500-09-023631-138
500-09-023632-136

COURT OF APPEAL OF QUEBEC

Montreal

On appeal from a Judgment rendered on May 9, 2013 by the Honourable Justice Martin Castonguay of the Superior Court, District of Montreal

---

Nos. 500-09-023631-138 C.A.M. – 500-05-057234-005 S.C.M.

COOPERS & LYBRAND, C.A.

APPELLANT – Defendant

v.

RSM RICHTER INC.

RESPONDENT – Plaintiff

-and-

REPUBLIC NATIONAL BANK OF NEW YORK (CANADA),
(formerly "Bank Leumi Le-Israel")
and
CREDIT UNION CENTRAL OF SASKATCHEWAN
and
B.C. CENTRAL CREDIT UNION
and
REPUBLIC NATIONAL BANK OF NEW YORK (CANADA) (formerly "Bank Hapoalim Canada")
and
BANCA COMMERCIALE ITALIANA OF CANADA
and
BANQUE NATIONALE DE PARIS CANADA
and
THE ESTATE OF THE LATE PETER N. WIDDRINGTON
and

RESPONDENT'S EXPOSÉ AND SCHEDULES

Volume 1 : pages 1 to 33

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MISES EN CAUSE – Mises en cause

RESPONDENT'S EXPOSÉ

I. INTRODUCTION & FACTS

1. In 1993 and 1994 more than 70 plaintiffs, including Respondent, Trustee in Bankruptcy of Castor Holdings Ltd. ("**Castor**"), instituted proceedings before the civil division of the Quebec Superior Court against Appellant Coopers & Lybrand ("**C&L**") and its Canadian partners (together, the "**Defendants**"). Each of the plaintiffs claimed damages suffered as a result of Defendants' professional negligence and not, as stated by Appellants,[1] "*as a result of Castor's bankruptcy*". Today the damages claimed in the still active actions (the "**Castor Actions**"), exceed $1 billion, including interest, special indemnity and costs.

2. In February 1998, Justice Paul Carrière, the then coordinating judge of the Castor Actions, selected one action (the "**Widdrington Action**") as the first to proceed to trial.[2] The judgment was to be binding for all of the Castor Actions on certain common issues, including professional negligence. All the other Castor Actions were stayed pending a decision in the Widdrington Action.[3] Although the plaintiff in the Widdrington Action was domiciled in Ontario and C&L's Canadian head office was in Ontario, Defendants did not dispute the jurisdiction of the Quebec Superior Court over the Widdrington Action and all of the Castor Actions.

3. Two months before the trial in the Widdrington Action commenced, on July 1, 1998, the public announcement was made that C&L had "merged" with PriceWaterhouse (the "**PwC Transaction**"), to create PricewaterhouseCoopers ("**PwC**").[4] The effect of the PwC Transaction was that, as at July 1, 1998, PwC took over the assets and goodwill of C&L.[5] However, PwC purports not to have become liable for the liabilities of C&L, including plaintiffs' claims in the Castor Actions.[6] C&L continued to exist after

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1 **A.E., vol. 1**, para. 7.
2 Decision rendered by Justice Paul Carrière dated February 20, 1998 (Exhibit R-2) **[Respondent's Schedules, hereinafter "R.S.", vol. 2, p. 142 & foll.]**.
3 **A.E., vol. 1**, para. 35.
4 PwC press release dated July 1, 1998, **A.E., vol. 2**, p. 254 & foll. (Exhibit P-12).
5 Amended Declaration dated November 28, 2011, paras. 37, 39 **[R.S., vol. 2, pp. 120-121]**. A Re-Amended Declaration dated May 27, 2013 was filed in order to reflect the change of designation of Respondent, **A.E., vol. 2**, pp. 88, 91.
6 The Gazette Newspaper dated April 22, 2011, p. 2 (Exhibit P-37) **[R.S., vol. 2, p. 180]**; *Di Pinto*, 2002 ABQB 901, *infra* note 116, para. 6.

July 1, 1998 with a domicile in Quebec at the offices of its attorneys Heenan Blaikie but it is a shell entity without employees.[7]

4. As a result of an *ex parte* application made by C&L and PriceWaterhouse, Justice Sanderson of the Ontario Superior Court issued an Order dated June 25, 1998 addressing only two matters: i) the parties were exempted from complying with the provisions of the *Ontario Bulk Sale Act* (the "**Ontario BSA**"), except section 7 thereof; and ii) the Application Record was sealed from the public (the "**First Sanderson Order**").[8]

5. On June 17, 1999, Respondent asked the Ontario Superior Court to review part of the First Sanderson Order in order to lift the sealing of the Application Record, so as to obtain information relating to the mechanics of the PwC Transaction.

6. The Appellants, in their proceedings before Justice Sanderson, submitted an expert's affidavit on Quebec law[9] that opined that the First Sanderson Order had no effect on Respondent's rights against property in Quebec nor on its right to seek to enforce its rights before the Quebec courts under Quebec law:

> *9. Even if Richter could have some of the rights which it claims and without considering the issue, an order exempting the transfer of assets from the Ontario Bulk Sales Act and a confidentiality and sealing order in respect of the material used to obtain the Ontario exemption order* ***would not deprive Richter of the ability to exercise such rights in Quebec as it may have under Quebec law. The Ontario order simply has no effect on Richter's rights, if any, against property in Quebec and Richter's right to seek to enforce its rights before the Quebec courts under Quebec law****.*

7. Prior to a decision on Respondent's application in Ontario, on June 25, 1999, Respondent initiated proceedings[10] before the Bankruptcy division of the Quebec Superior Court in Montreal (the "**Bulk Sale Action**"), seeking a declaratory conclusion that the PwC Transaction was in breach of the public order provisions of the *Civil Code*

---

7 CIDREQ as at May 26, 2011 (Exhibit R-40) **[R.S., vol. 2, p. 182 & foll.]**.
8 First Sanderson Order, **A.E., vol. 2**, p. 257 & foll. (Exhibit R-5).
9 Affidavit of Me James A. Woods dated September 20, 1999 **[R.S., vol. 2, p. 188.1 & foll.]**.
10 Petition to recover and/or enhance value of property, obtain directions and obtain certain declarations and orders ("**Respondent's Initial Motion**"), **A.E., vol. 2**, p. 277 & foll. (Exhibit R-9).

of Quebec ("**CCQ**") then in force[11] governing the sale of an enterprise and that, as a result, such transaction was not opposable against it and the other plaintiffs who are the Mis-en-cause/Intervenants in these proceedings (the "**Castor Claimants**"). As set out more fully below, contrary to the law of Ontario, in Quebec the Castor Claimants were, at that time, considered to be creditors for the purposes of the bulk sale provisions of the CCQ.[12]

8. On August 24 and 25, 1999, by way of Declinatory Exceptions (the **"First Declinatories"**), both C&L and PwC sought the dismissal of the Bulk Sale Action,[13] on the basis that the Bankruptcy division did not have jurisdiction, characterizing the dispute as a purely civil matter and as an accessory to the Castor Actions pending before the Quebec Superior Court.

9. The First Declinatory of C&L[14] alleged, *inter alia*, the following:

> *6. Il est à noter que chacune des poursuites ci-dessus mentionnées* [the Castor Actions], *incluant l'action de Richter contre Coopers, a été intentée devant la Cour Supérieure, juridiction civile, et non devant la Cour Supérieure siégeant en matière de faillite et d'insolvabilité; (...)*
>
> *9. Or, la Cour Supérieure, siégeant en matière de faillite et d'insolvabilité n'a pas juridiction pour entendre une telle requête en ce que: (...)*
>
> > *d) Les conclusions recherchées par le syndic Richter, tant pour lui-même que pour les mis-en-cause, dans la présente requête, sont de nature paulienne, ce qui présuppose un droit de créance envers l'Intimée Coopers. Ce recours est donc l' accessoire, le cas échéant, des actions qui ont été intentées devant la juridiction civile de la Cour Supérieure, incluant l'action intentée par Richter contre Coopers; il serait contraire à toute logique que la Cour Supérieure siégeant en matière de faillite (juridiction d'exception)*

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[11] *Pétroles St-Jean inc.* v. *2865-9985 Québec inc.*, REJB 1998-07826 (S.C.), para. 118 **[R.A., vol. 1, Tab-17**; Patrice Vachon, *La Vente d'entreprise: Acquisitions et ventes d'entreprises*, Montréal, Éditions Wilson & Lafleur Martel Ltée, 3e tirage, 1997, p. 115: *"Les dispositions portant sur la vente d'entreprise adoptées par le législateur aux articles 1767 à 1778 C.c.Q. sont d'ordre public (le ministre de la Justice, dans ses commentaires sur l'article 1767 C.c.Q., ne laisse planer aucun doute à cet effet)."* **[R.A., vol. 2, Tab-42]**.

