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RESPONDENT'S ARGUMENT

FACTUM OF RESPONDENT THE ESTATE OF THE LATE PETER N. WIDDRINGTON

INTRODUCTION

1. On or about February 14, 1994, Mr. Peter N. Widdrington ("**Widdrington**" or "**Respondent**"), now the Estate of the Late Peter N. Widdrington, brought an action (the "**Widdrington Action**") against the accounting firm of Coopers & Lybrand and their Canadian partners ("**C&L**" or "**Appellants**") in Superior Court file 500-05-001686-946, alleging negligence in the performance of their work for Castor Holdings Ltd. ("**Castor**") and the issuance of their opinions.

2. Widdrington was among more than 70 plaintiffs making such allegations against C&L in actions instituted in 1993 and 1994 (the "**Castor Actions**"). In February 1998, the Widdrington Action was selected as the first case to proceed to trial and it was determined that the conclusions of the trial judge on issues common to all plaintiffs would be decided in the Widdrington Action, obviating the need to re-litigate these issues in the other Castor Actions.[1] The trial of the Widdrington Action commenced in September 1998 before Justice Paul P. Carrière (the "**First Trial**") and was in its eighth year when hearings were suspended on or about October 30, 2006 due to the poor health of the trial judge.

3. By Order dated September 7, 2007, Superior Court Chief Justice François Rolland ordered that a new trial commence, pursuant to article 464 CCP, and appointed Justice Marie St-Pierre (the "**Trial Judge**") to be the presiding judge in the Widdrington Action (the "**New Trial**"), recognizing that it would be impossible and inefficient for any judge to simply continue where Justice Carrière left off.

4. The commencement of the New Trial was delayed until January 14, 2008, due to Appellants' unsuccessful attempt to seek the recusation of the Trial Judge,[2] and

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[1] *Widdrington* c. *Wightman et al.* (February 20, 1998), Montreal 500-05-001686-946 (S.C.).

[2] *Wightman* c. *Widdrington (Succesion de)*, (October 9, 2007), Montreal 500-05-001686-946, (S.C.) St-Pierre J. Appellants' attempt to recuse the Trial Judge was based upon the employment of her children, one of whom acted as a lawyer in the New York office of a law firm and the other as a second year law student of such firm; neither of whom had any direct or indirect involvement or interest in the Castor Actions.

their unsuccessful attempt to appeal from the October 9, 2007 Judgment dismissing their request for recusation.[3]

5. After 260 days of hearings, and numerous interlocutory appeals brought by the Appellants to this Honourable Court between 2008 and 2010, the Widdrington Action was taken under advisement on October 4, 2010.

6. On April 14, 2011, the Trial Judge rendered her decision on the merits of the Widdrington Action (the "**Principal Judgment**"), concurrently with her decisions on pending objections (the "**Judgment on Objections**") and on certain motions (the "**Judgment on Motions**") (collectively the "**Trial Judgments**"). The Principal Judgment clearly establishes that C&L committed egregious faults in the performance of their professional responsibilities, that Widdrington suffered damages as a result of his investments in Castor and his reliance on the professional opinions issued by C&L, and that his loss was a direct and immediate consequence of the faults committed by C&L.

7. The Principal Judgment alone is 753 pages in length, or 831 pages if annexes are included.[4] It contains more than 3,800 footnotes, more than 3,600 of which relate to the virtual mountain of testimonial and documentary evidence considered by the Trial Judge. Schedule 2 to the Principal Judgment is an 18-page detailed table of contents which, in itself, is a testament to the rigorous methodology employed by the Trial Judge with respect to each of the issues in dispute.

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[3] *Wightman c. Widdrington (Succesion de)*, 2007 QCCA 1687. Appellants used a similar tactic in attempting to have Respondent's counsel disqualified at the outset of the Castor Actions. These attempts at disqualification were equally refused by both the Superior Court and the Quebec Court of Appeal. In his judgment dated November 18, 1993, AZ-50786008, Justice Gomery qualified Appellants' motives in seeking to disqualify counsel as "*suspect, to say the least.*" He also stated that: "*Parties should not be encouraged to attempt to derail proceedings taken against them by adding to the legal expenses of the opposite party, under the pretext of preserving the reputation of the administration of justice*".

[4] The Judgment on Objections of 229 pages (412 footnotes) and the Judgment on Motions of 9 pages were also rendered on April 14, 2011.

8. The Principal Judgment provides an exhaustive and thorough analysis by the Trial Judge of the vast amounts of evidence adduced by the parties at first instance. The Trial Judge was in the privileged position of devoting nearly three years exclusively to the Widdrington Action and the Principal Judgment can only be described as a "*tour de force*" and a virtually unprecedented exercise in the review and synthesis of hundreds of thousands of pages of evidence.

9. On May 13, 2011, Appellants filed three inscriptions in appeal of the Trial Judgments (collectively the "**Inscriptions**"), namely: a 139 page inscription in appeal of the Principal Judgment ("**Inscription #1**"), a 32 page inscription in appeal of the Judgment on Objections ("**Inscription #2**"), and a 9 page inscription in appeal of the Judgment on Motions ("**Inscription #3**").

10. In a decision dated July 25, 2011[5], the Court of Appeal ordered Appellants to provide security of $16.9 million in connection with the present appeal. Justice Chamberland, writing for a unanimous bench, observed that the litigation was unique, not for the questions of law or fact that are raised, but rather for its procedural history, which has been labeled: "*un véritable dérapage judiciaire*."[6] Justice Chamberland noted the characterization of Appellants' litigation strategy by Associate Chief Justice Wéry (in a Judgment rendered in 2006) as a kind of "***procedural war of attrition***" and reproduced a sampling of the criticisms leveled against Appellants and their counsel by numerous judges of the Superior Court and the Court of Appeal:

> "*[37]* ***Les juges qui se sont penchés sur cette affaire, au fil des ans, tant en Cour supérieure qu'en appel, ont souvent utilisé des mots très sévères pour décrire la stratégie adoptée par les appelants et leurs avocats****. J'en retiens quelques exemples: "I cannot but characterize Defendants' conduct in this matter as having been disingenuous"[7] ; "By relabelling their proceedings (…) Defendants seem to be trying to enter through the back door when the front door has already been locked"[8] ; "The*

[5] *Wightman c. Widdrington (Succession de),* 2011 QCCA 1393.
[6] *Wightman c. Widdrington (Succession de)*, [2008] R.J.Q. 59 (C.A.), 2007 QCCA 1687, para. 73.
[7] *Richter & Associés inc. c. Wightman*, C.S.M 500-05-003843-933, December 3 1996, (J. Halperin).
[8] *Widdrington c. Wightman et al*., [2000] R.J.Q. 431 (C.S.), para. 20 (J. Guthrie).

> *[Defendants'] argument is specious"*[9]*; "This being said, the Defendants' […] argument […] turns out to be nothing more than stale rhetoric"*[10]*; "In fact, this isn't really about a full and complete defence but rather about strategic procedural posturing in case of an unfavourable judgement on liability"*[11]*; "[…] les requérants ne peuvent être autorisés à retourner chaque pierre au nom du droit à une défense pleine et entière et, en conséquence, exiger la remise en cause des paramètres relatifs au déroulement de l'instance décidés et reconnus depuis huit ans".*"[12] [emphasis added]

11. After reading the many decisions rendered in the context of 17 years of prolonged litigation, Justice Chamberland stated (in paragraph 38), that he was inclined to agree with Respondent's opinion that Appellants have systematically employed a "**scorched earth**" litigation strategy in this file.

12. On November 3, 2011, Appellants filed their [preliminary] Factum (the "**AF**") setting out the basis of their appeal of the Trial Judgments. As appears from the Inscriptions and the AF, the Appellants take issue with virtually every finding of fact and every assessment of credibility of Respondent's witnesses made by the Trial Judge. In other words, Appellants are asking this Court to conclude that the Trial Judge **got almost everything wrong**. The thrust of Appellants' appeal was described by Justice Chamberland in the following words:[13]

> "*[40] […]* ***Les appelants sont en désaccord avec la quasi-totalité des conclusions de la juge de première instance****, depuis la manière dont elle a géré le procès jusqu'à la question des dépens. Ils demandent à la Cour de réviser la quasi-totalité de ses conclusions de fait, y compris, dans plusieurs cas, son évaluation de la crédibilité des témoins.*
>
> *[41]* ***La tâche des appelants est considérable****. […]* " [emphasis added]

13. Throughout the AF, Appellants have tried to recast findings of fact and assessments of credibility as errors of law, in the hope that this Court will arrive at a different conclusion than the Trial Judge. This is not the role of an appellate

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[9] *Dunn c. Wightman*, J.E. 2006-2091 (C.S.), 2006 QCCS 5142, para. 42 (Associate Chief Justice Wéry) [*Dunn*].
[10] *Ibid.* at para. 56.
[11] *Ibid.* at para. 69.
[12] *Dunn c. Wightman*, J.E. 2007-186 (C.A.), 2007 QCCA 5, para. 33 (J. Rochon).
[13] *Supra* note 5.

court, particularly in cases involving complex proof. This long-standing principle was affirmed in 2010 by this Court.[14] It is hard to imagine a case with more complex proof than the present one (see §§21 to 23, summarizing the evidence and describing the Trial Judge's task as "*titanic*").[15]

14. Appellants' appeal is but a request presented to this Court to **retry** the **whole case,** and to substitute its appreciation of the evidence for that of the Trial Judge. As was explained in *Matte c. Charron*,[16] this Honourable Court does not entertain such invitations to retry cases.

15. Moreover, in Inscription #1, Appellants specifically allege "***bias***" on the part of the Trial Judge no less than **12 times**. Indeed, in an effort to establish that the appeals (founded primarily on Appellants' refusal to accept the Trial Judge's findings of fact, assessments of credibility and methods of case management) raise genuine issues that should be reviewed by this Court, Appellants repeatedly accuse the Trial Judge of "*systematic bias*", of being "*one-sided*", of "*abdicating her judicial independence*", of "*lack of even-handedness*", of "*mismanagement of the evidence*" and of being in a "*rush to finish*".[17]

16. In a decision of Chief Justice Rolland rendered on November 30, 2011[18] relating to a motion seeking to fix various Castor Actions for hearing by preference, the Chief Justice described the work of the Trial Judge as follows:

> *"[29]* ***She has proven her diligence, efficiency – and impartiality – to everyone's satisfaction****. Moreover, she has the unique advantage of possessing detailed knowledge of the facts …"* [emphasis added]

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[14] *9045-6740 Québec inc.* c. *9049-6902 Québec inc,* 2010 QCCA 1130, at para. 12, citing *CHSLD, infra* note 16 at paras. 54-55.

[15] **References to paragraphs in the Principal Judgment are herein designated by the symbol §.**

[16] *Matte c. Charron*, 2010 QCCA 1496 at paras. 46-49 [*Matte*]. See also: *Volailles du fermier inc. c. Éleveurs de volailles du Québec inc*. 2011 QCCA 1772 at paras. 60 and 69-75; *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) c. Comité provincial des malades*, 2007 QCCA 1068 at paras. 53-56 [*CHSLD*].

[17] By way of example, see paragraphs 14, 151, 181, 230, 371, 388, 441 and 501 of Inscription #1, although such claims are ubiquitous throughout the Inscriptions.

[18] *Sal. Oppenheim Jr. and Cie Kgaa c. Wightman*, 2011 QCCS 6653.

17. In deciding to appoint Madame Justice St-Pierre as coordinating judge of the other Castor Actions, despite the objections of Appellants, the Chief Justice stated the obvious:

> *"[28] … **No reasonable person** could reasonably fear bias on her [the Trial Judge] part.*" [emphasis added]

18. This statement of the Chief Justice echoed and confirmed what had been declared by the Court of Appeal in 2007:[19]

> *"[74]... en sachant tout ceci, qu'une personne bien renseignée, qui reverrait cette affaire en profondeur, conclurait, de façon réaliste et pratique, **qu'il n'existe pas de crainte raisonnable de partialité** à l'égard de la juge Marie St-Pierre."* [emphasis added]

19. The patently unfounded and gratuitous allegations of bias leveled against the Trial Judge illustrate the absence of merit associated with the present appeal.[20] This Court has affirmed the gravity of a party alleging bias on the part of a trial judge without cause. [21]

20. Finally, it is evident that a number of issues raised by Appellants in their Inscriptions are no longer being pursued in this appeal, as they are not addressed in AF or are only mentioned in a cursory fashion. These matters include, *inter alia*, the Appellants' theory related to the application of *lex contractus*, the Trial Judge's conclusions on C&L's performance as auditors, valuators and accountants, Appellants' theory of fraud, the Gaudette Motion, and certain of the rulings on objections.[22]

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[19] *Supra*, note 3.
[20] The test to establish bias is outlined in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369; see also *Peart v. Peel Regional Police Services Board,* 2006 CanLII 37566 (ON CA).
[21] *Paquette c. Conseil de la santé et des services sociaux de la Montérégie*, 1996 CanLII 6130 (QC CA) at pp. 7-9.
[22] Inscription #1 (*lex contractus*, adherence to professional standards and the defense of fraud); Inscription #2 (objections); and Inscription #3 (motions).

PART I: FACTS

21. Beginning with the very first paragraph of AF, Appellants misstate and misrepresent the factual evidence. While it is neither possible nor desirable to catalogue all of such misrepresentations in the Respondent's Factum (the "**RF**"), certain misrepresentations critical to the general understanding of the issues in dispute are described in the following paragraphs, and many others are identified elsewhere in RF. The myriad misstatements and distortions by Appellants illustrate the unreliability of the purported assertions made in support of the present appeal.

22. The Trial Judge's review of the factual evidence, set forth in exhaustive detail in the Principal Judgment, is adopted by Respondent. However, to assist this Court, a brief review of the facts is provided below and, when necessary, factual evidence is referred to elsewhere within the RF.

A. CHARACTERIZATION OF THE ISSUES IN DISPUTE, THE TESTIMONIAL EVIDENCE, AND STRATEGIC CHOICES

23. In paragraph 1 AF, Appellants incorrectly state that this litigation is about C&L's obligation towards one of Castor's directors: "*for amounts payable for his alleged defaults as a director*". In fact, the fundamental issues in dispute, that are **common to all of the Castor Actions**, are whether the audited financial statements, the valuation letters and legal-for-life certificates were materially misstated and misleading, and whether C&L performed their work negligently. These issues are not affected by the characterization of the Respondent as a director, an investor or a lender.

24. A second fundamental issue, **specific to the Widdrington Action**, is whether the fault, C&L's negligence, was the immediate and direct cause of the losses suffered by Respondent. The resolution of this question is also independent of the characterization of Respondent as a director, an investor or a lender.

25. Respondent's role as a director of Castor is only of possible relevance to the assessment of any contributory negligence. However, Widdrington's decision in late 1989 to invest in the equity and debt of Castor preceded his appointment as a director. Widdrington would clearly never have invested in Castor, and assumed the duties of a director, if C&L had not issued unqualified opinions attesting to the remarkable financial success of Castor.[23]

26. In paragraph 2 AF, Appellants state that because of "*time constraints*" in the New Trial, "*much of Plaintiff's evidence was by transcript*". This is inaccurate and misleading. At the request of both parties, the Trial Judge agreed that the testimony of the witnesses on the issue of reliance (causation), including those of Appellants,[24] would be imported into the court record for the New Trial. With respect to Widdrington, who died shortly after testifying, there was no question of his being able to testify *viva voce* before the Trial Judge. With two exceptions,[25] Respondent called all of the other lay witnesses who testified in the First Trial to testify again *viva voce* in the New Trial (and five additional lay witnesses as well as five expert witnesses) such that it is clear that there was no issue of "*time constraints*".[26] Moreover, none of Respondent's expert evidence on GAAS,[27] GAAP,[28] and share valuation letters, "*was by transcript*".

27. It is ironic that Appellants attack the fact that Respondent did not call as witnesses George Dragonas ("**Dragonas**"), or Socrates Goulakos ("**Goulakos**"), whom they identify as the preparers of Castor's financial statements together

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[23] §3572.

[24] Respondent's reliance witnesses were: Widdrington, Prikopa, Taylor, Lowenstein and Jarislowsky (Representations, March 3, 2008, pp. 194-195). Appellants' reliance witnesses were: Morrison and Lajoie (only the latter's direct examination was imported into the New Trial) (Representations, March 3, 2008, pp. 197-200).

[25] As described below in Section I RF, at the initiative of **Appellants**, extracts of David Whiting's testimony from the First Trial were filed into the Court record for the New Trial. Colin Gravenor who testified for 7 days in the First Trial did not testify in the New Trial (all exhibits produced through these witnesses, where there was no objection, were imported into the Court record in the New Trial).

[26] The other transcripts forming part of the Court record for the New Trial (examinations on discovery of the C&L personnel and the rogatory commission examinations) had nothing to do with the purported time constraints.

[27] Generally accepted auditing standards.

[28] Generally accepted accounting principles.

with Wolfgang Stolzenberg ("**Stolzenberg**").[29] Dragonas and Goulakos were chartered accountants ("**CAs**"), and former employees of C&L, who were retained by Castor as consultants. In their audit working papers, C&L never identified Dragonas as a key contact for the audits (Goulakos was identified but only for 1990)[30] and in their Plea, Appellants did not identify these individuals as the preparers of the financial statements.[31] Appellants examined Goulakos and Dragonas on discovery prior to the trial, and, at the start of the New Trial, counsel for Appellants expressly announced to the Court that they would not be filing such examinations.[32]

28. In fact, a number of the rulings under appeal (in particular, from the Judgment on Motions and the Judgment on Objections) relate entirely to Appellants' strategic choices not to call witnesses to testify *viva voce,* such as Karsten von Wersebe ("**von Wersebe**"), the owner of the York Hannover ("**YH**") group and David Whiting ("**Whiting**"), a senior vice-president of its Canadian operations, both residents of Ontario.

B. CASTOR HOLDINGS LTD. ("CASTOR")[33]

29. In 1975, Stolzenberg and von Wersebe incorporated Castor Holdings Inc.,[34] the precursor company to Castor, in Quebec.[35] The decision to incorporate Castor in New Brunswick, in 1977,[36] was for tax reasons.[37]

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[29] AF at paras. 18, 347e).
[30] PW-1053-24, seq. p. 355 (1988); PW-1053-20, seq.p. 259 (1989); PW-1053-16, seq. p. 262 (1990).
[31] Paragraphs 293 and 294 of Defendants' Amended Re-re-particularized Plea dated July 31, 1998 (the "**Plea**") identify R. Smith and Manfred Simon (with Stolzenberg) as the preparers of the financial statements. Both R. Smith and Simon testified *viva voce* in the New Trial. The request to examine Stolzenberg by rogatory commission was refused by the German authorities.
[32] Representations, January 7, 2008, pp. 170-173, confirmed by the Court on December 1, 2009, pp. 30-46.
[33] When used herein, Castor refers to either the parent company, Castor Holdings Ltd. on a stand alone basis or, where the context requires, to the consolidated company including its subsidiaries.
[34] §40.
[35] §40; PW-1053-117 (see p. 9).
[36] §41; PW-2400-8.
[37] PW-1053-64-1.

30. The C&L engagement partner on the audits, Appellant Elliot Wightman ("**Wightman**"), was the architect of Castor's corporate structure from its inception until its demise in 1992.[38] He participated in the decision to liquidate Castor Holdings Inc., and to incorporate Castor in New Brunswick.[39]

31. For about ten years, Stolzenberg and von Wersebe[40] ran Castor jointly, with Stolzenberg acting as CEO and von Wersebe acting as the Chairman of the Board. In 1987, von Wersebe resigned his post and from then until Castor's demise, Stolzenberg acted as Chairman of the Board as well as CEO and President.[41]

32. Although Castor engaged C&L as its auditor, the incorporating legislation, the *New Brunswick Business Corporations Act* ("**NBBCA**"),[42] does not impose the obligation of appointing an auditor on private companies.[43]

33. Castor never carried on business in New Brunswick, and the meetings of directors and shareholders were never held in New Brunswick.[44]

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[38] §2209.
[39] §2214.
[40] Von Wesebe was also the directing mind of the YH group of companies, Castor's most significant borrower (§129).
[41] §44.
[42] S.N.B., 1981, C. B-91 (PW-2312-1). (See, by way of example, the language used in s.102(1)(e))
[43] §3523.
[44] PW-2400 series.

34. The letters patent of Castor restricted the number of shareholders to 50.[45] In fact, the number of Castor's shareholders never exceeded 34.[46] The number of Castor's directors could not exceed 15 and, in fact, never exceeded 10.[47]

35. Castor's executive office and principal place of business, from where its activities were managed and directed, was always in Montreal, Quebec.[48] The written resolutions of the committees of directors of Castor were executed in Montreal,[49] and the proxies for the annual meetings of shareholders of Castor were to be returned to Castor in Montreal.[50]

36. The loans made by Castor were administered by the Montreal office. The loans made by Castor's foreign subsidiaries (other than the loans to the D.T. Smith companies which were administered by the Montreal office[51]) were administered from Europe.[52] However, the decisions with respect to all loans (including those made by the overseas subsidiaries) were made by Stolzenberg in Montreal.

37. During the relevant years, there were between 200 and 250 loans in Castor's portfolio.[53] As is evident from the Principal Judgment,[54] many of these loans were connected, either because of common assets securing the loans (e.g., Maple Leaf Village, the Skyline Hotels, the Montreal Eaton Centre, the Toronto

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[45] PW-2 at p. 5; also produced as PW-2400-8, s.3(b), bates #15930.
[46] PW-1053-24, seq. p. 185: AWP identifies the 32 shareholders as at December 31, 1988; PW-1053-20, seq. p. 119: AWP identifies the 34 shareholders as at December 31, 1989, including Widdrington; and PW-1053-16, seq. p. 132: AWP identifies the 33 shareholders as at December 31, 1990.
[47] PW-2400-5 (bates #015809): Castor's Restated Articles of Incorporation providing that the maximum number of directors was 15; PW-2400-9 (bates #015949-015950), PW-2400-10 (bates #015951-015954), PW-2400-11 (bates #015955-015962) providing the lists of directors during the relevant years; PW-1053-24, seq. p. 244: AWP identifies the 10 directors as at December 31, 1988 (and notes that the number of directors is fixed at 10); PW-1053-20, seq. p. 173: AWP identifies the 10 directors as at December 31, 1989 (and notes that the number of directors is fixed at 10); and PW-1053-16, seq. p. 181: AWP identifies the 9 directors as at December 31, 1990.
[48] §3354.
[49] Michael Dennis, September 8, 1995, pp. 79-80. For example, PW-12, pp. 1 and 2.
[50] For example: PW-12, Tab 2, PW-16-3, Tab-2, PW-1053-29, seq. pp. 159-173, PW-2400-30.
[51] §1986.
[52] §§94-101.
[53] PW-2893-18.
[54] MLV: §§168, 173; TSH: §183; CSH: §§197, 200, 202, 203, 205, 209; MEC: §§162-164, 166; TWTC: §190; Meadowlark: §241; YH: §§423, 2330, 2424.

World Trade Centre, the Meadowlark Shopping Centre), and/or were connected by common borrowers (e.g., the York-Hannover corporate loans).

38. Castor's investment portfolio was comprised of two parts; the "*relationship*" loans which comprised about 95% of the portfolio and the "*third party*" loans which comprised the remaining 5% of the portfolio.[55] Unlike the "*third party*" loans which were at arm's length, there was no underwriting process with respect to the making or renewing of the "*relationship" loans*.[56]

39. Castor held itself out to its investors and lenders as a spread lender that earned profits based on the difference between its cost of borrowing and the rates at which such funds could be deployed by way of loans to its own borrowers.[57]

40. Castor's borrowers were systematically breaching their loan covenants to Castor, especially in their failure to pay principal, interest and fees when due.[58] These borrowers were not financially viable during the 1988 to 1990 period, absent Castor's support.[59]

41. Appellants significantly misrepresent the nature of Castor's business; for example, in paragraphs 26 and 27 AF. It is incorrect to describe Castor's lending as solely related to real estate development projects. In fact, less than 50% of Castor's loan portfolio was secured by assets in the form of real estate,[60] and

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[55] §423; R. Smith May 14, 2008, pp. 65-69.
[56] §936; R. Smith, May 14, 2008, pp. 67–69. See also September 17, 2008, pp. 100-101.
[57] §§7, 52, 2157. R. Smith, May 14, 2008, pp. 36-39; September 17, 2008, pp. 24-25.
[58] §§57, 424-426; The loan agreements for the projects reviewed by the experts are all in evidence and, in general, require the monthly payment of interest, although some required quarterly payment of interest or yearly payment of interest. By way of example only, with respect to YH and MEC related loans for 1988, see: PW-1059-6 (loan 1091); PW-1060-3 (loan 1092); PW-1068-8 (loan 1067); PW-1063-4 (loan 1042); PW-1072-4 (loan 1048); PW-453 (loan 1049); PW-1073-5 (loan 1125); PW-1058-1 (loan 1125); PW-1058-1 (loan 1123); PW-452-1 (loan 1123/1152); PW-1054-10 (loan 1081); PW-1102-A3 (loan 1100); PW-566-22 (loan 1095); PW-1102A-4 (loans 1101, 1103. 1109).
[59] §§436, 439 (re YH: R. Smith, May 14, 2008, pp. 139-140, 174-175; September 3, 2008, pp. 50-52; September 15, 2008, pp. 137-139); D-1312, ES-25, p. 363; Selman, June 2, 2009, pp. 10-11 (re: OSH, CSH, TSH); Prychidny, October 14, 2008, pp. 44-49, 73-74; §860, re: MLV, R. Smith, May 15, 2008, pp. 247-251; September 22, 2008, pp. 205-207).
[60] §431.

much of that real estate security was related to hotels and shopping centres which were operating entities and not development projects.

42. Virtually all of Castor's recognized revenue consisted of unplanned capitalized interest and fees.[61] Consequently, a most remarkable and unfortunate characteristic of this "spread lender" was that more than 90% of its revenue was not received in cash[62] but, rather, was added to the principal of new or existing loans to borrowers who could never possibly repay what they owed to Castor.

43. Because Castor generated so little cash from its lending activities, it had to continually raise ever increasing amounts of investments and loans (based on misleading audited financial statements, valuation letters and legal-for-life opinions) merely to be able to service its own debts and to meet its overhead expenses and those of its borrowers. It is thus apparent that Castor did not carry on a legitimate business model but, rather, was a classic **ponzi scheme**.

C. COOPERS & LYBRAND ("C&L")

44. C&L were the auditors of Castor from its inception in 1978.[63] C&L were engaged by Castor in Montreal.[64]

45. Throughout the period in which Castor operated, the national firm of C&L had a large office in Montreal. Wightman, the engagement partner for the Castor audits, was a senior partner in the Montreal office.[65]

46. Wightman (together with his wife) had private business dealings with Stolzenberg, and acted as a promoter of Castor, such that he was in breach of the most fundamental independence requirements of an auditor. The description of this breach of independence is found in §§2193 to 2307 and the Trial Judge held as a finding of fact, in §2306, that:

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[61] §734; *Supra*, note 58.
[62] §§60, 2952.
[63] §§10, 104.
[64] D-4, being a letter from Wightman of C&L Montreal to Stolzenberg in Montreal.
[65] §3358.

> *"**Wightman's professional judgment was impaired** and caused him to approach the audits without exercising objectivity or independence. **Conclusive proof of such impairment** includes his casual attitude towards work performed by his audit teams, which demonstrates carelessness, his absence of skepticism in his dealings with Stolzenberg, his superficial wrap-up meetings which, in fact, never probed any transactions to the bottom, and his blindness to numerous "red flags" or suspicious circumstances".* [emphasis added]

47. C&L rendered a wide range of professional services to Castor,[66] reflected in their invoices which were issued by C&L Montreal. These invoices were delivered to Castor in Montreal. Payment for same was made by Castor in Montreal to the Montreal office of C&L.

48. C&L's fees for "*special services*" provided to Castor were greater than the fees for audit work.[67] C&L's invoices[68] include under "*special services*": the estimate of the fair market value of Castor's common shares; the preparation of legal-for-life certificates; the preparation of 5-year summary financial statements; work in connection with the establishment of subsidiaries; tax opinions and communications with Revenue Canada; attendance at Board of Director and shareholders' meetings; and preparation of certificates in response to requests made by certain lenders (in connection with the audited financial statements).

49. The C&L offices in New Brunswick had no involvement in any professional mandate on behalf of Castor. The C&L audit personnel for the Castor audits were not members of the New Brunswick Order of CAs.

50. The annual audit reports for the consolidated financial statements of Castor and for the non-consolidated financial statements of Castor, CH International (Netherlands) BV and CH International Finance NV ("**CHIF**") were prepared and issued by C&L in Montreal on the letterhead of C&L Montreal. Neither the audit

[66] §3356.
[67] §2218; PW-1053-2A-4; PW-1053-2A, seq. pp. 29, 103, 110.
[68] §2219, PW-2372-22; PW-2372-25; PW-2372-27; PW-3104; PW-3105; PW-3106; PW-3107.

reports nor the financial statements mentioned that Castor was incorporated under the NBBCA.[69]

51. The Castor Shareholders' Agreement[70] required that one share valuation letter be prepared annually, after the issuance of the audited financial statements. However, C&L's partners and employees based in Montreal prepared and issued share valuation letters opining on the fair market value of Castor's common shares (the "**valuation letters**") twice a year[71] and they were delivered to Castor in Montreal. These opinions of value were issued on the letterhead of C&L Montreal.

52. C&L's partners and employees based in Montreal prepared and issued the legal-for-life certificates,[72] on the letterhead of C&L Montreal, which were delivered to Castor's attorneys in Montreal. The legal-for-life opinions, which expressly relied on C&L's certificates, were prepared by Castor's attorneys in Montreal and issued to Castor in Montreal.[73] The audited financial statements were used by C&L to prepare the valuation letters and the legal-for-life certificates.

53. The audit work was performed by C&L in Montreal by the Montreal audit team or in Zug and Schaan by a C&L team sent from Montreal to Europe. Except for one junior member assigned for the 1990 audit, all members of both teams were employees/partners based in C&L's Montreal office (partners, second partners, managers, in-charge accountants, seniors and staff accountants).[74]

[69] §3361.
[70] PW-2382 (see definition of "valuation report").
[71] §3057; PW-6-1.
[72] PW-7.
[73] §§3085-3086.
[74] §3357.

54. Each year the audit consolidation related to Castor and its subsidiaries took place in Montreal as did the second partner review (performed by partners based in C&L's Montreal office).[75]

1. The auditors' reports

55. Over a period of 13 years, C&L performed the annual audits of Castor and issued unqualified opinions on the consolidated financial statements. The factual evidence with respect to the work performed by C&L in connection with the annual audits,[76] as well as the issue of the independence of the auditors, is summarized in detail in the Principal Judgment and is adopted by Respondent.

56. C&L were given unlimited access to Castor's accounting books and records.[77] These records clearly disclosed the magnitude of unplanned capitalized interest and fees, and the systematic renewal of loans year after year on their maturity dates. C&L were given unlimited access to Castor's mortgage and loan ledger cards,[78] which also disclosed the fact of capitalized interest and fees, and that Castor was funding the operating expenses of its borrowers.

57. C&L did not plan for the coordination of information obtained by their auditors at different locations, although C&L Montreal were responsible both for the audit in Montreal and the audit overseas.[79] There was no program to aggregate loans to the same borrowers, or loans secured by the same asset.[80] C&L did not evaluate related loans on a global basis, and therefore did not identify obvious security deficiencies.

58. C&L relied on management representations without obtaining independent corroborative evidence.[81] For example, with respect to the collectability of

[75] §3359.
[76] §2455.
[77] §2176.
[78] Rancourt, February 29, 2008, pp. 158-162.
[79] §2437.
[80] §2332.
[81] §§2449, 2556.

Castor's loans, C&L did not request third party audit evidence such as the financial statements of borrowers, which the latter were required by their loan agreement to provide, even with respect to loans which were unsecured or where the purported security was in the form of equity or guarantees, and even though such borrowers were not paying interest as required by the loan agreements.[82]

59. Although: (i) little cash was generated from its operations, (ii) nearly all interest and fees due from borrowers were being systematically capitalized (iii) Castor was funding the operations of its borrowers to keep them alive and (iv) there was virtually no evidence to support the carrying values of most of the loans[83] in a portfolio that exceeded $1.6 Billion in 1990, C&L did not recommend that Castor record additional loan loss provisions ("**LLPs**") over and above the negligible amounts already recognized by Castor in 1988, 1989 and 1990.

60. C&L knew that after 1985, the CICA Handbook (the "**Handbook**")[84] required the inclusion of a Statement of Changes in Financial Position ("**SCFP**") in the financial statements of operating entities.[85] The purpose of the SCFP is to focus on liquidity and solvency, and requires the disclosure of the amount of cash being generated from operations during the current year.[86] C&L acceded to the request of Castor's management to use a statement other than a SCFP, which hid from the user of the statements the fact that Castor was generating insignificant cash from its operations.[87] This was contrary to C&L's internal policies[88] and practices with respect to their other clients.[89] Even **C&L's own**

[82] §2322.
[83] §2456.
[84] GAAP : PW-1419-1 (1988); PW-1419-2 (1989); PW-1419-3 (1990); GAAS : PW-1419-1A (1988); PW-1419-2A (1989); PW-1419-3A (1990). Note: In RF, the 1989 reference of the Handbook is used, and when required, a specific reference is used to designate the year of the Handbook.
[85] §§524, 540.
[86] §§466-468; PW-1419-2, s. 1540.
[87] §§541-542.
[88] §526; PW-1420-1B, TPS-A-400.
[89] §§527-530.

partners were misled and mistakenly believed that the Castor financial statements did disclose the cash being generated from operations.[90]

61. Notes 2, 3 and 4 (the "**Maturity Notes**") of the audited consolidated financial statements provided misleading and inaccurate information concerning the matching of current assets and current liabilities, which was critical to an understanding of the company's liquidity and solvency.[91] Based on their own audit work, C&L were aware of the fact that there was a fundamental contradiction between the information being disclosed (i.e., that the loans in the portfolio were due within one year) and the reality of Castor's portfolio (i.e., that the loans were systematically renewed year after year and rarely, if ever, repaid).[92]

62. C&L made the decision to rely solely on management's representations as to the completeness of disclosure of related party transactions ("**RPTs**"). There was no audit program for RPTs for 1988 and 1989, either in Canada or overseas. There is no evidence that C&L performed any procedures to test the accuracy and completeness of management's representation with respect to the disclosure of RPTs for 1988 and 1989.[93] For year-end 1990, the audit program for RPTs was included in the audit working papers (the "**AWPs**") for Castor Montreal only, but the audit supervisor acknowledged that no substantive work was performed.[94]

63. As set out in the Principal Judgment, C&L's audit work was totally inadequate with respect to a number of other issues, which also led to material misstatements in the financial statements (diversion of fees, $100 million debentures, restricted cash, etc.).

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[90] §§2166-2171 (Re: Hayes, October 31, 1995, pp. 85-87; Cunningham, December 13, 1996, pp. 85-88; Higgins, December 18, 1996, pp. 110-114).
[91] §662.
[92] §§2175, 2176
[93] §2455; Martin, August 26, 1996, pp. 52-55, 76-79.
[94] Hunt, March 28, 1996, pp. 124-131.

