

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)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(ELLIOT C. WIGHTMAN, et al, APPLICANTS)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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A. Undeniable Issues of National Importance

1. This test case (test case in every sense of the word as it raises issues never-before addressed by this Honourable Court) raises a number of pan-Canadian legal (there is no factual dispute) questions of national and public importance relating to corporate governance:

Canadian Auditor liability

- Is the delictual liability of a corporation’s auditor (or any other person holding a corporate office) for faulty performance of his/her duties as auditor governed by the *lex delicti* rule or the company law that creates and defines his/her office, capacity and duties?
- Which jurisdiction’s law should be applied to delict claims when harmful material is prepared in one jurisdiction but is received, relied upon and causes harm in another jurisdiction?
- Should an auditor who issues an opinion be liable to anyone who happens to rely on it under either Canadian common law or civil law, irrespective of whether that person was an intended recipient or whether that person used it for a different purpose for which it was prepared?

Corporate director liability in Canada

- Should corporate directors bear the consequences of their own faults or can they now shift liability for breaches of their own fundamental duties of diligence? To what extent does the characterization of “outside” director impact a corporate director’s standard of due diligence?

2. As a result of the decision of the Court of Appeal below, uncertainty and inconsistency abound in Canada. The fact that the Respondent has taken the trouble to additionally seek the right to (conditionally) cross-appeal both red-flags this test-case and demonstrates the need for clarification. The guidance provided by this Honourable Court will benefit all of Canada, as:

- The issue of what rule of conflict is to be applied to govern the liability of corporate officers depends on the proper application of general principles of conflict of laws - the question of whether to apply *lex societatis* or *lex loci delicti* rests on arguments that are the same under the *Civil Code of Lower Canada* (“CCLC”) or the *Civil Code of Quebec* (“CCQ”) or under common law rules of conflicts.
- The determination of where to situate a delict or tort depends on the proper application of the principles elaborated by this Honourable Court in *Tolofson*¹, a judgment which applies throughout the country – this determination is not based on the text of the CCLC.
- The Court of Appeal judgment (liability of professionals towards non-clients) expressly rejects and contradicts the approach, concerns and policies enunciated in *Hercules* and

¹ *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 [LTA BOA Tab 24]

the approach in *Bail*² – the Court of Appeal seeks to apply general principles of civil law that are the same under the CCLC or the CCQ.

- The statutory structure for corporate governance which defines the roles, responsibilities, and relationships of the directors, auditors and shareholders to each other with respect to the financial statements is common to all companies across Canada, including Quebec.

B. Delictual Liability of Corporate Officers: Law of New-Brunswick or Ontario or Quebec? Help Please!

3. What law applies to the delictual (tortious) liability of a corporation's director or officer who commits a fault in the exercise of his or her corporate duties? Is it the law that creates the corporate office and defines its duties or the law where the delict occurs? This remains a fundamental issue of corporate governance and conflict of laws which this Honourable Court has never addressed before.

4. In arguing that the Court of Appeal in this case got it right by concluding QUEBEC law was to be applied to assess liability for damages sustained by the Respondent (both as an ONTARIO investor and as a NEW BRUNSWICK director), the Respondent fails to address the numerous problematic and negative consequences of the decision of the Court of Appeal (LTA at para. 25) and also fails to address:

- Castor was incorporated in NEW BRUNSWICK, not Quebec – Castor was governed by the NEW BRUNSWICK *Business Corporations Act*.
- The auditors were appointed as corporate officers of a NEW BRUNSWICK corporation; their obligations and any deficiencies in the performance of those obligations were defined and delineated by NEW BRUNSWICK legislation.
- Because auditors are an integral part of a corporation's structure, courts have recognized that auditors are officers of corporations.
- Although the Applicants had offices in Montreal and issued reports from the Montreal office, the work they performed was as auditors of a NEW BRUNSWICK corporation.
- A delict is comprised of two essential elements – fault and prejudice.

C. Indeterminate Liability - What About Harmonization from Within?

5. The Court of Appeal in this case recognized that its own decisions regarding the extra-contractual liability of professionals towards third parties was ambiguous and contradictory. It also acknowledged the existence within Quebec of two trends towards professional liability to non-clients – the broad view and a more restrictive approach. It chose, however, to adopt the

² *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 [LTA BOA Tab11]; *Bank of Montreal v. Bail Ltee*, [1992] 2 S.C.R. 554 [Reply Tab 2A]

broad view and to reject the more restrictive approach which was more in harmony with the concerns and limits set out by this Honourable Court in *Hercules*.³ As a result, under Quebec law, auditors are liable to all readers of audited financial statements, as auditors know or should know that the financial statements will be used by a variety of people for wide-ranging purposes.

6. In light of the fact that an auditor's position and role is the same throughout the country and in light of the fact that accounting standards and norms are identical in every province, should the harmonization of the civil law and common law solutions proposed by the Quebec Court of Appeal in *Savard*⁴ to restrict extra-contractual duty under Quebec law (based on this Court's reasoning in *Bail* and *Hercules*) have informed the decision of the Court of Appeal in this case?

D. Inconsistent, Incompatible and Irreconcilable

7. Because both the trial judge and the Court of Appeal wrote long judgments, the Respondent argues that leave need not be granted in this case. To speak plainly, long judgments are no guarantee of "getting it right".

8. Guidance is required from this Honourable Court, as the judgments below are inconsistent, incompatible and irreconcilable with SCC jurisprudence and cases from other provinces applying that jurisprudence, including:

Tolofson & Lex Delicti

SCC

This Honourable Court established *lex delicti* as the rule of conflict for delictual liability. The Court held that when a fault committed in one jurisdiction causes harm in another jurisdiction, *lex delicti* leads to the application of the law where the prejudice (consequences) occurs.