[12] See Respondent's Exposé ("**R.E.**"), para. 58, see note 87.

[13] C&L Declinatory: **A.E., vol. 2**, p. 335 & foll. (Exhibit R-17); PwC Declinatory: **A.E., vol. 2**, p. 344 & foll.

[14] C&L's First Declinatory, **A.E., vol. 2**, pp. 338-339.

> *soit compétente à entendre un recours qui est l'accessoire d'une action pendante devant la Cour Supérieure juridiction civile;* [Appellant's emphasis]

10. Appellants were not successful at first instance,[15] and appealed the decision of the lower court. In its Notice of Appeal,[16] C&L made the following submissions:

> *18. L'Appelante entend soumettre a cette Cour les moyens suivants: (...)*
>
> *C) L'honorable juge Guthrie a erré en fait et en droit en omettant totalement de tenir compte du fait que la requête du syndic n'est que l'accessoire de son action principale contre Coopers, laquelle action a été intentée devant la Cour supérieure siégeant en matière civile; (...)*

C. L'omission de tenir compte du fait que le recours du syndic est l'accessoire de son action intentée devant la Cour supérieure siégeant en matières civiles

> *35. Il est clair que la requête du syndic est de la nature d'une action paulienne puisque le syndic cherche essentiellement à faire déclarer inopposable à son égard un acte juridique intervenu entre Coopers et PWC; d'ailleurs le syndic se fonde expressément sur les dispositions du Code civil du Québec en matière de vente d'entreprises, lesquelles participent de la notion générale d'action paulienne (...)*
>
> *36. Or, il est clair qu'un recours paulien est l'accessoire d'une créance car, de par sa nature, il vise à protéger le droit du créancier à l' exécution de sa créance; ce caractère accessoire ressort clairement non seulement des dispositions pertinentes (cf. art. 1634 et 1768 C.c.Q.), mais également du fait que les règles générales de l'action paulienne se situent dans une section du Code intitulée «De la protection du droit à l'exécution de l'obligation»;*
>
> *37. Tel qu'il appert de la requête du syndic, la créance sur laquelle il se fonde aux fins de sa requête en inopposabilité est celle qu'il fait valoir dans le cadre de l'action en responsabilité civile qu'il a intentée*

---

[15] Judgment by Justice Guthrie of the Superior Court, dated October 29, 1999. At page 12 of the judgement, Justice Guthrie appears to have understood that Appellants were asserting that the "competent court" was the Superior Court of Quebec, civil division. In considering articles 163 and 164 CCP, Justice Guthrie stated that he does *"not believe that the Quebec legislator intended ... to end cases prematurely merely because the subject matter thereof belongs in another Quebec court."* **[R.S., vol. 2, p. 34 & foll.]**.

[16] C&L's Notice of Appeal (Exhibits P-22), *infra* note 19, paras. 18, 35-37.

> *contre Coopers à titre de vérificateur de Castor; or, cette action a été intentée par le syndic devant la Cour supérieure siégeant en matière civile;* [Appellant's emphasis]

C&L's grounds of appeal and allegations reproduced above were adopted by PwC in its Notice of Appeal.[17]

11. Appellants incorrectly state that they only requested the dismissal of the Bulk Sale Action and that the Court of Appeal, on its own initiative, transferred the case to the civil division of the Quebec Superior Court.[18] In fact, in their Notices of Appeal, Appellants each requested that this Honourable Court dismiss Respondent's action or "*rendre toute autre ordonnance appropriée.*"[19]

12. Similar to the submissions made in their Notices of Appeal, Appellants advanced the following arguments in their joint plan of argument for the appeal[20]:

> *3. Chacune de ces poursuites ci-dessus mentionnées* [the Castor Actions], *incluant l'action du syndic contre Coopers, a été intentée devant la Cour supérieure siégeant en matière civile, et non devant la Cour supérieure siégeant en matière de faillite et d'insolvabilité; (...)*
>
> *17. Les Appelantes sont d'avis que le jugement dont appel est erroné, pour les motifs suivants: (...)*
>
> > *B. En outre, le juge Guthrie a totalement omis de tenir compte du fait que la requête du syndic n'est que l'accessoire de son recours en dommages contre Coopers, recours qui a été intenté devant la Cour supérieure siégeant en matière civile;*
> >
> > *C. Il a également totalement omis de tenir compte du fait que la Cour supérieure siégeant en matière de faillite n'a de toute évidence aucune juridiction quant aux demandes des 46 mis en cause et que, de ce fait, seule la Cour supérieure siégeant en matière civile (tribunal de droit commun) a compétence sur la requête présentée;*

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[17] PwC's Notice of Appeal (Exhibits P-23), *infra* note 19, para. 8.
[18] **A.E., vol. 1**, para. 29.
[19] *En liasse*, Appellants' Notices of Appeal entitled "*Avis d'appel et Requête de bene esse pour permission d'en appeler*" dated November 8, 1999 (Exhibits P-22 and P-23) ("**Notices of Appeal**") **[R.S., vol. 2, p. 151 & foll.]**
[20] C&L and PwC's Joint Plan of Argument before the Court of Appeal dated January 20, 2000 **[R.S., vol. 2, p. 51 & foll.]**.

> *D. Enfin, il n' est pas sans conséquence de se retrouver devant la Cour supérieure siégeant en matière civile plutôt qu'en matière de faillite et ce, tant pour des raisons de procédure que de fond, notamment en raison du fait que la juridiction en « equity» de cette dernière lui donne des pouvoirs accrus et une juridiction additionnelle; (...)*

B. Le caractère accessoire de la requête du syndic par rapport à son action intentée devant la Cour supérieure siégeant en matière civile

> *41. En outre, le juge Guthrie a totalement omis de tenir compte d'un fait qui apparaît fondamental, soit le fait que le recours du syndic est l'accessoire de son recours principal, lequel a été intenté devant la Cour supérieure siégeant en matière civile;*
>
> *42. Un recours en inopposabilité est l'accessoire d'une créance, car il vise à en protéger l'exécution. Or, la créance sur laquelle se fonde le syndic aux fins de sa requête en inopposabilité est celle qu'il fait valoir dans le cadre de l'action en dommages intentée contre Coopers et ce, devant la Cour supérieure siégeant en matière civile;* [Appellants' emphasis]

13. In granting the appeal with respect to the jurisdiction of the Bankruptcy division, on March 17, 2000, this Honourable Court ordered that the Bulk Sale Action be transferred to the civil division of the Quebec Superior Court (the "**March 2000 CA Judgment**").[21] This Judgment is consistent with Appellants' above cited representations and clearly had the effect of determining that the Quebec Superior Court civil division had jurisdiction to hear the Bulk Sale Action.

14. On June 1, 2000, almost three months after the March 2000 CA Judgment, Justice Sanderson refused Respondent's request to lift the sealing order over the PwC Transaction Application Record on the ground that the request was tardy and that, according to the Ontario BSA, Respondent did not have standing as it was not a creditor of C&L (the "**Second Sanderson Order**").[22] This judgment was upheld on appeal without any written reasons (the "**Ontario Appeal Judgment**").[23]

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[21] March 2000 CA Judgment, **A.E., vol. 2**, p. 301 & foll. (Exhibit R-10).
[22] Second Sanderson Judgment, **A.E., vol. 2**, p. 262 & foll. (Exhibit R-7).
[23] Ontario Appeal Judgment, **A.E., vol. 2**, p. 309 & foll. (Exhibit R-15).

15. By letter dated April 13, 2000,[24] Respondent advised Appellants that, in conformity with the March 2000 CA Judgment, the file had been transferred to the civil division of the Quebec Superior Court, and that a new court number had been assigned to the file. Appellants did not oppose the file being assigned a Quebec Superior Court number. On April 18, 2000,[25] C&L's counsel requested that Respondent: "*fassiez parvenir une procédure amendée qui respecte les formes et les exigences applicables en division civile de la Cour supérieure.*"

16. Notwithstanding such request, Appellants then contested Respondent's subsequent Motion to Amend.[26] Their contestation was made before Justice James Kennedy sitting in the **civil practice division of the Quebec Superior Court**, on the grounds that the new proceeding should not refer to the proceedings before the Bankruptcy division. Justice Kennedy denied Respondent's request to make amendments which contained such references but he converted the Motion to Amend into a Motion for Transfer pursuant to article 20 of the *Code of Civil Procedure* ("**CCP**"), and, *inter alia*, ordered that the title of Respondent's Initial Motion be changed simply to "Declaration" (the "**Kennedy Judgment**").[27] Respondent complied with this judgment by filing its Declaration in the Bulk Sale Action on September 26, 2000.[28] Appellants did not challenge the jurisdiction of the Quebec Superior Court before Justice Kennedy.

