use Applicants' logic, they could just as well argue that partners of audit firms would be likely to move their services into Quebec since the majority of the Court of Appeal held that the liability of Applicants was "joint" whereas it would be *"joint and several"* under the laws of Ontario.

13. There is absolutely no legal basis for Applicants to argue that the laws of Quebec must be *"harmonized"* with the laws in the rest of Canada. This Court has consistently affirmed that Quebec civil law constitutes a complete system in itself and must be interpreted according to its own rules[35]. Harmonization of laws is a function of the competent legislatures.

14. Applicants appear to argue that because this is a test case that has binding effect on 39 other active Castor files, it is elevated to one of "*importance*"[36] that would meet the test for the granting of leave by this Court. However, the issue of Respondent's conduct as a director is not a "*common issue*" in this litigation. The alleged corporate governance principles in relation to the role of the late Peter Widdrington as director apply to **less than 1%** of the amounts claimed by the other Castor plaintiffs (who, in addition to the trustee in bankruptcy, are primarily banks, financial institutions and investors who were not directors)[37].

---

[33] Para. 55 of Leave Application.
[34] CA Judgment §§244-246 **[AR Tab 4C]**.
[35] *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375 at para. 56; *Laurentide Motels Ltd.* v. *Beauport (City)*, [1989] 1 S.C.R. 705 at 789; *Farber* v. *Royal Trust Co.*, [1997] S.C.R. 846 at para. 31 **[RBOA Tabs 11, 10, 8]**.
[36] Para. 68 of Leave Application.
[37] The only other active plaintiff who was a director of Castor is Smiley Rayborn Jr., with a claim in the principal sum of $1,252,944 – see Trial Judgment Annex A **[AR Tab 4A]**.

15. Applicants speculate that "*until the law is clarified by this Honourable Court, it is a juridical inevitability that longer trials will eclipse this one*"[38]. Firstly, there is no requirement for this Court to "*clarify*" the law, since the Court of Appeal decision is consistent with existing jurisprudence and doctrine and reconciles its own prior judgments. Secondly, it is more than ironic that Applicants submit this argument, having pursued their defense to the Respondent's action through a "*war of attrition*", as has been recognized by the courts below[39].

16. After employing this "*scorched earth*" litigation strategy[40] over the course of two lengthy trials including approximately 40 appeals to the Quebec Court of Appeal on interlocutory matters, Applicants finally acknowledged[41] their own professional faults and abandoned their appeals on negligence in 2012, 17 months after they filed their inscriptions in appeal of the trial judgment. It should be noted that of the 12 years of trial referred to in the conclusion of the Leave Application, more than 90% of the judicial time was devoted to the case related to issues of professional negligence. It is striking how much wasted time, effort and judicial resources resulted from Applicants' decision to leave no stone unturned in their futile contestation of their negligence in a situation where the Court of Appeal described both the non-compliance with accounting principles and the audit failures of C&L as an "*understatement*"[42] and concluded that the results of C&L's work were a "*fiasco*"[43].

17. After nearly 20 years (the lawsuit was instituted in 1994), it is appropriate to give effect to the opening words of the trial judge: "*Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada*"[44].

PART II: QUESTIONS IN ISSUE

18. There is no issue of national or public importance raised in the Leave Application:

---

[38] Para. 67 of Leave Application.
[39] *Wightman c. Widdrington (Succession de)*, 2011 QCCA 1393, at para. 37 [**RBOA Tab 13**].
[40] *Ibid.* at para. 38.
[41] CA Judgment §§55, 56, 197 [**AR Tab 4C**].
[42] CA Judgment §§67, 75 [**AR Tab 4C**].
[43] CA Judgment §74 [**AR Tab 4C**].
[44] Trial Judgment §1 [**AR Tab 4A**].