2. The share valuation letters

64. During a 12-year period, C&L prepared and issued a series of 24 valuation letters, each providing an opinion of the fair market value of the common shares of Castor.[95]

65. The valuation letters were used as the basis for determining the price at which Castor's common shares were issued to, and redeemed by, investors over the years.[96]

66. The valuation working papers reveal that C&L issued their opinions with virtually no analysis or care,[97] notwithstanding the fact that their opinions were absolutely unqualified and unrestricted.[98]

67. Over the period from year-end 1984 to year-end 1990, the fair market value of Castor's common shares, as determined by C&L, increased steadily demonstrating spectacular growth. The highest value ever ascribed to the common shares was $580, as set out in the valuation letter prepared and issued immediately following the issue of Castor's 1990 consolidated audited financial statements. This value was ascribed despite C&L's specific knowledge of a: "*slowdown in the real estate market in North America*".[99]

3. The legal-for-life certificates

68. Beginning in 1983, C&L prepared annual legal-for-life certificates based on compliance with specific statutory tests over a five year period. C&L repeated its errors with respect to the financial statements when they produced the legal-for-life certificates. This resulted in C&L negligently representing that Castor was in compliance with the required tests.[100] C&L's certificates were expressly relied on

[95] §2967.
[96] §§2985, 3057.
[97] §3066.
[98] §3064
[99] §298; PW-6-1, Tab 23 (the valuation letters at Tabs 22 and 24 contain the same statement).
[100] §3105.

by Castor's attorneys in order for them to opine that Castor had legal-for-life status.[101]

69. Castor used its legal-for-life status to obtain investments from pension funds, insurance companies and trust companies, as well as to send the misleading message to investors generally that Castor was a safe and creditworthy investment.[102]

4. C&L's knowledge of the Castor investment club and their acceptance of the use of C&L's professional opinions for fundraising

70. C&L, through Wightman, had knowledge of Castor's business and of the limited "*private investment club"* that interacted with Castor.[103] C&L were well aware that Castor's ability to raise funds from its lenders and investors depended on the very positive financial information and trends disclosed in the audited financial statements, valuation letters and legal-for-life opinions.[104]

71. Castor's audited financial statements played a critical role in its fundraising process.[105]

72. In fact, C&L's AWPs for the very **first audit of Castor** for 1978 disclosed that the audited financial statements were a prerequisite for Castor in order to obtain funds from investors*.*[106]

73. This fundraising purpose of the audited financial statements never changed. The Audit Planning Memoranda prepared by C&L, and forming part of the AWPs for the 1990 audit, and in anticipation of a 1991 audit, contained the following statement, under the heading: "*Users of the Financial Statements*":

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[101] §3086.
[102] §§3088-3099, 3103; Simon, June 16, 2009, pp. 69-70, 75-76.
[103] §§556, 3494; Wightman, February 8, 2010, pp. 172-174.
[104] §3363.
[105] Simon, April 27, 2009, pp. 109-111; June 16, 2009, pp. 44-49.
[106] PW-1053-64-1 (MAPs for the 1978 audit).

> *"Due to the nature of the client's business, the use of the financial statements is widespread being used by banks, lending institutions and shareholders.* ***The ability of the company to obtain financing for its lending activities in the following fiscal year is somewhat dependent on the results of the current fiscal year.***"[107] [emphasis added]

74. C&L prepared numerous copies of the audited financial statements[108] (although the number of shareholders, which also included the directors, never exceeded 34). During the relevant years when an outside printer was used to prepare the copies of the audited financial statements, Wightman reviewed the printer's proofs before they were finalized.[109]

75. C&L were aware that financial information from the audited financial statements was included in Castor's promotional brochures. C&L vetted the information in the brochures to ensure its accuracy,[110] and retained copies of brochures in the AWPs.[111] Wightman knew that the brochures, which included the audited financial results, were sent to borrowers and lenders of Castor.[112]

76. In fact, at the request of Wightman himself, Castor forwarded the audited financial statements and other promotional materials to certain potential investors designated by him.[113]

77. Wightman attended dinners after the Castor Board of Directors' meetings as well as the annual Castor shareholders' meetings, at which Castor's shareholders and lenders were in attendance,[114] and he communicated with Castor's lenders, directly and indirectly, to explain various aspects of Castor's financial statements.[115]

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[107] PW-1053-16-1, seq. p. 265.
[108] PW-2372-2, PW-2372-5, PW-2372-8, PW-2372-9, PW-2372-10, PW-2372-21.
[109] §3363; Wightman, March 11, 2010, pp. 36-38, 70-71.
[110] §3510; *Ibid*.
[111] PW-1053-6, seq. pp. 146-161.
[112] §3363; Wightman, September 13, 1996, pp. 109-115.
[113] PW-2372-32-1, PW-2372-32-2.
[114] §3518; PW-2434, PW-2435, PW-2436.
[115] §3518; PW-72, PW-2372-28, PW-2496.

78. Wightman responded directly to the queries of certain lenders and in July, 1991 even met with one of Castor's major lenders to explain the audit process and to confirm the reasonableness of the LLPs recorded by Castor.[116]

79. Wightman was considered a key "*ally*" in Castor's fundraising activities.[117]

80. To C&L's knowledge, Castor had to provide its audited financial statements to its lenders as a condition of its own financing agreements.[118] The identity of Castor's lenders was clearly disclosed in the AWPs and in the confirmation letters provided to C&L in connection with the audits.[119]

81. C&L made written representations to Revenue Canada to the effect that Castor's lenders and prospective lenders were provided with copies of the audited consolidated financial statements and that their lending decisions were based on Castor's viability.[120] This acceptance as to the use of the audited financial statements was also clearly reflected in the AWPs.[121]

82. C&L prepared numerous copies of the valuation letters[122] although the number of directors of Castor never exceeded 10. For example, C&L provided Castor with 100 copies of the March 6, 1991 valuation letter.[123]

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[116] §3363; PW-72; Martin, November 5, 2008, pp. 49-50, 93-96.
[117] §3518; R. Smith, May 14, 2008, pp. 108-111; PW-2434, PW-2435, PW-2436.
[118] §3510; Simon, April 27, 2009, pp. 109-111. C&L reviewed the loan agreements between Castor and its lenders which contained the covenants requiring Castor to provide its audited financial statements as a condition for financing.
[119] §3510; By way of example: CHL: PW-1053-25, seq. pp. 48-54 (1988); PW-1053-18, seq. pp. 138-139, 183 (1989); PW-1053-14, seq. pp. 144-145 (1990); CHIO: PW-1053-84, seq. p. 101 (1988); PW-1053-83, seq. p. 168 (1989); PW-1053-81, seq. pp. 119-120 (1990); CHIFNV: PW-1053-92, seq. pp. 185-187 (1988); PW-1053-90, seq. pp. 195-196 (1989); PW-1053-88, seq. p. 185 (1990); Bank confirmations: CHIFNV: PW-1053-91, seq. pp. 105-180 (1988); PW-1053-89, seq. pp. 86-194 (1989); PW-1053-87, seq. pp. 75-100 (1990); PW-1133A; PW-1133B; PW-1134; CHL: PW-1053-23, seq. pp. 21-32 (1988); PW-1053-18, seq. pp. 17-37 (1989); PW-1053-14, seq. pp. 25-37 (1990).
[120] §3510; PW-60.
[121] PW-1053-6, seq. p. 305.
[122] §2982, PW-2679; *Supra* note 47, with respect to the cap on the number of directors.
[123] §2982; PW-2315.

83. In a letter from C&L to Stolzenberg[124] sent in the Fall of 1987, the following statements were made by C&L in connection with the valuation letters:

> *"As you are aware, for a number of years,* ***Castor has been issuing and redeeming shares on the basis of periodic valuation reports prepared by us****. […]*
>
> ***Because shareholders have come and gone over the years based on these valuations****, and if you intend to raise additional capital in the future, based on these valuations, it would not be advisable to deviate the value paid significantly from our reports* …". [emphasis added]

84. The valuation working papers for the October 17, 1989 valuation letter (relied on by Widdrington for the 1989 investment) contained the following notation by C&L: "*Vente: 550 $. Aimerais vendre nouvelles actions - nouveaux actionnaires 550 $*".[125] The valuation working papers also contained a fax transmittal sheet which indicates that the valuation letter was sent to Stolzenberg and Dragonas by Bernard Lauzon of C&L's valuations department.[126]

85. The AWPs for the 1989 audit identified new shareholders, including Widdrington, and disclosed the price they paid for their investments in Castor's common shares (which naturally corresponded to the value established by C&L in the valuation letter dated October 17, 1989).[127]

86. The draft of the October 22, 1991 valuation letter (relied on by Widdrington for the October 1991 investment) contains a notation by C&L: "*S'il vous plaît,* ***urgent***".[128]

87. Contrary to C&L's procedures for valuation assignments,[129] all of the valuation letters issued for Castor (including those relied upon by Widdrington for his

[124] §2980; PW-665-2.
[125] PW-1053-50A, seq. p. 367.
[126] PW-1053-50A, seq. p. 351.
[127] PW-1053-20, seq. p. 124.
[128] §2983; PW-1053-50A, seq. p. 14.
[129] PW-2314, p. 12.

investments) contained absolutely no restrictions or qualifications as to their use or otherwise.[130]

88. C&L's internal policies (Technical Policy Statements) explain that legal-for-life status enabled companies such as Castor to raise money from entities such as insurance companies, since such status **denoted quality and liquidity**.[131]

89. Castor was described by C&L (to a partner in C&L Germany) in the following terms:

> *"(…) Castor is not a bank in Canada but is a mortgage lending company and is **qualified for issuing notes to major institutions** in Canada including life insurance companies, pension funds, trust companies, et cetera. **They have been clients of this office since 1975**".[132] [emphasis added]*

90. Included in the valuation working papers is a letter to C&L in connection with the legal-for-life status obtained by Castor in 1983, in which Stolzenberg states:

> "*I am also pleased that due to our legal-for-life status since the beginning of 1983, as well as our ability to tap new sources of funds, our cost for monies raised has been reduced substantially*".[133]

D. RESPONDENT PETER WIDDRINGTON

91. As determined by the Trial Judge, Widdrington would clearly not have invested in Castor in 1989 or 1991 had the audited consolidated financial statements and the other professional opinions issued by C&L not falsely disclosed a company with exceptional financial results and an uninterrupted trend of success.[134]

92. Widdrington was appointed as a director of Castor in March 1990;[135] however, his involvement in that capacity only began in May 1990, when he attended his

[130] §§3064-3066.
[131] §3096; PW-1420-1B, TPS-A-405.
[132] §3094; PW-1053-6, seq. pp. 103 and 105.
[133] PW-1053-50B-2, seq. p. 423.
[134] §§3335, 3572.
[135] §14.

first Board of Directors meeting. In all, Widdrington only attended 6 Board meetings before the demise of Castor in early 1992.

93. The facts relating to causation are provided in detail in the Principal Judgment and are adopted by Respondent but, to assist this Court, the factual evidence related to the due diligence performed by Widdrington, his reliance (to his detriment) on the professional opinions issued by C&L, and his role as a director of Castor, is briefly set forth in **Part III, Section C** of RF.

PART II: THE ISSUES IN DISPUTE

94. Respondent disagrees with Appellants' formulation of the issues.[136] The questions in dispute are:

1. Have Appellants demonstrated that the Trial Judge erred in concluding that the Quebec civil law is the governing law in a dispute concerning the professional work and responsibilities of auditors/accountants based in Montreal, who issued their opinions and certificates in Montreal in connection with services provided to their client Castor, a private entity incorporated under the NBBCA but with its principal office and operations in Montreal?

2. In the event that the common law would have been the governing law for the issue of negligence (which was found not to be the case), have Appellants demonstrated that the Trial Judge made a palpable and overriding error when she concluded that, based on the particular factual matrix, the issue of indeterminacy does not arise and therefore there is no bar to finding C&L liable for the damages suffered as a result of their negligence?

[136] AF at pp. 32–36. Note, in particular, that section A is entitled "*Rules Governing Auditors' Liability*" (and that term is used in each of the questions in this section) which is a misnomer as the litigation concerns the liability of professionals towards third parties; the question in A1) refers solely to "*negligent misrepresentation*" which is a common law term, rather than the civil law element of fault.

3. Have Appellants demonstrated that the Trial Judge made a palpable and overriding error in finding that Respondent relied on the professional opinions of C&L in the making of his investments in Castor?

4. Have Appellants demonstrated that the Trial Judge made a palpable and overriding error when she concluded that Respondent was not contributorily negligent in carrying out his duties as an outside director of Castor?

5. With respect to the determination that Appellants were negligent and did not comply with the applicable standards of their profession, have Appellants demonstrated that the Trial Judge made any palpable and overriding errors, including with respect to her rulings as to the admissibility of evidence, her findings of fact and her assessments of credibility?

6. Have Appellants demonstrated that the Trial Judge erred in concluding that the Appellants are jointly and severally liable towards Respondent?

7. Have Appellants demonstrated that the Trial Judge erred in the exercise of her discretion in the awarding of costs, including the costs of the First Trial as well as the costs incurred with respect to the issues common to all plaintiffs in the Castor Actions?

8. With respect to the appeal on the Judgment on Motions and the Judgment on Objections, have Appellants demonstrated that the Trial Judge erred in her rulings and that such errors are palpable and overriding?

95. For ease of review by this Court, the order of the substantive arguments in RF follows, to the extent possible, the order employed in AF.

PART III: ARGUMENT

A. THE PRINCIPLES OF LIMITED APPELLATE REVIEW

96. The main thrust of Appellants' argument is that the Trial Judge misunderstood key elements of the theories of their case, which in turn caused her to misapprehend the expert evidence adduced in furtherance of such theories. Appellants submit that the Trial Judge failed to consider relevant evidence and overlooked material evidence in coming to her conclusions. Appellants further submit that in some instances there was no evidentiary basis for certain of her findings.

97. Appellants' arguments in this respect are simply an attempt to invite this Court to re-examine and re-weigh the expert evidence that would support the Appellants' theories on negligence, causation (reliance and due diligence) and contributory negligence. However, accepting that invitation would be contrary to the well established role of an appellate court.[137]

98. The parties agree that the leading case setting out the principles of appellate review is *Housen v. Nikolaisen*.[138] Although these principles are not controversial, they are particularly significant in a case such as the present one which involved the analysis of an exceptional amount of factual evidence, notably with respect to the issues of negligence and reliance. It is undisputed that the finding of facts and the drawing of evidentiary conclusions from the facts is the province of the trier of fact.[139] Similarly, the weight to be assigned to the various pieces of evidence is to be determined by the trial judge. A court of appeal will not interfere with such determinations merely because it may take a different view of the evidence.[140] It is also a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on

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[137] *Matte, supra* note 16; Léo Ducharme, *Précis de la preuve*, 6e ed., Wilson & Lafleur, Montréal, 2005 at para. 541 [*Ducharme*].
[138] 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].
[139] *Ibid*. at paras. 10-25.
[140] *Ibid*. at paras. 23 and 25; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401 at paras. 52-74 [*H.L.*].

appeal[141] unless it can be established that the trial judge made some palpable and overriding error which affected his/her assessment of the facts.[142]

99. The Supreme Court of Canada has consistently held that a finding of negligence, a question of mixed fact and law involving the application of a legal standard to a set of facts, should be shown deference by appellate courts and should not be overturned where the only point in issue is the interpretation of the evidence as a whole.[143] This principle applies equally to findings of contributory negligence (or absence thereof).[144] A trial judge's conclusions as to reliance are pure questions of fact and go to the issue of causation.[145] Findings of causation should not be interfered with absent palpable and overriding error.[146]

100. This Court has often stated that it is not necessary for a trial judge to recount each piece of evidence put before him or her or to comment on each element thereof proffered as evidence.[147] This principle is all the more compelling in the case at bar where the evidence comprises more than a million pages and the Trial Judge was obliged to synthesize and identify only those elements which enable the reader to obtain an understanding of the factual underpinning of the Principal Judgment.

101. The above-stated stringent standard of appellate intervention assumes even greater importance where the appellant challenges the assessment of the evidence by the trial judge and yet reproduces only **selective portions** of the

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[141] In paragraph 327 AF, Appellants admit that considerable deference is to be paid to the Trial Judge's appreciation of the credibility of witnesses.
[142] *H.L.*, *supra* note 140 at para. 96 (citing with approval Dickson C.J.); Ducharme, *supra* note 137.
[143] *Housen, supra* note 138 at paras. 29, 32 and 36-37.
[144] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 57; *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at pp. 28-29.
[145] *Hogarth v. Rocky Mountain Slate Inc.*, 2011 ABQB 537 at para. 176 [*Hogarth*].
[146] *Housen, supra* note 138 at para. 70; *H.L. supra* note 140 at paras. 121-123; Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, Volume I – *Principes généraux*, 7th ed., (Cowansville : Yvon Blais, 2007) at para. 1-618.
[147] *A.M. c. Kliger*, 2011 QCCA 17, Bich JA. at paras. 3 and 7.

examinations or cross-examinations of the witnesses, asking this Court to rule on the basis of a **fraction** of the evidence heard at trial.[148]

102. Applying the principle of judicial restraint, this Court also refuses to intervene with respect to decisions rendered in the exercise of the broad measure of discretion of trial judges, save for exceptional cases of clear misuse or abuse of that discretion, or error of law. This deference extends to decisions rendered pursuant to the trial judges' inherent jurisdiction to manage and control the cases proceeding before them,[149] including the filing of expert reports,[150] as well as the exercise of the trial judges' discretion in the award of costs.[151]

B. THE ISSUE OF APPLICABLE LAW

B-1 The context of the debate

103. In March 1998, approximately **five years** after the lawsuits against C&L and their partners were issued in the various Castor Actions, Appellants amended their Plea and, **for the first time**, invoked the question of the applicable law.[152]

104. The decision to amend in this fashion was purely **strategic** and intended to take advantage of the (then) recent decision of the Supreme Court of Canada in *Hercules Management Ltd.* v. *Ernst & Young*.[153] The *Hercules* decision is based upon the public policy concern expressed in certain common law jurisdictions that auditors, even if negligent, should not be subjected to unlimited liability to third parties. Although the decision recognizes that there may be situations where the concerns surrounding unlimited liability will not arise, Appellants have erroneously interpreted the decision as a virtual bar to the liability of auditors to

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[148] *Consoltex inc. c. 155891 Canada inc.*, 2006 QCCA 1347 at para. 36. See also *Pateras c. M.B.,* [1986] R.D.J. 441, at pp. 443-444, AZ- 86122057 (C.A.); *Lévesque c. Lévesque*, J.E. 98-1284; 1998 CanLII 12922 (QC CA).
[149] *Celluland Canada inc. c. Rogers Wireless Inc.*, 2007 QCCA 449.
[150] *Horvath c. Imaction inc.*, J.E. 92-813, 1992 CanLII 3087 (QC CA) [*Horvath*].
[151] *Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.J. 303 at para. 27 [*Hamilton*]; *Groulx c. Habitation unique Pilacan inc.*, 2007 QCCA 1292 at para 93 [*Groulx*].
[152] Appellants' Amended Particularized Plea, Section 5.0, at p. 47.
[153] [1997] 2 SCR 165 [*Hercules*].

third party users of audited financial statements,[154] and have vigorously fought against the application of Quebec law in the faint hope that the *Hercules* decision will immunize them against liability for what has now been held to be a complete dereliction of their professional obligations.

105. In order to justify the application of the common law (Appellants were not concerned as to the specific common law Province), Appellants advanced three different theories of the applicable law:[155]

(i) the *lex societatis* (which Appellants assert leads to the application of the law of New Brunswick);

(ii) the *lex contractus* (which Appellants assert also leads to the application of the law of New Brunswick); and

(iii) the *lex loci delicti* (which, based on Appellants' erroneous interpretation of this rule, leads to the application of the law of Ontario).

106. After lengthy written and oral arguments,[156] the Trial Judge rejected Appellants' submissions and determined that the applicable law is the civil law of Quebec. Because of the exceptional nature of the Castor Actions, the Trial Judge decided to also assess what her determination with respect to the liability of C&L would have been if the applicable law was the common law.

107. Representations made to the Trial Judge on the issue of the applicable law included more than 100 references to doctrine and jurisprudence, as well as references to voluminous factual evidence. In the more than 40 pages of the

[154] Cherniak, PW-3099A, para. 27.
[155] §3353. Appellants in their Factum have now apparently restricted their arguments to two theories and no longer are arguing the *lex contractus*.
[156] The issue was argued for approximately 6 days before Associate Chief Justice Wéry in the context of C&L's unsuccessful Motion for a Declaratory Judgment on the Applicable Law and the successful Motion to Dismiss C&L's Motion (*Dunn* c. *Wightman*, 2006 QCCS 5143. As well, 3 days were devoted to arguing the issue before the Trial Judge in April 2008, (as appears from the Court record) and a significant amount of the resources allocated to the final written and oral arguments made to the Trial Judge in 2010 were devoted to this issue.

Principal Judgment devoted to the issue of applicable law, the Trial Judge clearly sets out the respective positions of the parties and their experts as well as her analysis and detailed reasons, the whole supported by doctrine, jurisprudence and factual evidence. In view of the enormous amount of evidence considered, the greatest deference should be accorded to the Trial Judge in connection with her findings on this matter.

108. The importance of the specific facts to the determination of the existence of liability of auditors in Canadian common law jurisdictions was recognized by Justice LaForest in *Hercules*: "*The specific factual matrix of a given case may render it an "exception" to the general class of cases (…)*".[157] Since the determination, as to whether a concern surrounding indeterminate liability arises, is wholly dependent on the particular factual matrix of the case, absent any manifest error, the finding of the trier of fact as to whether a case falls within the exception is not a proper matter for appellate review.

109. Because the Trial Judge determined, based on her investigation of the factual matrix in the case at bar, that the problem of potential indeterminate liability does not arise, she concluded that, even under the common law, C&L would be liable for the damages suffered by Respondent as a result of their negligence.[158] Since the Trial Judge determined that C&L are liable for their negligence whether Quebec civil law or the Canadian common law is the applicable law, the issue of the applicable law has been rendered moot in the Widdrington Action.

B-2 <u>The Trial Judge correctly characterized the fundamental question in dispute as a matter of delict</u>

110. Appellants do not dispute that the "*lex fori*", which is the law of the Court which is sitting (the Quebec Superior Court), determines the applicable law for the substantive issues. Appellants also concede that the Trial Judge correctly

[157] *Hercules*, *supra* note 153
[158] §37.

concluded that the provisions of the Civil Code of Lower Canada (the "**CCLC**")[159] provide the applicable conflict of laws rules (footnote 159 AF).

111. The Trial Judge determined that the first step in the process of identifying the applicable law is the: "*characterization of the question or questions"*.[160] As stated by the author C. Emanuelli: "*Le choix de la règle de conflit pertinente dépend de la qualification de la question qui est à l'origine du conflit*".[161]

112. Quebec courts must resolve a conflict in the characterization of the question in dispute by defining the issue in dispute according to the laws of Quebec.[162] As aptly stated by the Trial Judge, the rules for conflict of laws are the **rules of our own judicial** system and that : "*elles ne doivent, elles ne peuvent être interprétées, comme d'ailleurs les règles internes, que par les modes d'interprétation du système juridique qui les a **conçues***".[163] [emphasis added]

113. Quebec law does not have a precise conflict rule applicable to the issue of auditors' liability, so that specific characterization is not available under Quebec law. There is, however, a specific rule for delicts (art. 6(3) CCLC and art. 3126 *et seq.* CCQ).

114. The Trial Judge's detailed reasoning with respect to the characterization of the fundamental question in dispute as being a matter of delict is provided in §§3366 to 3378, supported by the leading authorities in Quebec private international law, jurisprudence, and the pleadings of both Appellants and Respondent.

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[159] Articles 6 and 8 CCLC.
[160] §3348.
[161] Claude Emanuelli, *Droit international privé québécois*, 3e ed., Montréal, Wilson & Lafleur, 2011, at para. 413. (at §3368, the Trial Judge cited the 2nd ed., 2006: the text is identical) [*Emanuelli*].
[162] *Emanuelli*, *supra,* note 161, at para. 408; *Agnew* c. *Gober*, (1910) 38 C.Q. 313 at pp. 326, 329; *Air Liquid Canada inc.* c*. Bombardier inc.*, 2010 QCCA 1631 at para. 15; *Gauthier* c. *Bergeron* [1973] C.A. 77 at p. 79.
[163] §3366, citing Prof. Crépeau as reproduced in *Gauthier* c. *Bergeron* [1973] C.A. 77 at p. 79.

115. Appellants have consistently identified the *lex societatis* as their primary argument.[164] For the purposes of that argument, Appellants characterize the issue in paragraph 93 AF as: "*the delictual liability of a corporation's officer for a faulty performance of his duties*". Consequently, as part of this characterization process, they include the corporation's auditor as an officer of the corporation. Appellants then argue that the question in dispute is one of status and capacity and therefore governed by the *lex societatis*, which is the law of New Brunswick.

116. The Trial Judge (in §§3375-3376), relying on Quebec doctrine to support her decision, rejected Appellants' argument that the delictual liability of the auditor for a faulty performance of his duties was distinguishable from other cases of delictual liability. Furthermore, she determined that the delictual liability of an auditor was not a question of status and capacity of the corporation.

117. The Trial Judge was correct in rejecting Appellants' argument, which is ill-founded for two reasons:

i) There is no rule in Quebec law that the delictual liability of an officer is to be characterized as a function of the status and capacity of the corporation; and

ii) Even if there was such a rule, it would not extend to the auditor, who is not an officer of the corporation.

1. In Quebec, the delictual liability of officers is not governed by the *lex societatis*

118. Appellants have not provided any Quebec jurisprudence to support their theory that the delictual liability of officers is governed by the *lex societatis.* Moreover, as explained more fully below, the Quebec doctrine that they do cite does not

[164] §20; Para. 12a of Inscription #1 *(lex loci delicti* is identified as their tertiary argument).

support their proposition that an auditor is an officer of the corporation with the result that his delictual liability is governed by the law of the corporation.

119. Appellants are incorrectly extending the application of *lex societatis* beyond what is properly considered as the status and capacity of a corporation. The leading Quebec authors on conflict of laws rules have provided the following insight into what is meant by the term "*status and capacity*" as employed in article 6(4) CCLC:

> Talpis[165]
>
> *"Tout ce qui concerne la régie interne de la personne morale étrangère est régie par la loi de son statut personnel. S'il s'agit d'une compagnie, c'est la loi du lieu de sa constitution. Cette même loi détermine l'organisation de la compagnie, qui peut en être directeur ou administrateur, le mode de leur nomination, les exigences quant à leur nombre, leur qualité, leur résidence, leur citoyenneté, la possibilité pour les directeurs ou les administrateurs de déléguer leur autorité, la tenue des assemblées, le lieu, le quorum, même l'exigence de tenir une assemblée formelle, la possibilité pour l'administrateur ou l'actionnaire de faire des contrats avec la société, les relations entre l'administrateur et l'actionnaire, le droit pour les actionnaires de démettre les administrateurs, de contrôler leurs activités, d'être renseignés, c'est-à-dire d'avoir accès aux principes, documents et registres de la corporation, le capital corporatif, la catégorie d'actions permise, la possibilité pour la société de racheter ses propres actions, la négociabilité de celles-ci et les personnes qui peuvent devenir actionnaires."*
>
> Emanuelli[166]
>
> *"Les questions concernant l'état et la capacité des personnes morales sont relatives à son existence juridique, à son organisation, à son fonctionnement, aux compétences de ses organes et de ses représentants, à sa capacité d'accomplir certains actes juridiques, aux conditions de sa fusion avec une autre personne morale, aux conditions de sa dissolution, etc."*

These interpretations of the meaning of the terms "*status and capacity*" as employed in article 6 CCLC are far removed from the liability of officers towards third parties and even farther removed with respect to the liability of auditors.

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[165] J. Talpis, *Aspects juridiques de l'activité des sociétés et corporations étrangères au Québec*, (1976) C.P. du N. 215 at para. 39 [*Talpis*].
[166] *Emanuelli*, *supra* note 161 at para. 510.

120. In paragraph 122 AF, Appellants criticize the Trial Judge's reliance on a 1976 article by Professor J. Talpis[167] as not being useful to the characterization of the dispute, although they also, in paragraph 93 AF, rely on this same article to support their theory of *lex societatis.* Appellants refer to a subsequent 1993 article by authors Talpis and Castel[168] and erroneously state that this text provides evidence that Talpis changed his opinion with respect to the application of the *lex societatis*: [Prof. Talpis]: "*has now unequivocally opted for the application of lex societatis to govern the liability of a corporation's officers*". However, in their 1993 article, authors Talpis and Castel specifically refer to and incorporate the 1976 article[169] with respect to the application of Quebec law to protect third parties, affirming the continued relevance of the 1976 Talpis article referred to by the Trial Judge.

121. Moreover, in paragraph 112 AF, Appellants cite only one sentence from the 1993 text of Talpis and Castel which they assert demonstrates that the *lex societatis* governs the delictual liability of officers. However, the text reproduced by Appellants is completed by the following sentence which indicates that the *lex societatis* does not apply to delictual liability when the corporation carries on its activities in Quebec:

> *"Cependant, la loi québécoise peut intervenir pour réglementer l'exercice de ses activités au Québec afin de protéger les tiers"*.[170]

122. In paragraph 123 AF, Appellants agree with the Trial Judge that the: "*activities of a corporation are subject to the law where such activities took place*". The explicit language of article 3083(2) CCQ (previously article 6(4) CCLC), circumscribes the application of the *lex societatis* as follows: "*The status and capacity of a legal person are governed by the law of the country under which it*

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[167] Talpis, *supra* note 165. See in particular, para. 89. Para. 88 of this text indicates that the company's representatives, such as directors, are governed by the *lex societatis* for their statutory liability.
[168] 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 [*Talpis & Castel*].
[169] Talpis & Castel, *supra* note 168 at para 137 (see footnote 40).
[170] *Ibid* note 168 at para 137.

was formed ***subject, with respect to its activities, to the place where they are carried on***". It is not disputed that Montreal, the location of Castor's business office, was where the corporation's activities were principally carried on and that Castor's connection with New Brunswick, apart from the incorporation of the company for purely tax reasons,[171] was nonexistent. Moreover, there was absolutely no connection between New Brunswick and the professional services performed by C&L on behalf of Castor, nor was there any connection between New Brunswick and the Respondent.

2. The auditor is not an officer of the corporation, and Appellants' theory of *lex societatis* cannot apply to the delictual liability of C&L for professional work performed other than in their role as auditor

123. Appellants' *lex societatis* argument is founded on doctrine from France which describes an auditor as an "*organe*" of the corporation.[172] The notion of the auditor *qua* "*organe*" of the corporation is foreign to Quebec civil law.[173] It is a fundamental tenet of auditing, as practiced throughout Canada, that auditors are independent of management and do not exercise any authority with respect to the corporation.[174] In Appellants' own words: "*the auditor cannot impose upon management his own judgment, estimates or preference*".[175]

124. Appellants, in paragraph 119 AF, citing a 2003 article by S. Rousseau, incorrectly suggest that there is authority in Quebec that supports the French doctrine with respect to the auditor as an "*organe*" of the corporation. While this author does state that the independent auditor is a cornerstone of corporate governance, the preceding paragraph gives the proper context to this statement:

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[171] As documented by C&L in their working papers (Exhibit PW-1053-64-1).
[172] AF at para. 119.
[173] See articles 359 and 360 of the CCLC. Article 311 CCQ provides that: "*Legal persons act through their organs, such as the board of directors and the general meeting of the members*." This is far removed from the role of the independent auditor vis-à-vis the corporation.
[174] S.5000.02 of PW-1419-2A. See also §§271-277 describing the respective roles of management and the auditor.
[175] AF at para. 24.

> *"Il appartient aux vérificateurs de s'assurer, autant que possible, que l'information financière relative aux affaires de la société préparée par les administrateurs reflète exactement la situation de la société, afin, premièrement, de protéger la société elle-même contre les conséquences d'erreurs ou, peut-être, de fautes non décelées […] et deuxièmement, de fournir aux actionnaires des renseignements fiables qui leur permettront d'examiner soigneusement la gestion des affaires de la société et d'exercer leurs pouvoirs collectifs de récompenser, de contrôler ou de destituer ceux à qui cette gestion a été confiée".*

125. Similarly, in a subsequent paragraph, the author writes:

> *"Compte tenu du rôle exercé par le vérificateur, les conditions d'admissibilité à cette fonction sont très strictes. Ainsi, pour être admissible au poste de vérificateur, une personne doit être membre de l'Ordre des comptables agréés. De plus elle doit être* ***indépendante de la direction de la société*** *qui fera l'objet de la vérification afin de pouvoir réaliser son enquête libre de tout conflit d'intérêts. Cette indépendance doit être maintenue à la suite de l'élection, à défaut de quoi, le vérificateur doit démissionner de son poste*".[176] [emphasis added]

It is evident that the author was not identifying the role of the auditor as an officer of the corporation but, rather, highlighting the importance of the verification of the financial condition of the corporation by an independent third party.

126. Author Kevin McGuiness describes the status of the auditor in *Canadian Business Corporations Law*, a text relied on by Appellants at footnote 302 AF. He writes:

> *"In carrying out their duties, the auditors of a corporation are neither agents of the corporation nor of the shareholders. Although retained by the*

[176] S. Rousseau, "La gouvernance d'entreprise à la croisée des chemins: comment restaurer la confiance des investisseurs à la suite de l'affaire Enron?" in *Barreau du Québec, Développements récents en droit des affaires*, Cowansville, Yvon Blais, 2003, EYB2003DEV537, p. 66. In footnote 131 to the text reproduced above, the author writes: " *L'article 113(3) L.C.Q. prévoit que le vérificateur ne peut être un administrateur ou un* ***dirigeant*** *de la compagnie qu'il doit vérifier. L'article 161 L.C.S.A. établit des règles plus détaillées en matière d'indépendance. […] la Loi présume que certaines personnes ne sont pas indépendantes, dont notamment l'administrateur, le* ***dirigeant****, l'employé et l'actionnaire important de la société ou d'une personne morale de son groupe …"*

> *corporation under contract, **they are not the officers of the corporation** within the meaning of the OBCA or the CBCA".*[177] [emphasis added]

127. McGuiness notes that: "*in order for the auditor to discharge this obligation* [reporting to the shareholders] *properly, the auditor must be and remain independent of the corporation*."[178]

128. Appellants argue that the NBBCA creates the "*office*" of the auditor.[179] The English version of articles 62.1 and 105 (1) NBBCA provides that an auditor "***may***" be appointed "***to hold office***." However, the French version of articles 62.1 and 105(1) NBBCA states that the appointed auditor is given a "***mandate***" by the directors:

> *"62(1) Après la délivrance du certificat de constitution, les administrateurs tiennent une réunion au cours de laquelle **ils peuvent**:*
>
> *[…]*
>
> *d) élire ou nommer des dirigeants;*
>
> *e) nommer un vérificateur dont **le mandat** expirera à la première assemblée annuelle des actionnaires; [emphasis added]*
>
> *105(1) Les actionnaires d'une corporation peuvent, par voie de résolution ordinaire, à la première assemblée annuelle des actionnaires et à chaque assemblée annuelle subséquente, nommer un vérificateur dont **le mandat** expire à la clôture de l'assemblée annuelle suivante;" [emphasis added]*

129. Section 10 of New Brunswick's *Official Languages Act*[180] provides that: "*The English and French versions of legislation are equally authoritative*". In a situation where there is ambiguity or a possible conflict between the English and French texts, the two versions must be read together to: "*ascertain the proper meaning of the terms … and should be interpreted in a manner which best*

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[177] Kevin P. McGuinness, *Canadian Business Corporation Law*, 2nd ed., Toronto, Butterworths, 2007, at para. 9.162. Although the author does not refer to the NBBCA, the wording of the relevant provisions is similar and therefore the reasoning is equally applicable to the NBBCA.
[178] *Ibid* at para. 9.160.
[179] Appellants refer to articles 105, 106, 107 and 108 of the NBBCA in AF at para. 118. None of these articles sets out the requirement that a private company must appoint an auditor. Article 107(1) provides that an auditor can be removed from office (or, in the French, "*relever de ses fonctions*") by ordinary resolution of the shareholders.
[180] SNB 2002, c O-0.5 at s.10.

ensures the attainment of their objects as required by s. 12 Interpretation Act".[181] In cases of ambiguity or conflict, the more restricted or limited meaning is preferred. In the present instance, undoubtedly the term "*mandate*" is narrower than "*officer*".[182] Furthermore, the term "*mandate*" is consistent with the role and appointment of the auditor as an independent third party and more accurately reflects the proper role of the auditor.