17. On September 28, 2000, Appellants filed a joint Second Declinatory (the "**Initial Second Declinatory**"),[29] which was amended (the "**Amended Second Declinatory**") twelve years later on October 16, 2012.[30] Appellants asserted that the Quebec Superior Court lacked territorial jurisdiction, or alternatively, that the Quebec courts should decline jurisdiction, in favour of Ontario, based on the principle of *forum non conveniens*. This assertion was a marked departure from Appellants' prior conduct of

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[24] Letter from Me Kandestin to Mes Hogue and Fournier (Exhibit P-25) **[R.S., vol. 2, p. 178]**.
[25] Letter from Me Hogue to Me Kandestin (Exhibit P-26) **[R.S., vol. 2, p. 179]**.
[26] Respondent's Motion to Amend dated August 23, 2000 together with a copy of the Declaration dated July 11, 2000 **[R.S., vol. 2, p. 64 & foll.]**.
[27] Judgment of Kennedy, J., **A.E., vol. 2**, p. 305 & foll. (Exhibit R-11).
[28] Respondent's Declaration dated September 26, 2000 **[R.S., vol. 2, p. 97 & foll.]**.
[29] **A.E., vol. 2**, p. 115 & foll.
[30] **A.E., vol. 2**, p. 126 & foll.

submission to the jurisdiction and their previous request to this Honourable Court to "*rendre toute autre ordonnance appropriée.*"

18. Appellants assert that Respondent left the file dormant between June 2001 and November 2011. However, as a result of the stay of proceedings ordered in all the pending Castor Actions, it would not have been appropriate or an efficient use of judicial resources for Respondent to have pursued its Bulk Sale Action prior to the judgment in the Widdrington Action rendered on April 14, 2011 holding Defendants liable for their professional negligence (the "**Widdrington Judgment**"). Such liability was confirmed by this Honourable Court on July 8, 2013 and C&L's professional negligence is now undisputed.[31]

19. In a Judgment dated May 9, 2013, Justice Castonguay (the "**Motions Judge**") dismissed the joint Amended Second Declinatory, holding that: i) Appellants had submitted to the jurisdiction of the Quebec Superior Court (a determination that by itself is sufficient to ground jurisdiction in Quebec);[32] ii) Respondent had demonstrated, at least on a *prima facie* basis, that a fault and damage had occurred in Quebec; and iii) the facts did not justify that the jurisdiction of Quebec be declined on the basis of the principle of *forum non conveniens*. Appellants now seek the reversal of this Judgment (the "**Judgment in Appeal**").

20. It should be noted that the Motions Judge is also the trial management judge assigned, since April 26, 2012, to the Castor Actions and related matters. He is in a unique position to know the file, observe the conduct of the parties, and to make decisions and orders that reflect the principles of proportionality, the efficient use of judicial resources and to promote the interests of justice.

21. The Motions Judge is therefore well-placed to comment on the strategic character of Appellants' conduct. Contrary to Appellants' suggestion, his characterization of the "*scorched earth*" tactics employed in the present debate does not stand in "*stark*

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[31] Appellant C&L's Application for Leave to Appeal to the Supreme Court of Canada, dated August 29, 2013, primarily seeks to overturn the unanimous decisions of the courts below that the civil law of Quebec is the applicable law to determine liability for their now undisputed professional negligence.

[32] Judgment in Appeal, para. 72, **A.E., vol. 2**, p. 42.

contradiction" with the Court of Appeal's description of Defendants' defense in the appeal of the Widdrington Judgment but is consistent with that decision when read in its entirety. By way of illustration only, Appellants mislead this Court when they state:[33] *"... after a full review of the case, the Court mitigated the costs in light of the fact that Coopers' appeal was successful on some of the issues."*[34] As a matter of fact, the order of costs at first instance (approximately $16 million) was unanimously confirmed in the following language: "*Notre travail dans ce dossier, avant, pendant et après l'audience nous convainc que cette conclusion de la juge ne constitue pas une erreur, loin de là. L'argument des appelants est mal fondé.* ***Ils sont d'ailleurs mal venus, après avoir fait flèche de tout bois en défense, de reprocher à la partie adverse d'avoir blindé sa preuve.***"[35] [emphasis added]

22. The Motions Judge's observation of the conduct of Appellants in the present matter is consistent with the numerous criticisms directed, particularly against C&L and their counsel, over the last 20 years in connection with the Castor Actions.[36] There is no doubt that Appellants continue to wage a war of attrition and should not be surprised when the courts are critical of their strategy.

II. QUESTIONS IN DISPUTE

23. Respondent submits that:

(i) The March 2000 CA Judgment constitutes *res judicata*.

Without prejudice to and under reserve of (i) above, which Respondent submits is dispositive of the issues in appeal:

(ii) With respect to the application of article 3148(5) CCQ:

a) the Motions Judge made no error in finding that, by their conduct, Appellants had submitted to the jurisdiction of Quebec courts; and

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[33] **A.E., vol. 1**, para 10.
[34] Here, this Court was dealing only with the costs of the appeal.
[35] *Wightman* v. *Widdrington (Succession de)*, 2013 QCCA 1187, paras. 548-549 **[R.A., vol. 2, Tab-34]**.
[36] *Wightman* v. *Widdrington (Succession de)*, 2011 QCCA 1393, paras. 35-38 **[R.A., vol. 2, Tab-33]**.

b) Appellants' failure to present a declinatory exception alleging an absence of territorial jurisdiction at the outset of the proceedings constitutes non-compliance with the *de rigueur* provisions of the CCP, then in force.

(iii) With respect to the application of article 3148(3) CCQ:

a) the Motions Judge made no error in finding that Respondent had demonstrated, *prima facie,* the connection between the Bulk Sale Action and Quebec, in a circumstance where the public order provisions of Quebec were not respected in relation to the PwC Transaction.

(iv) With respect to the application of article 3135 CCQ (*forum non conveniens)*:

a) the Motions Judge made no error when he exercised his discretion to maintain Quebec as the appropriate forum;

b) the Bulk Sale Action cannot constitute a collateral attack on the First Sanderson Order nor does the First Sanderson Order constitute *chose jugée* on the issues raised in the Bulk Sale Action; and

c) the Bulk Sale Action was instituted prior to both the Second Sanderson Order and the Ontario Appeal Judgment and therefore cannot constitute a collateral attack on these subsequently rendered judgments.

III. ARGUMENT

ISSUE 1: The Rule of *Res Judicata* Applies

24. The March 2000 CA Judgment constitutes *chose jugée* on the question of the jurisdiction of the Quebec Superior Court to hear the Bulk Sale Action. The rule of "*chose jugée" (res judicata)* applies when three conditions are satisfied: the object raised in the proceedings must be the same, the parties must be the same and the conclusion sought must be the same.[37] The proceedings before this Court in 2000,

[37] Article 2848 CCQ.

like the proceedings brought before the Motions Judge, involved the same parties (Richter as Respondent, the Mis-en-cause/Intervenants, and Appellants C&L and PwC) and requested the dismissal of the Bulk Sale Action.

25. As set out above, Appellants have consistently argued that the Bulk Sale Action is an accessory to the Castor Actions.

26. Appellants acknowledge that: "*In the case at bar, the motions for declinatory exception before the Bankruptcy Court sought the dismissal of the case for lack of jurisdiction, something that can only be requested when no court in Quebec has jurisdiction over the litigation as per art. 163 CCP*".[38] This Honourable Court rejected the motion to dismiss and granted Appellants' alternative conclusion to render any other appropriate order by referring the Bulk Sale Action to the competent court within the legislative authority of Quebec. The March 2000 CA Judgment states, *inter alia*:

> ***CONSIDÉRANT*** *que les prétentions du syndic-intimé relatives aux dépens et aux délais devant la chambre civile de la Cour supérieure peuvent recevoir une réponse devant la Cour supérieure qui a discrétion complète quant aux dépens et quant au cheminement du dossier, le tout dans l'intérêt des parties et en tenant compte de l'intérêt supérieur de la Justice; (...)*
>
> ***REJETTE*** *la requête en irrecevabilité, frais à suivre.*
>
> ***DÉCLARE*** *que le recours intenté par le syndic doit se poursuivre selon les règles du droit civil et non pas selon la Loi sur la Faillite et l'Insolvabilité.*
>
> ***RETOURNE à*** *cette fin le dossier à la Cour supérieure pour qu'il suive son cours.*

27. Consequently, it is clear that the March 2000 CA Judgment effectively disposed of the issues now raised by Appellants and determined that there was, in fact, a Court in Quebec that had jurisdiction to hear the Bulk Sale Action, failing which this Honourable Court would have ordered dismissal of such proceeding as requested in the primary conclusion then sought by Appellants. On this basis alone, the present appeal should be dismissed since the March 2000 CA Judgment constitutes *res judicata*.

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[38] **A.E., vol. 1**, para. 42.