(i) With respect to the private international law question: a) the argument that the *lex societatis* of Castor could govern the wrongful conduct of professionals in Quebec that harmed third parties is without merit or legal basis under the Quebec CCLC; b) it is settled law that the *lex loci delicti* is the law of the place where the injurious act occurred (Quebec); c) the courts below, after an exhaustive factual enquiry, determined that it would be incongruous and chaotic for Montreal accountants to have their liability determined on the basis of as many foreign laws as there are plaintiffs domiciled outside of Quebec; and d) the rules of private international law in Quebec were modified in 1994 such that the issues raised in this litigation will provide little assistance in other multi-jurisdictional cases;

(ii) Any suggestion that common law principles of civil liability in cases involving auditors or accountants in Canada should be "harmonized" with the principles of the Quebec civil law for delict is contrary to Canada's bi-jural tradition; and

(iii) With respect to the acts of Respondent in his capacity as a director in 1991: a) it is settled law that the objective test to assess the conduct of a director may include the fact that he is an "outside" director; and b) as the lower courts, after an exhaustive factual enquiry, found no fault in the actions of the Respondent in his role as a director, it is not controversial that he is entitled to rely on unqualified audited financial statements.

PART III: STATEMENT OF ARGUMENT

ISSUE 1: *Lex Loci Deliciti* and *Lex Societatis*

A. THE SETTLED RULES OF PRIVATE INTERNATIONAL LAW IN QUEBEC PROVIDE THAT THE DELICTUAL LIABILITY OF A NEGLIGENT PROFESSIONAL IS GOVERNED BY THE *LEX LOCI DELICTI* (AND NOT THE *LEX SOCIETATIS*)

19. There is no dispute that the applicable conflict rules are those of the court seized of the dispute (the *lex fori*) - in this case, the Quebec Superior Court - and, because the relevant events occurred prior to 1994, the provisions of the CCLC

apply[45]. It is well-established that to identify the applicable law, it is essential to first characterize the nature of the dispute. The courts below determined that the dispute dealt with questions of professional negligence, a characterization that was reflected in the pleadings of the parties[46]. This is not controversial and, in fact, Applicants have clearly anticipated this characterization in their arguments with respect to the meaning of the *lex loci delicti*.

20. The law applicable to a corporation (its status and capacity) does not extend to the extra-contractual liability of its directors and officers and certainly not to its auditors[47]. It is evident from the doctrine extensively cited by the courts below that there is no controversy about the meaning and scope of the term "*status and capacity*" as used in article 6 CCLC[48].

21. There is no rule in Quebec law that carves out the delictual liability of an auditor/accountant from the ordinary principles of civil responsibility and private international law: "*In regard to the client, an accountant's liability is subject to the general rules of the law of obligations ...* ***In regard to third parties, the remedy is founded on the rules of extracontractual liability,*** *particularly article 1457 of the Civil Code* (reproducing art. 1053 CCLC)"[49]. [emphasis added]

22. Applicants' argument - that there are reasons to make a distinction in the rules of private international law relating to the delictual liability of auditors - is purely academic and founded on authorities of foreign jurisdictions that do not reflect the law in Quebec or, for that matter, in Canadian common law[50].

---

[45] CA Judgment §§98-99 [**AR Tab 4C**].
[46] CA Judgment §§112-116 [**AR Tab 4C**].
[47] *Supra* note 26.
[48] CA Judgment §§116-128 [**AR Tab 4C**]; Trial Judgment §3375 and 3376 [**AR Tab 4A**].
[49] Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile, Volume II – Responsabilité professionnelle,* 7th ed. (Cowansville, Qc.: Yvon Blais) at para. 2-169 [**RBOA Tab 15**], cited in CA Judgment §115 [**AR Tab 4C**].
[50] CA Judgment §134 [**AR Tab 4C**].

B. THERE IS NO AUTHORITY IN CANADA THAT AN AUDITOR IS AN "*OFFICER*" OF HIS AUDIT CLIENT IN THE SENSE OF THE BUSINESS CORPORATIONS STATUTES AND, IN ANY CASE, C&L'S ROLE HERE WAS UNUSUAL AND FAR EXCEEDED THEIR MANDATE AS AUDITOR

23. Although the Court of Appeal explicitly acknowledged that it was not possible to give justice to the facts as described in the trial reasons, it considered it imperative to provide illustrations of certain salient facts, including with respect to the issue of negligence (now admitted), as those facts are so integral to the analysis of the issues in dispute[51].