130. In both the French and English versions of article 62.1 NBBCA, the role of the auditor is distinguished from the election or appointment of officers. Moreover, throughout the NBBCA, it is evident that the characterization of the auditor as an officer of the company would render certain text redundant (e.g., article 80(3): *"A director is not liable under section 76 or 79 if he relies in good faith upon: (a) financial statements of the corporation represented to him by an officer of the corporation* ***or in a written report of the auditor, if any,*** *of the corporation fairly to reflect the financial condition of the corporation"* [emphasis added to highlight the text that would be rendered redundant if the auditor was considered an officer]) and other provisions with respect to the auditor are inherently incompatible with the role of an officer of the company (e.g., article 104(1): *"Subject to subsection (5), a person is disqualified from being an auditor of a corporation if he is not independent of the corporation, any of its affiliates, or the directors or* ***officers*** *of any such corporation or its affiliates.*"*).*

131. Appellants incorrectly argue that the *lex societatis* "*solution is clearly established for the personal liability of the directors or officers entrusted with the management of the corporation* (…)".[183] The notion of auditor *qua* officer "*entrusted with the management of the corporation*" is antithetical to the

[181] *R.* v. "*M/S Apollo Tiger" Shipping GmBH & Co. KG*, 2005 NBPC 16 at para. 43; Section 12 of the *Interpretation Act*, RSNB 1973, c I-13, provides that: "*An Act or regulation shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the Act or regulation and every part thereof according to its true spirit, intent and meaning*."
[182] All officers of a corporation have a mandate to perform their duties; however, not all individuals given a mandate by a corporation are necessarily officers of the corporation (e.g. lawyers, consultants, etc.).
[183] Inscription #1 at para. 54.

fundamental concept of the independent auditor.[184] Moreover, Appellants' argument that the auditor is an officer and therefore part of the management of the corporation makes a mockery of one of their other theories of the case (referred to in a cursory fashion at paragraphs 482 to 483 AF). It is inconsistent to argue that a party: "*entrusted with the management of the corporation*" can raise a defence of management fraud.

132. Appellants use references to the auditor "*holding office*", found in the English version of the NBBCA, as a false pretext to exclude auditors' negligence from the general rules of civil liability in Quebec. In Quebec, actions involving auditors' negligence are not exempt from the application of the **general rules** of civil responsibility:

> *"La responsabilité du comptable répond donc, dans l'ensemble, aux mêmes impératifs et aux mêmes critères que les autres types de responsabilité professionnelle. L'importance de la pratique et des usages dans l'évaluation de la faute et l'exigence d'un lien de causalité direct et bien établi sont au cœur même de cette responsabilité*".[185]

133. In paragraph 121 AF, Appellants assert that auditors should be subject to the same rules that govern: "*the preparers of the financial statements (i.e. the corporation's directors)",* in that subjecting the auditor to *lex loci delicti*: *"would inevitably lead to inextricable difficulties and conflicting results*". Respondent submits that the Trial Judge's correct application of the *lex loci delicti* rule (as explained more fully below in section B-4), clearly avoids such "*inextricable difficulties and conflicting results*".

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[184] For example, as noted by the Trial Judge in §2204: "*The Code of Ethics of Chartered Accountants Regulation provides that accountants who are called upon to express opinions on financial statements must be free of influence that may impair, or be perceived as impairing, their professional judgment or objectivity and that an accountant cannot represent more than one party in the same transaction."* S.5100.02 of PW-1419-2A. See also §277.

[185] Jean-Louis Baudouin & Patrice Deslauriers*, La responsabilité civile,* vol. II – *Responsabilité professionnelle*, 7th ed., Cowansville, Yvon Blais, 2007 at para. 2-193.

134. Moreover, in paragraph 18 AF, Appellants identify the two CAs, retained by Castor as consultants,[186] as being the preparers of the financial statements (in addition to Stolzenberg). Talpis writes that the responsibility of an agent or mandatary[187] vis-à-vis third parties is governed by the rules of delict:

> *"La responsabilité d'un agent de la compagnie étrangère vis-à-vis la compagnie sera régie par la loi applicable au mandant suivant l'article 8 du Code civil.* ***La responsabilité de l'agent vis-à-vis d'autres personnes est régie par la loi du délit***".[188]

135. Undoubtedly, the responsibility of C&L, mandated by Castor to perform a variety of professional services, is equally governed by the rules of delict vis-à-vis third parties.

136. Furthermore, it is factually incorrect for Appellants to now attempt to limit their role to that of only "*auditors*" in the characterization of the question in dispute and in their arguments on the issue of applicable law. In §3356, the Trial Judge made a finding of fact supported by the evidence (footnote 3627) that, in addition to acting as auditor: "*C&L rendered a wide range of professional services to Castor*". The evidence expressly relied on by the Trial Judge, consists of C&L's own invoices which unequivocally establish that, separate from the audit services provided to Castor, C&L prepared opinions on the fair market value of Castor's common shares (work performed primarily by accountants and valuators in C&L's valuation department) and legal-for-life certificates.[189]

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[186] §§90-91.
[187] The French version of the NBBCA refers to the **mandate** given to the auditor.
[188] *Talpis*, *supra* note 165 at para. 89.
[189] C&L admitted in its Plea dated July 31, 1998 that: "*the valuation letters were prepared by the Defendants, and more particularly with the involvement of Elliot Wightman, Bernard Lauzon, Jacques St.-Amour and Pierre Jannard*" (para. 402); the said *" "valuation" letters provided* a *reasonable evaluation of the fair market value of the company's shares at the time of their issuance"* (para. 405); and that *"the "valuation" letters issued by the Defendants were prepared in accordance with all the applicable and accepted standards of their profession* as *generally understood at the time"* (para. 406). It is not disputed that B. Lauzon, J. St-Amour and P. Jannard were members of C&L's valuations department; Lajoie, October 18, 2006, pp. 79-80.

137. It is clear that Appellants' argument that the corporation's auditor is an officer of the corporation (which in itself is wrong) cannot extend to accountants and valuators performing other services.

138. The NBBCA contains no provisions that create the "*office*" of valuator or accountant, and therefore, the *lex societatis* cannot be applicable to the findings of the Trial Judge as to C&L's negligence in connection with these different professional roles.

139. Consequently, even if Appellants were correct as to the description of the auditor as an officer of the corporation and that the auditor's liability is governed by the status and capacity of legal persons (and they are not), then C&L's liability as auditor would be governed by New Brunswick law and their liability for the other negligently performed services would be governed by the *lex loci delicti.* This clearly is contrary to legal or common sense as their liability is not divisible.

140. Moreover, accountants are frequently mandated to perform a review engagement of a company's financial statements or to prepare a notice to reader, rather than an auditors' report. The NBBCA is silent with respect to the mandates that may be given to accountants other than as auditors. It is not logical to argue that a different regime of responsibility exists for accountants *qua* auditors and for accountants who perform these other professional mandates, and the courts in Quebec have never made such a distinction. For example, in *Malo* c. *Michaud*,[190] no distinction was made between auditors and accountants when the court confirmed that an accountant who was mandated to perform a review of the financial statements of a corporation will be held responsible for damages suffered by a third party that are the direct and immediate consequence of the faulty performance of his duties.

[190] J.E. 93-1551, EYB 1993-79335 (C.S.).

141. Finally, there is no reference in Castor's audited financial statements, valuation letters or legal-for-life certificates[191] to the fact that Castor was incorporated under the laws of New Brunswick or that C&L had allegedly conducted a statutory audit. The auditors' reports to the financial statements, as well as Appellants' other professional opinions, all identify that they were issued by **C&L Montreal**. For the reader and user of these professional opinions, it was entirely unforeseeable, even by C&L, that the law of a jurisdiction other than Quebec would be applicable in the case of C&L's professional negligence.

142. The Trial Judge correctly characterized the fundamental question requiring adjudication in the present litigation as being a delictual matter relating to professional negligence. In Quebec, it is that characterization that determines the appropriate conflict of laws rule.

B-3 The Trial Judge correctly identified *lex loci delicti* as the appropriate conflict of laws rule

143. After properly characterizing the fundamental question as a matter of delict, the next step to determine the applicable law is to identify the appropriate conflict of laws rule to apply. In §§3379 *et seq*., the Trial Judge held that pursuant to article 6(3) CCLC, the *lex loci delicti* rule applies to all delictual and quasi-delictual matters.

144. The Supreme Court of Canada's decision in *Tolofson* v. *Jenson*[192] sets forth the principle that in common law jurisdictions where there is a conflict of laws dispute involving a matter of tort, the *lex loci delicti* is to be applied (rather than the *lex fori*). This solution, based on the policy considerations of certainty, ease of application, predictability and the expectations of persons conducting their activities in a particular jurisdiction, is the same solution adopted by the legislator in Quebec in article 6(3) CCLC.

[191] PW-5 (1988, 1989 and 1990), PW-6-1 (1988, 1989, 1990 and 1991), PW-7 (PW-1988, 1989, 1990 and 1991).
[192] [1994] 3 S.C.R. 1022 [*Tolofson*]. The decision is cited by the Trial Judge, see footnote 3655, §3382.

145. As is apparent from §3353, Appellants ranked their argument in favour of the application of the *lex loci delicti* rule as their tertiary position (after their arguments for *lex societatis* and *lex contractus*), presumably because this rule leads to the conclusion that Quebec civil law is the applicable law.

B-4 The Trial Judge correctly applied the *lex loci delicti* rule and identified Quebec as the locus of the delict

146. The Trial Judge correctly interpreted the *lex loci delicti* rule when she stated in §3382, supported by doctrine and jurisprudence, that: "*The* lex loci delicti *rule means the place where the alleged wrongdoings (reproached acts) took place,* ***the place where the wrongful activity occurred***".

147. *Lex loci delicti* is defined in the [Quebec] Private Law Dictionary as the: "*Law applicable by reason of the localization of a delict* ***at the place it occurred***" and "*delict*" is defined as "*Intentional illicit act or omission of an extracontractual nature which causes damage*".[193]

148. In his 1986 text, *Introduction to Conflict of Laws*, author J.-G. Castel explained the application of the *lex loci delicti* rule, prior to the reforms of the Civil Code in 1994, as follows:

> *"Obviously, it is proper for a state to attach certain liabilities to some types of* ***conduct taking place within its territory. This view achieves a degree of certainty since a person engaging in activities in a particular state is able to adjust his conduct to the law of that state or to estimate what obligations he might incur should he injure someone as a result of such activities***." [194] [emphasis added]

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[193] *Private Law Dictionary and Bilingual Lexicons*, 2nd ed., Cowansville, Yvon Blais, 1991 at p. 253 and 119. The definitions found in the French counterpart are to the same effect. For example, *"Loi applicable en vertu de la localisation d'un délit au lieu de sa survenance*." In the *Dictionnaire de droit privé et lexiques bilingues*, 2e éd., Cowansville, Yvon Blais, 1991 at p. 342.

[194] J.-G. Castel, *Introduction to Conflict of* Laws, 2nd ed., Toronto, Butterworths, 1986 at p. 200.

149. In *Tolofson*, a common law case decided in late 1994, LaForest J., writing for a unanimous bench, similarly explained the reasons for applying the *lex loci delicti* as being where the wrongful activity took place[195]:

> *"... it seems axiomatic to me that, at least* ***as a general rule, the law to be applied in torts is the law of the place where the activity occurred,*** *i.e., the lex loci delicti. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another,* ***the defining activity that constitutes the wrong took place wholly within the territorial limits of one province****, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in Phillips v. Eyre, supra, at p. 28, "****civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law****". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences".* [emphasis added]

150. In *Tolofson*, LaForest J. suggested that there is a constitutional basis for the principle of territoriality and the *lex loci delicti* rule. The court took this one step further in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*,[196] and stated that: "*The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it.*" Finally, in a concurring judgment in *Castillo v. Castillo*,[197] Bastarache J. would have struck down an Alberta choice of law provision because it required the application of Alberta law where there was no "*meaningful connection*" between Alberta and the matter or the parties.

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[195] *Tolofson*, *supra* note 192 at p. 44 (CanLII).
[196] [2003] 2 S.C.R. 63 at paras 58, 66-68 [*Unifund*].
[197] [2005] 3 S.C.R. 870 at para. 46 [*Castillo*].

151. It is apparent that both in the Quebec civil law and in the Canadian common law, the general rule is that the delict is where the wrongful activity occurred. Moreover, it is only in *obiter* that LaForest J. suggests that there may be problematic situations where the fault and the prejudice occur in different places. As discussed more fully below, different factors may militate in favour of different solutions, but they must be interpreted narrowly to respect the constitutional principle of territoriality.

152. In the present matter, the Trial Judge determined that the professional activities of Appellants occurred predominantly in Montreal (see §§3383 and 3385). No manifest or palpable error has been raised by Appellants with respect to this finding of the Trial Judge.[198]

153. Contrary to Appellants' characterization set out in paragraphs 109 and 110 AF, the nature of C&L's faults, as described in the pleadings of both parties (noted by the Trial Judge in §§3370 and 3372), is not based on negligent misrepresentation or a failure of a duty to warn. Rather, the fault alleged by Widdrington, and by all of the plaintiffs in the Castor Actions, is the failure of Appellants to conduct themselves in accordance with the applicable professional standards. In §3370, the Trial Judge referred to paragraph 118 of Respondent's Re-Re-amended Declaration which states:

> *"118. As professional accountants, Defendants owed a duty to Plaintiff to conduct their audits, and all other professional services rendered to Castor in relation to the reliability of the financial statements and the valuation of Castor, in accordance with the Canadian Generally Accepted Accounting Principles ("CGAAP"), the Canadian Generally Accepted Auditing Standards ("CGAAS"), the Canadian Institute of Chartered Accountants Handbook ("CICA") and the Code of Ethics of the Canadian Institute of Chartered Business Valuators ("CICBV code")*…".[199]

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[198] In AF at para. 40, Appellants state that some of C&L's audit work was conducted in Europe (Switzerland, Liechtenstein); however, they fail to mention that this work was performed by partners and employees of C&L Montreal and was part of the consolidation performed in Montreal.

[199] Declaration dated March 13, 1998. In §3373, the Trial Judge reproduces Appellants' response to the allegations in para. 118 of the Declaration.

154. The authorities cited by Appellants are not relevant since they deal with situations where the alleged faults were described variously as a failure to warn, a failure to disclose, the tort of negligent misrepresentation, and the tort of negligent advice.[200] These are not the situations present in this case where, undoubtedly, the locus of the fault was in Quebec.

155. Moreover, Appellants have explicitly acknowledged that the locus of the fault was Quebec and not Ontario. They assert that the locus of Widdrington's prejudice was Ontario and then argue that, where the fault and prejudice arise in **different** jurisdictions, the delict is where the prejudice arose.

156. Appellants' assertion, in paragraph 105 AF, that the authorities relied on by the Trial Judge do not support her conclusion that the locus of the delict was Quebec, is incorrect.

157. By way of illustration, the decision of the Supreme Court of Canada in *Lister* v. *McAnulty*[201] stands for the principle that in a situation where the location of the fault differs from the location of the prejudice, the applicable law is the location of the fault. The phrase cited by Appellants in AF is clearly taken out of context:

> *"... and it is now for the Quebec courts to determine what rights he has with this imported status, under the laws of Quebec. To hold otherwise would be a violation of article 6 C.C. for it would mean that a foreigner suing in Quebec, for* ***damages that occurred in Quebec****, is governed by the laws of his domicile, not only as to his status and capacity, but also as to the law of torts and damages*". [emphasis added to the phrase relied on by Appellants]

Taschereau J.'s opinion with respect to the locus of the tort is expressed in the following passage:

> *"But his right of action, and the extent of his damages would undoubtedly be determined by the laws of Quebec, and not under the laws of his domicile, which have no application whatever".*

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[200] AF at para. 110, footnotes 185 and 186.
[201] [1944] S.C.R. 317.

Hudson J.'s opinion on this point is stated as follows:

> *"Where, as here, the wrong is committed in Quebec and the action is taken in Quebec court, article 1053 C.C. applies irrespective of the domicile of the parties (except as provided in article 6 of the Code)".*

Rand J.'s opinion, states:

> *"It is beyond controversy that, in the courts of the same jurisdiction, rights of actions arising from personal wrongs are the creation of the law of the place where the tortious acts are committed. This is expressly declared by article 6 of the Civil Code. Whatever consequences are to be attached to those acts must arise by force of that territorial law.*
>
> *[…]*
>
> *For the purposes of the law of Quebec, then, we have a claim on the part of a husband who possesses the right of consortium and who is under a legal duty to care for and support his wife while the marriage continues. These are the rights which in Quebec the husband complains have been violated by the wrongful act of the respondent. It is the law of Quebec and that only to which we must look for the legal consequence from those facts. It will arise from the law of personal wrongs in that province and part of that is the delimitation of the damages attributed to the impairment of right suffered. It was, in my opinion, a misconception of the law to be applied to import from Massachusetts the law of tort including the rule of damages to determine the rights of the appellant in Quebec".*

158. Similarly, Appellants are misleading with respect to the text written by Professor Crépeau relied on by the Trial Judge.[202] In §3382, the Trial Judge refers to this article, published in 1961, as support for the proposition that the *lex loci delicti* means the place where the alleged wrongdoings took place. The article is essentially a case comment following the decision in *O'Connor* v. *Wray* in which the author criticizes the application of the common law analysis to resolve conflicts of law in the Quebec civil law context. With respect to the *lex loci delicti*, Crépeau states that article 6(3) CCLC:

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[202] Appellants misquote Crépeau in AF at para. 105. The actual phrase employed by Prof. Crépeau in footnote 39 (referred to by Appellants) of his article, reads: "***On doit, nous semble-t-il, préférer la loi du lieu où s'est realisé le préjudice***" Appellants incorrectly reproduce the text as: *"on doit, nous semble-t-il, préférer la loi du prejudice*". P.-A. Crépeau, *De la responsabilité civile extracontractuelle en droit international privé québécois*, 1961, 39 R. du B Can, pp. 3-29.

> *"… ne prévoit, en effet, que le cas où le fait dommageable est survenu dans la province de Québec. […] Or, l'article 6, alinéa 3 du Code civil, précité, est une règle territorialiste. Les lois québécoises régissent toutes les personnes qui se trouvent sur le territoire de la province, qu'elles soient d'ailleurs domiciliées dans la province de Québec ou à l'étranger, parce que, étant dans la province de Québec, elles sont soumises aux lois québécoises, et notamment aux droits et obligations découlant des articles 1053 et suivant…"*

The article also supports the Trial Judge in her characterization of the fundamental question as a matter of delict rather than of status and capacity.

159. Although, in footnote 39 of the article, Crépeau ponders the issue as to what is fair and just with regard to the identification of the locus of the delict when the fault occurs in one jurisdiction and the prejudice arises in a different jurisdiction, this footnote does not supersede the text of the article, which clearly provides support for the reasoning of the Trial Judge. Moreover, in the body of the article, Crépeau cites the decision in *Lister* v. *McNulty* in which the court determined that the delict was where the fault occurred.

160. Appellants also argue that the Trial Judge erred in her interpretation of the *Tolofson* decision, and assert that *Tolofson* stands for the principle that when the tort and the damages occur in different places, the "*wrongful activity*" occurs at the place where the prejudice occurs (paragraph 98 AF). To support their argument, Appellants cite the following passage from *Tolofson*: "*There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case,* ***it may well be*** *that the consequences would be held to constitute the wrong*". [emphasis added]

161. Appellants ignore the explicit language used by LaForest J. which merely suggests that, in some circumstances (where the consequences are directly felt elsewhere), the damages may be considered to constitute the wrong. Appellants inappropriately urge this Court to interpret the above passage from *Tolofson*, in

line with what was said in *Moran* v. *Pyle National (Canada) Ltd.,*[203] and as meaning that the wrong takes place where the damages are suffered.[204] However, *Moran* v. *Pyle* dealt with the proper forum to take an action, not the choice of the law to be applied to the facts in the action.[205] In that case, the Supreme Court concluded that the Saskatchewan court had jurisdiction to hear the action. No ruling was sought, nor made, as to what law would apply to the issues in the case.

162. The court in *Stewart* v. *Stewart Estate*[206] cautioned that LaForest J.'s words in *Tolofson*, should not be interpreted as meaning that the principles in *Moran* v. *Pyle* are applicable to the choice of law determination. In fact, they cannot be, because the principle in *Moran* v. *Pyle* will identify a number of different jurisdictions where plaintiffs have suffered prejudice and should be entitled to exercise judicial jurisdiction against a foreign defendant. This may be appropriate for the proper forum but does not apply to choice of law disputes. In *Stewart*, the court favoured the identification of where the wrong occurred as the place that was clearly ascertainable: *"Otherwise, one might have a number of different jurisdictions in which it could be claimed that the wrong occurred".*

163. Moreover, it is clear from Dickson J.'s ruling in *Moran* v. *Pyle* that a tort will not always be considered to have been committed at the location in which the damages are suffered. In fact, he explicitly rejected the notion that the final link in the chain of events leading up to the cause of action will always be considered the "place" where the tort was committed. As he explained: "*in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules*". In that case, he found that it was acceptable for a plaintiff to take his action in the jurisdiction in which he suffered his physical injury

[203] [1975] 1 S.C.R. 393 [*Moran v. Pyle*].
[204] AF at paras. 99-100.
[205] In footnotes 166 and 177, Appellants' references to the decisions in *Bourque* v. *Proctor and Gamble inc.,* [1982] RP. 52 (C.S.), pp. 54-55 and in *A. Côté et Frères Ltée* v. *Laboratoires Sagi inc.,* [1984] C.S. 255, respectively, do not support their argument; as in the case of *Moran* v. *Pyle*, these are choice of jurisdiction cases with respect to product liability and not disputes as to the choice of law.
[206] 1996 CanLII 3636 (NWT SC) at paras. 27, 38.

and for that law to apply to his action, because: "*it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the* ***law of which is likely to have been in the reasonable contemplation of the parties***". In other circumstances, the location where the damages are suffered may not be similarly appropriate.

164. In paragraph 107 AF, Appellants rely on the decision in *Banque de Montreal* v. *Hydro Aluminium Wells*,[207] a choice of forum dispute rather than a conflict of laws issue. Author C. Emanuelli explains that these are separate and distinguishable issues which must be treated differently:

> *"380. […] Outre le fait que les règles relatives à la compétence internationale des autorités québécoises et celles applicables aux conflits de lois sont contenues dans des dispositions différentes du Livre X du Code civil,* ***les facteurs de rattachement qu'elles utilisent ne sont pas nécessairement les mêmes.*** *Ainsi, il peut y avoir dissociation entre la compétence judiciaire et la compétence législative : il est fréquent qu'une autorité québécoise se déclare compétente pour connaître d'une situation internationale et décide que celle-ci est régie par une loi étrangère*."[208] [emphasis added]

165. In a judgment rendered in 2001,[209] Justice H. Lebel of the Quebec Superior Court considered the issue of the *lex loci delicti,* subsequent to the decision in *Tolofson.* The factual situation in *Goodyear* arose in the mid 1970s and therefore the court applied the provisions of the CCLC. In *Goodyear*, a fault had been committed by a mechanic in Quebec which resulted in an accident in Ontario. The court considered whether the delict occurred at the place of the fault or the place of the prejudice and held that the locus of the delict was where the faulty activity took place:

> *"[80] Or, dans le présent cas, l'accident est effectivement survenu en Ontario mais* ***les gestes fautifs qui engagent la responsabilité de la Goodyear*** *ainsi que celle de K. M. Wholesale,* ***sont survenus au Québec****. Au sens strict, la lex loci delecti, la loi du lieu du délit, est donc le droit du Québec, et*

[207] J.E. 2004-679 (C.A.) [*Hydro Aluminium*].
[208] *Emanuelli*, *supra* note 161 at para. 380.
[209] *Mouzakiotis* c. *Goodyear Tire & Rubber Company of Canada*, 2001 CanLII 19590 (QC CS) at para. 80 [*Goodyear*].

> *ce, même si les fautes commises ont causé un accident en Ontario".* [emphasis added]

166. Appellants incorrectly argue that because the Widdrington Action is a case of pure economic loss, the delict must be considered to have occurred where Widdrington suffered his loss.[210] The locus of the harm in a case of pure economic loss was considered in the case of *National Bank of Canada* v. *Clifford Chance*[211] in the context of a dispute between a defendant, who was alleged to have negligently prepared a professional opinion in England, and the plaintiff banks which resided in Ontario. The court rejected the argument of the plaintiff banks that, in the case of economic loss, the harm is suffered where that loss is recorded on the books of the plaintiff. The court's reasoning is found in paragraph 33 of the judgment:

> *"In my view,* ***the damage resulting from the alleged negligent performance in the preparation of the Clifford Chance opinion was sustained in England in that the direct result of such negligence was that the plaintiff banks were unable to realize upon their security on the shares*** *of OYCWH and indirectly on the project assets of the Canary Wharf project and therefore to have a meaningful participation in the U.K. administration.* ***The recording of the impact of that harm or damage on the books of the various plaintiff banks in Canada does not, in my view, lead to the result that the damage or injury was sustained in Ontario****".* [emphasis added]

167. The pure economic loss which was arguably suffered by Widdrington at his domicile in Ontario may not constitute, to use LaForest J.'s language in his *Tolofson* obiter, consequences "*directly felt*" in Ontario. This is consistent with a line of decisions of the Quebec Court of Appeal[212] that pure economic loss is not

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[210] AF at para. 107.
[211] 1996 CanLII 8219 (ON SC).
[212] The question of prejudice in the form of a pure economic loss was recently considered by the Quebec Court of Appeal in a choice of jurisdiction dispute where extracontractual liability was considered (*Options Consommateurs* v. *Infineon Technologies AG*, 2011 QCCA 2116, leave to appeal to the S.C.C. is pending). The Court stated that where financial loss is only **recorded** in a jurisdiction, such fact alone is **insufficient** to ground territorial jurisdiction because: "*To confer jurisdiction on the sole basis of where the plaintiff records his or her patrimonial damage, irrespective of where the injury took place, would undermine the idea that the substantive locus of injury is a freestanding connecting factor, alongside the others spoken to in article 3148(3). […] This distinction between financial damage that is merely recorded*

sufficient to give the courts jurisdiction. It would thus be surprising if pure economic loss could be sufficient to establish the applicable law. The Supreme Court held in *Unifund*[213] that: "*a 'real and substantial connection' sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome*", and Bastarache J. held in his concurring judgment in *Castillo*[214] that: "*The real and substantial connection necessary for the Courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue*".

168. *Voth* v. *Manildra Flour Mills Pty. Ltd.*[215] was a jurisdiction case. As part of its *forum non conveniens* analysis, the High Court of Australia was asked to consider, *inter alia*, the applicable law in a situation where accountants had committed a fault in the state of Missouri in the United States which caused a pure economic loss to the plaintiff who was domiciled in Australia. In finding that the locus of the tort was where the accountants had committed the fault, the Court stated:

> *"64. (…)* ***The act of providing accountancy services was an act complete in itself, or, if not complete in itself, one that was initiated and completed in the one place. That place was Missouri****. The fundamental significance of that simple fact is not diminished merely because it may be possible, for the purposes of legal classification, to treat that act as equivalent to a statement that was received or acted upon in Australia.*
>
> *65. The act of the appellant giving the respondents their cause of complaint was committed in Missouri and thus the tort, if there was one, was committed in Missouri. Accordingly, even if the matter were to be litigated in this country, the appellant is liable to the respondents only if he is liable under the law of Missouri. See Phillips v. Eyre, at p. 28, where it is said that "the civil liability*

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in Quebec, on the basis of the location of the plaintiff's domicile, and injury that is otherwise suffered in Quebec, is a strong theme running through the cases. In Foster*, for example, it is this feature of* Quebecor Printing *that is emphasized by the Court.* …". The Court also held that the place where the contract was entered into, as a juridical fact, is relevant to localizing the damage even though the respondent was not a party to the contract.

[213] *Supra* note 196 at para. 58.

[214] *Supra* note 197 at para. 44.

[215] [1990] HCA 55 at paras. 64-65.

> *arising out of a wrong derives its birth from the law of the place, and its character is determined by that law*". [emphasis added]

Although this decision pre-dates *Tolofson*, the reasoning is derived from the decision in *Phillips v. Eyre,* which is also relied on by LaForest J. in *Tolofson* with respect to the articulation of the *lex loci delicti* rule.

169. Appellants cite the post-*Tolofson* decision of the Ontario Court of Appeal in *Leonard* v. *Houle*[216] as support for their interpretation of the *lex loci delicti* rule. This case involved a car chase in which the driver of a stolen van (a resident of Ontario) crossed the border from Ontario into Quebec, collided with another vehicle, and seriously injured the driver. Allegations of negligence were made against the Ontario and Quebec police. To determine the *lex loci delicti,* the court reasoned that the wrongful activity took place where the injury occurred, which was in Quebec. However, cases involving car accidents, where the locus of the fault may simply be **fortuitous**,[217] are of a very different nature than cases where a professional commits a fault when conducting his activities in a particular jurisdiction. Moreover, as stated in the *Clifford Chance* and *Voth* cases, when the prejudice is a pure economic loss, the fact that the loss is recorded by the plaintiff in a jurisdiction that is different than where the fault occurred, **does not change the character of where the wrongful act occurred**.

170. Moreover, the statement of the court in paragraph 30 of *Hydro Aluminium*, cited by Appellants, is made in reference to the decision of the Court of Appeal in *Foster* v. *Kaycan*,[218] in which the fact that the plaintiff recorded a financial loss in Montreal was not considered to be a sufficiently strong enough element of attachment to give Quebec jurisdictional competence. As explained above, in a choice of laws dispute, where the plaintiff has suffered a pure economic loss, such loss is even less likely to constitute consequences "*directly felt*" in the plaintiff's domicile.

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[216] 1997 CanLII 1218 (ON CA).
[217] RF at para. 171 and note 219.
[218] J.E. 2002-163 (C.A.) at para. 7.

171. Prior to the reform of the Civil Code in 1994, author J.-G. Castel considered how to apply the *lex loci delicti* rule in situations where the fault occurs in one jurisdiction but the prejudice occurs in a different jurisdiction.[219] Castel explains that flexibility in the application of the rule may be required in order to achieve justice when the place of the fault/accident is merely fortuitous. In such a case (for example, some car accidents), the laws of that jurisdiction may have no substantial connection with the parties or the issues. In the Widdrington Action, this problem does not arise as there is **no** question of a "**fortuitous fault**" and there exists an overwhelming connection between the parties and Quebec.

172. Furthermore, the notion that a delict is committed in the jurisdiction in which the damages were suffered was developed in the context of product liability litigation, in order that a plaintiff would not be subjected to the costly process of suing defendants in other jurisdictions. It is based on the defendant's implicit acceptance of the jurisdiction of the plaintiff, which is inferred from the fact that it has either consciously entered the plaintiff's marketplace, or that it was reasonably foreseeable that its products could cause damage in plaintiff's jurisdiction.[220] The rule is fair to victims who have no connection to the defendant's jurisdiction, as well as to defendants who derive a benefit from their participation in the foreign marketplace and are capable of controlling the legal jurisdictions to which they will be subject by deciding where to operate. This

[219] *Supra* note 194 at p. 200. In the 4th edition of this text published in 2002, Castel reiterated his earlier opinion that where the place of injury is purely fortuitous, the application of the *lex loci delicti* ,as being the place of injury, does not achieve fairness to the parties (at p. 202). In his anaylsis of *Tolofson* and the determination of the place of the tort, Castel writes: "… *the Supreme Court was of the opinion that for choice of law purposes, the place of tort is* ***where the wrongful activity occurred****. It is the law of that place that must determine the character of the wrong and its legal consequences. However, where all of the facts and events that constitute the wrongful activity occur in one state but the consequences of that activity are felt, the Court seemed to be* ***prepared to consider*** *the place of injury, that is, where the harm ensued, as the place of tort*." (at p. 214) [emphasis added] Castel also explains that LaForest J. and the concurring judges contemplated situations where the delict should **not** be considered the place of the prejudice in order to avoid an injustice (at pp. 210 - 212).

[220] *Moran* v. *Pyle*, *supra* note 203 at paras. 408-409; See also *Robson v. DaimlerChrysler Corp*., 2002 BCCA 354 at para. 7; *Harrington v. Dow Corning Corp*., 2000 BCCA 605 at paras. 83-84.

principle has no application in auditors'/accountants' liability cases.[221] Appellants are improperly invoking a principle intended to enable a victim to have recourse to justice as a **shield to escape liability.**

173. It is admitted by Appellants that the policy consideration underlying the rules of private international law in delictual matters is the indemnification of the **victim**.[222] It is ironic that Appellants seek to employ the rules of private international law to defeat this objective. Moreover, the policy consideration articulated in *Hercules* (to protect auditors from unlimited liability) is not intended to protect negligent Quebec auditors/accountants at the expense of victims who happen to be domiciled outside of Quebec.

174. In paragraph 102 AF, Appellants refer to article 3126 CCQ and misinterpret the text when they write: "*when a fault committed in one jurisdiction causes a prejudice in another, the delict is governed by the law of where the prejudice occurs (except when the wrongdoer could not reasonably have foreseen that his act could have an impact elsewhere)*". The actual text of article 3126(1) CCQ provides:

> *"**The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred**. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur*". [emphasis added]

The language of article 3126 CCQ reflects the intent of the legislator to confirm that, as a general rule, the *lex loci delicti*, is where the fault occurred (in French, "*le fait générateur du préjudice est survenu*").

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[221] Summer Bennett Joseph, Comment: *Drowning Professionals in the Stream of Commerce: An Examination of Purposeful Availment in the Professional Liability Context*, (2004) 53 Emory L.J. 277 at p. 298.
[222] AF at para. 101.

175. The principle enunciated in article 3126 CCQ must be understood in the context of each particular case.[223] As described above, in cases involving a fault in manufacturing that harms a party domiciled in another jurisdiction (as in *Moran* v. *Pyle*), the defendant manufacturer had knowingly entered the plaintiff's jurisdiction and conducted its business in that jurisdiction. This is not analogous to a case involving the professional activities of C&L which were conducted in Quebec and where C&L provided its professional opinions in that jurisdiction alone. This distinction was made, albeit in a dispute over the choice of forum, in *Cardinali v. Strait*.[224] In that decision, involving a plaintiff injured in a car accident in one jurisdiction but domiciled in another, the Court held that the place of the prejudice (the plaintiff's domicile) did not establish a sufficient connection even though: "*it was foreseeable that the plaintiff would return home after sustaining an injury.*" Moreover, as noted above, the courts have held that a prejudice in the form of a pure economic loss does not alter the characterization of the delict.

B-5 The Trial Judge correctly applied and interpreted the rules of private international law to achieve "*certainty, ease of application and predictability*" and "*to meet normal expectations*" of people conducting their activities within a particular jurisdiction

176. It is evident that if Appellants' theory and interpretation of the *lex loci delicti* rule were correct, C&L would be held to a myriad of different laws governing negligence dependent on the domicile of the various plaintiffs in the Castor Actions. Clearly, this outcome does not ensure predictability or certainty, principles that Appellants rely on to support their arguments for the *lex societatis* (paragraph 120 AF).

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[223] Talpis & Castel, *supra*, note 168 at para. 23. In their 1993 article reviewing the reforms to the Civil Code, these authors state that in a conflict of laws dispute, a Quebec court, analyzing a situation with alternative connecting factors, may select that which allows the application of the law which fosters obtaining the result desired by the Quebec legislator.
[224] 2010 ONSC 2503 at para. 43.

177. In 1993/1994, when the various Castor Actions were first initiated, there were approximately 70 plaintiffs domiciled in numerous jurisdictions including, by way of example:

- **Switzerland;**
- **Liechtenstein;**
- **Luxembourg;**
- **Germany;**
- **Panama;**
- **Ireland;**
- **Austria;**
- **United States;**
- **Quebec;**
- **Provinces of Canada (common law).**

178. Appellants' interpretation of the *lex loci delicti* rule would lead to an absurd result, being the application of a plethora of different systems of law and the real possibility of different results on the very issues that were designated as common to all these actions. That possibility undermines the benefits to the parties and to the justice system of the "test case" on the common issues.