ISSUE 2: Article 3148(5) CCQ – Submission to the Jurisdiction of Quebec

A. Appellants submitted to the jurisdiction of Quebec Courts

28. The Bulk Sale Action alleges an extra-contractual breach of the then applicable public order provisions of the CCQ. The cases cited by Appellants, to support their argument that Respondent had to demonstrate a "clear and unequivocal" intention not to submit to the forum, are not applicable as they pertain to situations where the parties had entered into a contract which included a choice of forum clause.[39]

29. The finding by the Motions Judge that Appellants had submitted to the jurisdiction of the Quebec Superior Court is amply supported by the evidence with respect to the procedural history and Appellants' conduct. Appellants are simply wrong when they assert[40] that the determination of whether a party has, by his actions, submitted to a jurisdiction is a question of law. Indeed, such an interpretation would render article 3148(5) CCQ devoid of all meaning. The Supreme Court of Canada decision[41] relied on by Appellants is not relevant as it relates solely to the question of material jurisdiction and the effect that an admission by the parties, that Quebec's law governing child abduction is applicable, has on the jurisdiction of the Quebec courts to decide the case pursuant to such law. Whether a party has submitted to a jurisdiction is a question of fact[42] and Appellants have not demonstrated any reviewable error.

30. Appellants are disingenuous when they state that their "*intention has always clearly and explicitly been to contest the jurisdiction of both the Bankruptcy Court and the Civil Court.*"[43] On the contrary, Appellants argued before this Honourable Court that the Bulk Sale Action was an accessory to the pending Castor Actions. The Motions Judge

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[39] *171486 Canada Inc.* v. *Rogers Cantel Inc.*, [1995] R.D.J. 91 (C.S.), pp. 15-16 **[A.A., vol. 1, Tab-2]** and *Mary Blake Enterprises inc.* v. *La Coupe (Montréal) Ltd.*, AZ-50150861 (C.S.), paras. 1, 18-20 **[A.A., vol. 2, Tab-23]**.

[40] **A.E., vol. 1**, para. 51.

[41] *W. (V.)* v. *S. (D.)*, [1996] 2 S.C.R. 108 **[A.A., vol. 3, Tab-47]**.

[42] *Métro inc.* v. *Supermarchés GP inc.*, 2005 QCCA 448 **[R.A., vol. 1, Tab-13]**, as cited in *Tysel Construction et rénovations inc.* v. *Knot*, 2012 QCCA 217, para. 4 **[R.A., vol. 2, Tab-28]**.

[43] **A.E., vol. 1**, para. 40.

correctly held that their words demonstrate submission to the jurisdiction and explain why neither Appellant made an express reserve in its proceedings.[44]

31. Recognizing that the Bulk Sale Action is an accessory to the Castor Actions, in July 1999, counsel for C&L agreed with the suggestion that Justice Carrière of the Quebec Superior Court (then responsible for the Castor Actions) be seized of Respondent's Initial Motion, thereby demonstrating submission to the jurisdiction of Quebec's courts.[45] Although he declined to assume this additional responsibility, it is apparent that, at that time, Appellants did not raise any issue of territorial jurisdiction.

32. Approximately 3 months after the March 2000 CA Judgment, Appellants again demonstrated that they were submitting to the jurisdiction of the Quebec Superior Court when they contested certain aspects of Respondent's Motion to Amend before Justice Kennedy.[46] They made no representations at the time that they intended to assert that such Court did not have jurisdiction to hear the Bulk Sale Action, nor did they object to Justice Kennedy exercising his jurisdiction.

33. The Motions Judge made no reviewable error when he determined that the actions and procedures taken by C&L and PwC, and the affirmations contained therein, constitute a submission to the jurisdiction of the Quebec courts.[47]

B. A declinatory exception alleging an absence of territorial jurisdiction must be made at the outset of the proceedings

34. The Motions Judge found that Appellants failed to present all of their declinatory exceptions, including an exception based on the absence of territorial jurisdiction,

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[44] In *Mfi Export Finance Inc.* v. *Rother International S.A. de C.V. Inc.*, 2004 CanLII 16200 (QC CS), paras. 80-82, the Court held that this type of admission *"constitutes an express recognition as to the jurisdiction of the Superior Court of Quebec"* despite a forum selection clause **[R.A., vol. 1, Tab-14]**.

[45] Letter from Me Desjardins of Heenan Blaikie to Me Flanz, counsel for Respondent, dated July 8, 1999 **[R.S., vol. 2, pp. 187-188]**.

[46] Judgment of Kennedy, J., **A.E., vol. 2**, p. 305 & foll. (Exhibit R-11).

[47] *The Education Resources Institute Inc.* v. *Chitaroni*, J.E. 2003-2252 (C.Q.), para. 20 ("***Chitaroni***") **[A.A., vol. 2, Tab-18]**; *International Image Services Inc.* v. *Ellipse Fiction/Ellipse Programme*, [1997] R.J.Q. 2808 (C.S.), paras. 26-27 ("***Image Services***"), affirmed by the Court of Appeal: REJB 1997-03899 (C.A.) **[R.A., vol. 1, Tab-10]**.

together at the outset in the First Declinatories made in 1999.[48] The rules of civil procedure then in force[49] required that a declinatory exception based upon an absence of territorial jurisdiction be made within 5 days of the time fixed to appear. The right to raise a declinatory exception based on territorial jurisdiction is not a matter of public order[50] and the delay to do so was *de rigueur*, as provided by article 170 CCP and confirmed by the Supreme Court in *Alimport*.[51] Subsequent decisions are to the same effect.[52]

35. The Motions Judge held that C&L and PwC: *"... avaient la capacité, dès lors,* [when they made their First Declinatories at the outset] *d'avancer les mêmes arguments que ceux maintenant développés".*[53]

36. In fact, it was only after two hearings before the Quebec Superior Court, and a hearing before this Honourable Court, a process lasting nearly one and a half years, that Appellants first specifically advanced their arguments as to a supposed lack of territorial jurisdiction of the Quebec Superior Court.[54]

37. Appellants incorrectly argue that they could not raise a declinatory exception based on territory (articles 3148 and 3135 CCQ) before the Bankruptcy division because it was the "*wrong Court*". The sole support for their argument is a 1967 decision.[55] As confirmed by this Honourable Court in 1991 (prior to the First Declinatories), the Bankruptcy and civil divisions are both divisions of the Superior Court[56] and bankruptcy courts can decide civil issues relating to material and territorial jurisdiction

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[48] Judgment in Appeal, para. 57-72, **A.E., vol. 2**, pp. 40-42.
[49] See articles 159, 161, 163, 164 and 170 CCP as at 1999. **[R.S., vol. 2, pp. 138-140]**
[50] *Image Services*, *supra* note 47 at para. 14. See: *Stavropoulos-Heliotis* v. *Olympic Airways, s.a.,* 2006 QCCS 4782, para. 20 **[R.A., vol. 2, Tab-24]**.
[51] *Alimport* v. *Victoria Transport Ltd.*, [1977] 2 S.C.R. 858, p. 863 ("***Alimport***") **[A.A., vol. 1, Tab-5]**.
[52] *Veilleux* v. *Paquin*, [1981] R.P. 135 **[R.A., vol. 2, Tab-30]**; *Image Services*, para. 8, *supra* note 47.
[53] Judgment in Appeal, para. 71, **A.E., vol. 2**, p. 42
[54] See Motion for Declinatory Exception dated September 28, 2000, **A.E., vol. 2**, p. 115 & foll.; Amended Motion for Declinatory Exception dated October 16, 2012, **A.E., vol. 2**, p. 126 & foll.
[55] **A.E., vol. 1**, footnote 37, *Re Durocher*, (1967) 10 CBR (NS) 244 **[A.A., vol. 3, Tab-36]**.
[56] *Excavation Sanoduc (Re)*, AZ-91011471 (C.A.), pp. 2-3 **[R.A., vol. 1, Tab-6]**. See also *TVA Publications inc.* v. *Quebecor World inc.*, 2009 QCCA 1352, para. 7 **[R.A., vol. 2, Tab-27]**. See also March 2000 CA Judgment, para. 4, **A.E., vol. 2**, p. 303 (Exhibit R-10).

that arise in the course of proceedings.[57] Even within the Bankruptcy division, all preliminary exceptions must be raised as soon as possible.[58]

38. Appellants misinterpret the 2001 decision in *Sam Lévy,*[59] upon which they rely for their argument that articles 3148 and 3135 CCQ (territorial jurisdiction) could not have been raised at the outset because they were in the Bankruptcy division.[60] However, in *Sam Lévy* the issue before the Court involved a request under section 187(7) of the *Bankruptcy and Insolvency Act* (the "**BIA**") for the transfer of a file from the Bankruptcy division of one province to another. In that case, the provisions of the CCQ dealing with territorial jurisdiction were not relevant, and the Supreme Court so held, as the BIA and its rules specifically dealt with the matter. In contrast, in the present case, articles 3148 and 3135 CCQ are applicable. The Supreme Court specifically stated that:

> *As to the legal issue, the question is whether arts. 3148 or 3135 of the* Civil Code of Québec *have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the Act or these Rules" (Bankruptcy and Insolvency General Rules, s. 3)...*[61]

Consequently, the *Sam Lévy* decision supports the Judgment in Appeal, which confirms that territorial jurisdiction could have, and should have, been raised before the Bankruptcy division at the outset of the proceedings. The present case could not have been disposed of under the provisions or rules of the BIA.