24. Applicants present this Leave Application as restricted to their role as auditors. That role is the basis for their *lex societatis* argument. Although they claim that they do not challenge the factual findings of the trial judge[52], the only way Applicants can succeed on this argument is if this Court rejects the concurrent factual findings of the trial judge, and the Court of Appeal, that Applicants' fault "*far exceeds*" their role as auditor[53]. Otherwise, whatever argument might apply to an accountant acting within the parameters of an audit role is irrelevant when, as here, the accountant is found to have acted well outside that mandate. Further, it would lead to an impossible outcome to suggest that the *lex societatis* should apply with respect to auditors, but that the *lex locti delicti* should apply when an accountant is negligent with respect to other professional activities[54].

25. Applicants propose that this Court should consider "*for the very first time*" their theory of the *lex societatis*. This theory has never been considered before because, apart from the fact that this is a professional negligence dispute, the proposition that the auditor is an officer of the corporate entity is in direct conflict with the spirit and intent of Canada's provincial and federal business corporation acts, including the *New Brunswick Business Corporations* Act[55] *("**NBBCA**")*. As stated by McGuiness:

---

[51] CA Judgment §28 [**AR Tab 4C**].
[52] CA Judgment §28 [**AR Tab 4C**].
[53] Trial Judgment §§2208, 2219 [**AR Tab 4A**] and CA Judgment §§73, 82, 96, 198, 252 [**AR Tab 4C**].
[54] CA Judgment §152-156 [**AR Tab 4C**].
[55] S.N.B., 1981, c. B-9.1.

> *9.162 In carrying out their duties, the auditors of a corporation are neither agents of the corporation nor of the shareholders. Although retained by the corporation under contract,* ***they are not officers of the corporation within the meaning of either of the OBCA or the CBCA****. Instead, auditors are statutory* functionaries[56]. [emphasis added]

26. A similar conclusion was expressed by the Court of Appeal as follows: "*Examination of the Canadian legislative provisions regarding auditors, both in English and in French, highlights a community of thought beyond superficial differences. In all cases, auditors, even if they are appointed officers or servants of the corporation, are not such in the strict sense of the terms*"[57]. If it were not so, auditors would lose their independence, a quality essential to the proper fulfillment of their duties.

27. The Court of Appeal held that Applicants' core argument in support of the application of the *lex societatis,* based on the English text of the *NBBCA* which refers to the auditor "*holding office*" [in French, *le mandat*], is "*more one of semantics than of substance*" and that the Applicants' theory would lead to "*an unacceptable legal situation*"[58]. There is no issue of national importance that warrants the intervention of this Court.

C. IT IS SETTLED LAW THAT THE *LEX LOCI DELICTI* MEANS THAT THE LAW TO BE APPLIED IN A CASE OF DELICT IS THE LAW OF THE PLACE WHERE THE INJURIOUS ACTIVITY OCCURRED

28. The Court of Appeal unanimously agreed with the trial judge that the law to be applied is the *lex loci delicti*, which leads to Quebec as the governing law[59].

29. It is not controversial that the general rule in delict and tort is that the *lex loci delicti* is the law of the place where the injurious activity occurred. This rule in tort, clearly set out by this Court in *Tolofson,* was reviewed and reaffirmed by this

---

[56] CA Judgment FN 38, §142 [**AR Tab 4C**]. Kevin P. McGuinness, *Canadian Business Corporation Law,* 2nd ed., Toronto, Butterworths, 2007 [**RBOA Tab 17**].
[57] CA Judgment §148 [**AR Tab 4C**].
[58] CA Judgment §§134, 152 [**AR Tab 4C**].
[59] CA Judgment §156 [**AR Tab 4C**].