179. In §3384, the Trial Judge cites *Tolofson*, where LaForest J. described the practical advantages of the *lex loci delicti* rule in the sense of the place of the wrongful act:

> *"I have thus far framed the arguments favouring the lex loci delicti in theoretical terms. But* ***the approach responds to a number of sound***

> ***practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be*** *and expect that concomitant legal benefits and responsibilities will be defined accordingly*." [emphasis added]

180. As summarized in §3385, the Trial Judge made a finding of fact that C&L's wrongful activities occurred in Montreal, Quebec. It was entirely reasonable for the Trial Judge to conclude from the evidence in §3383 that C&L's auditors and accountants who provided services to Castor: "*all practising professionals in the Province of Quebec, adjusted their conduct and estimated what obligations they might incur should they cause prejudice as a result of deviation from the Quebec laws.*" This is what all professionals do.

181. What are the expectations of the reasonable man when he conducts his activities in a particular jurisdiction? Author J.A. Clarence Smith answered the question as follows in his article "Torts and the Conflict of Laws":[225]

> *"The question remains, however, why a man should regulate his conduct by one law rather than by another - a question neither of metaphysical jurisprudence like the creation by law of liabilities, nor of territorial jurisdiction involving a duty to obey, but of human instinct, or, as an English lawyer might prefer to put it, the expectation of a reasonable man. The instinct relevant here is the feeling that when in Rome one should do as Rome does; that such a feeling exists is not primarily a question of law but an undeniable fact."*

182. It is inconceivable that Wightman[226] and his team at C&L could ever have foreseen, when they were providing their professional services to Castor and issuing opinions in Quebec, that they could be subject to the laws of a variety of jurisdictions other than Quebec. In Canada, chartered accountants obtain their

[225] Modern Law Review, Volume 20, issue 5. September, 1957, p. 447 at pp. 459-460.
[226] The engagement partner for the services provided by C&L Montreal to Castor.

professional designations in the Province in which they conduct their practice and are obliged to conduct themselves in conformity with the laws of that Province.[227] In fact, it is telling that two of the Appellants' expert witnesses, both CAs themselves, in assessing the professional conduct of C&L in the present litigation, made reference to the Quebec Code of Ethics for Accountants and not to the codes of ethics of New Brunswick or of Ontario.[228]

183. Under Appellants' theory, CAs who are only licensed to practice in the Province of Quebec and who are obliged to follow the professional standards and rules of ethics in force in Quebec, would have their liability determined by a variety of laws which may have entirely different practices and procedures from those to which a Quebec practitioner is bound. This is hardly consistent with the principle in *Tolofson* which is to defer to the place which better achieves justice, fairness and meets the normal expectations of people exercising their activities in a particular place.

184. The theory advanced by Appellants would lead to an absurd (and patently unfair) result if the plaintiff who suffered a loss resided in a jurisdiction which allowed, for example, punitive damages, exemplary damages or treble damages against auditors. It would thus have the unintended consequence that third party victims of C&L's defective work in Quebec could obtain different results merely as a function of where they happened to be domiciled.

185. C&L's position is also inherently contradictory. They are purporting to argue in connection with the *lex loci delicti* rule that a choice of law rule which would make their liability much less certain should apply to the dispute, while then purporting

[227] CAs are admitted to the profession through their Provincial Institutes/Ordre. These bodies are responsible for establishing and administering the qualification process, admission criteria and performance standards within their jurisdictions. (*Chartered Accountants Act*, R.S.Q., chapter C-48, PW-2311, being *Code of Ethics of Chartered Accountants Regulation*, R.S.Q., c. C-26, s.87).
[228] Selman, May 7, 2009, pp. 107-109 (direct examination) and Levi, February 2, 2010, pp. 57-58 (cross-examination).

to assert (in the context of the Canadian common law) that indeterminacy should negate their liability for their negligent conduct.

186. The Trial Judge identified the policy considerations for the *lex loci delicti* rule which, as articulated in *Tolofson,* include practical considerations, and correctly determined that the facts in the Widdrington Action militated in favour of finding that the wrongful activity occurred in Quebec and therefore the wrong is to be governed by the laws of Quebec.

187. C&L argues the contrary today, not out of any sense of principle or to give effect to any reasonable expectations of their partners and employees at the relevant time, but solely to attempt to benefit from the decision in *Hercules*.

B-6 The Trial Judge correctly applied the civil law principles governing the liability of professionals vis-à-vis third parties

188. Having determined that Quebec law applies, the Trial Judge stated that pursuant to article 1053 CCLC, a plaintiff need prove a fault, damages and a causal connection between the fault and the damages to succeed and that the professional liability of C&L with respect to third parties is determined by comparison with the conduct of a similar professional, acting reasonably.[229]

189. The principles relevant to the assessment of the civil liability of accountants in Quebec were reviewed by Mr. Justice Pierre Tessier in *Malo* c. *Michaud*.[230] Even if the professional's conduct conformed to the rules and practices of his profession, he may nevertheless not escape liability if a court finds that the conduct was not reasonable.[231]

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[229] §§261-264. *Roberge* c. *Bolduc* [1991] 1 R.C.S. 374, 1991 CanLII 83 (S.C.C.) at p. 28 [*Roberge*]; *Caisse Populaire de Charlesbourg* v. *Michaud*, 1990 R.R.A. 531 (C.A).
[230] *Supra* note 190.
[231] §265. *Roberge*, *supra* note 229 at p. 79; *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 1995 CanLII 72 (CSC) at para. 43 [*Ter Neuzen*]; *Kripps* v. *Touche Ross & Co*., [1997] B.C.J. No. 968 (B.C.C.A.) at paras. 69-73, leave to appeal to the Supreme Court of Canada denied (1997) S.C.C.A. No. 380 [*Kripps*].

190. Appellants incorrectly state the Trial Judge's conclusion in question A3 (p. 32 AF) when they write: "*the trial judge erred in law when she concluded that under Quebec civil law, an auditor issuing an opinion is liable 'to the whole world'*." Needless to say, the cited phrase was never employed by the Trial Judge and does not reflect her conclusions. The civil law of Quebec limits the extent of liability by the requirement of proof of a direct and immediate causal link between the fault and the damages.[232] Although the analysis used in the common law Provinces differs from that used in Quebec, there is no support for Appellants' assertion in question A3 AF, nor has the traditional civil law analysis opened the door to a floodgate of litigation against accountants and auditors in Quebec.[233]

191. The Trial Judge articulated the civil law of Quebec as it relates to the extra-contractual liability of auditors and accountants and, at §§3396 to 3404, rejected Appellants' argument that *Hercules* has been imported into Quebec law on the basis of the comments made by the Court of Appeal in the *Savard* decision.[234]

192. The Trial Judge reviewed the *Savard* decision in §§3398 to 3401. In *Savard*, the appellants were seeking to hold, *inter alia*, two lawyers, who did not represent them, responsible for their loss occasioned by a transaction in which they were all involved. The Court of Appeal agreed with the lower court that, while in principle, lawyers can be held liable to third parties for professional faults, this was not a situation where their extra-contractual liability was engaged. The Court of Appeal considered the issue of auditor's liability and made specific

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[232] Baudouin and Deslauriers "La responsabilité civile", 7e éd., vol. II, Cowansville, Édition Yvon Blais at 2-190; *Roberge*, *supra* note 229 at p. 85.

[233] It is particularly disingenuous that Appellants refer (in AF, footnote 215) to the Castor litigation as the type of "*burgeoning indeterminate litigation*" that has plagued the Quebec judicial system for the last 18 years. As has been expressly recognized in judgment after judgment rendered by the judges of the Superior Court and the Court of Appeal, Appellants have improperly exploited the justice system to try to evade a conclusion on liability and have waged a war of attrition which, to date, has denied justice to the various plaintiffs who suffered damages as a result of the gross negligence of C&L. See references in paragraphs 4, 10, 11 of the Introduction section of RF to the criticisms leveled against Appellants' for their litigation tactics.

[234] *Savard c. 2329-1297 Québec inc. (Hôtel Lord Berri inc.),* 2005 QCCA 705 [*Savard*].

references to the common law decisions in *Hercules* and *Haig*[235] to illustrate the principle that auditors can be held liable to third party users.[236] As correctly noted by the Trial Judge, the same principle applies in civil law.

193. The Court of Appeal in *Savard* (at paragraph 97), cited the *Ultramares Corp.* decision only to reinforce the point that there are limitations on the extra-contractual liability of professionals. A professional, whether an accountant or a lawyer: "*n'est pas responsable de la perte économique subie par tous ceux qui gravitent autour de lui à quelque titre ou quelque occasion que ce soit*". As discussed more fully below, many factors affect the determination as to whether it is appropriate to hold the professional extra-contractually liable.[237]

194. The *Savard* decision does not introduce any new element into the assessment of professional responsibility in Quebec. Rather, the decision is often cited as authority for the proposition that a lawyer can be held to be extra-contractually liable to a third party based on the negligent execution of his mandate, and accordingly, it is used to contest motions to dismiss brought by lawyers claiming that the third-party's case discloses no cause of action.[238]

195. It is noteworthy that Justice Louis Rochette, who was on the bench in *Savard,* wrote the decision in *Girard* one week after the *Savard* decision was rendered, in which he affirmed that in a case of extra-contractual liability of accountants: *"[…] les appelants avaient en conséquence le fardeau de prouver, selon la prépondérance des probabilités, une faute de Girard et un lien causal entre cette faute et le dommage subi"*.[239]

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[235] *Haig v. Bamford*, [1977] 1 S.C.R. 466 [*Haig*].
[236] *Savard, supra* note 234 at para. 95.
[237] *Ibid*. at para. 99.
[238] *Plastiques Balcan ltée* c. *Usital Canada inc.*, 2006 QCCS 5899; *Desjardins Capital de développement Estrie inc. c. Labbé*, 2010 QCCS 234.
[239] *Allaire* c. *Girard & Associés (Girard et Cie comptables agréés)*, 2005 QCCA 713 at para. 32.

196. Appellants refer to the Trial Judge's citation of the decision of the Court of Appeal in *Agri-capital Drummond inc.* v. *Mallette*[240] (paragraph 174 AF) but fail to mention that Baudouin J.'s criticism (of the use of the obiter in the **2005** decision in *Savard* to support the applicability of the common law to auditors' liability in Quebec) was cited with approval in the **2009** Mallette decision.

197. As specifically noted by the Trial Judge, Baudouin opined in the most recent edition of "La responsabilité civile" that the comments made, in obiter, in *Savard* do not change the longstanding principle that common law concepts are not applicable in Quebec. The Trial Judge referred to the 2009 decision of the Court of Appeal in *Mallette* and reproduced a lengthy extract from the reasons of Justice Dalphond which are founded on Baudouin's analysis of *Savard*.[241]

198. Furthermore, *Savard* itself clearly reiterated (at paragraph 95) the established principle of the auditors' liability to third party users of financial statements.

199. In paragraph 185 AF, Appellants misinterpret the text by Baudouin and Deslauriers when they state: "*an accountant's delictual liability towards third parties will depend on whether the document he prepared was used by its intended recipient and for its intended purpose*." The text cited by Appellants[242] merely states that if the document contains an express restriction on use (e.g. it was prepared for the sole purpose of enabling the corporation to obtain financing), a third party cannot use the document as the basis of his recourse with respect to a different use. Professionals know how to include qualifications and restrictions on the use of the opinions that they prepare. Appellants chose not to do so. As set out in the Principal Judgment, C&L did not include any

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[240] *Agri-capital Drummond inc.* c. *Mallette, s.e.n.c.r.l.*, 2009 QCCA 1589 at para. 30. The Supreme Court rejected leave to appeal this decision: *Mallette, s.e.n.c.r.l., Gratien Nolet et al.* c. *Agri-Capital Drummond* Inc., 2010 CanLII 6341 (CSC.) [*Mallette*].

[241] §3404.

[242] *"lorsque dans Ie document une remarque énonce, sans ambiguïté, Ie but pour lequel il a été confectionné, un tiers pourra plus difficilement l'utiliser pour argumenter qu'il pouvait être destiné à une autre fin. Ainsi, si Ie document mentionné explique que Ie rapport est rédigé dans Ie seul but qu'une compagnie puisse obtenir un financement, un tiers qui aurait acquis des actions sur fa foi de ce document ne pourrait utiliser ce rapport pour justifier son recours."*

restrictions on use, or similar qualifications, in their written professional opinions.[243]

200. Based on the factual evidence, the Trial Judge determined that C&L knew and accepted that their professional opinions and certificates were used by Castor for the purpose of fundraising from lenders and investors in Castor's investment club. In these circumstances, Widdrington's reliance on these documents was reasonable or, using the language of Baudouin, Widdrington: "*[peut] utiliser ce rapport pour justifier son recours*."

201. In paragraph 193 AF, Appellants are asking this Court to overturn the Trial Judge's articulation of the Quebec civil law regarding the responsibilities of professionals towards third parties on the basis that: "*within the framework of the Canadian federation*", it is inconvenient to their national firm that auditors' liability is analyzed differently in common law and civil law. However, Canada is a bijural country. The *British North America Act*[244] divided legislative powers between the federal and provincial governments. Subsection 92(13) allowed for national legal duality by providing that property and civil rights would be under provincial jurisdiction. Quebec was thus able to preserve its civil law and the other provinces their common law.

202. The Supreme Court of Canada has confirmed on a number of occasions that the Quebec civil law is a complete system in itself and that care must be taken not to adopt principles from other legal systems.[245] As stated in *Perron-Malenfant v. Malenfant (Trustee of)*:[246]

> *"This Court cannot undo the Quebec legislature's express choices and adopt the policy of the common law provinces, only because it is convenient to do*

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[243] §§2192, 3064.
[244] U.K. 1867, 30-31 Victoria, c. 3 (since 1982, *Canada Act 1982* (U.K.), 1982, c. 11).
[245] *Laurentide Motels Ltd*. v. *Beauport (City)*, [1989] 1 S.C.R. 705; *Farber* v. *Royal Trust Co.*, [1997] S.C.R. 846.
[246] [1999] 3 S.C.R. 375 at para. 56.

so in a particular case. This is something to be left for the consideration of the legislature itself."

B-7 <u>The Trial Judge correctly applied the principles set out in the *Hercules* decision</u>

203. In the unique circumstances of the present litigation, the Trial Judge elected to provide what her findings would have been had she determined that the applicable law was the common law (§§3433, 3485). Although this issue may be purely academic if this Court determines that Quebec law applies, Respondent will respond to Appellants' arguments which incorrectly describe and interpret the factual and legal considerations of the Trial Judge's decision.

204. The Trial Judge provided an overview of the expert testimony on the Canadian common law relevant to auditors'/accountants' liability in §§3437 to 3483. The Trial Judge's analysis of the relevant principles is set out in more than 50 paragraphs (beginning at §3484), and is supported by more than 50 footnotes referencing case law, expert evidence and factual evidence.

205. *Hercules* remains a leading authority in Canadian common law with respect to the policy issue of indeterminacy in the context of auditors' liability. However, the decision does not modify the earlier decision in *Haig*, written by Dickson J., in which the Supreme Court held the auditors liable for their negligence even though the identity of the investors was not specifically known at the time the auditors' report was prepared.[247]

206. The Trial Judge considered the five elements that a plaintiff must establish in an auditors'/accountants' liability case, primarily relying on the evidence of Appellants' expert on the common law of Canada, John Campion ("**Campion**") (§§3456 to 3472). The Trial Judge specifically noted that the experts for

[247] Admitted by Appellants in AF at para. 162.

Appellants (Campion) and Respondent (Earl Cherniak, "**Cherniak**") agreed on this point of law.[248]

207. Appellants assert that the Trial Judge erroneously applied the principles with respect to the first of these five elements and therefore erred when she concluded that C&L owed a duty of care to Widdrington. In cases alleging the negligence of auditors/accountants, the Canadian common law requires a plaintiff to establish that there is a duty of care based on a "*special relationship*" between the plaintiff and the defendant. As stated by the Trial Judge (in §3486), the existence of such a duty of care in tort is to be determined through the application of the two-part test first articulated in *Anns* v. *Merton London Borough Council*.[249]

1. The first part of the *Anns* test: proximity

208. The Trial Judge considered the first part of the *Anns* test in §§3488 to 3502, asking: "*whether C&L and Widdrington can be said to be in a relationship of proximity or neighborhood*". The Trial Judge in §§3494 to 3502 provided a summary of her findings relevant to the first branch of the *Anns* test. The factual support for each of these findings was explained in much greater detail elsewhere in the Principal Judgment.[250]

209. The knowledge of the auditors/accountants of a class of plaintiffs who would rely on their opinions is sufficient to establish proximity. In 2003, the Ontario Divisional Court, in the context of a certification of a class action, recognized that a duty of care may lie between an auditor and a party who is not in a contractual or near contractual relationship with it. In that case, the plaintiffs pleaded that the

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[248] §3473.
[249] *Anns* v. *Merton London Borough Council*, [1978] A.C. 728 (H.L.), adopted by the Supreme Court of Canada in *Kamloops (City)* v. *Neilson*, [1984] 2 S.C.R. 2 [*Anns*]. See footnote 3719 of the Principal Judgment.
[250] By way of illustration, in §3495, the Trial Judge states: "*In this case, and as explained under the heading "Independence" of the present judgment, Wightman was a promoter of Castor's affairs*."

auditor knew of a class of lenders who would rely on the financial statements and who did in fact rely on the information.[251]

210. Appellants admit that Castor's private fundraising was normally carried out within a relatively small circle of business acquaintances who knew each other very well and that: "*it was reasonably foreseeable that Castor might use the financial statements for fund-raising*".[252] This admission echoes the comments of LaForest J. in *Hercules* (reproduced in part by the Trial Judge in §3492): "*In modern commercial society, the fact that audit reports will be relied on by many different people (e.g., shareholders, creditors, potential takeover bidders, investors, etc.) for a wide variety of purposes will almost always be reasonably foreseeable to auditors themselves. Similarly, the very nature of audited financial statements -- produced, as they are, by professionals whose reputations (and, thereby, whose livelihoods) are at stake -- will very often mean that any of those people would act wholly reasonably in placing their reliance on such statements in conducting their affairs. ..."*

211. In *Hercules*, while ultimate liability was negated for policy considerations under the second part of the *Anns* test, the auditor was found to have owed a *prima facie* duty of care to the plaintiff shareholders, who had an indirect relationship with the auditors. In his 2007 text "Accountants' Liability in Canada",[253] author R. Foerster discusses the duties owed by accountants to third parties where there is no privity of contract. Foerster describes the ease with which third parties, such as investors, should be able to meet the first part of the *Anns* test.

2. The second part of the *Anns* test: policy considerations (indeterminacy)

212. After determining that the first part of the *Anns* test was met, the Trial Judge considered the second part of the *Anns* test in §§3503 to 3531, asking: "*whether,*

[251] *Canadian Imperial Bank of Commerce* v. *Deloitte & Touche*, [2003] O.J. No. 2069.
[252] Para. 951 of C&L's Reply dated July 31, 1998.
[253] Scarborough, Ont.: Thomson Carswell, 2007, pp. 4-7 cited by Cherniak in PW-3099A at pp. 7-8.

in the particular circumstances of this case, there are considerations which ought to negate or limit the scope of C&L's duty of care and the class of persons to whom it is owed or the damages to which a breach of such duty may give rise."

213. The Trial Judge clearly understood that the policy consideration articulated in *Hercules* is that, absent proof of factual circumstances that demonstrate that indeterminacy is not a concern, auditors should not be subject to: "*liability to an indeterminate class, for an indeterminate amount, and for an indeterminate time*."[254] As stated in §3512, the following 2 conditions must be met to satisfy the concern as to indeterminacy:[255]

(a) Knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant; and

(b) Use of the statements at issue for the precise purpose or transaction for which they were prepared.

214. The Trial Judge reproduced an extract of the *Hercules* decision in §3506 in which LaForest J. writes that: "***the specific factual matrix of a given case*** *may render it an "exception" to the general class of cases*" such that "*the typical concerns surrounding indeterminate liability do not arise*." [emphasis by the Trial Judge]. The paramount importance of the factual investigation by the Court is evident throughout the *Hercules* decision.[256]

215. The importance of the facts to the assessment as to whether there is a concern surrounding indeterminacy was stated by Cherniak, Respondent's expert on the Canadian common law, as follows: "*there is no substitute for a close examination*

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[254] §3475.
[255] *Hercules*, *supra* note 153 at para. 37.
[256] For example, in para. 41: "*Where, however,* ***indeterminate liability can be shown not to be a concern on the facts of a particular case****, a duty of care will be found to exist*" and, in para.44: "*It should be equally clear, however, that in certain cases,* ***this problem does not arise because the scope of potential liability can adequately be circumscribed on the facts****. An investigation of whether or not indeterminate liability is truly a concern in the present case is, therefore, required*." [emphasis added]

of the facts to determine auditor's liability in general and whether indeterminacy considerations do arise and whether they're negatived."[257] Appellants do not dispute that this evaluation is a finding of fact.

216. The Trial Judge clearly understood that if the common law applied, she would be required to investigate whether a concern over indeterminate liability truly arises or whether the specific factual matrix of the litigation removed the case from the general class of auditors' liability cases, such that no such concern arises. The Trial Judge made this investigation and concluded that, based on the specific facts of the present litigation, the typical policy concerns surrounding indeterminate liability do not arise (§3515).

a) The investigation as to whether a concern over indeterminacy arises: knowledge of an identifiable class

217. The Trial Judge made no palpable or overriding error in finding that C&L had knowledge of the plaintiff (or an identifiable class of plaintiffs). In §§3517 to 3519, the Trial Judge provided her detailed explanation, supported by footnotes containing more than a dozen references to documentary and testimonial evidence, as to why she concluded that C&L was well aware that a distinct, identifiable group was relying on their professional opinions.

218. In addition to the evidence and explanation provided by the Trial Judge in those paragraphs, evidence to support her conclusion with respect to C&L's knowledge is woven throughout the Principal Judgment, for example within the sections addressing "Independence", "Share Valuation Letters" and "Legal-for-Life" certificates.[258] As well, additional relevant references are included with the Trial Judge's references to evidence regarding the second condition required to satisfy the *Hercules* exception (§3510) (the purpose of the statements at issue) as these conditions are often inextricably linked.

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[257] Cherniak, February 24, 2010, pp. 67-69, cited by the Trial Judge in §3513.
[258] Independence, §§2193 to 2307; Valuation Letters, §§2957 to 3074; Legal For Life, §§3075 to 3105;

219. Castor was a private entity and kept close control over who was invited to invest or lend money to the corporation. There was never any general invitation or solicitation to the public. The C&L engagement partner, Wightman, testified that Castor raised funds through an "*investment club*"[259] composed of closely connected lenders and shareholders.

220. It is evident that Wightman was not referring to a formal investment club *per se* but, rather, was describing Castor's fundamental business model which was to raise funds on an annual basis from a select and restricted group of investors and lenders. In fact, the term "*investment club*" appears in the working papers of C&L, for example, in connection with the annual solicitation of capital from investors and potential investors.[260]

221. In the present case, the scope of C&L's liability can be readily circumscribed. In describing the "*investment club*", Wightman emphasized that membership was restricted to a close-knit group; in fact, he attempted to justify the fact that the audited financial statements included a Statement of Changes that did not conform to the format mandated by the Handbook, on the basis that the users of Castor's financial statements were well known and that, if they wanted a different format, they could simply ask.[261]

222. The documentary evidence is clear that the scope of each class was limited and was identifiable. The number of Castor's directors was never more than 10,[262] the number of shareholders was never more than 34[263] (and could not exceed

[259] Wightman, October 11, 1995, pp. 69-70.
[260] PW-1053-50B-2, seq. pp. 267, 585.
[261] §3519.
[262] As evident from Castor's Minute Books, see by example, an extract from PW-2400-11 bates #15955-15957, identifying the directors as at February 25, 1991, s*upra* note 47.
[263] *Supra* note 46.

50) [264] and the number of lenders never exceeded 100, the majority of whom had a long relationship with Castor and renewed their loans year after year.

223. C&L knew that the shareholders were represented by Castor's directors.[265] C&L reviewed the minutes of the meetings of directors and shareholders and recorded the number and identity of Castor's directors[266], shareholders[267] as well as Castor's lenders[268] in their AWPs. These parties constitute an identifiable class.

224. The AWPs for 1989 contained, by way of example, a list entitled: "*Capital Increase / New Participations as at Dec. 31, 1989 incl. Debentures*". The information provided to C&L included the identity of existing and new investors, including Respondent, and the purchase price for the common shares is $550, which was the price anticipated in the Minutes of the Board of Directors reviewed by C&L[269] and the value determined by C&L in the valuation letter dated October 17, 1989, relied on by Respondent.[270] The working papers related to the October 17, 1989 valuation letter document the fact that Castor was anticipating that new shareholders would be investing at a value of $550 and that the said opinion on value was provided to Castor on a "*rush*" basis by Bernard Lauzon (of C&L's valuations department).[271]

225. As a matter of fact, variation in the membership of the Castor "*investment club*" was exceptional. Lenders renewed their loans year after year (or made additional loans) and Castor's annual capital campaigns were directed to the shareholders and directors.[272] Therefore, there is no application in the present case to

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[264] PW-2, p. 5. PW-2400-8, s.3(b) on bates #15930. NOTE: In *Haig*, *supra* note 235, The Court considered that because they were dealing with a private company with a limited number of shareholders, there was no issue of that class being unlimited or indeterminant.
[265] §556; Wightman, October 11, 1995, p. 69.
[266] *Supra* note 47.
[267] *Supra* note 46.
[268] *Supra* note 119. During the relevant years, there were less than 100 lenders to Castor.
[269] PW-1053-50A, seq. pp. 314-320 reviewing PW-2400-106, bates #17885-17892.
[270] PW-1053-50A, seq. pp. 314-320.
[271] PW-1053-50A, seq. pp. 367-368, 351.
[272] *Supra* notes 46, 47, 118, showing that the specific lenders, directors and shareholders did not significantly vary during the relevant years.

Appellants' statement in paragraphs 157 and 158 AF, that the limited class cannot be "*any individual or entity approached by Castor to obtain financing",* as the evidence is clear that Castor exercised strict control over membership to this investment club.[273] This is clearly not a case which would *"effectively create an insurance scheme*" for an unidentifiable class (see paragraph 151 AF citing *Caparo*).

226. The Supreme Court of Canada in *Haig* v. *Bamford*[274] established that the specific identity of a potential member of the class is not a prerequisite for the finding of a duty of care, as has been affirmed by a number of courts.[275] The factual context for the decision in *Haig* was that a private company, experiencing a shortage of capital, requested that audited financial statements be prepared so that it could raise money in the form of loans and investment. The auditors knew that the statements would be given to the lender and would be used to raise money from investor(s) but were not informed of the specific names of any potential investor. The majority of the Court of Appeal opined that there was no duty of care because: "*there was no specific person or group in mind as a prospective investor or investors; Haig was not known to the accountants and they were not aware that he had been shown a copy of the statement or that he had been approached to invest in the company.*"[276] The Supreme Court disagreed and held that there was a duty of care owed to a potential investor. Like in Castor, the auditors were preparing financial statements for distribution to, *inter alia*, potential investors, and the auditors either furnished the company with copies for that purpose or knew that numerous copies were being printed for that purpose.

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[273] Simon, April 28, 2009, pp. 130-134. This testimony describes a negotiation between Castor and the CIBC about a possible credit facility and the fact that it was Castor that finally decided not to do business with the CIBC and not pick up on their credit offer; the Minutes (PW-2400 series) also document the infrequent changes with respect to directors and shareholders.
[274] *Haig supra* note 235.
[275] See, for example, *J.L.P.* v. *C.R.P.*, 2008 CanLII 1835 (ON SC) at para. 72. The issue was considered in the context of a successful motion to amend the plaintiff's claim. In considering *Hercules* the Court stated that "*the test for indeterminate liability is not whether a defendant can control the number of defendants or the amount of their claims, but whether the scope of liability can be readily circumscribed.*"
[276] *Haig supra* note 235 at pp. 475-476.

227. In ruling in favour of the investor/appellant in *Haig*, the Supreme Court concluded that the auditors were aware that the company intended to supply the statements to a limited class of which the appellant was a member. The court considered the *Ultramares* decision but held that there was no concern of indeterminate liability even though the auditors were unaware of the specific identity of the members of the class:

> ***"The names of the potential investors were not material to the accountants. What was important was the nature of the transaction or transactions for which the statements were intended, for that is what delineated the limits of potential liability."***[277] [emphasis added]

228. In *Hercules*, the Supreme Court called the decision in *Haig* eminently sound and referred to the fact that the auditor had been informed of the class of persons who would rely on the report. *Hercules* does not introduce the obligation for a plaintiff to demonstrate that the auditors know the precise identity of potential members of the class. Appellants are patently incorrect when they assert, in paragraph 153 AF, that: "*we are thus in the situation of* Ultramares*, not in the situation of* Glanzer *or* Haig."

229. The factual similarities between *Haig* and Castor are important:

- Both companies were private entities;
- Both companies required audited financial statements for fundraising purposes and this was the primary purpose of obtaining audited statements;
- In both cases the auditors knew of the corporation's need to raise capital in the form of loans and investment; and
- In both cases the auditors may not have known the names of each potential member of the class but the class size was limited and the

[277] *Ibid*. at pp. 478-479.

auditors were aware of the nature of the transaction or transactions for which the statements were intended, and knew that there was a pre-determined cap on the amount of money to be raised each year (see footnote 295).

In these circumstances, holding negligent auditors liable does not mean, to use the words of Dickson J. (in *Haig*): "*that the doors must be thrown open*" to the world at large.

230. With respect to the identity of Respondent specifically, the minutes of the Board of Directors of Castor, reviewed by C&L, reported that Widdrington was to be approached to become a new shareholder and director of Castor.[278] This was an exceptional event (as evidenced by the minutes of the Board of Directors[279]) and is not reflective of a company opening its doors to the world.

231. The Trial Judge correctly stated that size alone of a class or potential class of plaintiffs is not sufficient to render it indeterminate, a statement that experts for both parties concurred with (§3505).

232. Appellants criticize the Trial Judge for failing to mention the Supreme Court of Canada's decision in *Design Services Ltd.* v. *Canada*[280] and cite their expert's testimony with respect to this decision's discussion of the notion of a "*limited class of plaintiffs.*" However, in the extract of testimony relied on by Appellants, Campion specifically opined that the decision: "*does not supplant the Hercules case in the context of an audited financial opinion.*"[281]

233. The issue in *Design Services* was whether a new duty of care should be recognized between an owner and subcontractors because, in contrast to cases involving accountants/auditors, it did not fall within the five different categories of

[278] PW-2400-106 at bates #017890; C&L reviewed these minutes as recorded in the AWPs PW-1053-20, seq. pp. 178-180.
[279] PW-2400 (series).
[280] 2008 SCC 22, [2009] 1SCR 737, in AF at paras. 160 and 161.
[281] Campion, August 31, 2009, pp. 170-175, referred to in AF at para. 160, footnote 231.

negligence claims for which a duty of care has been found for pure economic loss. The *Design Services* decision offers no new insight into the notion of a "*limited class of plaintiffs*", apart from providing a striking contrast between a true situation of indeterminacy and the situation at issue that was evaluated by the Trial Judge and correctly found to be limited.

b) The investigation as to whether a concern over indeterminacy arises: use of the opinions for a purpose for which they were prepared

234. The Trial Judge found that C&L had knowledge of the precise purposes that their opinions were used for. The facts to support this finding are provided in a **non-limitative** list in §3510, supported by footnoted references to more than 20 different extracts of testimony and exhibits (as well as in §3363 and elsewhere in the Principal Judgment). **Paragraphs 70 to 90 of RF** also summarize some of the evidence establishing C&L's knowledge and acceptance of the specific purposes for which their professional opinions would be used.

235. The experts on the Canadian common law agreed that audited financial statements may be used for other purposes **in addition to** a statutory audit purpose (as noted by the Trial Judge in §3471). The fact that the NBBCA does not impose the obligation upon private corporations to obtain audited financial statements, is only one element among many that led to the Trial Judge's conclusion that Castor's audited financial statements were not solely prepared to comply with the incorporating statute.

236. In paragraph 165(c) AF, Appellants attack the factual conclusion of the Trial Judge that the audited financial statements were prepared for multiple purposes and not solely in the context of a statutory audit. Appellants cite the BC Court of Appeal's decision in *Rangen Inc.*[282] as support for the assertion that incidental use of the financial statements does not alter the specific purpose for which the

[282] *Rangen Inc.* v. *Deloitte & Touche*, (1994) CanLII 1555 (B.C.C.A.).

report is prepared. However, C&L knew that the **primary purpose** of their opinions and certificates was to raise funds from Castor's lenders and investors.

237. In *Rangen,*[283] the corporation was a public company incorporated under the *B.C. Companies Act*[284] and an annual audit was required by statute. In contrast, Castor was a private entity and, since the incorporating legislation did not impose the requirement of an audit on private companies, it cannot be assumed that the primary purpose of Castor obtaining audited statements was to comply with the requirements of the NBBCA. The Court in *Rangen* noted that the auditors did not distribute the statements to anyone other than the directors of the company. This is different from the facts in the present litigation where, *inter alia*, the auditor was aware of the wide distribution of the audited statements to investors and lenders[285] and actively participated in the printing of numerous copies of the statements,[286] and in the distribution of the statements to current and potential shareholders and depositors in order to solicit investments.[287]

238. Financial statements may be prepared for the purpose of fundraising and the auditors'/accountants' knowledge of such purpose can be properly pleaded to establish a duty of care. In *CC&L Dedicated Enterprise Fund (Trustee of)* v. *Fisherman*,[288] in the context of an unsuccessful Motion to strike a Statement of Claim, the Court distinguished the audits from those in *Hercules*, and held that the financial statements were prepared, to the knowledge of the auditors, to enable the corporation to raise funds from the investing public.

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[283] *Ibid* at paras. 5, 36.
[284] R.S.B.C. 1979, c. 59. S.202(1) reads: "*Subject to section 203, every company shall have an auditor.*"
[285] §3521; PW-1053-16, seq. p. 265; D-758, PW-2372-1, and PW-2695 in which C&L writes: "***The [audit] report refers to two years, the current and preceding year, rather than one year. Although this practice is to be used mainly by public companies, Castor's statements are widely distributed*** *and should, therefore, include this change."*
[286] §3363; *Supra* note 108.
[287] §§3510, 3524.
[288] (2001) 18 B.L.R. (3d) 260 (Ont. S.C.J.) at paras 54-55.

239. In *Mackenzie Financial Corp.* v. *McRae,*[289] the defendant auditors were unsuccessful in arguing that they did not owe a duty of care to the plaintiff who had purchased a business for which the auditor had prepared financial statements although the financial statements were prepared for the corporation and its shareholders. The Court held that a duty of care arose since the auditors understood the purpose for which the plaintiff required the financial statements and did not attempt to limit the scope of their duty of care.

240. The determination as to whether the audited financial statements of Castor were used to solicit funds and whether C&L had knowledge of this fundraising purpose are pure **questions of fact**. As set out in the Principal Judgment, the evidence is overwhelming that the primary use of the audited financial statements (and the share valuation letters and legal-for-life certificates) was: "*in order to obtain and maintain the financing required to meet its current obligations and to enable its business to expand.*"[290] The Trial Judge provided detailed support for her findings[291] and there is no manifest or palpable error demonstrated by Appellants in that regard.

241. The viability of Castor from year to year was predicated on its ability to raise funds either by loans (mostly renewals and extensions) or investments from a limited group of third parties.[292] Castor could not have succeeded in this endeavor without C&L's unqualified opinions and certificates.