39. The essence of Appellants' argument based on the *Sam Lévy* case is that a party can only make a declinatory exception based upon material jurisdiction before the Bankruptcy division and, after all appeals are exhausted, must then make a second declinatory exception based upon the lack of territorial jurisdiction of

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[57] *Experts en traitements de l'information (ETI) Montreal inc. (Faillite), Re*, 2004 CanLII 345 (QC CS), reversed on other grounds: 2005 QCCA 1257, paras. 20, 23-24, 32, 36, 39-41 **[R.A., vol. 1, Tab-7]**. See also *TVA Publications inc.* v. *Quebecor World inc., supra* note 56, para. 7.

[58] *Jurak* v. *Matol Botanical International*, [2001] Q.J. no 4913 (C.A.), paras. 3-4 **[R.A., vol. 1, Tab-11]**.

[59] *Sam Lévy & Associés* v. *Azco Mining Inc.*, [2001] 3 S.C.R. 978 ("***Sam Lévy***") **[A.A., vol. 1, Tab-7]**.

[60] **A.E., vol. 1**, para. 50. **NOTE:** In 1999 the failure to disclose all of their declinatory exceptions at the outset was clearly not based on this 2001 decision.

[61] *Sam Lévy*, *supra* note 59, para. 62.

the Quebec courts. They fail to address the monumental waste of judicial resources, extensive delays, unnecessary additional costs and absence of proportionality which such a position inflicts upon the parties and the legal system and which also ignores the possibility of utilizing case management to have all jurisdictional matters dealt with in a timely and cost-efficient manner.

40. Appellants are incorrect when they state that, in *Castor Holdings Ltd. (Syndic de)* ("**Syndic de Castor**"), Richter, by invoking the *Sam Lévy* case, "*convinced the Bankruptcy Court to extend the reasoning of the Supreme Court to all of the rules of private international law.*"[62] Unlike the present case, in the *Syndic de Castor* case, it was not disputed that this was a bankruptcy matter. The question to be decided was whether the BIA had a specific provision addressing the issue of jurisdiction in a situation where a person (in that matter, Richter as Trustee of Castor) claims the property and estate of the debtor. As in *Sam Lévy*, in the *Syndic de Castor* case there were specific provisions in the BIA that applied and the CCQ was not applicable.

41. Appellant C&L contends that by including a general, non-specific reserve in its First Declinatory, it reserved its right to present a second declinatory (more than a year later).[63] Remarkably, although Appellants admit that PwC did not make any similar reserve in its First Declinatory,[64] they suggest that this Court should allow PwC to "piggyback" on C&L's non-specific reserve and find that it also reserved its rights.

42. In *Gameday Leadership Management v. Emirates Canadian Sport Development*,[65] Dugré J.S.C. held that the appearance filed by a party which used the standard phrase "*under reserve of all legal objections*", without mentioning a reserve to raising an exception based on absence of territorial jurisdiction, does not constitute an express reserve and cannot relieve a party of its failure to raise the lack of territorial jurisdiction of the court at the outset.

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[62] **A.E., vol. 1**, para. 49.
[63] **A.E., vol. 2**, p. 339, para. 14 (Exhibit R-17) reads: *"L'intimée Coopers reserve tous ses droits et motifs de contestation, incluant les moyens preliminaries et dilatoires qu'elle pourrait desirer faire valoir, à l'encontre de la requête intentée par Richter"*; PwC made no such reserve, **A.E., vol. 2**, p. 346 (Exhibit R-17).
[64] **A. E., vol. 1**, para. 27.
[65] 2012 QCCS 4467, para. 9 citing the decision in *Image Services*, *supra* note 47, paras. 26-27 **[R.A., vol. 1, Tab-8]**.

43. It is apparent from various letters[66] and paragraph 33.1 of the Amended Second Declinatory, that Appellants and their counsel know how to include, when they believe it is necessary, an express reserve, including a reserve based on absence of territorial jurisdiction. Appellants elected not to do so in any of the Castor files, including the Bulk Sale Action prior to October 16, 2012. This failure to make an express reserve to raising an exception cannot now be remedied. The Motions Judge made this observation when he wrote, after reproducing the express reserve included in the Amended Second Declinatory, that:

> *(...) Coopers et Price, en se réservant leurs droits quant à l'absence de progression du présent dossier, s'arriment nécessairement et jusqu'à un certain point, aux autres dossiers de la saga Castor et aux ordonnances qui y sont prononcées.*[67]

44. In *Conserviera S.P.A. v. Paesana import-export inc.*,[68] this Honourable Court considered whether the respondents in that case had submitted to the jurisdiction where, unlike the present case, they had included in the proceedings an express reserve on the issue of territorial jurisdiction. Although filing a motion to have the action continue by way of simplified procedure in the Quebec Superior Court would normally constitute submission, this Court concluded that such express reserve clearly manifested their intention to raise a declinatory exception based upon the territorial jurisdiction of the court, such that they could not be found to have submitted to the jurisdiction.

45. Appellants suggest that the Kennedy Judgment supports their argument that C&L's non-specific reserve was intended to preserve their right to file a subsequent declinatory exception based on territorial jurisdiction. However, Appellants misquote the Kennedy Judgment, which does not mention "*delays to contest the said Declaration*"[69] but, rather, provides that the "*delays to exercise procedural measures*

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[66] Correspondence from Me Yvan Bolduc to Me Ronald Auclair dated June 17 and October 21, 2013 relating to discontinuances filed by certain plaintiffs (Ibero, Gontard and Aleman) **[R.S., vol. 2, pp. 198-200]**.
[67] Judgment in Appeal, para. 107, **A.E., vol. 2**, p. 48.
[68] [2001] R.J.Q. 1458 (C.A.), para. 11 **[A.A., vol. 2, Tab-15]**.
[69] **A.E., vol. 1**, para. 32.

will commence from the time of service of the declaration".[70] Justice Kennedy was not asked to make any reserve on territorial jurisdiction and he did not do so. Appellants never mentioned the possibility before him.

46. Neither C&L's non-specific reserve (PwC having failed to include any reserve) in its First Declinatory nor the Kennedy Judgment, even remotely evidence any intention by Appellants to make another declinatory exception based upon the absence of territorial jurisdiction. Appellants must, as the Motions Judge found,[71] be held accountable for their decisions and strategies.

ISSUE 3: Article 3148(3) CCQ – Fault and Damage in Quebec

A. Respondent demonstrated, on a *prima facie* basis, the constituent elements set out in article 3148(3) CCQ

47. Having determined that Appellants had submitted to the jurisdiction of Quebec, the Motions Judge, while he did not have to do so, then went on and concluded that the Quebec courts also had jurisdiction pursuant to article 3148(3) CCQ as the Respondent had demonstrated, on a *prima facie* basis, a connection between the Bulk Sale Action and Quebec.

48. The legislative intent of article 3148(3) CCQ was to expand the international jurisdiction of Quebec authorities.[72] The demonstration of any one of the four alternative criteria in article 3148(3) CCQ is sufficient to ground Quebec's jurisdiction.[73] As held by the Supreme Court of Canada, these criteria are simply examples of situations which constitute a "*real and substantial link*" between the proceedings and Quebec.[74] Moreover, at this stage in the proceedings, Respondent need only establish

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[70] **A.E., vol. 2**, p. 308.
[71] Judgment in Appeal, para. 69, **A.E., vol. 2**, p. 42.
[72] H. Patrick Glenn, "Droit international privé" in *La réforme du Code Civil : Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, Les Presses de l'Université Laval, 1993, 671, para. 90, p. 754 **[R.A., vol. 2, Tab-39]**.
[73] *Morales Moving and Storage Company* v. *Bitton*, 1995 CanLII 4935 (QC CA), p. 3, 5 **[R.A., vol. 1, Tab-15]**.
[74] *Spar Aerospace Ltd.* v. *American Mobile Satellite Corp.*, 2002 CSC 78, para. 56 ("***Spar Aerospace***") **[A.A., vol. 3, Tab-42]** as cited in *Hoteles Decameron Jamaica Ltd.* v. *D'Amours*, 2007 QCCA 418, para. 22. **[R.A., vol. 1, Tab-9]**.

that, taking the facts alleged in their proceedings to be true, a *prima facie* connection to Quebec is demonstrated.[75] Finally, a broad and liberal interpretation is to be accorded to this provision.[76]

49. In light of these principles guiding the application of article 3148(3) CCQ, this Court should accord great deference to the conclusions of the Motions Judge in finding that the proceedings establish a *prima facie* connection to Quebec sufficient to ground territorial jurisdiction.