Court in 2012[60]. As stated by this Court in *Tolofson*, Quebec legislators followed the same solution for delicts in article 6 CCLC[61].

30. Contrary to Applicants' arguments, this case is not about a failure to warn or the receipt of a negligent misrepresentation. Applicants' fault was their failure to perform their professional activities in a manner that satisfied the standards of the time. C&L's negligent activities were performed by accountants and auditors from C&L's Montreal office, whose activities were regulated by the Quebec Order of Chartered Accountants, and who were subject to the laws of Quebec. The audits were performed from beginning to end by the accountants and staff of the Montreal office of C&L and not merely "*finalized*" in Montreal as suggested by Applicants[62]. The occurrence of the wrong (Applicants' faults) is the delict's most substantial and characteristic element and Quebec is the sole jurisdiction with a substantial interest in the faulty activity. There is no basis to disturb these concurrent factual findings of the lower courts.

31. If Applicants' theory of the *lex loci delicti* rule were correct, there would be a myriad of different laws governing negligence, depending upon the purely fortuitous domicile of the various plaintiffs in the Castor actions. The plaintiffs who instituted actions against Applicants in 1993/1994 were domiciled in jurisdictions spanning the globe (including Liechtenstein, Germany, Ireland, Panama, Switzerland, Japan and the United States). The result would be absurd – the application of a plethora of different systems of law and the possibility of different results on the very issues that were designated as common to all these actions. In the words of Applicants, this would cause "*inextricable difficulties and conflicting results*"[63].

---

[60] *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 at paras. 49-50. The Court found that the tort of defamation constitutes an exception to the general rule as there was a real and substantial connection to Ontario **[RBOA Tab 7]**.
[61] Paras. 1049, 1050 and 1051 of *Tolofson* **[ABOA Tab 24]**, cited in CA Judgment §§161-166 **[AR Tab 4C]**.
[62] Para. 25 of Leave Application.
[63] Para. 21 of Leave Application.

32. The trial judge considered La Forest J.'s dictum in *Tolofson* with respect to the practical advantages of the *lex loci delicti* rule as being the law of the place of the wrongful activity ("*certainty, ease of application and predictability*")[64]. It is ironic that Applicants rely upon this guidance of the Court to bolster their theory of *lex societatis*[65] while, at the same time, they propose an interpretation of the *lex loci delicti* rule that is completely impractical and contrary to the spirit and principles expressed by this Court in *Tolofson*.

33. As stated by the Court of Appeal, Applicants' argument, that the *lex loci delicti* should be the place where the damage is felt, is strategic, to avoid the application of Quebec civil law[66]. Certain legislators (mainly in Europe) have articulated this concept to protect victims, whereas it is being invoked here by the negligent party as a weapon against its victims.

34. In addition, the articulation of the *lex loci delicti* rule under article 6 CCLC is not a matter of public importance within Quebec, in light of the 1994 reform to the Civil Code's rules pertaining to private international law.

ISSUE 2: "Harmonization"

A. THERE IS NO CONTROVERSY IN THE FACT THAT CANADA IS A BI-JURAL COUNTRY

35. This Court has confirmed that the Quebec civil law is a complete system in itself and that care must be taken not to adopt principles from other systems, including the policy of the common law provinces. Consequently, Applicants' argument that this Court should "*harmonize*", as between Quebec civil law and Canadian common law, the rules for the civil liability of auditors, has no legal basis[67].

36. In the present case, Respondent seeks recovery for the economic loss he suffered as a result of Applicants' negligence. This Court, subsequent to rendering the decision in *Hercules*, acknowledged that, with respect to actions for

[64] Trial Judgment §3384 **[AR Tab 4A]**.
[65] Para. 32 of Leave Application.
[66] CA Judgment §193 **[AR Tab 4C]**.
[67] *Supra* note 35.

recovery for economic loss arising from a tort/delict, the law of Quebec provides a distinct analysis that differs from the common law[68].