242. Castor's corporate structure was thus devised in a fashion to facilitate the raising of money from lenders and investors, including through the use of off-shore investment vehicles in, *inter alia*, Curaço, Cyprus and Ireland.

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[289] (1998) 81 O.T.C. 321 (Gen. Div.) at paras. 60-61.
[290] §3510.
[291] See, for example, §§3496, 3497 and 3510.
[292] Smith, May 14, 2008, pp. 139-140, 175; September 3, 2008, pp. 50-51; September 15, 2008, pp. 138-139.

243. The issue of alleged indeterminacy has to be considered in light of the role that Wightman played as an "*important promoter of Castor*"[293] and in view of the fact that:

> *"Wightman was the **architect** of Castor's corporate structure since its inception in 1978 until its demise in 1992*."[294] [emphasis added]

244. Extracts of the minutes of the meetings of directors included in the AWPs indicate that, on an annual basis, there was a limited authorization of the money that Castor was permitted to borrow in any given year[295] such that the amount of the potential liability of C&L could not be construed as indeterminate.

245. Castor's annual fundraising to a limited class for a defined amount was, to C&L's knowledge, the raison d'être of having audited financial statements, valuation letters and legal-for-life certificates.

246. Concerns over indeterminacy do not arise in the present case. There is no evidence that investing in Castor was open to anyone and everyone. C&L knew that Castor was an investment club composed of a limited and closely connected group of investors and lenders. C&L knew the identity of the members of the investment club or their representative. C&L knew that Castor's lenders and investors were making their credit and investing decisions based on C&L's unqualified opinions. C&L knew the cap on borrowing that Castor set on an annual basis and that Castor's continued viability was dependent upon the success of its annual fundraising activities. There is no doubt that the primary purpose for obtaining opinions from C&L was to support Castor's annual

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[293] §2210.
[294] §2209.
[295] PW-2400-77, bates #017214: March 26, 1985: Eligibility for investment: $325M; PW-2400-83, bates #017381: March 14, 1986: Eligibility for investment: $450M; PW-2400-89, bates #017515: March 17, 1987: Eligibility for investment: $648,450,000 (Reviewed in PW-1053-29, seq. pp. 130-136); PW-2400-98, bates #017712: March 22, 1988: Eligibility for investment: $833,301,000 (PW-1053-24-5); PW-2400-102, bates #017816: March 17, 1989: Eligibility for investment $1,112,226,000 (Reviewed in PW-1053-20, seq. pp. 168-183); PW-2400-111, bates #017941: March 21, 1990: Eligibility for investment: $1,446,381,000 (Reviewed in PW-1053-16, seq. pp. 177-187); PW-2400-120, bates #018050: March 21, 1991: Eligibility for investment: $2,003,348,000.

fundraising requirements. There is no palpable and overriding error in the Trial Judge's assessment of the factual evidence or, indeed, any error whatsoever.

247. Moreover, in a situation where the professional is not independent or objective, and has egregiously breached the accepted standards of professional conduct, it would be abhorrent to immunize him from liability as was recognized by the Trial Judge when she stated in §3531:

> *"On the facts of this case, the Court finds that deterrence of negligent conduct is an important policy consideration with respect to auditors' liability that needs to be taken into consideration."*

C. THE ISSUE OF CAUSATION (RELIANCE AND DUE DILIGENCE) OR THE SO-CALLED "SOPHISTICATED INVESTOR" ISSUE

C-1 Decision of the Trial Judge: Findings of Fact

248. Based on her exhaustive review of the evidence, the Trial Judge held that Widdrington was fundamentally misled by the unqualified opinions of C&L in the auditors' reports and valuation letters (§3330). The Trial Judge concluded that the damages suffered by Widdrington were the direct result of C&L's negligence.[296] Had C&L complied with the applicable standards, Castor would not have been able to present audited financial statements (and valuation letters and legal-for-life certificates) disclosing results even close to those appearing in the subject documents.[297] Had C&L qualified their opinions, disclosed the extent of capitalization of interest improperly recognized as revenue, and revealed the true financial situation of Castor, Widdrington would not have invested and would not have suffered the loss.[298]

249. The Trial Judge further concluded that it was reasonable for Widdrington to have accepted and relied on the unqualified opinions of C&L, one of the world's largest and most prestigious accounting firms, for the purposes of his investments

[296] §§37, 3421, 3572.
[297] §§3335, 3415, 3572.
[298] *Ibid*.

(§§3332, 3340) and that he discharged his duty of care as a director, given all of the relevant circumstances (§3344).

250. Appellants contend that the Trial Judge committed an "***overriding error of law***" in determining that Widdrington reasonably relied on the audited financial statements and valuation letters prepared by C&L for purposes of his investments in Castor.[299] This characterization is wrong. The issue of causation (or, to use the language of the common law, the reasonableness of Widdrington's reliance) **is a question of fact**.[300]

251. In *Hogarth*,[301] Madam Justice E. A. Hughes of the Court of Queen's Bench of Alberta stated at paragraph 176 that: "*Reliance is a question of fact and goes to the issue of causation*".[302] In *Allaire c. Girard & Associés (Girard et Cie comptables agréés)*,[303] Mr. Justice Rochette was of a similar view. The applicable standard of review is therefore a palpable and overriding error.[304]

252. Appellants' argument reflects their confusion as to the nature of their liability. The misstatements for which Appellants are liable are not, for example, the misstated LLPs or the undisclosed RPTs in the consolidated financial statements of Castor. Appellants' misstatements, with respect to the financial statements, are the Auditors' Reports that opine that the consolidated financial statements for the

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[299] AF at para. 5 f).
[300] *Manita Investments Ltd. v. T.T.D. Management Services Ltd.*, 2001 BCCA 334 at para. 10: *"[10]* ***Whether reliance on a representation is reasonable or not, is essentially a question of fact****. Here, there was ample evidence to support the trial judge's conclusion that the plaintiff's alleged reliance on Kirk's negligent statement was not reasonable. The reasonable purchaser would, in the circumstances, have been put on its inquiry from the outset, and would have taken steps promptly to ascertain the boundary of the subject property that would have put the matter beyond any doubt. I would not give effect to this ground of appeal."*
[301] *Hogarth, supra* note 145 at para. 176.
[302] *Housen, supra* note 138 at para. 26. At best, the question of whether reliance was reasonable (again using the language of the comon law) is a question of mixed fact and law insofar as it involves applying the standard of due diligence to a person's conduct. As appears from *Housen*, *supra* note 138, at paras. 36-37, the standard of review for questions of mixed fact and law is that of palpable and overriding error.
[303] 2005 QCCA 713.
[304] *Housen, supra* note 138 at paras. 36-37; Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, Volume I – *Principes généraux*, 7th ed., (Cowansville : Yvon Blais, 2007) at para. 1-618.

years 1988, 1989 and 1990, presented fairly, in all material respects, the financial position of Castor and the results of its operations in accordance with GAAP.[305]

253. Both Quebec courts and common law courts have affirmed that: "*once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages*".[306] In *Kripps*,[307] the British Columbia Court of Appeal reversed the trial judge's conclusion with respect to the plaintiff's burden of proof and confirmed that there was no obligation to prove that the plaintiff's decision to purchase debentures was made as a result of reliance on a specific misstatement in the audited financial statements (in this case inadequate LLPs).

254. Appellants' argument on the issue of reliance rests on their confusion between the *causa causans*, and the conditions *sine qua non* for the loss suffered by Widdrington. The authors, Baudouin and Deslauriers, explain this distinction as follows:

> *"**1-626 –** Position jurisprudentielle – La jurisprudence québécoise emprunte au système de la **causalité adéquate** la démarche consistant à **séparer la cause véritable des simples circonstances ou occasions du dommage**. Ce ne sont donc pas toutes les conditions sine qua non qui peuvent et doivent être retenues, mais seulement celles qui ont rendu objectivement possible la réalisation du préjudice. […]*"[308]

255. The jurisprudence in Quebec (and under the common law) is uniform in holding that to engender the auditor's liability, once fault is proven, the plaintiff need not prove that the audited financial statements were the only factor which caused the plaintiff to invest. Thus, in *Garnet Retallack & Sons Ltd. c. Maheux*, Mr. Justice Jacques rejected the criterion of "*substantial reliance*" that had been applied by

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[305] §§417-419; PW-5 (Tabs 10, 11 and 12, for the relevant years).
[306] *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co*., [1991] 3 S.C.R. 3, at p. 16; While this is a common law decision, the jurisprudence cited therein is from Quebec and the Quebec Court of Appeal has endorsed this principal in *Biotech Electronics Ltd. v. Puetter*, 1998 CanLII 13186 (Q.C.A.) at pp. 41-42.
[307] *Kripps*, *supra* note 231 at para. 105.
[308] Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, Volume I – *Principes généraux*, 7th ed., (Cowansville : Yvon Blais, 2007) at para. 1-626.

the trial judge. Plaintiff need only prove that the negligence was the direct and immediate cause of the damage.[309]

256. In the case of audited financial statements, once a plaintiff has established that they were materially misstated, there is no obligation for such plaintiff to prove that, but for any particular misstatement, he would not have made his investment. By definition, materiality is information that, if omitted or misstated, would influence or change a decision.[310]

257. Under the common law, Mr. Justice Finch, in *Kripps*, stated that: "*It is sufficient, therefore, for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to her or his detriment*".[311] In *Surrey Credit Union v. Willson*,[312] the Court came to a similar conclusion. In *Hogarth*, Madam Justice E. A. Hughes of the Court of Queen's Bench of Alberta stated that: "*The representation need not be the sole or fundamental factor that induced a plaintiff to rely upon it*."[313]

C-2 <u>The Trial Judge's assessment of the evidence on reliance and due diligence</u>

258. In order to justify their request for this Court to interfere with the Trial Judge's factual conclusions, Appellants argue that none of the witnesses on the issues of reliance and due diligence testified *viva voce* at the New Trial, except Alain Lajoie for his cross-examination.[314] It should be recalled that this circumstance was the result of an agreement by the parties (and accepted by the Trial Judge) to import this evidence into the New Trial for the benefit of both parties. Appellants, having lost at first instance, now try to exploit this circumstance to incorrectly assert that this Court should reconsider these issues on the basis that

[309] *Garnet Retallack & Sons Ltd. c. Maheux*, [1990] J.Q. no 462 (Q.C.A.), at p. 6.
[310] PW-1419-2, s.1000.14.
[311] *Kripps, supra* note 231 at para. 103.
[312] *Surrey Credit Union v. Willson*, 1990 CanLII 751 (BC SC) at p. 35.
[313] *Hogarth, supra* note 145 at para. 177.
[314] AF at para. 200.

it stands in as good a position as the Trial Judge to assess the witnesses and the evidence.[315] Appellants' premise is patently false.

259. The Trial Judge had the opportunity to hear the *viva voce* testimony of numerous other witnesses who played a key role in Castor's activities, including its fund-raising activities, and was thus in a privileged position to read and assess the reliance and due diligence evidence that had been transcribed and imported into the New Trial. The lay and expert evidence dealing with reliance and due diligence is intertwined with the voluminous other evidence in this case proffered *viva voce*, such that this Court is not in the same position as the Trial Judge to assess and consider the import and nuances of this transcribed testimony.

260. This Court has consistently held that the factual findings of a trial judge must be treated with deference **even when they are based on a written record**. The principal basis for this deference is founded upon the judicial policy that appellate courts should not, and must not, retry cases, as affirmed recently in *Bellido c. Société générale de financement du Québec*.[316] In that case, this Court held that the findings of fact of the trial judge, who took cognizance of the evidence by reading the transcripts of the examinations following the recusation of the initial judge, still deserved deference.[317] In *2159-4395 Québec inc. c. Lamarche*,[318] this Court affirmed that the principle of deference applies to the findings of fact by the trial judge, regardless of the method of presentation of the evidence.[319]

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[315] *Ibid*.
[316] *Bellido c. Société générale de financement du Québec*, 2011 QCCA 297.
[317] *Ibid*. at paras. 8-9.
[318] *2159-4395 Québec inc. c. Lamarche*, 2011 QCCA 2117.
[319] *Ibid at paras. 21-22.* See also *Lafond c. Pétroles Crevier inc*., 2007 QCCA 4, Morin, Dalphond and Dufresne, JJA. at para. 3; *Assurances générales des Caisses Desjardins inc. c. ING Groupe Commerce*, 2007 QCCA 689, at paras. 19-30; *Cooke c. Suite*, 1995 CanLII 4836 (QC CA), at pp. 4-6.

C-3 <u>The Trial Judge considered the written submissions of both parties and then performed her independent analysis of the evidence</u>

261. In paragraph 201 AF, Appellants gratuitously state that the Trial Judge: "*adopted literally the Plaintiff's argument (…) resulting in the appearance that the Court did not apply her own analysis to the issues.*" These accusations, which appear to be an adjunct to Appellants' allegations of bias, are just another unfounded and malicious attack by the Appellants on the character of the Trial Judge.

262. The Trial Judge benefits from the presumption that her written reasons leading to her conclusions are the result of a careful and independent analysis.[320]

263. Written submissions are an integral part of any significant trial, and it is the right of a trial judge, after having completed a proper critical analysis, to prefer parts of the arguments submitted by one of the parties. In the present case, both sides were asked by the Trial Judge to submit their written legal arguments in *PDF* and *Word* formats.[321] Both parties clearly understood that the written arguments would be used by the Trial Judge as a tool to assist her if she chose to recite or adopt certain parts of the arguments of the parties. This process is regularly implemented by our courts. Appellants never objected to this process; rather they actively participated therein and filed in first instance electronic versions of their approximately 350 pages of written arguments and reply submissions.

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[320] *R. v Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267 at para. 19.

[321] Representations, April 23, 2010, p. 9: [The Court] *"… je* ***souhaiterais que ce que l'on me donne soit un format, ça peut être Word ou PDF, selon le choix que les procureurs feront et avec les propositions de vos responsables informatiques, là, moi je veux pas savoir les changements qui ont été faits, etc., mais je souhaiterais avoir la possibilité de faire des opérations copier/coller, cut-and-paste***.", See also the Procès-verbal for April 23, 2010 at p. 9.

264. Moreover, Appellants are disingenuous by failing to draw attention to the paragraphs from their own written submissions that are largely reproduced in this same section of the Principal Judgment.[322]

265. The Principal Judgment sets out the positions and theories of the parties and it is crystal clear that the Trial Judge carefully considered these opposing positions, reviewed all of the evidence, and then came to her own conclusions after months of deliberations.

C-4 Widdrington relied on the professional opinions of C&L for purposes of his investments in Castor

266. The relevant facts which support the Trial Judge's conclusion that Widdrington relied on C&L's professional work are not disputed as to their existence.[323] Rather, it is the relative weight that the Trial Judge accorded to them, and the inferences she drew from them, that Appellants take issue with in this appeal. As previously stated, the facts, as provided in the Principal Judgment, are adopted by Respondent, but certain aspects are reviewed below to assist this Court.

1. The 1989 equity investment[324]

267. In December 1989, Widdrington invested $1,130,400 in 10.75% convertible debentures, in 8% preferred shares and in common shares of Castor, in the form of four units of $282,600 each.[325]

268. In deciding to make his first equity investment in Castor, Widdrington relied on the audited consolidated financial statements for the year ended December 31,

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[322] For example, approximately 30 paragraphs of the Principal Judgment (§§3120–3125, 3285-3289, 3193–3198, 3205, 3207-3210, 3215–3221, 3223, 3281, 3289–3291, 3294-3295, 3302) reproduce substantial portions from Appellants' written arguments dated July 8, 2010 (beginning at page 219).
[323] AF at paras. 199 and 268.
[324] The term "equity investment" refers to the investments made in late 1989 and 1991 which were composed of common and preferred shares as well as debentures and is used to distinguish Widdrington's investments from a short-term deposit of $200,000 made in 1988.
[325] §3226.

1988[326] and for the five years from 1984 to 1988, inclusive,[327] the valuation letter issued by C&L on October 17, 1989,[328] as well as the interim unaudited consolidated financial statements for the nine months ended September 30, 1989.[329] Based on the audited consolidated financial statements over five years from 1984 to 1988 inclusive, Castor appeared to be a highly profitable company with spectacular results.[330] This positive trend was continuing, as reported in the valuation letter issued by C&L and the internal unaudited financial statements.

269. Widdrington was looking for a long-term investment opportunity.[331] His review of the valuation letter and discussions with Stolzenberg disclosed an increase in the fair market value of the common shares, from less than $200 a few years earlier to a current range of $525 to $550.[332] It appeared that there was a lot of opportunity for growth in the value of these common shares, which was of great interest to him.[333] He reviewed the parts of the documents provided to him which were of particular interest, including the numbers evidencing the steady increase in the asset base, the revenues, and the net earnings of Castor.[334] It is therefore a misrepresentation of the facts for Appellants to suggest that Respondent merely "*glanced*" at them, or worse, failed to analyze any of the figures.[335]

270. Widdrington discussed the proposed equity investment with his advisors:[336] (i) Bill Wood ("**Wood**"), then the engagement partner, of the accounting firm Ernst &

[326] PW-10-2 (also PW-5, Tab 10).
[327] PW-10-2.
[328] PW-10 (also part of PW-6).
[329] PW-10.
[330] §3341.
[331] §3224; Widdrington, November 30, 2004, pp. 40-41, 50-53; Taylor, January 20, 2005, pp. 75-77.
[332] §3224; Widdrington, November 29, 2004, pp. 171-172.
[333] §3224; Widdrington, November 29, 2004, pp. 171-172.
[334] §3224; Widdrington, November 29, 2004, pp.156-163 as regards the interim unaudited Consolidated Financial Statements for the Nine Months Ended September 30, 1989; pp. 163-165 as regards the document titled "Castor Consolidated Financial Statements Actual"; pp. 175-178 as regards the Consolidated Financial Statements for the Five Years Ended December 31, 1988; Widdrington, December 16, 2004, pp. 42-48.
[335] AF at paras. 67, 287.
[336] §3223.

Young, for the audit of Labatt,[337] (ii) Heinz Prikopa ("**Prikopa**"), then the manager of the Labatt pension funds,[338] and (iii) George Taylor ("**Taylor**"), then Labatt's Chief Financial Officer.[339]

271. Widdrington met with Prikopa on December 14, 1989, and again on December 18, 1989,[340] on which occasion they concentrated on the C&L valuation letter dated October 17, 1989, the audited Consolidated Financial Statements for the year ended December 31, 1988, and the Consolidated Financial Statements for the Five Years Ended December 31, 1988.[341] Prikopa and Widdrington proceeded with a close "line-by-line" examination of the audited financial statements and valuation letter.[342] To assist Widdrington in his decision, Prikopa prepared two memoranda[343] in which he identified the key factors to consider with respect to such investment. While Prikopa was complimentary about Castor's profitability, growth, return on equity, and much higher than industry spread of 3%,[344] he also raised some softer points and risk factors associated with the investment, which was consonant with Widdrington's expectation as to the nature of Prikopa's input.[345]

272. Widdrington also asked Wood to call the Montreal office of Ernst & Young to get his colleagues' opinion of Castor and/or the C&L people working on the Castor audit. Wood reported back that several colleagues knew the C&L people auditing Castor and considered them to be capable.[346]

273. Finally, as part of the due diligence process preceding Widdrington's decision to invest in Castor, Prikopa and Wood had a telephone conversation with

[337] §3184.
[338] §3130.
[339] PW-2390; Taylor, January 20, 2005, pp. 9-10.
[340] §§3210, 3221.
[341] Widdrington, November 30, 2004, pp. 10-28 (at pp. 12-13).
[342] Prikopa, January 12, 2005, pp, 125-137.
[343] PW-43-1; PW-43-2.
[344] See the first paragraph of Prikopa's "key considerations" in PW-43-1.
[345] Widdrington, November 30, 2004, pp. 40-41.
[346] Widdrington, November 30, 2004, pp. 77-79.

Stolzenberg on December 15, 1989, the purpose of which was to ask certain additional questions. Their questions to Stolzenberg were directed in particular to the issues of the quality of the current loan portfolio and "exitability", that is, the possibility for Widdrington to sell his shares should he desire to do so.[347] Taylor asked Prikopa to get something in writing on the geographical distribution of the mortgage portfolio and to get a sense of the size of the loans.[348] Prikopa testified that Stolzenberg was forthcoming with information and answered all of their questions, including those concerning the diversification of the loan portfolio. Both Prikopa and Wood were satisfied with Stolzenberg's responses to their questions.[349]

274. On December 18, 19 and 21, 1989, there were further communications between Prikopa and Castor's representatives with respect to the issue of exitability and the Shareholders' Agreement, as well as the loan portfolio document which Prikopa had requested from Stolzenberg.[350]

275. Appellants misrepresent the evidence when they state that Lowenstein thought it was "*unfortunate*" that Widdrington had not read the Shareholders' Agreement.[351] Appellants' counsel posed a hypothetical question and asked Lowenstein to assume that Widdrington had not read it.[352] However, the proof reflected just the opposite. Widdrington read the relevant paragraphs of the Shareholders' Agreement shortly after its receipt.[353]

276. On December 22, 1989, Prikopa received the mortgage portfolio analysis promised by Stolzenberg.[354] Appellants incorrectly state that Lowenstein opined that this document "*definitely*" did not provide adequate responses to Prikopa's

[347] §§3215-3216; PW-10-4.
[348] Taylor, January 20, 2005, p. 77.
[349] Prikopa, January 12, 2005, pp. 98-99, 120-121.
[350] PW-43-3, PW-43-4 and PW-43-5.
[351] AF at para. 294.
[352] Lowenstein, March 24, 2005, pp. 62-63.
[353] Widdrington, December 16, 2004, p. 169.
[354] §3229; PW-10-5; Prikopa, January 12, 2005, p. 141.

concerns,[355] and distort the purpose for which this document was requested. The mortgage portfolio analysis was intended to provide Widdrington and his advisors with information on the geographical distribution and the relative size of Castor's mortgage loans.[356] This was Prikopa's and Wood's so-called "*concern*", and the information from Castor and the document provided by Stolzenberg were wholly adequate. Lowenstein's opinion was that this analysis was useful for the purpose of the due diligence performed by Widdrington prior to his investment. [357]

277. The question that was put to Lowenstein in cross-examination by Appellants was in a completely different context; he was asked whether the mortgage portfolio analysis provided an answer to items 3 and 5 of Prikopa's memo,[358] namely: "*What is the quality of present loan assets? How good are they - are there any shaky loans in portfolio?*" and "*What is the average quality of loans made - I assume they operate in the higher rate higher risk loan market - the 13% average rate earned and the 3% spread suggests higher loan risk*." Lowenstein agreed that the mortgage portfolio analysis[359] did not provide the complete answer to these questions. Nor was it intended to.

278. The purpose of Prikopa's memo[360] was to explain the nature of the business in which Castor was involved and to make Widdrington aware of the unique characteristics of such business.[361] Prikopa testified that he did not expect to get answers to the questions he asked in his memo before Widdrington would make his initial investment; rather, his purpose was to make Widdrington sensitive to

[355] AF at paras. 73 and 296.
[356] Prikopa, January 12, 2005, pp. 97-99; Taylor, January 20, 2005, p. 77.
[357] Lowenstein, March 21, 2005, pp. 66-67. See also Jarislowsky, April 4, 2005, pp. 183-184.
[358] PW-43-1.
[359] PW-10-5.
[360] PW-43-1.
[361] Prikopa, January 12, 2005, pp. 100-101, 110-112.

relevant elements if he became involved with Castor.[362] Widdrington confirmed that this was his understanding of the purpose of Prikopa's questions.[363]

279. By December 20, 1989, Prikopa had received a copy of the Shareholders' Agreement.[364] Prikopa subsequently requested, and obtained from Castor, certain clarifications regarding the provisions dealing with potential redemption of shares and sale of shares to third parties.[365] Prikopa had the legal department of Labatt review the Shareholders' Agreement, which provided him further comfort.[366] Widdrington's instructions to transfer the money to Castor, and the actual money transfer to Castor, took place on December 28, 1989, **after** all requested information had been received.[367]

280. In paragraph 57 AF, Appellants misrepresent Respondent's testimony with respect to his knowledge of Castor's loans to Trinity (a company in which he and Stolzenberg were directors) at the time of his investment in Castor in late 1989. The inference made by Appellants is that Respondent ignored the fact that these loans were not disclosed as RPTs on the financial statements. However, the testimony referred to in footnote 85 AF discloses that Respondent had heard the name CHIO (a subsidiary of Castor) but did not understand the relationship between CHIO and Castor or between Trinity and Castor.[368]

281. Far from acting out of a supposed blind trust in Stolzenberg,[369] or with excessive haste, as Appellants contend,[370] Widdrington sought the advice of Prikopa, Taylor and Wood to assist him in analyzing the advisability of investing in Castor

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[362] Prikopa, January 12, 2005, pp. 100-101; Jauary 17, 2005, pp. 79-82.
[363] Widdrington, November 30, 2004, pp. 59-62.
[364] §3228; PW-2382.
[365] PW-43-5; Prikopa, January 12, 2005, pp. 140-141.
[366] §3228; Prikopa, January 12, 2005, pp. 140-141.
[367] §3230; PW-11-2.
[368] In §3327, the Trial Judge highlighted Widdrington's limited role in Trinity and that: "*as an outside director, he was not involved in, or questioned on, the funding of Trinity's investment activities or any of its financial matters*". She specifically noted that: "*Widdrington also testified he didn't have any specific knowledge of loans extended by Castor or its subsidiaries to Trinity for most of his tenure as a director of Trinity.*" (Reference was made to Widdrington's testimony on December 14, 2004).
[369] AF at para. 282.
[370] AF at para. 276.

in December 1989. As acknowledged by Appellants' expert Morrison, it was: "*hard to exceed the quality of investment advice that was available here…*"[371]

282. After reviewing the documentation (including C&L's unqualified opinions) and Prikopa's memo (PW-43-1), Taylor met with Widdrington and advised him that he felt that the investment: *"(…) was a proper and prudent investment.*"[372] Taylor testified that, absent the unqualified audited financial statements and C&L's professional opinions, he would have recommended that Widdrington not enter into the investment.[373] Prikopa testified that, as a result of Castor's apparently "*outstanding financial performance*", Wood, Taylor and himself were all in agreement with Widdrington's decision to invest in Castor.[374]

2. The 1991 equity investment

283. On October 25, 1991, Widdrington made a second equity investment in Castor, whereby he subscribed for one unit, composed of common shares, preferred shares and a convertible debenture, for a total subscription price of $292,560.[375]

284. This second investment was made the day after a meeting of the Board of Directors of Castor. It was preceded by a letter from Stolzenberg, dated September 25, 1991, requesting an increase of the capital base of Castor. The letter described the circumstances that necessitated this call for an infusion of capital and was accompanied by the interim financial statements as at June 30, 1991 as well as the most recent valuation letter prepared by C&L.[376]

285. Contrary to Appellants' characterization, the injection of new capital was not a response to overcome a so-called "*liquidity crisis*".[377] Rather, the 1991 capital call arose in the context of what Stolzenberg described as a tightening of credit

[371] Morrison. October 3, 2006, p. 164.
[372] Taylor, January 20, 2005, p. 45: he was VP of Finance of Labatt's parent company in 1977, then Executive VP in 1984, and finally Labatt's CEO.
[373] Taylor, January 20, 2005, p. 43.
[374] Prikopa, January 12, 2005, pp. 134-137.
[375] §3237; PW-19.
[376] §3238; PW-17.
[377] AF at paras. 8, 196b) and 243.

lines by the banks for real estate activities, and a need on the part of Castor in such circumstances to show strength to the banks and outside investors.[378]

286. Widdrington believed that the proposed strategy of raising new capital made sense and was consistent with what Castor had done in the past to raise equity.[379] Most importantly, Stolzenberg's letter was accompanied by C&L's valuation letter dated March 6, 1991, establishing a current fair market value of **$580 per common share**. The proposed subscription price was directly based upon C&L's testament of value, as appears from Stolzenberg's letter which specifically states: "*Based on this valuation, the proposed subscription price for common shares is $580.00*".[380] This was the **highest value** ever determined by C&L for the common shares of Castor in the history of the company.[381]

287. Widdrington gave Stolzenberg's letter with its attached documents (PW-17) to Prikopa to review. Prikopa prepared a memorandum, wherein he concluded that this was a good investment for Widdrington.[382] However, Prikopa suggested that Widdrington wait until he received the materials for the Board meeting of October 24, 1991, attended the said meeting, and until he had the opportunity to discuss this matter with Stolzenberg and other members of the Board, before making his decision.[383] Widdrington followed Prikopa's advice.

288. A C&L valuation letter dated October 22, 1991 was tabled at the Board meeting of October 24, 1991.[384] It provided an unqualified opinion of the fair market value of Castor's common shares as at September 30, 1991, that is, subsequent to Stolzenberg's letter of September 25, 1991 calling for an injection of capital. Widdrington testified that this valuation letter was the critical factor which

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[378] PW-17.
[379] §3239; Widdrington, December 2, 2004, pp. 38-45. For the reference to the company raising more capital in the past, see also PW-16-3 Tab 6.
[380] PW-17.
[381] §2989.
[382] §3240; PW-47; Widdrington, December 1, 2004, pp. 159-174.
[383] §3240; Widdrington, December 1, 2004, pp. 163-164, 175; Prikopa, January 17, 2005, pp. 146-147.
[384] PW-2400-124, bates #018107.

impelled him to make his second equity investment.[385] Widdrington further testified that the directors were all enthusiastic about supporting this particular effort and that he believed that the other shareholders and directors of Castor were going to participate in that capital subscription.[386] It must be recalled that virtually all shareholders of Castor were represented by the directors.

289. Contrary to Appellants' assertions,[387] Widdrington did not, in his testimony at trial, depart from his deposition on discovery in his account of the October 1991 directors' meeting. During his examination on discovery, Widdrington acknowledged that the atmosphere at the Board meeting was more somber than during previous meetings. This was understandable: an issue was being brought to the attention of the Board concerning banking facilities that needed to be alleviated, and the directors were being asked to put in money in order to remedy the situation.[388] Alternative strategies were also discussed[389] but the directors unanimously agreed that the solution proposed by Stolzenberg of injecting new equity was the right thing to do.[390]

290. Widdrington also acknowledged that, as compared to the March 6, 1991 valuation letter, the low end of the fair market value ascribed to the common shares of Castor had decreased slightly.[391] However, the book value of these shares had substantially increased since the March 6, 1991 valuation letter. As well, C&L's valuation letter of October 22, 1991 stated that: "*because of the slowdown*" in the real estate market in North America, "***additional opportunities will be available to Castor***",[392] an assertion that made a strong impression on

[385] §3241; Widdrington, December 2, 2004, pp. 46-48.
[386] Widdrington, January 6, 2005, pp. 166-172.
[387] AF at paras. 259 and 262.
[388] Widdringon, November 9, 1995, pp. 163-164.
[389] Widdrington, January 6, 2005, pp. 166-173.
[390] PW-51. The Minutes of the Board of Directors meeting of October 24, 1991 state: "*The directors unanimously endorsed the Chairman's efforts to correct the situation, and the meeting agreed that it was in the best interest of the Corporation to raise additional capital and to secure medium term debt financing*."
[391] §3242; Widdrington, December 2, 2004, pp. 13-15.
[392] §3242; PW-18, Tab 6, p. 4.

Widdrington.[393] Appellants' expert Morrison testified that this statement, in the C&L valuation letters, signified C&L's acceptance of the accuracy of that assertion, and that the information provided to the reader was "*encouraging*."[394]

291. It is noteworthy that a C&L draft of the October 22, 1991 valuation letter was marked " *S.V.P Urgent* ",[395] as it was specifically prepared for the Board meeting held two days later, and certainly confirms that C&L understood that their opinion as to the value of the common shares would be used and relied upon for the purpose of raising additional funds. Moreover, included in C&L's working papers in connection with this final valuation letter, was the "1991 Capital Subscription Form" explicitly providing that "participation in the capital of Castor" would be at the price of $580 per common share (consistent with C&L's opinion of value).[396]

292. During his tenure as a director, Widdrington had been provided with two legal-for-life opinions issued by McCarthy Tétrault, which were included in the materials for Castor's Board and shareholders meetings[397] and which were expressly based on the legal-for-life certificates issued by C&L on February 16, 1990 and February 15, 1991, respectively.[398] The McCarthy Tétrault opinion letter of March 6, 1991 is further referred to in the Minutes of the Board of Directors meeting of March 21, 1991[399] and is included in the Directors' Book remitted to Widdrington prior to the May 7, 1991 meeting of the Board.[400]

293. The legal-for-life certificates prepared by C&L were based on compliance with specific statutory tests, over a five year period, which depended on the results in the audited financial statements and subsequent calculations. They were a

[393] §3242; Widdrington, December 2, 2004, pp. 16-17.
[394] Morrison, October 5, 2006, pp. 213- 217.
[395] PW-1053-50A, seq. pp. 14-18.
[396] PW-1053-50A, seq. pp. 23-26.
[397] PW-12, Tab 12 (May 8, 1990) and PW-14, Tab 11 (March 22, 1991).
[398] PW-7.
[399] PW-15, p. 4.
[400] PW-16-3, Tab 10; PW-2400-120, bates #018050.

"*significant affirmation of the financial health of the company"*.[401] Manfred Simon, VP Fundraising ("**Simon**") explained that Castor used its legal-for-life status not only to obtain investments from pension funds, insurance companies and trust companies, but also to send the message to investors generally that Castor was a creditworthy investment.[402] C&L's internal policy on the preparation of such certificates recognized that it was reasonably foreseeable that third parties would rely on this status as indicating: "*a certain level of quality and liquidity in the security"*.[403]

294. The legal-for-life status added to Castor's aura as a "safe" investment, providing comfort to Widdrington, who was aware of the legal-for-life documentation[404] and understood what legal-for-life status signified.[405] Castor's legal-for-life status was a factor considered by him and his advisor Prikopa, who considered the designation to be a positive indication that the company was profitable, which contributed to Widdrington's decision to make his investment in 1991.[406]

C-5 The information conveyed to the reader by the audited consolidated financial statements and other professional opinions issued by C&L

295. The Trial Judge held that, between year-ends 1978 and 1990, the trends in financial performance of Castor with respect to revenue, net earnings, retained earnings, assets/liabilities, capital stock as well as shareholders' equity, evident from Castor's audited consolidated financial statements: "*portrayed an uninterrupted pattern of yearly improvement and success in all those categories"*.[407] In §3108, the Trial Judge noted that the Appellants' and Respondent's experts agreed that Castor's financial trends, as reflected in the

[401] §3092; Lowenstein, March 21, 2005, pp. 78-82.
[402] §3092; Simon, June 16, 2009, pp. 69-70, 75-76, 81.
[403] PW-1420-1B, TPS-A-405.
[404] Widdrington, November 30, 2004, p. 162.
[405] §3235; Widdrington, November 30, 2004, p. 140.
[406] §3236; Prikopa, January 12, 2005, pp. 147-156; January 13, 2005, pp. 10-11.
[407] §420, citing PW-2908, Vol. 1, p. S-4, S-16 and S-17.

audited consolidated financial statements, were "*outstanding*",[408] "*highly impressive*",[409] "*spectacular*",[410] and even "*magnifique*".[411]

296. Looking at the trends in performance reflected in the 24 valuation letters issued by C&L, Appellants' expert, Morrison, recognized that the results were "*very exceptional*"[412] and that Castor's share valuation trend was more impressive than either the Bank of America or the Royal Bank of Canada during the same period.[413] The historical performance evidenced by C&L's opinions of value revealed to readers that Castor had successfully weathered a downturn in the economy that occurred in the early 1980s which suggested that Castor's management was able to steer Castor through the tough times in the economy as well as to benefit from a strong real estate market.[414]

297. The findings of the Trial Judge as to the false appearance of financial success at Castor, affirmed by C&L in their unqualified opinions, are based solely on her appreciation of the evidence and are unassailable and should not be disturbed by this Honourable Court.