50. In the section of the Judgment in Appeal entitled "*Faute et Préjudice au Québec*", the Motions Judge[77] reproduced paragraphs 55 to 58 of the Amended Declaration.[78] Appellants did not appeal the Judgment granting leave to amend the Declaration with respect to these paragraphs[79] and the facts alleged therein must be taken as proven, at this stage.[80]

51. With respect to the criterion of a fault committed in Quebec, the fault alleged in the proceedings is described as follows:

> *55. The failure to comply with the relevant provisions of the Quebec Civil Code relating to sale of an enterprise, as hereinabove referred to, constitutes a fault, committed in Quebec.*[81]

52. The Motions Judge noted that the combined effect of section 7 of the Ontario BSA, which would exclude Respondent (as a contingent creditor) from the definition of creditor, and the fact that the Application Record was sealed further to the request of Appellants, made it impossible for Respondent to obtain the details of the PwC Transaction or to know whether its rights, as a creditor pursuant to the CCQ provisions for the sale of an enterprise, had been contravened. He also found that the absence

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[75] *Republic Bank* v. *Firecash Ltd.*, 2004 CanLII 8560 (QC CA), para. 23 **[R.A., vol. 2, Tab-21]**. See also *Spar Aerospace*, *supra* note 74, para. 33.
[76] Claude Emanuelli, *Droit international privé québécois*, 3e ed., Montréal, Wilson & Lafleur, 2011, para. 194, p. 118 **[R.A., vol. 2, Tab-37]**.
[77] Judgment in Appeal, para. 84, **A.E., vol. 2**, p.44.
[78] Amended Declaration dated November 28, 2011, *supra* note 5.
[79] Judgment by Justice Castonguay dated May 9, 2013 granting Respondent's leave to amend its Declaration with respect to paragraphs 55 to 58 thereof **[R.S., vol. 2, p. 133 & foll.]**.
[80] *Spar Aerospace*, *supra* note 74, para. 31 **[A.A., vol. 3, Tab-42]**.
[81] Amended Declaration dated November 28, 2011, *supra* note 5.

of information was due not to the application of the laws of Ontario but, rather, to Appellants' conduct. He concluded, therefore, that the Respondent had met its burden at this stage with respect to the criterion of fault for the purposes of article 3148(3) CCQ. The final determination as to whether the factual circumstances constitute a fault would be a question for the judge on the merits.

53. The fault of Appellants was to frustrate the right of creditors to seek satisfaction of their claims recognized (and to be recognized) by judgments rendered against the Defendants in Quebec and, necessarily, was committed where the failure to comply with the public order provisions of the CCQ constitutes a wrong, namely in Quebec.[82] Contrary to Appellants' argument, the place where the PwC Transaction was signed is not relevant. It is pure speculation for Appellants to assert that the formalities required under Quebec law, if they had been respected (as they should have been), would have been carried out in Ontario.[83]

54. Moreover, Appellants' argument that their actions cannot constitute a fault in Quebec because the activities were condoned by the Ontario courts is ill-founded, as there is no evidence that the Ontario courts were made aware of the public order provisions of the CCQ or that the Castor Claimants would be considered to be creditors in Quebec. It is not disputed that at the time of the PwC Transaction, Appellants had large offices in Quebec (one such office in Montreal having been exclusively responsible for the Castor work) and there is no evidence that Appellants' *ex parte* application in Ontario and their request to seal the Ontario Application Record[84] were not strategic manoeuvres intended to circumvent the provisions of the CCQ dealing with the sale of an enterprise. The recent words of the Ontario Court of Appeal, in assessing territorial jurisdiction in a negligent misrepresentation case, are compelling:

> *(...) In the modern world where corporations have various offices in various locations, corporate defendants should not escape liability*

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[82] *3141705 Canada inc.* c. *Brueckner Group*, REJB 1997-02645 (C.S.), paras. 4-6, 11, 14-15. **[R.A., vol. 1, Tab-1]**. See also *Ubisoft Divertissements inc.* v. *Tremblay*, 2006 QCCS 2475, paras. 12, 23-24, 55 **[R.A., vol. 2, Tab-29]**.

[83] **A.E., vol. 1**, para. 66.

[84] Judgment in Appeal, para. 89, **A.E., vol. 2**, p. 45.

> *simply because they send their studies to an office of the plaintiff outside Ontario with the clear understanding that it will be acted on in Ontario.*[85]

55. The PwC Transaction occurred 8 weeks before the commencement of the trial in the Widdrington Action and it is inconceivable that Appellants and their counsel were unaware of the public order provisions of the CCQ or that, in Quebec, the Castor Claimants would be considered as "creditors" even though their claims were not yet liquidated. The knowledge and intentions of Appellants is a matter to be proven at trial.

56. With respect to the criterion of damage suffered in Quebec, the damage alleged in the proceedings is:

> *57. Such failure to comply with the relevant provisions of the Quebec Civil Code, also caused damages to be suffered by the Plaintiff and by the Mises-en-cause, in Quebec, because the property and assets of COOPERS, the common pledge of its creditors, was transferred to PWC without having followed the prescriptions of the Civil Code of Quebec, with respect to the sale of an enterprise.*[86]

57. It is also relevant that the Respondent, at para. 56 of its proceedings, alleged that: "*At the time of the merger and sale on July 1, 1998, a substantial portion of the assets that were sold and/or transferred to PWC were situated in the Province of Quebec ...*" This allegation has not been disputed.

58. Had Appellants complied with the then applicable public order provisions of the CCQ at the time of the merger, C&L would have been obliged, pursuant to article 1768 CCQ, to list all of the Castor Actions in their affidavit, notwithstanding that the claims were not yet liquidated by a judgment (*"liquidée plus tard par jugement"*). These claims come within the definition of *"créance à échoir"*.[87] Compliance with the

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[85] *Central Sun Mining Inc.* v. *Vector Engineering Inc.,* 2013 ONCA 601, para. 33 **[R.A., vol. 1, Tab-2]**.

[86] Amended Declaration dated November 28, 2011, *supra* note 5.

[87] art. 1569b CCLC or art. 1768 CCQ; Pierre Dalphond, "Entreprise et vente d'entreprise en droit civil québécois", *Revue du Barreau,* 1994, EYB1994RDB51, pp. 21-22: "*Une créance dite «litigieuse » doit être dénoncée lors d'une vente en bloc...*" **[R.A., vol. 2, Tab-36]**; Patrice VACHON and Lara KHOURY, "Le sort des créances litigieuses dans la vente d'entreprise", *Repères*, Septembre 1994, EYB1994REP186, pp. 2-6 **[R.A., vol. 2, Tab-43]**; *Erapa A.G.* c. *Caristrap Corporation et Caristrap International Inc.*, AZ-86031178 (C.Q.), pp. 9-11, 14, 16-17 **[R.A., vol. 1, Tab-5]**.

CCQ provisions would have preserved the rights of Respondent and the Mis-en-cause/Intervenants at the time the PwC Transaction was signed to execute eventual judgments rendered in Quebec against assets that, a significant portion of which, were located in Quebec.[88]

59. In related litigation (Motion for Declaratory Judgment (Insurance)), in which the Respondent is an applicant and Appellant C&L is a Mis-en-cause, a motion to dismiss was made on the basis, *inter alia*, that the applicant's claim should be considered future and hypothetical until the Widdrington Judgment becomes final and executory. This argument did not find support in the case law[89] and was rejected by Prévost, J.S.C.[90]

60. Contrary to Appellants' pretentions, the prejudice to the Castor Claimants as a result of the PwC Transaction is not hypothetical, as this Honourable Court found in awarding $16.9 million as security for the appeal from the Widdrington Judgment.[91] Depriving the Castor Claimants of the possibility of executing an eventual judgment because of a transfer of assets from C&L to PwC, leaving the liabilities in what is now a shell, constitutes a prejudice suffered.