37. It is not controversial that the application of the civil law will sometimes lead to a different solution than the common law. However, Applicants' suggestion that the application of the rules of civil liability in Quebec will *always* lead to a materially different (and unacceptable) outcome than the application of the Canadian common law is nothing more than unsupported rhetoric.

B. IT IS WELL-ESTABLISHED THAT THE QUEBEC CIVIL LAW EMPLOYS THE CONCEPT OF CAUSATION AS THE CONTROL MECHANISM TO LIMIT LIABILITY

38. Applicants' suggestion that there is now unlimited liability of auditors in Quebec grossly misrepresents the judgment of the Court of Appeal.

39. Applicants invited the Court of Appeal to review the decisions of the Quebec courts, including its own, relevant to the extra-contractual liability of professionals towards third parties. The court took "*stock of the issue*" in order to reconcile all of the relevant decisions (what Applicants refer to as the "*broad*" and "*restrictive*" approach)[69] and to carefully articulate the principles to assess the delictual responsibility of professionals, including accountants/auditors. The Court of Appeal reasons provide a clear statement of the law of Quebec and clarify its own prior judgments.

40. The Court of Appeal unequivocally confirmed that the common law's requirement of a "*duty of care*" has not been imported into the civil law and is not relevant to the determination of civil liability in Quebec[70]. There is nothing new, confusing or controversial in this and it raises no issue of national importance.

41. This Court has rejected the proposition that the application of Quebec civil law will lead to unlimited liability in cases of economic loss and has affirmed that the

---

[68] *Bow Valley Husky* v. *Saint John Shipbuilding*, [1997] 3 S.C.R. 1210 at para. 44 [**RBOA Tab 3**].
[69] On the facts as found in this case, either approach would result in a finding of liability.
[70] CA Judgment §§216-220, 247-248 [**AR Tab 4C**].

element of causation "*appears to have worked well in avoiding frivolous claims and the threat of unlimited liability [...]*"[71]. This view is supported by the doctrine: "*causation is a flexible enough concept to serve as a restrictive device, and in practice it has led to a marked limitation of the acceptance of such claims*"[72].

ISSUE 3: Director's Liability

A. THIS IS NOT A CASE WHERE A DIRECTOR'S ACTIONS WERE NEGLIGENT OR ILLEGAL

42. One year after he was appointed as a director of Castor, at the third meeting of the board of directors that he attended, Respondent Widdrington approved a declaration of dividends. The audited financial statements of Castor had been issued one month earlier and C&L issued a share valuation letter, providing an unqualified opinion of value for the company's common shares that was the highest in its history, two weeks earlier. These facts are not in dispute.

43. The Court of Appeal agreed with the trial judge that, given the particular factual context, "*Widdrington cannot be criticized for being lax or careless by relying on Coopers' opinions, in the specific context of the March 21, 1991 declaration of the dividend*"[73]. There is no basis for Applicants' argument that the Court of Appeal decided that "*Respondent could not be faulted for his own recklessness*"[74].

44. The provisions of the *NBBCA* (applicable when Widdrington was a director of Castor) relevant to the declaration of dividends, exempted a director from liability if he, acting in good faith and with reasonable care and diligence, relied upon *"financial statements of the corporation represented to him by an officer of the*

---

[71] *Canadian National Railway* Co. *v. Norsk Pacific Steamship,* [1992] 1S.C.R.1021 [**RBOA Tabs 4**], cited in CA Judgment §244 [**AR Tab 4C**].
[72] Lara Khoury, *The Liability of Auditors Beyond Their Clients: A Comparative Study*, (2001) 46 McGill Law Journal 413 at 470, cited in CA Judgment §246 [**AR Tab 4C**]; See also: Jean-Louis Baudouin and Patrice Deslauriers *La responsabilité civile, Volume II - Responsabilité professionnelle,* 7th ed. (Cowansville, Qc.: Yvon Blais, 2007) at para. 2-190, cited in CA Judgment §245 [**AR Tab 4C**]; [**RBOA Tabs 18, 15**].
[73] CA Judgment §417 [**AR Tab 4C**].
[74] Para. 20 of Leave Application.