C-6 Widdrington conducted appropriate due diligence and his reliance on the professional opinions of C&L was reasonable

298. The Trial Judge held that Widdrington was entitled to rely on the presumed knowledge, expertise and professionalism of C&L, which had acted as Castor's auditors since its inception, and who had been valuing Castor's shares since 1980.[415] She found that given the information and opinions provided year after

[408] Lowenstein, March 21, 2005, p. 71.
[409] Morrison, October 10, 2006, p. 220; October 11, 2006, pp. 14-16.
[410] PW-2405, pp. 6-7; Morrison, October 5, 2006, p. 112.
[411] Lajoie, November 19, 2009, pp. 130-131. See also Jarislowsky, April 4, 2005, pp. 38-39.
[412] §2988; Morrison, October 10, 2006, pp. 198-199.
[413] §2988; Morrison, October 10, 2006, pp. 209-210. See charts PW-2887, PW-2887-1.
[414] §2992.
[415] §3336.

year by C&L, it was reasonable for Widdrington to rely on same for his investments in Castor.[416]

299. Appellants incorrectly maintain that Widdrington should have been held to be the author of his own misfortune.[417] They further contend that such alleged contributory negligence on the part of Widdrington should have been held to be a complete bar to his action, or alternatively, reduced the award of damages in proportion to his fault.[418]

300. However, the Trial Judge found that Plaintiff committed no fault, either in the exercise of his duties as a director of Castor, or in the due diligence exercised by him prior to making his respective investments in Castor.[419] It was Appellants' burden to prove a fault on the part of Widdrington, which was the logical, direct and immediate cause of the damages suffered by him, a burden which Appellants failed to satisfy. Contributory negligence applies when the Court finds that two faults have caused the damage.[420] This is not the case here.

301. In *Morency v. Lafleur*[421], the court concluded that the auditor was solely liable for the damages caused to the plaintiff company and its principal (a director of the company), even though the latter was a CA, and, as argued by the defendant, should have uncovered the error committed by the auditor in the preparation of the financial statements. The same conclusion was reached by the court in *Sheldon Besner et al vs Friedman & Friedman.*[422]

302. The Trial Judge found that: "*Plaintiff's experts on reliance, Lowenstein and Jarislowsky, were* ***exceptionally qualified*** *to opine on Widdrington's*

[416] §§3340 and 3534.
[417] AF at para. 5 f).
[418] AF at para. 205.
[419] §3343.
[420] See, for example *Business Development Bank of Canada c. Pfeiffer,* 2009 QCCS 2310 at para. 93.
[421] (2002) CanLII 7992 (QC CS) at para. 26.
[422] [2004] Q.J. No. 7855 at para. 61.

investments in the equity of Castor".[423] [emphasis added] Their qualifications and credibility are not disputed by Appellants.

303. Both Lowenstein and Jarislowsky considered that Appellants' experts imposed a burden of due diligence on Respondent that far exceeded what could be expected of an individual investor and in fact would obviate the need for auditors.[424] They clearly established that Widdrington conducted a reasonable due diligence process and, in fact, did more than would be expected of a typical high net worth investor in similar circumstances.[425] Jarislowsky testified that he himself would not have done more due diligence than that performed by Widdrington and his advisors.[426]

304. It lies ill in the mouth of Appellants, who provided their unqualified professional opinions as to Castor's past performance and positive outlook in their audit reports, valuation letters and legal-for-life certificates, to now argue that it was unreasonable for Widdrington to rely on same for the purpose of his investments.

D. THE DIRECTORS' DUTIES ISSUE

305. Appellants assert[427] that Widdrington: *"[…] as a **director** was primarily entrusted with the task of establishing Castor's financial statements*". [428]

306. Appellants further assert that: "*Under s.100 of the Act (NBBCA) the duty to prepare financial statements in accordance with GAAP rests primarily on the directors of the Corporation*." [429] As support for this assertion, Appellants refer to

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[423] §3334.
[424] PW-2404, p. 5; PW-2405, p. 13.
[425] PW-2404, p. 2; PW-2405, p. 13.
[426] PW-2405, pp. 11, 13; Jarislowsky. April 4, 2005, pp. 32-34.
[427] AF at p. 33.
[428] In paragraph 236 AF, Appellants state that the financial statements of a company are: "*prepared by the **Management**.*" Similarly, in their Auditors' Report (PW-5-1, Tabs 88A, 89A, 90A), C&L asserted that: "*These financial statements are the responsibility of the company's **management**. Our responsibility is to express an opinion on these financial statements based on our audits."* In paragraph 18 AF, Appellants identify the preparers of the financial statements as Dragonas, Goulakos and Stolzenberg.
[429] AF at para. 233.

s.5000.02 of the Handbook.[430] However, that section makes it clear that the responsibility lies with **management**, not its directors. A similar principle is contained in s.5000.04 of the Handbook.[431]

307. It is common ground that Widdrington never fulfilled a management function within Castor and was never an officer of the company.[432] Accordingly, contrary to Appellants' assertion, Widdrington, as a director (but not part of management), was not: *"primarily entrusted with the task of establishing Castor's financial statements."*

308. Section 80(3) NBBCA provides:

> *"A director is not liable under section 76*[433] *or 79*[434] *if he reasonably relies in good faith upon:*
>
> *(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the* ***auditor****, if any, of the corporation, fairly to reflect the financial condition of the corporation; or*
>
> *(b) a report of the lawyer,* ***accountant****, engineer, appraiser or other person whose profession lends credibility to a statement made by him."* [emphasis added]

309. Virtually identical provisions were found, in the relevant years, in the *Canada Business Corporations Act,*[435] the *Quebec Companies Act,*[436] and the *Ontario Business Corporations Act.*[437]

310. C&L were the auditors of Castor and issued unqualified opinions with respect to Castor's consolidated financial statements since the inception of Castor. The valuation letters issued by C&L start with the sentence*: "You have asked us as*

[430] PW-1419-2A.
[431] PW-1419-2A.
[432] §3250; PW-2400-115 and PW-2400-123.
[433] Which includes voting or consenting to a resolution authorizing the payment of a dividend when the corporation is insolvent.
[434] Which provides that a director shall act honestly with good faith and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, in the best interests of the corporation.
[435] R.S.C. 1985 c. C-44 sec.122 (1); 123(4) (a) (b).
[436] R.S.Q., c. C-38, s.123.84.
[437] R.S.O. 1990, c. B.16 s.134 (1) (A) & (b), and 135 (4) (a) and (b).

> ***auditors*** *and* ***professional accountants*** *to assist you in establishing the fair market value of the common shares of Castor…"*[438] [emphasis added]

311. In *Blair* v. *Consolidated Enfield Corp*.,[439] the Supreme Court of Canada articulated the principle that directors are justified in trusting the work of a corporation's representatives. Me Paul Martel was of a similar view.[440]

312. In paragraph 211 AF, Appellants refer to the *Wise*[441] decision in the context of s.79(1)(b) NBBCA. There is no mention in AF, however, of s.79(1)(a). In the case at bar, the issue is not related to the "s*tatutory fiduciary duty",* but is, rather, restricted to the "*duty of care*", as such terms are defined in paragraph 32 of the *Wise* decision. Appellants argue[442] that because the Supreme Court in *Wise* "preferred" describing the duty of care standard as "*objective*", rather than "*objective/subjective*" as described by Robertson, J.A. in the *Soper* case,[443] it follows that, in doing so, the Supreme Court also abolished the distinction between "*inside*" directors and "*outside*" directors. Respondent submits that Appellants' conclusion is incorrect and that the decision in *Wise* did not change the exonerating provisions of s.80(3) NBBCA.

313. It is the last paragraph of the *Wise* decision that is cited by the Trial Judge,[444] in which the Supreme Court of Canada stated:

> *"Directors and officers will not be held to be in breach of the duty of care under s.122(1)(b) of the CBCA if they act prudently and* ***on a reasonably informed basis.*** *The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that*

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[438] See, PW-6-1, for example, the valuation letter of September 28, 1990 (Tab 22) and March 6, 1991 (Tab 23).
[439] [1995] 4 S.C.R. 5, paras. LXV-LXVII.
[440] Paul Martel, "*The Duties of Care, Diligence and Skill owed by Directors of Federal Business Corporations – Impact of the Civil Code of Quebec*" (2007) 42 R.J.T. 233, at pp. 262-266.
[441] *People's Department Stores inc. v. Wise*, [2004] 3 S.C.R. 461 [*Wise*].
[442] AF at paras. 210 and 211.
[443] *Wise, supra* note 441 at para. 63.
[444] §3344 (citing para. 67 of *Wise*).

> ***perfection is not demanded****. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made*." [emphasis added]

314. At paragraphs 77 and 78 of the *Wise* decision, the Supreme Court stated:

> *"77. The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s.123(4)(b) (…).*
>
> *78. Although Clément did have a bachelor's degree in commerce and 15 years of experience in administration and finance with Wise,* ***this experience does not correspond to the level of professionalism required to allow the directors to rely on his advice as a bar to a suit under the duty of care. The named professional groups in s.123(4)(b) were lawyers, accountants, engineers, and appraisers. Clément was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence.*** *(…)*" [emphasis added]

315. Clearly, the Supreme Court agreed with the Quebec Court of Appeal to the effect that s.123(4)(b) *CBCA* would have provided a successful defence if the advice the Wise brothers had relied on or was provided, *inter alia*, by an auditor and/or accountant. Thus, the *Wise* case is supportive of Respondent's position. Furthermore, in the *Wise* case, it should be noted that the 3 Wise brothers were the only directors of People's.[445] In the case at bar, Widdrington was but one of 10 directors, in 1990,[446] and one of 9 directors in 1991,[447] the rest of whom had been long standing Board members before he was appointed.

316. Furthermore, Respondent submits that the distinction between inside directors and outside directors is still valid, insofar as concerns the duty of care. In *Soper*, Robertson J.A. referred[448] to "*inside directors*" as: "*those involved in a day-to-day management of the company and who influence the conduct of the business*

[445] *Wise, supra* note 441 at para. 12.
[446] PW-2400-114 and PW-1053-16, p.181.
[447] PW-2400-122.
[448] *Soper v. Canada*, [1998] 1 F.C. 124 at para 44.

affairs", and an "outside director" as one that: "*took no part in the financial affairs of the company and could not have influenced the course of events*."[449]

317. Similarly, authors Wainberg & Wainberg define an outside director as: *"[…] usually a person who is well known in business or political circles, and whose name is an asset. Most likely, he (or she) is on more than one Board […] (H)e may not be an officer, employee or shareholder*".[450] This description is particularly relevant to the situation of Widdrington.

318. In the case of *Smith v. Canada,* the court noted:

> *"The facts that are relevant to the determination of whether a person is an "inside director" relate to the tasks that the person undertakes as a director and the degree of the person's involvement in the business of the corporation*."[451]

319. In a work published subsequent to the Supreme Court decision in *Wise*, author J. Anthony Van Duzer, wrote:[452]

> *"A higher standard will be expected of directors who are also officers of the corporation, sometimes referred to as inside or executive directors, as compared to directors who are not part of the management team, often called outside or non-executive directors, because of the greater information that inside directors have access to."*

320. In the case of *Mohos* v. *The Queen*, the issue was whether a director of the company could successfully invoke the defence set out in s.227.1 (3) of the *Income Tax Act*, having: *"[…] exercised the degree of care, diligence and skill to prevent the failure that a reasonable prudent person would have exercised in comparable circumstances"* (the same section referred to by the Supreme Court in *Wise*). In paragraph 55 of the *Mohos* case, Justice Jorré stated:

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[449] *Ibid* at para. 49.
[450] Wainberg & Wainberg, *Duties and Responsibilities of Directors in Canada*, CCH Canadian Ltd., 6ed., 1987 at p. 8.
[451] (2001) FCA 84, para. 24.
[452] J. Anthony Van Duzer, *The Law of Partnerships & Corporations*, 3rd ed. (Toronto: Irwin Law, 2009) at p. 382.

> *"An inside director does face a heavier burden in establishing that he exercised the requisite care […]"*[453]

321. Similarly, in *Cadrin* v. *Canada*, Décary, J.A., stated:

> *"The outside director who gets involved to the extent of his role in the business and his abilities meets the standard of care in principle. If he ensures that the business is viable before investing money in it, if he surrounds himself with reliable and competent people who undertake the day-to-day management of the business,* ***if he stays generally informed*** *about what is happening,* ***if nothing happens which should arouse suspicion*** *about the payments of the corporation's liabilities, if he acts quickly when problems arise, he should not as a general rule be held liable.*"[454] [emphasis added]

322. The reality of the business world, including back in 1990 to 1992 when Widdrington served as a director of a number of public and private institutions, was, and remains, that the extent of the duty of care for an outside director is, and must be, less than that of an inside director.

323. In paragraph 215 AF, Appellants purport to rely on the case of *Distribulite Ltd. v. Toronto Board of Education Staff Credit Union Ltd*.[455] However, the facts in the *Distribulite* case are clearly distinguishable from the case at bar. In that case, Campbell, J. of the Ontario High Court of Justice found that the board of directors was **aware of numerous red flags** which it ignored or passed over, leading the Court to the statement that: *"It is true that there can be no fraud without trust, and it is true that the Board and the directors are entitled to place trust and faith in their* ***servants when there is no reason to doubt them.*** *But trust does not mean blind trust*."[456] [emphasis added]

324. Similarly, Appellants' reference[457] to the case of *UPM-Kymmene Corp*. v. *UPM-Kymmene Miramichi Ltd.*, and their assertion that this case is authority for the proposition that: *"[…] a director fails in his duty of diligence where he or she*

[453] 2008 TCC 199 (CanLII) at para. 55.
[454] [1998] F.C.J. No. 1926 at para. 5.
[455] (1987) 62 O.R. 255 (H.C.J.) [*Distribulite*].
[456] *Distribulite, supra* note 455 at pp. 61-62.
[457] AF at para. 215.

relies exclusively on experts without exercising any oversight", is of no assistance considering the factual context of such case as compared to the facts in the case at bar. *UPM-Kymmene* involved an oppression remedy, which examined the conduct of a director who sought the benefit of a self-interested contract with the corporation he serves.[458]

325. In paragraph 215 AF, Appellants refer to the case of *Stroh v. Millers Cove Resources Inc.*, and assert that: "*The Ontario Court of Appeal affirmed a ruling by the Ontario Court (General Division) that a director fails in his duty of diligence if he displays a lack of curiosity as to a corporation's affairs*." In fact, the sole issue in appeal in that case was whether the trial judge's finding of oppression should be confirmed or overruled.[459]

326. Widdrington was only appointed a director of Castor at the meeting of the Board of Directors held on March 21, 1990 but did not attend that meeting and did not receive a Directors' Book prior to that meeting.[460] The next meeting of the Board of Directors was held on May 8, 1990, with Widdrington in attendance.[461] This was the first Board meeting that he attended**.** Prior to that meeting, Widdrington received the "Directors' Book" containing relevant information on Castor's operations, investments and financial results.[462]

327. Thus, by the time Widdrington attended his first directors' meeting on May 8, 1990, considering: (i) the financial and other documentation he had received from Stolzenberg in December 1989, (ii) the information received by Prikopa and Wood from Stolzenberg prior to his first investment, (iii) the information contained in the minutes of the meeting of directors held on March 21, 1990, and (iv) all of the information contained in the Directors' Book prepared for the May 8, 1990

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[458] *UPM-Kymmene v. UPM-Kymmene Miramichi Inc.**, (2002) 214 D.L.R. (4th) 496 (Ont. S.C.) Lax, J., conf. (2004) 42 B.L.R. (3d) 34 (Ont. C.A.).
[459] *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1949.
[460] PW-12-4; Widdrington, November 30, 2004, pp. 120-125; PW-2400-11.
[461] PW-2400-113.
[462] PW-12; Widdrington, November 30, 2004, p. 129.

meeting, it can certainly be said that Widdrington was, in the words of the Supreme Court of Canada in *Wise*, "*reasonably informed*".

328. Following the meeting in May, 1990, Widdrington attended only **5 other meetings** of directors prior to Castor's demise in February, 1992.[463] In each instance, Widdrington was provided with a voluminous Directors' Book, containing extensive information with respect to Castor's business operations, including the 1990 audited financial statements supported by the unqualified opinion of C&L, and valuation letters prepared by C&L dated February 28, 1990, September 28, 1990, March 6, 1991 and October 22, 1991.

329. While Widdrington may not have known the names of the individual borrowers of Castor, this is not at all surprising, given that Castor had a portfolio of between 200 and 250 loans. Similarly, he did not know the identity of the individual borrowers of the CIBC, on whose board he also sat. It is unreasonable to expect, and to require, a director, who is not part of management and is not involved in the day-to-day operations of a company, to demand information on the actual borrowers of the company.

330. In contrast, Wightman as auditor testified as to the degree of analysis that C&L purported to perform on each and every material loan in Castor's portfolio: [464]

> *"I said that we reviewed, and I will repeat one more time,* ***we reviewed each and every material loan*** *and we looked at those loans and satisfied ourselves that they were fairly valued and that the interest with respect to them was properly recorded, and if it was properly recorded and the loan was fairly valued, we considered it to be recordable as revenue and good and valid income."* [emphasis added]

[463] §3554.
[464] Wightman, September 13, 1996, pp. 74-75.

331. When shown this extract of Wightman's testimony, Appellants' expert, Morrison, testified[465] that he would have been "*very impressed*" and "*reassured*" by such affirmation by the auditor.

332. In fact, a meeting took place between two representatives of one of Castor's larger lenders, Bayerische Vereinsbank, and Wightman in July, 1991 for the specific purpose of reviewing with him the audit procedures performed by C&L with respect to Castor, including specific questions posed to Wightman with respect to Castor's loan portfolio and C&L's audit thereof. The Trial Judge referred to this meeting in §§3363 and 3510. It is ironic that Appellants criticize Respondent for not having identified the problems in Castor's loan portfolio when C&L provided a positive in-person report to Castor's lender in July 1991 and reassured it that the audit work carefully reviewed major loans and assessed the reasonableness of the LLPs recorded by Castor.

333. Appellants' argument[466] that Widdrington's failure to perform his duties as a director renders him contributorily liable for his loss cannot possibly have any application insofar as his investment in December 1989 (prior to his appointment as a director). This was explicitly recognized by the attorneys for Appellants during the testimony of Respondent's expert, Lowenstein.[467]

334. With respect to Widdrington's alleged failure to fulfill his duties as a director of Castor, Appellants distort the evidence when they refer to the testimony of Lowenstein in support of their submission that Widdrington did not insist on receiving more detailed information with respect to the business of Castor, its management, and the details of its loan portfolio, as well as to obtain the answers to various questions raised by one of his advisers, Prikopa.[468]

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[465] Morrison, October 5, 2006, pp. 100, 101.
[466] AF at paras. 240-242.
[467] Representations, March 24, 2005, pp. 77-78.
[468] AF at para. 226.

335. In fact, Lowenstein's testimony reinforces the testimony of Jarislowsky, to the effect that given the "***spectacular***" results achieved by Castor over the ten years prior to Widdrington becoming a director in March 1990, as reflected in Castor's audited financial statements, supported by the unqualified opinion of C&L, and given the long series, and frequency of emission, of the valuation letters issued by C&L, evidencing an ever increasing fair market value for Castor's common shares, together with the other information furnished to Widdrington, and to the other directors, there was no need for Widdrington to require any additional information, in order to fulfill his duties as a director.[469]

336. In paragraph 226 AF, Appellants refer to an excerpt of Lowenstein's testimony that, as a director: *"[…] he would have obtained as much information as he could over time.*" Appellants have failed, however, to cite the immediately following paragraph of Lowenstein's testimony (referred to by the Trial Judge in §3279) regarding the evolutive learning process of a director. Further, at page 124, Lowenstein testified, with respect to Widdrington's October 1991 investment:

> *"Again, I do think we have to remember in the context of this that two days before we have the Coopers & Lybrand report as at September 30th which did not indicate that there were any loans loss provisions required for the September 30th statements."*

337. At paragraph 224 AF, Appellants refer to the testimony of Jarislowsky, one of Respondent's experts, whose mandate was to opine only on the due diligence performed with respect to Widdrington's investment in December 1989. It is important to note that Jarislowsky testified that questions relating to Widdrington's role as a director of Castor were not part of his mandate and that he had not reviewed any facts with respect thereto.[470]

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[469] Although Lowenstein was not called as an expert on director's duties, the Court allowed limited cross-examination on this question. Lowenstein affirmed that, in the face of the recently issued C&L opinions, he would not have expected Widdrington to insist on receiving more information either at the Board meetings or outside of those meetings (Lowenstein, March 24, 2005, pp. 99–105, 110-113).
[470] Jarislowsky, April 4, 2005, p. 202.

338. Accordingly, it is necessary to contextualize the answers given by Jarislowsky as cited by Appellants in paragraph 224 AF. The questions posed in cross-examination with respect to corporate governance, and the knowledge of the affairs of a company that a director should allegedly possess, were purely hypothetical in nature, based on a given set of facts which are nowhere supported by the proof in the case at bar, and in the face of clearly expressed testimony by Jarislowsky that he had no knowledge of Widdrington's work as a corporate director. [471] However, by analogy, it is instructive and relevant to review Jarislowsky's testimony with respect to questions posed in cross-examination relating to Widdrington's due diligence for his first investment in December 1989, and dealing with the same subject matters set out in paragraph 224 AF. In his testimony, Jarislowsky was clear that Widdrington obtained more than enough information to support his investment and that if there were concerns with the portfolio; **it was the role of C&L to disclose them**.[472]

339. In fact, Jarislowsky testified:[473]

> *"And if I had been offered the directorship* [in Castor]***, I would not have done as much as Mr. Widdrington.***" [emphasis added]

E. SETTLEMENT WITH THE TRUSTEE

340. A portion of Widdrington's claim, $1,250,000, is for reimbursement of the sum paid by him to settle the action lodged against him, and the other directors of Castor, by the Trustee of Castor, for improper declaration and payment of dividends, in the amount of $15,552,942, in March, 1991, at a time when Castor was insolvent, and within 12 months of the bankruptcy of Castor (the "**Trustee's Action**").

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[471] Jarislowsky, April 5, 2005, pp. 8-9.
[472] Jarislowsky, April 4, 2005, pp. 110-112, 152-153; April 5, 2005, p. 62.
[473] Jarislowsky, April 4, 2005, p. 172.

341. The Trustee's Action was based on s.101 of the *Bankruptcy & Insolvency Act* ("**BIA**"),[474] **as it then read**. In 1991, the only defence available to a director to escape liability under s.101 BIA was set out in s.101(3), which exonerated from liability the director who had protested against the transaction. Conversely, the BIA **as it now reads**[475] would exonerate a director who reasonably relies on an auditor's report with respect to financial statements or other written reports of the auditor as to the financial position of the corporation.

342. Thus, at the time of the declaration and payment of dividends in Castor (March 21 and July, 1991, respectively), the only defence that could have exonerated Widdrington was if he had protested against such transaction.

343. The declaration of dividends was made at the March 21, 1991 meeting of the Board of Directors and appears in the Minutes[476] immediately following the tabling, review and approval of the audited financial statements for year end December 31, 1990. On page 4 of the same Minutes, under the caption: "*Fair Market Value Opinion*", there is the following entry:

> *"The Chairman tabled the opinion of Coopers & Lybrand dated March 6, 1991 which established the fair market value of the common shares of the corporation on or about December 31, 1990 at approximately $580 per share."*

344. Also, under the caption: "Eligibility For Investment And Borrowing Resolution", there is the following entry:

> *"The Secretary indicated that McCarthy Tétrault would be issuing shortly its opinion as to the eligibility for investment by various financial institutions and pension funds in Canada in the Corporation's short term promissory notes and other money market instruments."*

[474] R.S.C., 1970, c.B-3.
[475] R.S.C., 1985, c.B-3, s.101(2.1)(a).
[476] PW-2400-120.

345. On February 15, 1991, C&L issued a "legal-for-life" certificate[477] that stipulated:

> *"**As independent auditors of Castor**, we hereby certify that:*
>
> *1. During each of the five years ended December 31, 1986 to December 31, 1990, both inclusive, **Castor earned an amount available for the payment of a dividend** upon its common shares of at least four per cent of the average value at which the issued common shares of Castor were carried in its capital stock account during the year in which such amount was earned…*
>
> *The foregoing is based on the consolidated financial statements of Castor for the five years ended December 31, 1990, a summary of which is attached for your information, and on subsequent investigations*." [emphasis added]

346. Subsequent to the issuance of this legal-for-life certificate by C&L, McCarthy Tétrault issued its opinion confirming the eligibility of Castor's notes as legal-for-life investments.[478] In rendering their opinion, McCarthy Tétrault stated:

> *"We have received, examined and are relying upon:*
>
> *(i) **Certificates dated February 15, 1991 of Coopers & Lybrand**, the independent auditors of the Corporation, addressed to us, which certificates are based on the consolidated financial statements of the Corporation for the five years ended December 31, 1990, attesting among other matters to dividends previously paid and to earnings of the Corporation: …"*

347. Thus, at the time of the declaration of the dividends on March 21, 1991, and prior to the payment of the dividends in July, 1991, Widdrington had:

i) audited financial statements of Castor as at December 31, 1990, with the unqualified opinion of C&L, evidencing a highly profitable and solvent financial position;

ii) a C&L valuation letter ascribing the highest value to Castor's common shares in its history;

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[477] PW-7.
[478] PW-14, Tab 11.

iii) reference to a forthcoming legal opinion by McCarthy Tétrault as to the eligibility of Castor's notes for investment by various financial institutions and pension funds in Canada; and

iv) McCarthy Tétrault's legal opinion dated March 22, 1991 as to "legal-for-life" eligibility, which refers to and relies upon the legal-for-life certificate by C&L dated February 15, 1991.

348. Based on the then relevant provisions of the BIA, none of the foregoing was sufficient to provide a defence to the Trustee's Action against Widdrington for improper payment of $15 million of dividends. Added to the virtually insurmountable legal obstacle faced by Widdrington vis-à-vis the Trustee's Action was Widdrington's personal and family situation, including:

i) his advancing age, at the time, well into his 60s;

ii) the fact that he was no longer with Labatt and his earnings had declined;

iii) a totally handicapped 9 year-old grandson, with a single mother with no resources;

iv) another member of his immediate family who had required, and continued to require, financial help;

v) the fact of being one of only 3 Canadian directors of Castor, with the others being offshore;

all combined to suggest to Widdrington that a settlement with the Trustee, for a sum considerably less than his $15 million exposure, was the prudent and appropriate thing to do.[479]

349. The Trial Judge came to this exact conclusion, based on the evidence presented before her, and supported by the doctrine and jurisprudence cited by her.[480] The

[479] Widdrington, December 3, 2004, pp. 124-127.

conclusion of the Trial Judge is a finding of fact and Appellants have not raised any palpable and overriding error that would justify appellate interference.

350. The Trial Judge referred (in Footnote 3850), *inter alia*, to *McGregor on Damage,*[481] and to the case of *Gallop* v *Abdoulah* (Saskatchewan Court of Appeal).[482] The facts of the *Gallop* case bear a striking similarity to the facts of the case at bar, as set out in §3587, and in Widdrington's testimony.[483]

351. In paragraphs 240 and 241 AF, Appellants invoke the doctrine of *"fin de non recevoir*" and refer to the cases of *Airmax and Soucisse*, in support of their assertion that, as a matter of law, Widdrington is not entitled to claim compensation from C&L due to his alleged breach of duty.

352. The case of *Airmax* is clearly distinguishable. In *Airmax*, one of two directors of the company (the "*Remaining Director*") used the corporation as a vehicle to sue the other former director for improper diversion of corporate funds, improper declaration of dividends, and, generally, for having acted contrary to the interests of the corporation. Justice Jean Bouchard found that the Remaining Director was aware of the difficulties of the company, aware of its liquidity problems over a period of two years, his good faith was doubtful, his credibility was at issue, and that he was aware of exhorbitant administrative expenses and fictitious dividends[484]. It was because of these findings of fact (none of which are present in the case of Widdrington), that Justice Bouchard referred to the case of *National Bank of Canada* v. *Soucisse*,[485] and applied the doctrine of "*fin de non recevoir*" and dismissed the action.

353. Similarly, in *Soucisse,* the facts were such as to clearly distinguish it from the case at bar, and illustrate why the doctrine of *fin de non recevoir* is not applicable

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[480] §§3583-3590.
[481] *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell, 1997) at 285-287.
[482] *Gallop v. Abdoulah*, 2008 SKCA 29, at para. 36 [*Gallop*].
[483] Widdrington, December 3, 2004, pp. 124-127.
[484] *Airmax Environnement Inc. v. Auger*, 2006 QCCS 3634 at paras. 39, 40, 41, 43, 46 and 51 [*Airmax*].
[485] *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339 [*Soucisse*].

to the present case. In *Soucisse*, following the death of a surety, the Bank failed to disclose complete information to the heirs of the deceased about the existence of letters of revocable suretyship. Justice Beetz, writing for the Supreme Court, noted that the Bank: *"[took the initiative in giving them (the heirs) only partial information*", in that: *"[…] the suretyships existed and were revocable*." By only giving the heirs partial information, the Bank unilaterally altered the situation to its advantage. Further, Justice Beetz stated that the obligation to disclose such information to the heirs: *"[…] results from the principle that agreements must be performed in good faith*."[486] The facts in the case at bar do not put into question Respondent's good faith.

354. In paragraph 234 AF, Appellants cite the case of *Bilodeau*[487] which, they assert, is followed in the common law jurisdictions as well as in the civil law of Quebec. However, the *Bilodeau* case, as well as all the other cases cited by Appellants in Footnote 305, relate to construction issues, involving disputes between owners, contractors, sub-contractors, suppliers, architects, *et a*l, where the issues involved are matters of construction contract, and are thus irrelevant to this case.

355. In paragraph 238 AF, Appellants refer to the Judgment of Justice Lemelin in *RSM Richter Inc. v. Gambazzi et al.* and assert that she rejected Gambazzi's defence that he had reasonably relied on the auditors' reports when he authorized the payment of dividends. Respondent submits that this is incorrect. Rather, Justice Lemelin noted that the only way to avoid condemnation would lie in the exercise of the Court's residual discretion. Referring to the Supreme Court decision in *Wise*, Justice Lemelin stated:[488]

> *"On pourrait donc prendre en compte la bonne foi et l'intention des parties dans le contexte précis de l'opération litigieuse."*

[486] *Ibid.* at p. 356.
[487] *Bilodeau v. Bergeron & Fils Ltée*, [1975] 2 S.C.R. 345.
[488] *RSM Richter Inc. v. Gambazzi et al*, 2008 QCCS 3437, at para. 69.

356. Justice Lemelin stated that Gambazzi had the burden to show why the Court should exercise its discretion not to condemn him, and that he had failed to do so, based on the evidence led before her. Only two witnesses testified: the Trustee and Gambazzi. The other respondents to the Trustee's Action (Stolzenberg, Leser, Ochsner and Strohmeyer) did not file a contestation and were not represented at trial.[489]

357. Among the many findings by Justice Lemelin which led her to conclude that Gambazzi had not satisfied the burden to convince the Court to exercise its residual discretion, based on equity, in its appreciation of the conduct of Gambazzi, were the following facts:

i) Gambazzi, a lawyer, became a director of Castor in 1980;[490]

ii) His principal role in Castor was to make investments in Castor, on his own behalf, on behalf of his companies, and on behalf of his clients;[491]

iii) Stolzenberg would, at a certain period of time, visit Gambazzi at his offices in Lugano, approximately once a month, and bring with him numerous documents relating to transactions between Castor and various companies, for signature by Gambazzi;[492]

iv) There were hundreds of such documents, all signed by Gambazzi, without his really knowing the context or implications thereof;[493]

v) Gambazzi's approval of the declaration of dividends at the March 21, 1991 Board of Directors meeting, allegedly in reliance on the audited financial statements as at December 31, 1990, could not be retained by the court because:

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[489] *Ibid* at paras. 38 and 3.
[490] *Ibid* at para. 13.
[491] *Ibid* at para. 13.
[492] *Ibid* at para. 17.
[493] *Ibid* at para. 85.

> *"Le tribunal ne croit pas que M. Gambazzi était dans la complète ignorance de la situation financière de Castor, un survol de certaines transactions éclaires."*[494]

vi) A $2 million transaction between Castor and another company, Trade Retriever, in which Gambazzi signed for the latter company, as borrower, was executed by Gambazzi: *"…pour faire plaisir à Stolzenberg: 'c'est seulement 2 millions de dollars'";*[495]

vii) Gambazzi signed a loan agreement on behalf of a number of Castor's borrowers, recorded as "receivables" on the financial statements of Castor, which, according to the proof, were not;[496]

viii) Gambazzi was unable to identify the beneficial owners of those borrowers, represented by him, nor their respective financial positions;[497]

ix) Gambazzi, acting on behalf of one of Castor's subsidiaries, CHIF, entered into a $50 million year end transaction which had the effect of artificially and falsely improving the liquidity of Castor's financial statements by $50 million, as at fiscal year end 1990;[498]

x) Gambazzi had knowledge of the fact that Castor and/or Stolzenberg participated in "window dressing" transactions, which artificially, and falsely, improved Castor's financial statements;[499]

xi) Gambazzi directly participated in a circular transaction which had the effect of artificially, and falsely, improving Castor's financial statements to the extent of $100 million;[500]

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[494] *Ibid* at para. 88.
[495] *Ibid* at para. 95
[496] *Ibid* at para. 97.
[497] *Ibid* at para. 98.
[498] *Ibid* at paras. 100-103.
[499] *Ibid* at paras. 104-105.
[500] *Ibid* at paras. 106-111.

xii) Gambazzi: *"…avait assez d'informations à compter de 1990-1991, bien avant la faillite, pour susciter son attention et plus de vigilance";*[501]

xiii) After the declaration of dividends in March, 1991, in April, 1991, prior to the payment of the dividends, Gambazzi was informed by Stolzenberg that Castor was in need of liquid funds, it had exceeded its line of credit of $100 million granted by Credit Swiss, Zurich, and Gambazzi advanced a short-term loan of $10 million; subsequently, Stolzenberg requested him to leave the funds on deposit for "window dressing purposes".[502]

358. None of the above findings by Justice Lemelin can be attributed to Widdrington.

359. As further support for their pretension that Widdrington failed to perform his duties as director, Appellants, in paragraph 238 AF, assert that: "*Generally speaking, the evidence revealed that Castor's entire board was entirely passive*" and refer to paragraph 83 of the Lemelin Judgment, where Justice Lemelin stated: *"[…] se limite(ant) à regarder les chiffres sans questionner contrôler ou vérifier.*"

360. As noted above, the only testimony led before Justice Lemelin was that of the Trustee and Gambazzi. The only testimony with respect to the role played by the directors was the self-serving evidence of Gambazzi. Widdrington was not a party to the Trustee's Action before Lemelin, J., and did not testify.

361. Clearly, the Judgment of Lemelin, J. does not make "*proof*" in the case at bar.[503] Appellants failed to lead this proof (the testimony of Gambazzi) in the Widdrington Action or, for that matter, in any of the Castor Actions. Secondly, to condemn the role played by Widdrington as a director of Castor, based on the

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[501] *Ibid* at para. 112.
[502] *Ibid* at paras. 113-117.
[503] *Wightman v. Widdrington*, 2005 QCCA 584, Hilton, J.A. at para. 4; *Bédard v. Wm Wregley Jr. Co*., REJB 2000 - 17945, Yves Maynard, J.C.S. at paras. 36, 37, 38, 39; *Sécurité (La) Compagnie d'assurances générale du Canada v. Venmar Ventilation Inc*., AZ-50083314, Normand Gosselin, J.C.S. at para. 29.

testimony of Gambazzi (which is not even part of the court record) would be a flagrant breach of the *audi alteram partem* rule.