61. Appellants criticize the Motions Judge for relying on a statement made by author Claude Emanuelli to support his conclusion that damage was suffered in Quebec. However, the concerns articulated by Appellants[92] are not relevant in the present case. As described below, with respect to the issue of *forum non conveniens*, multiple connections to Quebec exist in the present matter to ground jurisdiction, in addition to the fact that Respondent's domicile is in Quebec. The Motions Judge was therefore justified in adopting the words of Emanuelli and concluding that, at this preliminary

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88 *Spar Aerospace*, *supra* note 74, para. 30
89 *R. in right of Newfoundland* v. *Commission Hydro-Électique de Quebec*, [1982] 2 S.C.R. 79, pp. 106-107 **[R.A., vol. 1, Tab-18]**.
90 *Widdrington (Succession de)* v. *Underwriters at Lloyd's*, 2012 QCCS 4159, paras. 50-55. (the decision was not appealed) **[R.A., vol. 2, Tab-31]**.
91 *Wightman* v. *Widdrington (Succession de),* 2011 QCCA 1393, paras. 47-52, *supra* note 36.
92 **A.E., vol. 1**, paras. 75-77.

stage, the facts alleged suffice to establish that Respondent, *prima facie*, has suffered damage in Quebec.[93]

62. Appellants refer to the decision of this Honourable Court in *Option Consommateurs v. Infineon Technologies, a.g.,*[94] to support their argument that jurisdiction under article 3148(3) CCQ cannot be grounded on the mere fact that a plaintiff recorded its patrimonial damage in Quebec.[95] However, Appellants also breached the applicable provisions of the CCQ in Quebec and the assets of C&L, including assets located in Quebec, were transferred to PwC in contravention of the CCQ. Finally, Appellants' argument directly contradicts their argument before this Honourable Court in the Widdrington Action, where they asserted that the fact that Mr. Widdrington recorded his economic loss in Ontario is sufficient to establish that the common law of Ontario is the applicable law (a much stricter test than the test to establish jurisdiction).[96] To say the least, this demonstrates a lack of conviction with respect to this argument.

63. The *Air Canada*[97] decision cited by Appellants is not relevant as the case deals with a failure to warn, not the prejudice occasioned as a result of the failure to comply with rules of public order and the transfer of assets.

ISSUE 4: Article 3135 CCQ – *Forum Conveniens / Forum Non Conveniens*

A. Quebec is the *forum conveniens*

64. As is set out explicitly in article 3135 CCQ, a Quebec court that has jurisdiction may, **exceptionally**,[98] decline jurisdiction. Moreover, jurisdiction should only be declined

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93 Judgment in Appeal, para. 86, citing Claude Emanuelli, **A.E., vol. 2**, p. 44.
94 2011 QCCA 2116 **[A.A., vol. 2, Tab-29]**. The decision was recently affirmed, 2013 SCC 59.
95 **A.E., vol. 1**, paras. 77-78.
96 Appellant C&L's Factum before the Court of Appeal in the Widdrington Action, para. 107 **[R.S., vol. 2, p. 196]**.
97 *Air Canada* v. *McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554 **[A.A., vol. 1, Tab-4]**.
98 **NOTE**: The exceptional nature of the principle is affirmed by counsel for C&L. See Serge Gaudet, "Le livre X du Code civil du Québec: bilan et enjeux" (2009) 88 *R. du B. can.* 313, pp. 315-316 **[R.A., vol. 2, Tab-38]**.

when the authorities of the other country are "*nettement plus appropriées*" than Quebec to decide the issue.[99]

65. The applicable principles[100] and the relevant facts were pleaded before the Motions Judge in a hearing that lasted more than 3 days. He considered and weighed the facts and held that, in the circumstances, the jurisdiction of Quebec should not be declined. As affirmed by the Supreme Court of Canada in *Van Breda,*[101] the burden is on the party raising an argument of *forum non conveniens* to demonstrate why the court should decline its jurisdiction and displace the forum chosen by the plaintiff. Appellants have failed to demonstrate that the Motions Judge failed to exercise his discretion reasonably[102] and it is well settled that courts of appeal accord a very high degree of deference to a discretionary determination.[103]

66. Appellants argue that there are facts that would favour Ontario as the appropriate jurisdiction to hear the Bulk Sale Action. However, as was pleaded before the Motions Judge, Quebec has many more *"facteurs de rattachement"* than Ontario:

(a) since 1993/1994 the Quebec courts have been seized with the Castor Actions, including more than 40 appeals to this Honourable Court;
(b) the Bulk Sale Action, which Appellants conceded was an accessory to the Castor Actions, concerns the applicability of the public order provisions of Quebec law (Ontario law is irrelevant);
(c) the Bulk Sale Action alleges fault and damage that occurred in Quebec;
(d) a substantial portion of C&L's assets affected by the PwC Transaction were located in Quebec;
(e) the domicile of Respondent is in Quebec;

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[99] *Stormbreaker Marketing and Productions Inc.* v. *Weinstock,* 2013 QCCA 269, paras. 86-87 **[R.A., vol. 2, Tab-25]**.
[100] *Oppenheim Forfait GmbH* v. *Lexus Maritime inc.*, AZ-98011623 (C.A.), pp. 7-8 **[R.A., vol. 1, Tab-16]**, also reproduced at para. 95 of the Judgment in Appeall, **A.E., vol. 2**, p. 46.
[101] *Club Resorts Ltd.* v. *Van Breda*, 2012 SCC 17, para. 95 **[R.A., vol. 1, Tab-3]**.
[102] *Sabre inc.* v. *Air Canada*, 2003 CanLII 72070 (QC CA), paras. 4, 6-7 **[R.A., vol. 2, Tab-22]**.
[103] *Éditions Écosociété Inc.* v. *Banro Corp.*, 2012 SCC 18, para. 41 **[R.A., vol. 1, Tab-4**; *Saudi Arabian General Investment Authority* v. *André R. Dorais Avocats*, 2013 QCCA 941, paras. 15-19 **[R.A., vol. 2, Tab-23]**.

(f) Respondent is acting *ès qualité* as Trustee of Castor under the authority of a Montreal bankruptcy file. Castor's executive office, and its main activities, were in Montreal;[104]

(g) Appellants had, and continue to have, domiciles in Quebec;

(h) Appellants' extensive past and current activities in Quebec;

(i) the Quebec Superior Court is also seized with accessory litigation concerning the question as to whether C&L's professional liability insurance is subject to Quebec law;

(j) the judgments in the Widdrington Action, at first instance and on appeal to this Honourable Court, establish that the applicable law governing the liability of C&L is Quebec; and

(k) the interests of justice and the practicality and juridical economy of having all Castor related matters tried before the courts of Quebec.

67. The Motions Judge provided clear reasons for his decision that Quebec should not decline jurisdiction. For example, at paragraph 108, he wrote that: "*Tous les autres dossiers de cette saga ont été ou seront entendus au Québec et les parties sont représentées par les mêmes cabinets d'avocats depuis le début. Il ne serait certes pas de l'intérêt d'une saine administration de la justice qu'un seul dossier soit entendu par une autorité étrangère.*"

68. As well, with respect to the interests of justice, the Motions Judge (at para. 104 of the Judgment in Appeal) concluded that: "*Le simple fait, pour un tribunal de l'Ontario, de considérer le présent litige en regard de ses propres jugements antérieurs, irait à l'encontre de l'intérêt de la justice.*" He correctly recognized that any proceedings which Respondent (or the other Castor Claimants), if now instituted in Ontario in relation to Bulk Sales legislation, would likely fail. This would constitute a denial of

[104] *Widdrington (Estate of)* v. *Wightman*, 2011 QCCS 1788, paras. 8-9 **[R.A., vol. 2, Tab-32]**; *Wightman* v. *Widdrington (Succesion de)*, 2013 QCCA 1187, para. 29, *Supra* note 35.

justice which, in itself, justifies the Quebec courts hearing the dispute based on the principle of "*for de nécessité*".[105]

69. The principles of proportionality and efficient use of judicial resources militate in favour of maintaining Quebec's jurisdiction, particularly in the context of the Castor saga which has unfolded before the Quebec courts over the last two decades. It is also relevant that the *forum non conveniens* argument was never made by Appellants prior to their Second Declinatory. This Honourable Court has held that motions raising issues of *forum non conveniens* should be filed as early as possible and the failure to do so is a serious factor to be considered.[106]

70. It is more than a little ironic that Appellants suggest that the interests of justice would support a finding that Quebec should decline jurisdiction in favour of Ontario while Quebec is the only province concerned with the compliance of the public order provisions of the CCQ.

B. There is no collateral attack on the First Sanderson Order nor is there *chose jugée* on the issues raised in the Bulk Sale Action

71. Appellants argue that the Bulk Sale Action constitutes a collateral attack against the Ontario judgments and suggest that there is *res judicata*. This argument is totally without merit and inconsistent with the admission by Appellants before Justice Sanderson that the First Sanderson Order would not deprive Respondent of the ability to exercise its rights in respect of the PwC Transaction under Quebec law.[107]

72. Furthermore, with respect to the First Sanderson Order, it is evident that the conditions of article 2848 CCQ are not met: Respondent in the Bulk Sale Action was not even a party to the proceedings in Ontario; the object of the proceedings is not identical - the Bulk Sale Action is based upon the applicability of Quebec law whereas the First

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[105] Article 3136 CCQ; *Lamborghini (Canada) Inc.* v. *Automobili Lamborghini S.P.A.*, 1996 CanLII 6047 (QC CA), p. 20-22 **[R.A., vol. 1, Tab-12]**; Prof. John P. McEvoy, "Forum of necessity in Quebec Private International law: C.c.Q. art. 3136", (2005) 35 *R.G.D.* 61, p. 103 **[R.A., vol. 2, Tab-40]**.
[106] *Droit de la famille-2546*, 1996 CanLII 5910 (QC CA), p. 7 **[R.A., vol. 2, Tab-34A]**.
[107] Affidavit of Mr. J.A. Woods, para. 9, *supra* note 9.