Court of Appeal below

When a fault committed in one jurisdiction causes harm in another jurisdiction, the delict is to be situated where the fault is committed (the Court failed to take into account the fact that the wrongful activity or wrong, for the purposes of *lex delicti* is not a fault in itself but rather a fault that causes a prejudice).⁵

Other Courts in Canada

The approach and interpretation of the Court of Appeal contradicts the manner in which wrongful activity and consequences have been interpreted by other courts in Canada, including by the Ontario Court of Appeal.⁶

³ Judgment of Court of Appeal below, at paras. 202, 212, 247-248 [LTA Tab 4C]

⁴ *Savard v. 2329-1297 Quebec Inc.*, (2005) R.J.Q. 1997 [LTA BOA Tab 22]

⁵ The approach of the C.A. is also inconsistent with provisions adopted in the U.K. and Europe which favour the law of the prejudice [Reply Tab 2i] and American jurisprudence rejecting the place of audit test [*Harco*, Reply Tab 2D]

*Écosociété & Lex Delicti*⁷SCC

This Honourable Court, while addressing the issue of *forum non conveniens*, concluded that the law of Ontario applied to defamatory statements contained in a book sold in Ontario but entirely written and printed in Quebec.

Court of Appeal below

Referred to and relied on *Ecosociété* to confirm its interpretation of wrongful activity as meaning the place of the fault rather than the place of the prejudice.

*Air Canada & Situs of Fault*⁸SCC

This Honourable Court concluded that the locus of the fault, when a defendant fails to warn a plaintiff of a potential danger, is the place where the warning ought to have been received.

Court of Appeal below

The Court reasoned, in contradiction of its own jurisprudence, that the locus of the fault in this case was where the incomplete or misleading information was prepared and issued.

*Hercules & Rejection of Indeterminate Liability*SCC

This Honourable Court concluded that an auditor, in principle, does not owe a duty of care to everyone and, in particular, to investors or creditors. The mere fact that auditors might know that their financial reports will be used by investors is not sufficient to establish the relationship or purpose connection between a third party and an auditor.

Court of Appeal below

The Court expressly rejects and contradicts the approach enunciated in *Hercules* and in *Savard*, and as a result, concludes that Quebec auditors, if negligent can be subject to indeterminate liability even if in the rest of Canada, auditors, if negligent, are not subject to indeterminate liability

*Peoples Department Store and Director Duty of Care*⁹SCC

This Honourable Court confirmed directors and officers are not in breach of the duty of care under the CBCA if they act prudently and on a reasonably informed basis, the standard of care being an objective (not a subjective) one. A director's conduct is to be assessed by what his/her skills and knowledge should be.

Court of Appeal below

Focusing on the distinction between "internal" and "external" director, the CA re-introduced a subjective analysis/test to determine reasonableness and prudence. This allowed the Court to by-pass the conclusion of Justice Lemelin that "Castor's entire board was entirely passive, limiting itself to looking at the numbers without questioning, controlling or verifying".¹⁰

⁶ See for example *Leonard* (ONCA) [LTA BOA Tab 12]; *Ostroki*, (ONSC.) [Reply Tab 2F]; *Ross*, (N.W.T.S.C.) [Reply Tab 2G]; *Barclay's Bank PCL*, ABQB, at para. 42 [Reply Tab 2B]; *Shane*, (ONSC) [Reply Tab 2H]

⁷ *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636 [LTA BOA Tab 9]

⁸ *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554 [LTA BOA Tab 2]

⁹ *Peoples Department Store v. Wise*, [2004] 3 S.C.R. 461 [BOA LTA Tab 17]

¹⁰ *RSM Richter v. Gambazzi*, 2008 QCCS 3437, at para. 83 [BOA LTA Tab 31]

9. The Respondents specifically place 'en jeu' in their factum the following key issues of interest to this Honourable Court:

- what, and where, is the liability, of Quebec auditors and accountants;
- the "private international law of Quebec";
- harmonization of laws being a legislative rather than judicial function;
- whether there is any obligation on a national court to "clarify" law;
- and, what this Honourable Court's decision in *Hercules* does or does not say¹¹.

E. See-no-evil, hear-no-evil, speak-no-evil – The corporate blame game

10. This Application for Leave to Appeal provides this Honourable Court with the opportunity to address from a corporate law perspective, whether directors can evade liability for breaches of their corporate law duties by blind reliance on audit reports – should they be protected if they sit idle and never ask questions. Can a director primarily entrusted with a task (financial statements) shift his/her liability onto another person (auditor) whose role is to verify for others the Directors' performance?¹² This is the juridical equivalent of asking: can the proverbial see-no-evil, hear-no-evil, speak-no-evil monkeys pass the buck to their duped auditor with a dismissive 'you should have picked up on our monkey business'? Because that's exactly what the courts below in the instant case held, and that's the confusion every single accountant, every single auditor, feels every morning they wake up.

F. Corporate Governance and Conflict of Laws; Certainty and Clarity Required

11. Lack of clear corporate governance principles creates uncertainty in Canada. All who invest in, and rely on, the prudent operation of corporations, as well as their proper direction and oversight, require a minimum of some basic judicial guidance from this Honourable Court. It is Canada's corporate governance principles and thereby Canada's economic stability that are at stake.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF OCTOBER, 2013

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¹¹ Response to the Application for Leave to Appeal ("Response"), paras. 8, 9, 13, 15, 53

¹² See *Bilodeau v. Bergeron & Fils*, [1975] 2 S.C.R. 345 [LTA BOA Tab 6] [Reply Tab 2C]