362. In paragraph 228 AF, Appellants assert that the Trial Judge: "*erred in holding C&L liable to Widdrington for the settlement without first considering whether Widdrington was legally entitled to claim a contribution from the Defendants, notably because he should bear the consequences of his fault*." Respondent submits that this is an incorrect position: the Trial Judge did consider whether Widdrington committed a fault. She concluded, **as a finding of fact**, that Widdrington believed that the audited financial statements fairly presented Castor's true financial position, and he reasonably relied on them being confident that Castor was in a position to pay dividends when, unbeknownst to him, Castor was hopelessly insolvent.[504]

363. In paragraphs 229 and 230 AF, Appellants raise the issue of Widdrington's alleged negligence, and assert that because of his negligence: *"Widdrington cannot, as a matter of law, shift the consequences of his own negligence to anyone else, including the auditor."* However, as noted above, the Trial Judge expressly held that Widdrington committed no fault whatsoever, and in §3575, Justice St-Pierre ruled that:

> *"There was no contributory negligence on the part of Widdrington."*

F. THE ISSUE OF C&L'S NEGLIGENCE

F-1 The context of the debate

364. Representing an extraordinary and exceptional undertaking by the Trial Judge, almost **600 pages** of the Principal Judgment are devoted to the issue of C&L's negligence.[505] With respect to each issue in dispute, the Trial Judge reviewed the documentary and testimonial evidence, set out the facts, the positions of the parties and the opinions of their experts, and provided detailed reasons for her

[504] §3584.
[505] Pages 40-637.

conclusions, all of which are supported by more than **3,000 footnotes**. It is truly difficult to fathom Appellants' desperation in criticizing the judgment on the issue of negligence as "***excessively general***"![506]

365. In §51, the Trial Judge wrote: "*Castor was like a coin – it had two sides: the appearances and the reality.*" The Trial Judge had been invited by Appellants to conclude that Castor's loan portfolio was composed of loans that were fully collectible and that the audited financial statements of Castor were not only correct but that they even **understated** the value of such loans. Based on a review of the documentary and testimonial evidence, the Trial Judge held that the portrait of Castor, as the financially sound entity depicted in the audited financial statements, was an **illusion**. This finding, which was based on the massive amount of evidence before her, was integral to her determination that Castor's audited consolidated financial statements did not comply with GAAP.

366. Appellants admit at paragraph 327 AF that considerable deference is to be paid to the Trial Judge's appreciation of credibility,[507] yet they ask this Court to overturn every determination as to credibility made by the Trial Judge regarding Respondent's expert witnesses. In AF, Appellants do not, however, challenge the Trial Judge's appreciation of the credibility (or lack thereof) of their own experts and lay witnesses. The Trial Judge's negative assessment of the credibility of a number of their key witnesses, such as Wightman (the audit engagement partner),[508] Mary Beth Ford ("**Ford**") (the audit manager for the overseas audits),[509] Russell Goodman ("**Goodman**") (Appellants' expert on GAAP),[510] Donald Selman ("**Selman**") (Appellants' expert on GAAS, but not on

[506] AF at para. 381.
[507] See also *Droit de la famille — 10647*, 2010 QCCA 587; *O.F. v. A.C.*, 2005 QCCA 1136.
[508] §§497, 2293, 2294, 2295, 2414, 2977, 2984, 3009, 3010.
[509] §§291, 633-637, 1139, 2496, 2501.
[510] §§391, 911, 1326, 1617, 1635.

C&L's audit work on the loans)[511] and Phillip Levi ("**Levi**") (Appellants' expert on fraud),[512] therefore stand.

367. Goodman was Appellants' sole expert on the issue of GAAP with respect to Castor's loan portfolio. Goodman was a managing partner of PriceWaterhouse when he became responsible for the Castor mandate and became a managing partner of PricewaterhouseCoopers when PriceWaterhouse merged with Coopers & Lybrand in July 1998.[513] This expert witness was found by the Trial Judge to have an interest in the litigation which put into question his ability to be objective and unbiased, and his theories, when applied to the facts, were found to be unreliable, not credible and "***did not hold water***."[514] Appellants' arguments on the issue of GAAP, as applied to the facts of Castor, are therefore unsupported by credible expert evidence or by the facts.

368. The obligation to comply with GAAP is a legal matter but the determination of whether there has been compliance with GAAP is an accounting matter.[515] In the absence of credible expert evidence of accounting matters, such as the application of cross-collaterization (in the absence of legal agreements), Appellants have no foundation to appeal the findings of the Trial Judge on matters requiring professional expertise.[516] Similarly, with respect to the other elements of C&L's negligence, for example the valuation letters, Appellants' witnesses such as Selman and Wightman were found by the Trial Judge not to be credible.[517]

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[511] §§366-367, 372, 374, 375, 3062.
[512] §§411, 415.
[513] §§382, 387, 390.
[514] §§391, 911, 1326, 1617, 1635.
[515] *Jeffery* v. *London Life Insurance Company*, 2011 ONCA 683 at para. 74.
[516] *International Culinary Institute of Canada, Inc.* v. *Grant Thornton LLP*, 2010 BCSC 541, paras. 28, 30-32. In this decision, the Supreme Court of British Columbia found that the plaintiff had led no evidence of the standard of care of a chartered accountant conducting a review engagement and held that: "*A lack of expert evidence on this point is fatal to the plaintiff's case."* A failure to adduce credible expert evidence is tantamount to adducing no expert evidence on a particular issue.
[517] §§2977, 2984, 3009-3010, 3062.

369. Remarkably, in the New Trial, Appellants chose not to present any expert evidence to attempt to defend their numerous failures to audit for LLPs in accordance with the prevailing standards. They purposely limited the mandates of their own experts to avoid any evidence regarding the quality of C&L's audit work in connection with Castor's loan portfolio, by far its most significant asset. Much of the evidence of their experts was restricted to theory.[518] However, theoretical arguments must be considered and evaluated in light of the factual evidence. The evidence unequivocally supports the conclusion that the audited financial statements, as well as the share valuation letters and legal-for-life certificates, were grossly misstated,[519] and that the professional work performed by C&L was in breach of the recognized professional standards of the time, including the lack of independence and objectivity of the engagement partner.

370. The Trial Judge made no error in characterizing the applicable standard of care on the issue of C&L's negligence. Therefore, as recognized by Appellants in paragraph 213 AF, the breach of a standard of care is a mixed question of fact and law, reviewable only for palpable and overriding errors.[520] Appellants have not established that any such alleged errors had a determinative impact on the judgment on negligence.[521] In the absence of such errors, the Trial Judge's conclusions, which were founded on an appreciation of the evidence as a whole, should not be disturbed.[522]

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[518] For example, §375 with respect to D. Selman.
[519] The relevant years for the assessment of negligence are 1988, 1989 and 1990 (as well as 1991 for the issues of the share valuation letters and legal-for-life certificates).
[520] The Court in *Housen*, *supra* note 138, is explicit in paras 29 and 30 that, when the mixed question of fact and law is a finding of negligence, there is a more stringent standard mandated for appellate review.
[521] *Volailles du fermier inc.* c. *Éleveurs de volailles du Québec (Fédération des producteurs de volailles du Québec),* 2009 QCCA 871 at para. 10; *Therrien v. Launay*, EYB 2005-92515 at paras. 12, 13 (C.A.).
[522] *Housen, supra* note 138.

371. The portion of AF on audit negligence is devoted almost exclusively to an attack of the Trial Judge's rulings and assessments of Respondent's expert witnesses and the question as to whether the audited financial statements complied with GAAP in 1988. Although C&L's failure to comply with the applicable audit standards (GAAS) is an essential component of the findings on negligence with respect to the audits, this aspect of the Principal Judgment is virtually **ignored** by Appellants, presumably because the errors committed by Appellants are so egregious and indefensable.[523]

F-2 Expert evidence

1. The Trial Judge made no reviewable error in her review of, and reliance on, the expert evidence

372. In paragraph 319 AF, Appellants assert that the Trial Judge, in deciding the negligence issue: "*adopted the opinions reached by Plaintiff's experts, Vance, Froese and Rosen*" and attack her decision to do so. At paragraph 350 AF, Appellants erroneously assert, without citation, that the Trial Judge: "*relied entirely on Plaintiff's experts to the exclusion of Defendants' experts*". These assertions are intended to infer that the Trial Judge was biased and one-sided in her appreciation of the expert evidence as was expressly stated in Appellants' Inscriptions.[524] This attack on the Trial Judge and our system of justice is entirely without merit and is based on misrepresentations and distortions of the facts.

373. Furthermore, Appellants conveniently neglect to identify the instances where they have admitted, or their own experts have acknowledged, many of the

[523] Selman, June 4, 2009, p. 93: "*I'm not defending the audit work here*."
[524] By way of example, see paragraphs 14, 151, 181, 230, 371, 388, 441 and 501 of Inscription #1, although such allegations are ubiquitous throughout the Inscriptions.

material misstatements in the audited consolidated financial statements identified in the Principal Judgment.[525]

2. The Trial Judge made no reviewable error in characterizing the mandates of the expert witnesses

374. Appellants assert at paragraph 328 AF that the Trial Judge erred in considering the restricted nature of their experts' mandates. However, the Trial Judge held as a matter of fact that none of Appellants' experts provided an overall opinion on the audited financial statements,[526] and that they: "*advanced a number of theories contradictory at first glance, **if not mutually exclusive***".[527] GAAP and GAAS are inter-related and there is no logic in severing these principles in the assessment of auditors' negligence. The Trial Judge was correct to consider that

[525] The following are **illustrative** of such admissions and acknowledgements. In paragraph 334 of their Plea, Appellants admit that Stolzenberg "owned or managed" 97872, see also paragraphs 223 and 320 with respect to the role of Gambazzi and E. Banziger (RPTs). In paragraphs 248 and 249 of their Plea, Appellants admit that, because Stromeyer owned, controlled or had an interest in various companies including Aden International Finance S.A. and Cantal Anstalt, which borrowed money from Castor, these were RPTs. Appellants' experts acknowledge that the $100M debentures transaction, including the $100M of loans to Morocco and Foxfire, had no real business or monetary purpose, artificially and fraudulently improved Castor's balance sheet by misrepresenting, to the extent of $100M, its liquidity, with the necessary consequence that Castor's audited financial statements for each of the years 1988, 1989 and 1990 were not prepared in accordance with GAAP and were materially misstated and misleading.(Levi: D-1347, p. 60, January 13, 2010, pp. 197-200; February 2, 2010, p. 139, January 12, 2010, pp. 65-66. Selman: D-1295, p. 237 (6.3.17), p. 312 (6.11.05). In paragraphs 348 and 354, 355 of their Plea, Appellants admit that US$50M was restricted and that the financial statements were materially misstated as this was not disclosed.

[526] §317. Goodman's mandate was limited to only GAAP issues relating to the valuations of certain loans, Levi opined on the impact of fraud on the audits and Selman's mandate was limited to specific GAAP and GAAS issues, excluding LLPs. The Trial Judge further found as fact that: "*[n]one of the Defendants' experts has provided an opinion about the inter-relationship of GAAS and GAAP, despite being chartered accountants with audit experience*", they: "*performed restricted mandates that do limit rather than complete the understanding of the fundamental issues of the case*", "*[t]he concepts of GAAS and GAAP have been severed so that none proffer an opinion on the fundamental question in this case: did C&L conduct its 1988, 1989 and 1990 audits in accordance with GAAS and, if not, what were the consequences of such failure?*" and: "*their various opinions cannot be assembled and taken as a whole*". §§361-364.

[527] §324. In an effort to justify Appellants' audit work (a ground of defense abandoned in the present appeal) Levi and Selman concluded that certain transactions were fraudulent, while Goodman opined that the same transactions were legitimate and that the financial statements in connection therewith were not materially misleading.

Goodman, Levi and Selman provided irreconcilable fragments of opinion, of limited use, on the same issues.[528]

375. Appellants' experts acknowledged that they were not providing the Court with a comprehensive opinion on the issue of negligence. For example, Selman stated:

> *"[…]* ***I'm not in a position to deal with the question of whether or not the financial statements have been presented appropriately****, and the Court will have to take my testimony, and later witnesses' testimony and sew it together to get to that conclusion, and that's just the fact of the matter."*[529] [emphasis added]

376. Despite Appellants' claims that Kenneth Froese ("**Froese**") was unfairly favoured over Goodman and Selman,[530] the mandates and credibility of Goodman and Selman were affected by many factors that were not referenced by Appellants and that did not apply to Froese.[531] Appellants' further accusation that Froese's report did not address fraud is simply incorrect.[532]

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[528] *D.L. c. Excellence (L'), compagnie d'assurance-vie*, 2007 QCCS 5776 at paras. 42, 43: "*La crédibilité de l'expert dépend de plusieurs facteurs, tel qu'énoncé par la Cour supérieure : Une expertise valable doit rencontrer les critères de fiabilité, de rigueur scientifique, d'indépendance intellectuelle et d'éthique* ***qui permettent à la cour de l'utiliser à la solution du (…) litige****. …Par ailleurs, le juge peut accorder que peu de crédibilité au témoignage de l'expert qui recèle des lacunes comme, par exemple, un témoignage évasif, contradictoire, empreint de partialité, etc. …*".

[529] Selman, June 1, 2009, pp. 94-95.

[530] AF at paras. 329-330.

[531] §§365-396. The Trial Judge considered, *inter alia*, the limited point of view from which Goodman's report was written, the restricted content of Selman's and Goodman's reports, their disregard of evidence, their inconsistent or biased methodologies, their advocacy of Appellants' position, Goodman's interest in the litigation, Goodman's determinations of the credibility of other witnesses and the manner in which Selman and Goodman responded to questions at trial. Goodman's statement that he was not comfortable opining on audit matters and GAAS was found by the Trial Judge to be: "*a surprising and unreliable answer in the circumstances*", given his experience as an auditor. Selman's statement that he was: "*not in a position to deal with the question of whether or not the financial statements have been presented appropriately*" was also considered by the Trial Judge.

[532] AF at para. 337. Froese's report clearly assumed fraud, as appears from his mandate outlined in para. 1.6 of his report, PW-2941, Vol. 1: "*We were also asked to provide our opinion as to whether the extent of alleged fraud by management of Castor and by other parties, was such that it is likely that auditors, conducting audits in compliance with GAAS, had sufficient information available to them to identify problem loans and material misstatements in spite of the alleged management fraud.*" Froese also stated at para. 8.31: "*In our opinion,* "sufficient appropriate audit evidence" *was readily available to C&L to permit C&L to conclude that Castor's consolidated financial statements were materially misstated in each of the years ended December 31, 1990, 1989 and 1988, in spite of the alleged fraud by management and others*". See also §§2860, 2866, 2874.

377. The Trial Judge held that Respondent's experts, Keith Vance ("**Vance**"), Froese and Lawrence Rosen ("**Rosen**"): "*with distinctly different background and experience, all independently arrived at the same conclusion that the audited financial statements of Castor for 1988, 1989 and 1990 contained material misstatements that should have been identified and would have been identified by C&L but for their negligent audit work*".[533] Their mandates did not prevent them from assisting the Court with the fundamental issues in dispute, which is why they were not considered to be restricted.[534] As summarized in the Principal Judgment, each of these three experts opined that Castor's audited consolidated financial statements were materially misstated in each of the years 1988, 1989 and 1990 and further opined that C&L did not comply with GAAS.

378. Appellants have not raised any manifest error in the above-mentioned findings of fact, and the decision of the Trial Judge to consider the restricted mandates of Appellants' experts is amply supported by decisions of the Quebec Superior Court and Court of Appeal, which were cited in the Principal Judgment.[535] The

[533] §322.
[534] By way of example, Froese concluded that Castor's financial statements were materially misstated because material LLPs were required, but not taken. Although he was not asked to opine on GAAP disclosure issues in his report, he did testify on that topic. See for example Froese, December 2, 2008, pp. 124-125. The Trial Judge correctly accepted that Froese did not adopt the portion of the 1997 report prepared by his deceased co-author.
[535] §330; See for example *Club de voyages Aventures (Groupe) inc. c. Club de voyages Aventure inc.*, REJB 1999-13211 at paras. 31, 56-58, 82, AZ-99021695 (S.C.); *Tremblay c. Perrone (Succession de)*, [2006] QCCS 3073 at paras. 69-71, AZ-50376939; J.E. 2006-1624 appeal dismissed, [2007] QCCA 1604; *Danny's Construction Company Inc. c. Birdair inc.*, EYB 2010-169584 at paras. 381, 392, 396-398, 404-405, 412-413, 416-417, 453 (S.C.); *Tourbières Premier ltée c. Société coopérative agricole régionale de Rivière-du-Loup*, REJB 2001-23507 at paras. 30-35, 50 (C.A.); *Audet c. Landry*, [2009] QCCS 3312 at paras. 61-68, AZ-50566973, J.E. 2009-1472, [2009] R.R.A. 796, appeal allowed on quantum only, 2011 QCCA 535; *X Merchant inc. c. Ginsberg, Gingras & Associés inc.*, EYB 2009-158718 at paras. 199-209 (S.C.); *Boiler Inspection and Insurance Co. of Canada c. Manac inc./Nortex*, AZ-50194738 at paras. 176-193, J.E. 2003-2156, [2003] R.R.A. 1415 (rés.), principal grounds of appeal dismissed and incidental appeal allowed with partial dissent, [2006] QCCA 1395, principal appeal allowed and incidental appeal dismissed, [2006] QCCA 1398.

decisions cited by Appellants are of no assistance to this Court on this point.[536]

3. The Trial Judge made no reviewable error in admitting the experts' reports

379. Appellants claim at paragraph 320 AF that the Trial Judge erred in allowing Respondent to introduce into the New Trial six "*new*" expert reports erroneously asserting, without citation, that Respondent committed to only introducing expert testimony adduced in the First Trial. Appellants misstate the circumstances surrounding the introduction of the experts' reports, and seek to have this Court overturn a trial management decision that was largely based on the Trial Judge's determinations of fact.

380. Appellants incorrectly state at paragraph 320 AF that the decision of the Trial Judge to allow the filing of the experts' reports was somehow at odds with an alleged "*imposition*" by Chief Justice Rolland of a 120-day limit on Appellants' proof. In fact, this Court has already twice dismissed Appellants' attempts to appeal the 120-day limit and has rejected Appellants' claim that the Trial Judge relinquished her independence by adopting as her own the Chief Justice's order.[537] This is not the first time Appellants have "*misinterpreted*" a ruling, as was acknowledged by Associate Chief Justice Wéry on October 16, 2006.[538]

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[536] Appellants cited three decisions that do not address the issue of whether a court may consider a restricted mandate in assessing the credibility of an expert witness. See *Lindhal Estate v. Olsen*, 2004 A.J. 967 and *Rances v. Scaplen*, 2008 A.J. 1323 and *Simard v. Larouche*, 2011 QCCA 911, which instead concern adverse inferences and witnesses not called to testify. In those decisions, the only statement that may be relevant to this case is the Court's observation in *Rances* that: "*not one of the experts could provide a complete explanation to the satisfaction of the Court*" on the reconstruction of the accident in question. Appellants also referred to *A.H. Coates & Sons v. John-Cor Development Ltd.*, (1999) N.B.J. 474, a case in which the New Brunswick Court of Queen's Bench accepted the evidence of the plaintiff's expert, even though it was "*not required*" to draw an adverse inference from the limited mandate of the defendant's expert.

[537] *Wightman c. Widdrington (Estate of)*, 2009 QCCA 1542 at para. 9; *Wightman c. Widdrington (Succession de)* 2009 QCCA 710.

[538] *Dunn, supra* note 9 at para. 44. Appellants now appear to have abandoned the preposterous claim set forth at paras. 176-192 of their Inscription #1 that having "only" 120 days to complete their proof resulted in a "miscarriage of justice". The term "*miscarriage of justice*" no longer appears in their Factum, and

381. During the First Trial, Respondent filed and identified on his Rule 15 the expert reports of Rosen & Vettese (Dr. Rosen)[539], Ernst & Young[540], BDO Dunwoody (Keith Vance)[541], Doane Raymond (Kenneth Gunning; Ken Froese being a co-author)[542], Drivers Jonas, Robson Rhodes (Hugh Aldous), Stephen Jarislowsky[543], Paul Lowenstein[544], Professor Reuven Brenner[545] and Earl Cherniak[546].

382. During the First Trial, considering that Vance testified on professional negligence for approximately four trial years, including more than 260 days in cross-examination and re-cross-examination by Appellants, Respondent did not call other experts (such as Rosen or Gunning) on that issue, but never renounced his right to do so in the New Trial. Respondent also never renounced the right to call rebuttal expert witnesses, such as Cherniak, to testify on matters in respect of which the burden of proof lay with Appellants.

383. At a pre-trial conference held on July 16, 2007, prior to the New Trial, Chief Justice Rolland specifically invited each side to have their experts prepare detailed reports so as to relieve the necessity of having said experts testify at length in direct examination (similar to the concept of the "*Read-In Rule*" later applied by the Trial Judge). At no time was there ever an implicit or explicit understanding that Respondent was bound to follow the identical strategy from the First Trial at the New Trial. On the contrary, the decision to order a New Trial

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Appellants' casual reference to the 120-day limit is simply a misguided attempt to support their appeal by "*misinterpreting*" a decision that is already *res judicata*.

[539] PW-3033, Vols. 1 and 2, dated October 27, 1997.
[540] Dated October 28, 1997.
[541] PW-1417, dated October 30, 1997.
[542] Dated October 31, 1997.
[543] PW-2405, dated August 6, 1998.
[544] PW-2404, dated August 27, 1998.
[545] Dated August 28, 1998.
[546] PW-3099, dated September 2, 1998.

gave Respondent the absolute right to be the master of his proof and to adduce evidence as he deemed appropriate.[547]

384. Numerous conferences were held prior to the New Trial to discuss case management, first before Chief Justice Rolland and then before the Trial Judge, and no specific identification of the experts to be produced at the New Trial was made by either party prior to mid-January 2008. In later pre-trial conferences, Respondent advised of his intention to file 8 expert reports[548] in addition to the reports and testimony on reliance which were imported into the New Trial by consent.

385. On February 12, 2008, Appellants made a Motion in which they sought the exclusion of 7 of the 8 expert reports identified by Respondent even though Appellants would themselves produce a new expert report by Levi as well as significantly altered expert reports by Selman and Goodman.[549] Appellants argued that Respondent should be prevented from deviating in any respect from the litigation strategy used in the First Trial before Mr. Justice Paul Carrière. Respondent filed a detailed contestation to such motion.

386. The Trial Judge rendered a decision on the matter on **February 27, 2008**, and concluded, *inter alia*, the following:

> *"Vers un nouveau procès, il y a nécessairement et obligatoirement un changement de stratégie de part et d'autre qui s'impose puisqu'il n'est pas question que l'on puisse refaire ce qui a été fait, le second procès ne durera pas huit ans et plus."*[550]

[547] Where the filing of an expert report is due to an evolving situation or case of long duration, it should be allowed. *Corp. Steckmar c. Laurentienne générale (La), compagnie d'assurances inc.*, AZ 94011377 at p. 3, J.E. 94-624, [1994] R.D.J. 243; *Landry c. Blouin*, AZ-99026469, B.E. 99BE-975 (S.C.).
[548] Rosen, Vance, Froese, Cherniak, Brenner, Kingston, Tom O'Neil and Neil Gold.
[549] The expert report of Selman produced in the New Trial as D-1295 "*superceded*" his 2005 report produced in the First Trial as D-659-1 which in turn "*superceded*" his report dated May 21, 1998, filed into the court record.
[550] February 27, 2008 Judgment at p. 33.

387. Referring to a joint proposal prepared by counsel for the parties and submitted to Chief Justice Rolland,[551] the Trial Judge found as a question of fact that Respondent had not bound himself to a trial strategy.

388. The Trial Judge found as fact that the majority of the expert reports that Respondent sought to file in the New Trial were not new reports, but simply contained more detail on the same subject matters that were previously canvassed in detail by such experts in their prior reports.[552] She further found that it was impossible for Appellants to claim to have been taken by surprise in the New Trial.[553] Where the opposing party is not taken by surprise, having been advised in advance, or already having possession of the expert reports sought to be produced, their production should be allowed, in order to preserve the inalienable and inviolable right of a party to make its proof before the Court.[554]

389. Appellants are also ill-founded in seeking to justify the intervention of this Court by attacking the Trial Judge's decision to allow the filing of the expert reports of O'Neil and Brenner, who were never called to testify and whose reports were not referred to or relied upon by the Trial Judge in the Trial Judgments. As for the reports of Rosen, Froese, Kingston and Cherniak, Appellants have not asserted any facts that would demonstrate any specific manifest or palpable error on the part of the Trial Judge as to the content of those experts' reports or the circumstances in which they were filed.

390. The decision to allow the filing of experts' reports is rendered in the exercise of the broad measure of discretion enjoyed by judges of the Superior Court, and of their inherent jurisdiction to manage and control the cases pending before them.

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[551] The Joint Proposal of the parties is attached as Annex D of the Procès-verbal of the January 7, 2008 case management meeting (and is referenced and relied on by Appellants in para. 29 of Inscription #3).
[552] February 27, 2008 Judgment at p. 40.
[553] February 27, 2008 Judgment at p. 32.
[554] *Vézina c. Brady*, 2006 QCCA 1069 at paras. 25-32; *9074-1307 Québec inc. c. Canadelle, a Division of Canadelle, l.p.*, 2005 QCCA 1011; *Licata c. Royale du Canada (La), compagnie d'assurances*, AZ-95011177, J.E. 95-272 (C.A.); *Landry c. Blouin*, AZ-99026469, B.E. 99BE-975 (S.C.); *St-Germain Transport inc. c. Procureur général du Québec*, AZ-93021505, [1993] R.R.A. 568 (S.C.) at p. 11.

The Court of Appeal does not intervene except in exceptional cases of clear misuse or abuse of that discretion, or error of law.[555]

4. The Trial Judge made no reviewable error in applying the "Read-in Rule"

391. At paragraph 5(g) AF, Appellants claim that the Trial Judge erred in relying on "*inadmissible, unsworn evidence in experts reports by deeming them read into the record*", referring to the rule by which an expert would be qualified, produce his report, submit to examination and cross-examination, and his report would be entered into evidence as if it had been read before the Court (the "***Read-in Rule***").

392. At paragraph 321 AF (and footnote 366), Appellants incorrectly assert that such decision was made on March 4, 2008 and that it could not have been the object of an immediate appeal, as it: "*admitted rather than rejected evidence*". In fact, the Read-in Rule was established during a pre-trial conference held on January 8, 2008.[556] It is clear from the Trial Judge's comments on March 4, 2008 at pages 45-46 that the Read-in Rule had already been established prior to that time.[557]

393. The Trial Judge alerted counsel for Appellants that she had made previous rulings on the Read-in Rule in the case at bar which they chose not to appeal to this Court (as opposed to the numerous other issues on which they did seek leave to appeal), as appears from the transcript of May 20, 2009 at page 170. Subsequently,[558] the Trial Judge had occasion to remind Appellants that they had not lodged an appeal in respect of her decision on the Read-in Rule.[559]

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[555] *Horvath, supra* note 150.
[556] Extract of the pre-trial conference held on January 8, 2008, pp. 86-90 and 102-103.
[557] Representations, March 4, 2008, pp. 45-46.
[558] Cited by Appellants in AF at p. 114, footnote 371.
[559] Representations, March 4, 2008, pp. 43-51; August 31, 2009, pp. 34-35; and May 20, 2009, pp. 165-173.

394. Appellants claim at paragraph 325 AF that on August 31, 2009, the Trial Judge applied the Read-in Rule to prevent them from questioning one of their experts on matters already covered by his report. If the Trial Judge's application of the Read-in Rule prevented Appellants from adducing evidence (which is clearly not the case), article 29 (2) CCP would not, in any event, have prevented Appellants from immediately seeking to appeal that decision.

395. The authorities cited by Appellants in support of the proposition that an expert's report is not evidence are irrelevant to the present case. The Court of Appeal in *Massinon c. Ghys*[560] stated that the communication of an expert report pursuant to article 402.1 CCP does not exempt the expert from testifying and bringing such report into evidence, absent the consent of the opposing party. It did not address the situation in which the expert testifies under oath and submits to lengthy cross-examination. In *125057 Canada inc. c. Rondeau*[561], the expert witness appears to have cut his examination short without testifying as to important issues and there is no indication that he summarized his report *viva voce* or incorporated his report into his testimony by reference, as was done by the expert witnesses in the present case. In *Chubb du Canada, Cie d'assurances c. Ste-Foy (Ville)*[562], *Ali c. Compagnie d'assurance guardian du Canada*[563], and *Anthony c. Williams*[564], the expert witnesses had not testified at all, contrary to the expert witnesses in the present case. These authorities are of no assistance in this case.

396. Appellants fail to mention that each of Respondent's experts underwent extensive direct examination, cross-examination, re-direct examination and at times, re-cross examination on all material aspects of their respective reports. Respondent's experts summarized in detail their opinions and the conclusions of

[560] 1998 CanLII 12845 (C.A.) [*Massinon*].
[561] 2011 QCCS 94.
[562] 2000 CanLII 7681 (C.A.).
[563] 1999 CanLII 13177 (C.A.).
[564] [1975] C.A. 112.

their reports.[565] On February 5, 2009, Appellants' counsel admitted to the Trial Judge that Vance and Froese had substantiated their reports with oral testimony.[566]

397. Appellants' claim that Rosen did not sufficiently testify as to the content of his reports is unfounded. Those arguments were made before the Trial Judge on February 5, 2009 in an unsuccessful attempt to strike Rosen's reports and, at that time, **counsel for Appellants stated to the Trial Judge that Appellants would live with her decision.**[567] In dismissing Appellants' motion, the Trial Judge considered that Rosen was the third witness to be called by Plaintiff on the issue of auditor's negligence, and that Vance had already testified to issues that did not require additional clarification *viva voce* by Rosen.[568] In any event, one cannot give serious consideration to this argument in view of the fact that Rosen testified *viva voce* for **21 days** in the New Trial.

398. Where a qualified expert witness testifies at trial, a trial judge has the discretion to accept the contents of the expert report as part of the testimony of the witness, as if the witness had read the report into the record.[569]

399. The Trial Judge had the unique opportunity to appreciate first-hand the credibility and reliability of the various expert witnesses and the contents of their reports, having heard their ***viva voce* expert testimony** over a period of **152 trial**

[565] See for example Vance, March 5, 2008, pp. 79-126; Rosen, February 5, 2009, pp. 143-158; Froese, November 11, 2008, pp. 210-212, 264-265; November 25, 2008, pp. 53-64, 170-207; November 28, 2008, pp. 171; December 2, 2008, pp. 130-134.
[566] Representations, February 5, 2009, pp. 192-193.
[567] Representations, February 5, 2009, p. 190 (arguments and decision at pp. 178-204).
[568] Rosen, February 5, 2009, pp. 203-204.
[569] Pierre Tessier et Monique Dupuis, "Les qualités et les moyens de preuve – Le témoignage Preuve et procédure" in *Collection de droit 2011-2012*, vol. 2 (École du Barreau du Québec, 2011), EYB2011CDD13 at p. 54; See for example *Asselin c. Audet*, REJB 2001-24260 (C.S.) at paras. 136-139, 189-196, *BCE inc. (Arrangement relatif à)*, (10 January 2008), Montreal 500-11-031130-079 (C.S) at paras. 7-9 and *BCE inc. (Arrangement relatif à),* (11 January 2008), Montreal 500-11-031130-079 (C.S.) at paras. 96-99; *Mallette* c. *Bélisle*, EYB 1981-139034 (C.S.) at para. 46.

days.[570] It takes substantial temerity to suggest that these examinations should have been further extended in order to force the experts to repeat everything written in their reports (when the Trial Judge had indicated to the parties that she had read them in their entirety prior to each expert testifying).[571]

400. The right to cross-examine Respondent's expert witnesses ensured that Appellants suffered no prejudice by the introduction into evidence of their reports.[572] The Read-in Rule was a practical mechanism that served to reduce the duration of the direct examinations of such witnesses, but in no way eliminated or limited their cross-examinations. In the context of this particular case, which suffered from unprecedented delays and desperately required the careful judicial management of time and resources, the Read-in Rule was an appropriate and necessary measure, and same cannot constitute a genuine basis for appeal of the Trial Judge's decision.

401. Appellants' attempt to support their arguments by incorrectly claiming at paragraph 321 AF that the Read-in Rule resulted from a conclusion of the Trial Judge: "*that the Court and the parties were bound by the 120 days allocated for each party*". In fact, this Court has already twice dismissed Appellants' attempts to appeal the 120-day limit and has rejected Appellants' claim that the Trial Judge relinquished her independence in any way by adopting as her own the Chief Justice's order.[573] As a matter of fact, Appellants alone were accorded

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[570] **38 days** in the case of Respondent's expert Keith Vance; **23 days** in the case of Respondent's expert Kenneth Froese; **21 days**, in the case of Respondent's expert Dr. Lawrence S. Rosen; **4 days**, in the case of Respondent's expert John Kingston; **1 day**, in the case of Respondent's expert Earl Cherniak; **22 days**, in the case of Appellants' expert Donald Selman; **26 days**, in the case of Appellants' expert Russell Goodman; **11 days**, in the case of Appellants' expert Philip Levi; **2 days**, in the case of Appellants' expert Alain Lapointe; **2 days**, in the case of Appellants' expert John Campion; and **2 days**, in the case of Appellants' expert Alain Lajoie, which she was able to compare with the transcripts of **3 days** of his testimony in chief imported into the new trial.

[571] Representations, August 31, 2009, pp. 34-35; June 2, 2009, pp. 143-146 (Appellants acknowledge the Trial Judge having read the experts' reports).

[572] *Dionne* c. *Tôle gaufrée de Québec Inc.*, AZ-76031178, [1976] C.P. 433 at 437-438; *U.S. Fidelity & Guarantee Co, et al* v. *Bel Air Laurentien Aviation Inc.*, AZ-91031002 (C.Q.) at pp. 7-8 citing the decision of *Dionne*; *Gauthier* c. *Séguin*, (1969) B.R. 913.

[573] *Supra* note 537.

136.25 trial days to adduce their evidence, as well as additional time for oral arguments.

F-3 Audit negligence (GAAS & GAAP)

1. The Trial Judge's conclusions on GAAS and the issue of fraud

402. In §2186, the Trial Judge concluded:

> *"Because C&L did not conduct their audits in accordance with GAAS and because C&L cannot successfully plead fraud to excuse themselves, the Court concludes that C&L committed a fault in their professional work in connection with the audits of Castor for 1988, 1989 and 1990."*

403. In §2306, the Trial Judge concluded (after an exhaustive review of the evidence) that the engagement partner, Wightman, was not objective or independent. This lack of independence and breach of ethical standards helps to explain the near total abdication by C&L of their professional duties in this matter.

404. In fact, the Trial Judge devoted 114 paragraphs of the Principal Judgment to the specific issue of the auditor's independence and objectivity,[574] supported by almost 200 footnotes, the vast majority of which reference the factual evidence but also include expert evidence. It is significant that Appellants do not take issue with the Trial Judge's conclusions that C&L did not comply with: i) the requirement under GAAS to have an objective state of mind; ii) the requirements for CAs imposed by the Quebec Code of Ethics; and iii) C&L's own rules governing professional independence.