Sanderson Order deals strictly with the Ontario BSA; and the First Sanderson Order does not consider, nor rule on, the applicability of the provisions of the CCQ dealing with the sale of an enterprise (in 1998).

73. A collateral attack is defined as "*an attack on a judgment in a proceeding other than a direct appeal.*"[108] However, as admitted by Appellants,[109] the First Sanderson Order addressed only two matters: i) the parties were exempted from complying with the provisions of the **Ontario** BSA, except section 7 thereof; and ii) the Application Record was sealed from the public. The conclusions sought in the Bulk Sale Action, if granted, would not disturb these orders as they seek the following: i) a declaration that the PwC Transaction "*constitutes a "sale of an enterprise" as envisaged and governed by Articles 1767 and following of the Civil Code of Quebec, which were in force at the time of the sale/merger on or about July 1, 1998*"; ii) a declaration that all sales and/or transfers of assets by C&L to PwC as a result of such transaction are "*inopposable as against both Plaintiff and each of the Mises-en-Cause*"; iii) an order that "*the valuation, on a fair market value basis as of June 30, 1998*" of such assets be made by an expert valuator appointed by the Court; and iv) an order that Defendants "*furnish a full accounting to Plaintiff*" of the property sold or transferred by C&L to PwC.

74. Appellants assert that the Ontario BSA and the provisions of the CCQ with respect to the sale of an enterprise that were in force at the time of the PwC Transaction "*had the same purpose*" and "*essentially similar*" formalities. While some overlap in purpose may exist, it is also true that: "*the [Ontario] BSA is importantly different in policy objective and scope from the bulk sales legislation that used to exist in other Canadian jurisdictions.*"[110] In the specific context of the CCQ provisions in force in 1998, the scope of the term "creditors" was much wider in Quebec[111] and there was no provision equivalent to section 3 of the Ontario BSA which allows a party to request an order for exemption from the bulk sale provisions.

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[108] *Black's Law Dictionary*, 8th ed., Thomson West, 2004 **[R.A., vol. 2, Tab-35]**.
[109] **A.E., vol. 1**, para. 14.
[110] Robin B. Schwill, "The Bulk Sales Act (Ontario): Down But Not Out" (2009) 25 *B.F.L.R.* 525, p. 529 **[R.A., vol. 2, Tab-41]**.
[111] See R.E., para. 58, see note 87.

75. Appellants argue that "*full faith and credit*" must be given to the judgments rendered in Ontario,[112] including the First Sanderson Order. The "*full faith and credit*" rule is a constitutional imperative that exists to facilitate a court's decision whether or not to enforce a foreign order.[113] It does not serve as justification to dismiss an action otherwise validly instituted in this Province.

76. Appellants are incorrect when they assert that the Motions Judge recognized that the Ontario courts "*had already decided the questions at issue in this case*"[114] but then refused to apply *forum non conveniens,* which they then claim is an error of law. On the contrary, the Motions Judge never stated that the Ontario judgments had decided the questions at issue in the Bulk Sale Action. Clearly, they could not have done so since they do not address the applicability of the relevant provisions of the CCQ.

77. The *Boucher* v. *Stelco* decision, cited by Appellants is distinguishable. In that case the parties were given ample opportunity to be heard and advance their arguments prior to the court determining that the proceedings constituted a collateral attack on the Ontario decision. In the present case, Respondent was never given notice of the application before Justice Sanderson and she was not asked to rule on whether the PwC Transaction constituted a breach of the Quebec provisions then in force with respect to the sale of an enterprise. In fact, Appellants specifically represented to the Ontario court that her judgments could not have any impact on any proceedings instituted by Respondent in Quebec.

78. In contrast to the present litigation, Appellants did not raise the collateral attack argument in other litigation instituted in Alberta against C&L for professional negligence prior to the PwC Transaction and in which they later (in 2000) admitted and acknowledged that "*C&L, PwC and PwC LLP will be jointly and severally liable for any judgment which may be obtained.*"[115] ("***Di Pinto***"). In *Di Pinto,* the plaintiffs sought to

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[112] **A.E., vol. 1**, para. 108.
[113] In *Beals* v. *Saldanha*, [2003] 3 S.C.R. 416, relied on by Appellants (para. 106 AE), the Supreme Court affirmed that a foreign judgment will be rejected if natural justice has not been respected, for example, if there was no notice given to the defendant or no opportunity to defend (para. 65) **[A.A., vol.2, Tab-9]**.
[114] **A.E., vol. 1**, para. 95.
[115] Amended Amended Statement of Defence to Amended Statement of Claim, consented to on November 6, 2003 (in the *Di Pinto* case) **[R.S., vol. 2, p. 189 & foll.]**.

obtain the written records that would evidence the relationship of PwC and the "*legacy firms*" which were subject to existing and potential claims against C&L at the time of the PwC Transaction.[116] Judge Lee noted that C&L and PwC gave limited evidence describing their relationship:

> *[29] ... The Defendants are not a corporation, but rather partnerships and perhaps complex national and international partnerships, so as such more information is needed. ...*
>
> *[31] However the Plaintiffs are entitled to know who the Defendants are, and while it is unfortunate that the Defendants are a complex organization, that is not the Plaintiffs' problem. There are only one set of Rules, not a special set of Rules for complex Defendants.*

79. In *Di Pinto* (which was subsequently settled), Appellants never asserted that the request for information about the PwC Transaction was a collateral attack on the First Sanderson Order or any other judgment rendered by the Ontario courts. It is clear that the Ontario judgments were never intended to preclude the proper administration of justice in another province.

80. Moreover, although Appellants allege that: "*PwC is not, and has never been, a defendant or party to any of the Castor Actions, and has not been involved in the defence of the Castor Actions*",[117] the *Di Pinto* litigation demonstrates that PwC's role post-merger, with regard to the litigation instituted against C&L pre-merger, is certainly not transparent. Similarly, in the U.S., in the *Ambassador* case,[118] PwC was held liable for the damages suffered (more than US$180M, including interest) as a result of the negligent audits performed by C&L.

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[116] *Rennick & Di Pinto* v. *Coopers & Lybrand*, 2002 ABQB 901 **[R.A., vol. 2, Tab-19]**. A subsequent judgment explains that that Defendants had compiled the requested documentation about the PwC Transaction, further to the Court's orders, but to avoid disclosure they advised the Court that: "*the Defendant will simply formerly (sic) acknowledge that the ongoing entity PricewaterHouseCooper LLP will be responsible for any judgment they obtain against the Defendants Coopers and Lybrand now known as PricewaterhouseCoopers and PricewaterhouseCoopers LLP*": *Rennick & Di Pinto* v. *Coopers & Lybrand*, 2003 ABQB 699, paras. 45, 49, 56-58 **[R.A., vol. 2, Tab-20]**.

[117] **A.E., vol. 1**, para. 8.

[118] *Thabault* v. *Chait,* 541 F.3d 512 (2008) (the "***Ambassador***" case) **[R.A., vol. 2, Tab-26]**.

81. Finally, a managing partner of PwC (in the Montreal office), Mr. Russell Goodman, provided expert testimony on behalf of Appellant C&L in the Widdrington Action. In the Widdrington Judgment, the trial judge concluded the following with respect to his testimony and implication in the litigation:

> *It is not believable that Goodman would assume that he has and had no economic interest in the outcome of the present litigation either directly as a partner of PriceWaterhouseCoopers or indirectly because of the potential liability of a number of his partners.*[119]

C. The Bulk Sale Action cannot be a collateral attack on the Second Sanderson Order and the Ontario Appeal Judgment

82. The Second Sanderson Order and the Ontario Appeal Judgment both deal with Respondent's request to lift the confidentiality and sealing order and do not address the issue of the applicability of Quebec law, which is the object of the Bulk Sale Action. The Bulk Sale Action, as it was instituted prior to these judgments, if granted, clearly could not disturb these judgments.

IV. CONCLUSIONS

83. In light of the foregoing, Respondent respectfully submits that the present appeal should be dismissed and that the Judgment in Appeal should be confirmed, the whole with costs in both Courts against Appellants solidarily.

The whole respectfully submitted.

Montreal, this 15th day of November, 2013

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[119] *Widdrington (Estate of)* v. *Wightman*, 2011 QCCS 1788, para. 391, *supra* note 104.

V. AUTHORITIES

JURISPRUDENCE **Paragraph(s)**

DOCTRINE