corporation ***or in a written report of the auditor****, if any, of the corporation fairly to reflect the financial condition of the corporation"*[75]. [emphasis added]

45. Applicants suggest that an outside director such as Respondent, fairly new to the company, should not be entitled to rely on their unqualified professional opinions even in circumstances where there is not a scintilla of evidence to suggest that the company is in financial difficulties. This is contrary to the law as has been articulated by this Court[76]. Vézina J.C.A., in the judgment below (considering the relevant roles of the auditor and a director/investor in the context of the latter's investment in October 1991), noted the irony of the argument being put forth by Applicants that Respondent was "*a fool*" to rely on the unqualified opinions of one of the largest accounting firms in the country[77].

46. Applicants have failed to establish any fault (much less an illegal act) on the part of Respondent when he approved the payment of a dividend in March 1991. Applicants cannot succeed on this argument without obtaining different factual findings but, not only is there no basis to interfere with the concurrent findings of the lower courts on this issue, there is no factual basis to support Applicants' argument. In any event, this is not an issue of national importance.

B. IT IS WELL-SETTLED THAT THE OBJECTIVE TEST TO ASSESS THE CONDUCT OF A DIRECTOR INCLUDES A CONSIDERATION OF THE FACTUAL CIRCUMSTANCES REGARDING THE ROLE OF SUCH DIRECTOR

47. There is no dispute that this Court's decision in *Peoples*[78] sets out the test to be used to assess the conduct of a director. In para. 63 of that decision, the Court held that *"to say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are*

---

[75] *Supra* note 55 at article 80(3) *NBBCA*. The English appears to have been awkwardly translated from the French version of this article which reads: "*Un administrateur n'est pas responable en vertu de l'article 76 ou 79, s'il s'appuie de bonne foi sur: (a) des états financiers de la corporation reflétant équitablement sa situation, d'après l'un de ses dirigeants ou d'après le rapport écrit du vérificateur de la corporation, le cas échéant;*"

[76] *Blair* c. *Consolidated Enfield,* [1995] 4 R.C.S. 5 [**RBOA Tab 1**], cited in CA Judgment §406 [**AR Tab 4C**].

[77] CA Judgment §§360-362 [**AR Tab 4C**].

[78] *Peoples Department Stores Inc. (Trustee of)* v. *Wise*, 2004 SCC 68 [**ABOA Tab 17**].

important [...]". The Court of Appeal agreed with the trial judge that the fact that Respondent was an outside director was a relevant factual element to be considered in assessing his conduct[79]. There is nothing controversial or surprising in this determination.

48. Since the decision in *Peoples*, Canadian courts have routinely and sensibly continued to consider the inside/outside director distinction in their assessment of the conduct of directors as part of the requisite objective test[80]. This distinction also appears, without debate, in the relevant literature[81].

49. The proposition of Applicants that the courts below, by considering the fact that Respondent was an outside director, re-introduced a "*subjective analysis/test*", is wholly without merit. There is no issue here of national or public importance.

C. IT IS WELL-SETTLED THAT THE ROLE OF A DIRECTOR DOES NOT EXTEND TO THE VERIFICATION OF THE AUDITOR'S WORK IN THE SENSE OF RE-DOING THE AUDIT

50. There is no evidence in the record that, in March 1991, when Respondent approved a resolution to declare the payment of a dividend, there was any evidence available to him, absent a re-audit of Castor's books and records, that Castor's financial health was impaired. The Court of Appeal confirmed that the trial judge made no error in her finding, based on the particular facts, that Respondent had committed no fault and, in this context, was entitled to rely on an unqualified Auditors' Report. The suggestion of Applicants, with no support in the evidence, that Respondent fed false information to the auditors, is pure fiction[82].

---

[79] CA Judgment §§397-398 [**AR Tab 4C**].
[80] E.g. *Borduas* v. *Canada*, 2010 FCA 102 at para. 5; *Ceridian Canada Ltd. c. Labrecque*, 2008 QCCS 4960 at para. 159; *Silver v. Imax Corporation*, 2009 CanLII 72342 (ON SC) at paras. 400, 404-405, 408 [**RBOA Tabs 2, 6, 12**].
[81] E.g. Wainberg and Wainberg, *Duties and responsibilities of Directors in Canada*, CCH Canadian Limited, 6th ed., 1987 at 8; J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3rd ed. (Toronto: Irwin Law, 2009) at 382 [**RBOA Tabs 19, 14**].
[82] Para. 5 of Leave Application.

51. The characterization of the auditor as an independent watchdog on management has long been entrenched in our system of corporate governance[83]. As described by the Court of Appeal, the ultimate weapon a company has to persuade investors and lenders are *"financial statements audited by a highly respectable firm that confirmed, year after year, without any qualifications, the soundness and prosperity of [its] enterprise"*[84].

PART IV: CONCLUSION

52. Although the facts are unique, at its heart, this case is about professionals who abdicated their responsibilities and, as a result, caused harm to third parties, including Respondent. Applicants knew, and approved, that their professional opinions were the primary tool being employed by their client, a private company, to raise money from a small group of investors and lenders. In the words of Applicant, the engagement partner Wightman, this group constituted a *"private investment club"*[85]. No spectre of indeterminate liability exists, given these undisputed facts and there are no public policy concerns raised as a consequence of the judgments below.

53. Professionals, whether working in Quebec or in the common law provinces, are subject to the relevant rules for civil liability which are derived from different traditions. Applicants incorrectly suggest that this Court's decision in 1997 in *Hercules* immunizes negligent auditors in the common law provinces from tortious liability and that the Quebec civil law provides no restrictions to limit the delictual liability of professionals working in Quebec. Moreover, there is no evidence of an exodus from Quebec to the common law provinces of auditors since 1997 or any evidence of burgeoning auditor's negligence cases in Quebec.

54. Applicants' purported concern over "*unnecessary litigation*" cannot be taken seriously in light of the many criticisms directed against them by numerous

---

[83] *Guardian Insurance Co. v. Sharp*, [1941] S.C.R. 164 at 168, 180; *Capital Community Credit Union Ltd. v. BDO Dunwoody*, 2000 CanLII 22757 (ON S.C), at para. 234, aff'd by the Court of Appeal, 2001 CanLII 3508 (ON CA) **[RBOA Tabs 9, 5]**.
[84] CA Judgment §69 **[AR Tab 4C]**.
[85] Trial Judgment §3517 **[AR Tab 4A]**.

Quebec Superior Court and Court of Appeal judges for their "*scorched earth*" litigation tactics.

55. This case raises no questions or doubts about the respective roles of auditors and directors in Canada. Auditors have the responsibility for verification of their client's financial statements, in accordance with the norms of their profession, before signing unqualified opinions about the financial health of the entity. Directors are entitled to rely on an auditor's report, in the absence of facts indicating that the director has acted dishonestly or in bad faith. Furthermore, Respondent acted as a director of Castor in the early 1990s and therefore the case provides limited insight with respect to the responsibilities of directors today.

PART V: SUBMISSIONS CONCERNING COSTS

56. Respondent seeks its costs in this Court. With respect to Applicants' request to review the decisions of the courts below with respect to costs, there is no basis to interfere. Those costs determinations were discretionary and made, in part, because the vast majority of the costs incurred related to Applicants' negligence, which they have now admitted.

PART VI: ORDER SOUGHT

57. The Respondent requests an Order dismissing the Application for Leave to Appeal made by the Applicants, with costs.

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

FISHMAN FLANZ MELAND PAQUIN LLP

Fishman Flanz Meland Paquin

Me Avram Fishman
Me Mark E. Meland
Me Leonard Flanz
Me Margo R. Siminovitch

PART VII: TABLE OF AUTHORITIES