405. The Trial Judge held as a finding of fact that C&L's GAAS failures were: "***blatant, pervasive and inexcusable***".[575]

406. Appellants do not challenge any of the conclusions of the Trial Judge on the issue of GAAS or the defense of fraud with any specificity. In fact, in paragraphs 316-317 AF, Appellants merely assert that liability will only result if Castor's

[574] §§2193 – 2307.
[575] §2436.

financial statements did not fairly present Castor's financial situation in accordance with GAAP, and that the Trial Judge's conclusions as to GAAS are "*irrelevant"* if the Trial Judge erred on the issue of GAAP. Appellants have raised no specific palpable and overriding errors as to the Trial Judge's conclusions on GAAS and the defence of fraud, such that they have virtually **abandoned** the appeal in that respect.[576]

2. The Trial Judge's conclusions on GAAP

407. Appellants claim at paragraph 375 AF that the Trial Judge erred in concluding that the audited consolidated financial statements of Castor: "*for 1988 did not present fairly the company's situation in accordance with GAAP*". Any material misstatement renders the financial statements not in compliance in GAAP, such that, unless this Court were to overturn each and every determination of a material misstatement made by the Trial Judge, Appellants cannot possibly succeed in their appeal on the issue of GAAP. This is particularly true given that **Appellants have acknowledged that the financial statements were misstated**.[577]

408. Not a single expert witness who testified before the Trial Judge opined that the audited consolidated financial statements of Castor for the years 1988, 1989 and 1990, taken as a whole, complied with GAAP. On the contrary, the three experts on accounting and auditing called by Respondent all opined that Castor's

[576] As appears from the Principal Judgment and pleadings, Appellants' defence was predicated on multiple theories of the case. Theory one was that the financial statements were not materially misstated and therefore it was inconsequential whether or not the auditors complied with GAAS. Theory two was that an extensive fraud perpetrated by management and third parties prevented C&L from identifying material misstatements. Theory three was that the true cause of Respondent's losses was Castor's collapse, due to an unprecedented meltdown in the market. At §§317, 323-324 and 361-364, the Trial Judge found that the individual mandates of Appellants' expert witnesses were designed to support these mutually exclusive theories of the case, their opinions often contradicted each other and, on many key points, at least one of Appellants' experts concurred with many of the opinions of Respondent's experts on the GAAP and GAAS issues in dispute. Appellants' litigation strategy highlights their lack of conviction about the merits of their case.

[577] Inscription #1 at para. 438: "*The trial judge fails to consider and address the evidence and the impact of fraud raised by Defendants in respect of the **GAAP misstatements**, including related party transactions, restricted cash, $100 million debentures, fee diversion, and information regarding certain of the loans.*" [emphasis added]

financial statements were materially misstated and not in accordance with GAAP.[578] Appellants' experts Selman and Levi also opined as to material misstatements in the financial statements.[579]

409. The lay testimony and documentary evidence, cited at length by the Trial Judge, demonstrated overwhelmingly that virtually none of Castor's loans was collectible during the relevant years, that Castor was insolvent by year end 1988 and that its business model was illusory and destined to fail.

410. It is truly astonishing that Castor, which was in the business of lending money to borrowers and supposedly receiving interest income, collected virtually no cash from its borrowers during the relevant years. In fact, between 1988 and 1990, **capitalized interest and fee revenue** constituted between **92.4%** and **96.2%** of Castor's recorded revenue.[580] This situation was not disclosed in the audited financial statements and, as described hereafter, C&L adopted a presentation format that hid from the reader the overwhelming extent of the capitalized interest and fees.

3. Appellants cannot appeal the Trial Judge's conclusions for 1989 and 1990 merely by claiming that they are derivative of her conclusions for 1988

411. In paragraph 375 AF, Appellants improperly ask this Court to overturn the Trial Judge's conclusions on GAAP regarding the years 1989 and 1990 on the basis that those conclusions are: "*largely derivative of her 1988 conclusions*".

412. As is evident from the Principal Judgment, the Trial Judge properly analyzed the issue of LLPs in light of the evolving factual situation, taking into account the

[578] §§310, 311, 312, 314, 2147.
[579] See, for example, §§324, 683-684, 1684-1687, 1861.
[580] §§440-442

increase in Castor's exposure in each subsequent year and the weakening of its collateral security with respect to each of the loans/projects reviewed.[581]

413. The Trial Judge's conclusions on GAAP with respect to 1989 and 1990 are separate and independent from her conclusions for 1988, such that Appellants have the burden to establish how each purported palpable and overriding error regarding 1988 is determinative of the Trial Judge's conclusions for 1989 and 1990. Appellants have not even attempted to do so.

4. The application of GAAP principles

414. Paragraphs 376 to 384 AF, describing supposed general errors with respect to the LLPs, are replete with patently false assertions. Appellants commence this section with the statement that the Trial Judge made no reference to GAAP.[582] In fact, the Trial Judge held that the financial situation of Castor was not presented fairly, in accordance with **GAAP**, in the 1988, 1989 and 1990 audited consolidated financial statements.[583]

415. Appellants assert that the Trial Judge failed to define the term "***materiality***".[584] In fact, numerous paragraphs of the Principal Judgment are devoted to the meaning of that term.[585] The Trial Judge also cited Respondent's and Appellants' experts with respect to the level of materiality to be used to assess misstatements, being the levels established by C&L in the context of their annual audits of Castor for income items and for net assets.[586] Other courts have

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[581] For example, with respect to the YH Corporate loans, the Trial Judge reviewed the factual evidence specific to 1989 at §§1480 to 1498, the expert evidence with respect to 1989 at §§1499 to 1517. The issue of LLPS related to the DT Smith loans and the Nasty Nine loans are specific to 1990 such that the Trial Judge's conclusions at §§2042 to 2047 and §§1868 to 1874, respectively, quite obviously cannot be derivative of her 1988 conclusions.
[582] AF at para. 376.
[583] §419.
[584] AF at paras. 376 to 378.
[585] See, *inter alia*, §§456, 2124, 2125, 2138-2140, 2145-2147, 2149-2153.
[586] §§2084, 2138-2141.

affirmed the appropriateness of assessing the judgment and conduct of an auditor by the materiality levels that he established.[587]

416. Appellants incorrectly claim that the Trial Judge failed: "*to identify even an approximate amount by which the LLPs were misstated*."[588] Although the Trial Judge was not required to determine the exact amount of any particular misstatement,[589] she clearly did specify the minimum required LLPs[590] and/or referenced, with approval, the **range of LLPs** proposed by the expert witnesses for each of the relevant years.[591] In fact, the required LLPs were in the hundreds of millions of dollars as described in detail in the Principal Judgment.

a) Two schools of thought: cross-collateralization / lender's intent

417. Appellants' main arguments with respect to cross-collateralization are found in paragraphs 412 *et seq*. AF and relate to the issue of GAAP. The Trial Judge correctly determined that, within the Castor loan portfolio, cross-collateralization occurred when foreseen by the loan agreements or when there was evidence that the borrower and lender had agreed to off-set security surpluses associated with one loan against security deficiencies on another.[592]

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[587] *Capital Community Credit Union Ltd.* v. *BDO Dunwoody*, 2000 CanLII 22757 (ON SC), at para. 173.
[588] §§376-377.
[589] §§809-810, 1420, 1699. There was no obligation for the Trial Judge to provide in her conclusions a precise figure for the LLPs that ought to have been recorded by Castor at year ends 1988, 1989 and 1990. The Trial Judge was charged with the task of determining whether, on a balance of probabilities, Castor's financial statements were materially misstated. For the year end 1988, she found that it was evident that the actual carrying value of loans could not have been close enough to $1,005,992 (which was the carrying value of the loans in the audited financial statements) to avoid a material misstatement (§§810-811); For the year end 1989, she found that it was evident that the actual carrying value of loans could not have been close enough to $1,424,051 (which was the carrying value of the loans in the audited financial statements) to avoid a material misstatement (§§1417-1419); For the year end 1990, she found that it was evident that the actual carrying value of loans could not have been close enough to $1,689,973 (which was the carrying value of the loans in the audited financial statements) to avoid a material misstatement (§§1696-1698).
[590] For example, §915 for MLV in 1988; §1141 for TSH in 1988; §1570 for TSH in 1989; §1475 for MLV in 1989; §1632 for Meadowlark in 1989; §1874 for the Nasty Nine in 1990; §1903 for MEC in 1990; §1929 for TSH in 1990; §1946 for CSH in 1990.
[591] For example, §§995 and 1042 for the YH Corporate loans in 1988 (here the reference by the Trial Judge to "huge" LLPs would therefore be in the range, minimally, of $60.4 million to $91 milllion).
[592] See, *inter alia*, §§1039 and 1189.

418. Contrary to Appellants' assertion in paragraph 354 AF, the Trial Judge never stated that: "*the commonly accepted lending practice of cross-collateralization*" was not acceptable under GAAP. What the Trial Judge did not accept was Goodman's application of this practice where it contradicted legal principles, business and common sense, and the factual evidence of how Castor conducted its affairs. In paragraph 421 AF, Appellants blatantly misrepresent the Trial Judge's statements in §§1039-1040 when they write: "*The trial judge held that Castor had no contracts which allowed it to use excess value [...]*". In fact, the Trial Judge stated: "*[...] that when Castor and YH 'intended' that Castor could participate in any surpluses, they entered into a contract to that effect.*" In §1027, the Trial Judge similarly stated that: "*Castor knew how to enter into agreements with the borrowers that provided it with the right to participate in any potential "surplus" on a project*", and referenced both documentation and testimonial evidence to support this finding. The Trial Judge further noted in §1040 that Goodman applied potential surpluses to other deficiencies, where no such contracts existed.

419. Appellants' expert Goodman was the only expert who testified that Castor's intent was to off-set, on a global basis, material loan loss exposures that existed at year end with respect to specific loans, against purported surpluses in the security available on other loans. Respondent's experts on GAAS and GAAP did not agree with Goodman's opinion as applied to the facts of this case.[593] The Trial Judge noted, *inter alia*, the admissions by Goodman that the YH group (North America) was insolvent during the relevant years (§1021) and that offset must be "*based on the facts*" (§1036). The Principal Judgment includes a detailed review of the factual evidence with respect to the issues of lender's intent and cross-collateralization.[594]

[593] See, for example, §§1018-1020.
[594] See, for example, §§1021-1041.

420. One illustration, among many, of the lack of consistency between Goodman's theory and the facts of the case with respect to cross-collateralization and lender's intent, is with respect to the 1990 financial statements. The information recorded in the AWPs by C&L disclosed that a major borrower connected to the Maple Leaf Village ("**MLV**") project had a shareholders' deficit in excess of $65 million[595], the project was identified as an audit concern, interest and fees on the MLV loans were being systematically capitalized, a number of the loans related to the project were assessed as "*high risk*" by management, management had decided to record a general loan loss provision of $5 million in connection with this project, and C&L considered that an additional reserve might be required.[596] When questioned in cross-examination about why Castor did not apply his theory of cross-collateralization and use a purported "*surplus*" from loans to other members of the YH group to off-set this LLP, Goodman said that: *"the five (5) million dollar loan loss provision* [taken by Castor and accepted by C&L] *was not required under GAAP*."[597] As stated by the Trial Judge in §1025:

> *"When Castor acknowledged deficiencies on various YH loans, such as in the case of Airport Corporate Center ("ACC"), Meadowlark and MLV, it recorded loan loss provisions and did not purport to apply alleged security surpluses on other loans in Castor's portfolio."*

421. It is apparent that Goodman was substituting his own "*intent*" (with hindsight) for the actual "*lender's intent*".

422. Goodman acknowledged[598] that, with respect to the YH group, the following large loan loss exposures existed: **$33.1 million** in 1988; **$58.2 million** in 1989; and **$81.5 million** in 1990. It is evident that, without the benefit of his theory regarding the effect of undocumented and presumed cross-collateralization,

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[595] PW-1053-15, seq. pp. 159, 259.
[596] §§1767-1773.
[597] Goodman, November 30, 2009, pp. 164-166.
[598] D-1312-6. In addition to those loss exposures, a loss of $7.9 million on the loans related to the Ottawa Skyline Hotel ("**OSH**") has been included based on an extract from Goodman's 1998 report, PW-3093. Goodman did not offer an opinion on the OSH for 1990 in the trial before Marie St-Pierre, J.S.C., as he did not consider it part of the YH Group at that date.

massive and material LLPs were required under GAAP (consistent with the opinions of Respondent's experts and the initial report of Appellants' expert Selman[599]). Goodman's theories of cross-collateralization and lender's intent ignore the factual evidence, and were restricted to the one expert who had a financial interest in the litigation. This is not an accepted school of thought and the Trial Judge properly did not accept Goodman's theory on this issue.

423. Appellants do not challenge the assessment by the Trial Judge of the testimony of Ron Smith ("**R. Smith**") (a senior executive of Castor), as credible and reliable.[600] However, in paragraph 415 AF, Appellants try to denigrate the role and evidence of R. Smith on the issues of cross-collateralization and the definition of the YH group. R. Smith's testimony, corroborated by the documentary evidence, was that there was no general right of off-set and that Castor's approach was the exact opposite of what was being suggested by Goodman, in that Castor looked at the projects as entirely separate groups. The capitalized interest, fees and expenses that accumulated on the loans to the Toronto Skyline Hotel ("**TSH**") and the Calgary Skyline Hotel ("**CSH**"), in particular, were recorded on separate grid notes and the clearing account 046 for the YH loans was never used for the capitalized interest on these two projects.[601] Appellants also ignore the testimony of their own witness Morrison who opined that Castor's intent was to treat its loans on a one-off basis:

> *"...but I said each of these had a different situation and a different circumstance and it was – and CASTOR approached it, as I recall, on a one-off basis. [...] It means each loan stood on its own feet and the circumstances surrounding it and what they could charge and what fees they could charge, and they attempted to negotiate each one of them."*[602]

424. In paragraphs 417 and 418 AF, Appellants blatantly misrepresent the evidence with respect to the Trial Judge's rejection of Goodman's definition of the YH

[599] PW-3072, extract of the 1998 Report of Selman, produced to assess the credibility of the witnesses.
[600] §§1460, 2434.
[601] §1192; R. Smith, September 18, 2008, pp. 19–20.
[602] Morrison, October 5, 2006, pp. 91-93.

group. Goodman asserted that projects such as the TSH and CSH were owned by YH such that the deficiencies in security on the loans to these projects could supposedly be offset against purported surpluses on other loans/projects in the YH group.[603] The evidence as a whole disclosed the exact opposite.

425. For example, Whiting testified[604] that the TSH and CSH were not owned by YH and Goodman failed to take this evidence into account in his opinion to the Court.[605] Similarly, Walter Prychidny, the senior executive at YH Hotels ("**Prychidny**") testified that all major ownership decisions regarding the TSH and CSH were made by Castor and not by YH.[606]

426. Moreover, Appellants are wrong to assert (footnote 466 AF) that the Trustee's representative, Bernard Gourdeau, testified that there was a general right of offset within the YH group. Firstly, he was not testifying as an expert in this case. Secondly, his testimony was clear that an offset would only exist in specific circumstances, such as when two loans are both secured by a personal guarantee.[607] This is similar to the testimony of Froese, referred to in this same footnote, in the context of the DTS loans which were secured by identical personal guarantees. None of this evidence provides support for a general right of offset in the absence of legal documentation or an established practice, as proposed by Goodman and Appellants.

b) Two schools of thought: capitalized interest / statement of changes in financial position ("SCFP")

427. Following a detailed and meticulous review of the evidence, the Trial Judge concluded that Castor's financial statements were also not in compliance with GAAP: (i) because they did not include a SCFP (§§486 to 542) and (ii) because

[603] §§1016, 1017, 1030, 1184, 1218, 1221.
[604] §§1081, 1145; Whiting, November 18, 1999, pp. 90-91.
[605] §§1183-1193; Goodman, October 26, 2009, pp. 33-34, 40-60, 65, 113-114, 137.
[606] §§1081-1082, 1147-1148; Prychidny, October 15, 2008, pp. 121, 174-175.
[607] Gourdeau, February 22, 2008, pp. 92-96.

they did not disclose that a material amount of interest revenue was due to unplanned capitalization of interest (§§711 to 805).

428. Appellants are incorrect when they state in paragraph 425 AF that, in concluding that GAAP required a SCFP, the Trial Judge: "*erroneously selected among competing schools of thought*." Respondent's experts were unequivocal that during the years 1988 to 1990, a SCFP was required pursuant to s.1540 of the Handbook and that the omission of same was a breach of GAAP.[608] The Trial Judge, in §523, reproduced a passage of Appellants' expert Selman's report in which he acknowledged that: "*the format used by Castor did not meet the literal requirements of the Handbook, section 1540 to provide a SCFP*" (see also §536).

429. Moreover, as reviewed in detail by the Trial Judge, C&L's partners and employees who were involved in the audits of Castor all testified that by 1986 a SCFP was being used by their other clients (§§527 to 530). C&L's own internal technical materials make it clear that a SCFP was required and that, if it was not provided, then a reservation was required in the Auditors' Report (§526).

430. As noted by the Trial Judge in §531, the issue of "*two schools of thought*" with respect to the need for a SCFP was raised during the cross-examination of Vance because of the commentary provided in a textbook authored by an acknowledged expert. However, the textbook was published in 1984, prior to the changes to the Handbook which made the inclusion of a SCFP mandatory for a company such as Castor. From 1985 onwards, there was only one accepted school of thought and, to comply with GAAP, a SCFP was required.

431. Appellants state in paragraph 427 AF that the Auditors' Report that they signed referred to the format employed by Castor (a Statement of Changes in Net Invested Assets, "**SCNIA**") and therefore the reader was not misled. However, a SCFP would have disclosed the cash being generated from operations (or in Castor's case, the fact that virtually no cash from operations was being

[608] §§503-519.

generated).[609] The inclusion of a SCNIA, which made no such disclosure, hid from the reader the fact that material information, required under GAAP, was not disclosed in Castor's financial statements. This distinction was described by the Trial Judge in §§2163 to 2171.

432. Significantly, in §§2166-2167, the Trial Judge identified the **testimony of C&L's own partners** as the most compelling proof to support her conclusion that the SCNIA was materially misleading (two of these partners were themselves misled when they reviewed Castor's financial statements, as they erroneously believed that the amounts disclosed on the SCNIA represented cash).

433. In addition to the finding that GAAP required the use of a SCFP, Appellants also erroneously assert that the Trial Judge chose between two accepted schools of thought when she concluded that GAAP required that Castor's financial statements disclose the fact that in each of the relevant years there were material amounts of capitalized interest. The Handbook requires the disclosure of material information and provides that materiality: "*should be judged in relation to the significance of financial statement information to decision makers. An item of information, or an aggregate of items, should be deemed material if it is probable that its omission or misstatement would influence or change a decision*"[610] (see, in particular, §§456, 2145, 2151).

434. Respondent's experts opined that Castor's policy of capitalizing interest on its loans and the quantum of the capitalized interest (for 1988 to 1990) constituted material information, and therefore disclosure of same was required (their opinions are summarized in §§766 to 774). For the reader or user, what is of paramount importance is that material information is disclosed ***somewhere*** in the financial statements. Based on the factual situation, without this disclosure, Castor's financial statements were materially misstated and were not fairly

[609] Appellants admitted in their Reply, para. 625: "…*Coopers & Lybrand understood that Castor was not receiving much of its revenue in cash*."
[610] PW-1419-2, Introduction, Application, para. 4; PW-1419-2, s.1000.14.

presented. There are no two accepted schools of thought about the requirement to disclose material information under GAAP.

435. Appellants are patently wrong when they assert in paragraph 435 AF that there is no evidence that there were "*huge*" amounts of unplanned capitalized interest. Generally speaking, virtually none of Castor's significant borrowers was able to service its interest and fee obligations and, consequently, the loan amounts ballooned in large part because of the annual practice of capitalizing interest and fees. Both R. Smith and Whiting explained why YH, for example, was not paying **any** interest, as required by the loan agreements and why Castor tolerated this unacceptable situation.[611] Castor's bookkeeper, Ruth Tooke, testified that she was very concerned about this abnormal situation of a lending company not receiving cash for such a long time:[612]

> *"I was very concerned because normally, a company wouldn't be operating for such a long time without receiving some cash and I even discussed the situation with Barry MacKay and we both… we were both a bit worried because Castor was so dependent on York-Hannover and I even made copies of the York-Hannover advance account each year and took them home. I'm not sure why, but I just felt that if anything happened, I had some kind of a record of the York-Hannover account and the fact that the interest was capitalized for so long, for so many years."*

436. In paragraphs 428 and 429 AF, Appellants misrepresent the Trial Judge's holding with respect to the principle of fairness when they refer to §715 and state that the Trial Judge was applying a "*higher authority*" than GAAP. In fact, §715 reads:

> *"**Did GAAP require** that the amount of capitalized interest revenue be separately identified in the financial statements, […] as [...] a result of an overriding principle of "fairness"?"* [emphasis added]

437. It is evident that the Trial Judge was referring to the broader concept of fairness which is required under GAAP within the Handbook as evidenced, *inter alia*, by

[611] §§435-439; R. Smith, May 14, 2008, pp. 138-140, 174-175; September 3, 2008, pp. 50-51; September 15, 2008, pp. 138-139; Whiting, November 16, 1999, pp. 129-130.
[612] Tooke, February 27, 2008, p. 170.

the obligation to exercise professional judgment to ensure that the financial statements are not materially misstated.[613]

438. The Rayner affidavit[614] (the "**Rayner Affidavit**"), referred to by Appellants in paragraph 430 AF, states that GAAP is used: "*to ensure consistency and **fairness** in reporting".*[615] Paragraphs 8 and 12 of the Rayner Affidavit affirm the interplay between the notion of fairness and the obligation to not be misleading. Rayner cites two leading authorities in Canada who explain fairness in GAAP as follows: "*Principles of accounting therefore refer to those standard rules for accounting action that are necessary to make for **fair and effective communication** through the medium of financial statements*." (R.M. Skinner); and "*The reader can then interpret "**fairly**" in the non-technical sense of "**not misleading***," *[…]*" (R.J. Anderson). [emphasis added].

439. These statements in the Rayner Affidavit are consistent with the findings of the Trial Judge and the opinions of Respondent's experts with respect to the obligation imposed on auditors by the Handbook to not knowingly affirm to the reader that misleading financial statements are "*presented fairly*".[616] It is noteworthy that Appellants fail to address in AF the quantum or materiality of Castor's capitalized interest and fee income (more than 96% in 1990[617]) or the obligation under GAAP to disclose material information, so as not to be misleading.

440. Appellants are incorrect if they are suggesting that GAAP requires only the literal adherence to rules without the exercise of professional judgment and without concern about communicating materially misleading financial information. The

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[613] PW-1419-2, s.1000.50: "*In those rare circumstances where following a Handbook Recommendation would result in misleading financial statements, generally accepted accounting principles encompass appropriate alternative principles. […]The identification of these circumstances is a matter of professional judgment[…]"*; Vance, March 5, 2008, pp. 53-55; March 6, 2008, pp. 178-188.
[614] PW-2370-5A-C.
[615] PW-2370-5A-C, para. 18b.
[616] §§743, 786, 787, 792; Vance, September 2, 2008, pp. 44-47; Rosen, February 4, 2009, pp. 58-61.
[617] §§440-442

theory put forward by Appellants is that GAAP is comprised of a set of technical rules, and that if they are literally complied with, the financial statements are deemed to present fairly in accordance with GAAP. In other words, the mere fact that a technical rule has been followed will satisfy the test of fair presentation in accordance with GAAP. Under this convoluted theory, the public accountant collaborates with management to present misleading information and to defeat the intent of clear disclosure. Furthermore, the unambiguous language of s.3850 of the Handbook stipulates that: *"The amount of interest capitalized in the period should be disclosed.*" Arguably, if a "*technical*" approach is relied on by Appellants, this should lead them to the conclusion that the Handbook mandated the disclosure of all capitalized interest.[618]

441. Moreover, although courts exercise deference to the standards established by professional bodies, a professional who follows standards that are unreasonable, can still be found to be negligent.[619]

442. In paragraph 432 AF, Appellants incorrectly assert, without authority or direct reference, that the Supreme Court of Canada in *Hercules:* "*expressly*" disavowed the underlying rationale of the *Kripps* decision regarding the aim of auditing, such that *Hercules* should either be seen as having overturned *Kripps*, or at least limiting the relevance of *Kripps* to companies subject to the British Columbia companies legislation. Appellants are clearly mistaken. *Kripps* is never even mentioned in the *Hercules* decision and the Supreme Court refused leave to appeal the B.C. Court of Appeal's decision in *Kripps*, nearly **six months <u>after</u> the decision in *Hercules* was rendered**. [620]

443. While *Hercules* was primarily concerned with the policy concern of indeterminacy, the Court of Appeal in *Kripps* addressed the auditors' obligation of fair presentation to ensure that they do not knowingly accept as "*fairly presented*"

[618] PW-1419-2, s.1500.05; s.3850.03.
[619] *Roberge*, *supra* note 229 at p. 79; *Ter Neuzen*, *supra* note 231 at para. 43; *Kripps*, *supra* note 231 at paras. 69-73.
[620] (SCC News release of November 6, 1997, file 26118; (1997) S.C.C.A. No. 380).

statements that are materially misleading. Moreover, the statement in *Kripps* with regards to the aims of auditing is entirely consistent with paragraph 32 of the *Hercules* decision. This principle, articulated in *Kripps,* is also consistent with the provisions of the Handbook relating to the intended purpose of financial statements,[621] and is not limited to companies incorporated under the B.C. legislation. Moreover, Appellants' expert on the common law of Canada, Campion, never opined that *Hercules* overturned *Kripps,* and Respondent's expert, Cherniak, opined that: "*Ontario courts would afford great weight to this* [the Kripps] *decision*" and that: "*[o]ther Canadian common law appellate courts outside of British Columbia have adopted Kripps…*".[622]

c) Hindsight

444. Appellants incorrectly assert in paragraph 357 AF that there are over 100 instances in which the Trial Judge improperly relied on hindsight to support her conclusions, primarily with respect to GAAP. In fact, the conclusions of the Trial Judge are founded on the testimonial and documentary evidence when appreciated as a whole. In contrast, Appellants direct this Court to individual pieces of evidence, without explaining their context, or without referring to corroborative, contemporaneous evidence relied upon by the Trial Judge, or without noting that their own experts relied on the same evidence. It is the obligation of the Appellants to provide this Court with all of the relevant evidence,

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[621] See for example PW-1419-2, s.1000.12 : "*The objective of financial statements is to communicate information that is useful to investors, creditors and other users in making resource allocation decisions and/or assessing management stewardship […]* "; PW-1419-2, s.1000.10: "*Investors and creditors are interested, for the purpose of making resource allocation decisions, in predicting the ability of the entity to earn income and generate cashflows in the future to meet its obligations and to generate a return of investment*"; PW-1419-2, s.1700.02: "*Financial statements provide information about conditions, trends and ratios that assists in predicting cash flows and assessing earnings and financial position of an enterprise.*" PW-1419-2, s.1500.02 adds to the auditor's "fairness" obligations, stating that "*[e]ffective reporting should also give recognition to new problems as they arise and changes in the requirements of investors, creditors, governments and society generally*".

[622] PW-3099A at p. 14, referring to *Mandavia v. Central West Health Care Institutions Board*, (2005) 730 A.P.R. 107 (N.L.C.A.) and *Kelly v. Lundgard* (2001), 202 D.L.R. (4th) 385 (Alta. C.A.). See also Cherniak, February 24, 2010, p. 117. With respect to the the decision of the B.C Court of Appeal in *Kripps* being applied approvingly in the province of Ontario, see for example *466715 Ontario Ltd. (c.o.b. Multi Graphics Print & Litho)* v. *Proulx*, [1998] O.J. No. 3390 at paras. 63-64.

and not just the evidence that appears to favour their case. In the words of the Honourable Justice Lemelin, J.C.A. (*ad hoc*):

> *"[43] Depuis l'arrêt de notre Cour dans Pateras, il est reconnu qu'une partie ne peut choisir dans la preuve seulement les parties qui lui sont favorables. Le juge Bernier concluait:*
>
> *S'il le fait et qu'il appert du jugement, ou si la partie adverse dans son mémoire le démontre, qu'il y avait d'autres éléments de preuve que le juge a considérés pour fonder une décision, en l'absence de ceux-ci la Cour d'appel, n'étant pas en mesure de vérifier si le premier juge a commis une erreur, et vu la présomption de validité des jugements, ne peut que rejeter le motif d'appel dont il s'agit. (je souligne)*
>
> *[44] La jurisprudence a retenu cette approche logique. Malgré les allègements apportés à la confection du mémoire d'appel, la Cour doit bénéficier de tous les éléments requis pour déceler s'il y a une erreur d'appréciation de la preuve par la juge de première instance.*"[623]

445. Without being provided with all of the relevant evidence, an appellate court cannot form an opinion as to whether the Trial Judge made a palpable and overriding error. Moreover, the instances of alleged hindsight identified by Appellants, when examined in light of the evidence, demonstrate that these do not constitute hindsight or determinative errors at all.

446. Virtually every assertion made by Appellants to attack the Trial Judge's analysis of the evidence on GAAP is misleading or incomplete. Lack of space limits a full reply herein but the following examples **illustrate** the misrepresentations in connection with Appellants' assertions on the issue of hindsight.

447. In paragraphs 360 to 363 AF, Appellants incorrectly state that the Trial Judge improperly analysed contemporaneously prepared "financial statements", through the prism of contradictory testimony given 20 years later, and describe this analysis as hindsight. The principal example given by Appellants relates to the *viva voce* testimony of Prychidny, where he explained the context of the exhibits

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[623] *Mignacca et al.* v. *Provigo inc*., J.E. 2004-1777; REJB 2004-70099 (C.A.); citing, in para. 43, *Pateras* c. *M.B*., [1986] R.D.J. 441, at pp. 443-444 and, in para. 44, *Vitrerie A. & E. Fortin inc*. c. *Armtec inc*. R.J.Q./P.C. 1999-914 (C.A.); REJB 98-09385 (C.A.).

referenced in footnotes 412 and 413 AF. These exhibits, including offers and counter-offers, document the unsuccessful attempt by YH to sell the hotels it owned or managed in 1988, as described in §1118[624] and the value of the YH hotels during the relevant years. The Trial Judge found Prychidny to be a credible and reliable witness.[625] His testimony, with respect to the value of the YH hotels is corroborated by the testimony of R. Smith and Whiting as well as massive amounts of contemporaneous documentation cited throughout the Principal Judgment. For example, the values provided in the counter-offers put forward by YH during negotiations (which were merely negotiating tactics or trial balloons) were clearly inflated, unrealistic and unreliable.[626] The Trial Judge correctly considered Prychidny's testimonial evidence, in the context of the evidence as a whole, and drew the inferences and conclusions that supported her findings as to the value of these assets under GAAP during the relevant years.

448. When a document is not a contract, there is no reason for the author thereof to be precluded from testifying about what he meant or intended when the document was prepared. This principle is explained in *Le Soleil Hotel & Suites Ltd.* v. *Le Soleil Management Inc.* as follows:

> *"There is no basis in principle or precedent, however, to extend the rule to other documents based on the persuasive purpose for which they are tendered. On the contrary, to do so would be to deprive the Court of potentially helpful evidence regarding the context within which an alleged agreement may have been reached. Accordingly, in making my factual findings I have considered the witnesses' explanations of various documents where those documents form part of the relevant context*."[627]

449. In other examples of alleged hindsight raised by Appellants, their **own experts relied on the very same documents, or reached the very same conclusions**,

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[624] Prychidny, October 14, 2008, pp. 165-172; PW-499D.
[625] §§909, 1473 and 2882
[626] With respect to the TSH (one of the hotels forming part of this negotiation), Appellants' expert Morrison testified that: "*it was generally known that it* (TSH) *was not a good project*", that: "*it was a real dog*" (referred to by the Trial Judge in §1130).
[627] 2009 BCSC 1303 at para. 53.

that Appellants now identify as support for their statement that the Trial Judge used improper hindsight in reaching her conclusions (the paragraphs in the Principal Judgment cited in paragraphs 449 to 456 RF are those referred to by Appellants in footnote 410 AF).

450. With respect to documents to support the conclusion that there was a diversion of fees in 1988 (§2072), Appellants' expert Selman agreed[628] that the relevant bookkeeping transactions appeared clearly, and were recorded contemporaneously, in Castor's books and records reviewed by C&L for the 1988 consolidated audit. On the issue of the value of the CSH in 1988 (§§1149, 1150, 1166 and 1192), like the Trial Judge, Appellants' expert Goodman specifically relied on PW-467A[629] as a value indicator for 1988.[630] Similarly, on the issue of the value of the TSH in 1990 (§§1909, 1920, 1925, 1926 and 1928), Appellants fail to mention that in the same footnote reference, the Trial Judge cited Appellants' expert Levi's opinion to support her statement that interest on the Lambert loans was paid by way of cash circles.

451. Appellants are misleading when they assert that the Trial Judge's mention of specific documents (referenced in footnote 410 AF) constitutes hindsight, but then omit to mention that this evidence was corroborated by contemporaneous evidence which was also used to support her conclusions. For example, with respect to the value of the TSH in 1988, Appellants refer to §1122 and PW-242 with respect to the quantification of the hotel's cash flow. The same information was provided by contemporaneous documents, such as PW-424.

452. Appellants ignore the contemporaneous evidence referred to by the Trial Judge with respect to the value of the TWTC in 1989. In footnote 410 AF, they selectively direct this Court to only three documents out of the eight documents referred to by the Trial Judge in support of the finding that Castor was

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[628] §2094.
[629] Skyview Hotels draft 1988 unaudited financial statements, dated March 22, 1989.
[630] D-1312, p. 420.

unsuccessful in having its security interest perfected in 1989 (§§1605, 1609, 1610).

453. Similarly, in establishing the value of the YH corporate loans in 1990 (§§1793, 1797), the Trial Judge did not rely solely on PW-1136-5A but, rather, referred to significant other evidence, which also disclosed the dismal state of YH's financial affairs at year end 1990; for example, PW-1171-1 and PW-1137-5 with respect to YHDL.[631] This conclusion was also supported by Appellants' expert Goodman, who acknowledged a deficiency of at least $81.5 million at year end 1990.[632]

454. On the issue of RPTs, Appellants direct this Court to §§1648 and 2617 and PW-292.[633] However, Stolzenberg's assistant Ingrid O'Connor ("**O'Connor**") testified, in an extract also referred to by the Trial Judge in support of the statement that 687292 Ontario Limited was a WOST company, that the information contained in PW-292 represented the corporate reality for the period 1988 to 1990.[634] This information was further corroborated in contemporaneous tax reports.[635] Appellants are misleading when they fail to note that the testimony of O'Connor, R. Smith and Prychidny are all cited in support of the finding that Stolzenberg's relationship with this entity was not hidden.

455. Appellants falsely assert that the Trial Judge relied on hindsight, by claiming that any reference to evidence which is dated after the relevant time period was improper, without explaining the context in which such documents are referred to by the Trial Judge.

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[631] §§1789-1790.
[632] RF at para. 422; D-1312-6.
[633] Letter dated February 19, 1991 which included a spreadsheet of the WOST group of companies prepared by Ingrid O'Connor.
[634] O'Connor, January 14, 2009, pp. 64-65, 80.
[635] PW-568-4; PW-568-5; PW-568-6; PW-568-7; See also PW-568-13.

456. By way of illustration, in footnote 410 AF, Appellants refer to §1071 and PW-1137-2,[636] without explaining that this exhibit is referred to in the review of Vance's opinion as to the value of the MEC in 1988. Vance's position on this project was not retained by the Trial Judge.

457. Similarly, with respect to the value of the TSH in 1990, Appellants refer in this same footnote 410 to §§1909, 1920, 1925, 1926 and 1928 and D-825.[637] However, in §1909, the Trial Judge was setting out Respondent's experts' opinions and in §1926 she provides a review of the appraisals. The Trial Judge did not rely on D-825 to reach her conclusion for 1990. Although the Trial Judge agreed with Froese that C&L should have requested an updated appraisal in early 1991 when they performed the audit, she nonetheless gave C&L the benefit of the doubt in her conclusion in §1928 that: "*the **best possible** scenario as to market value*" was the $93 million dollar appraisal (dated 1988), and she used such appraisal to determine that an LLP of $42.9 million was still required.

458. In paragraphs 372 to 374 AF, Appellants incorrectly state, in connection with their arguments on hindsight, that the Trial Judge erred in concluding that there is no concern with the integrity of Castor's books and records. However, the Trial Judge provided detailed reasons in §§278 to 300 for her conclusions under the heading "*Castor's books and records*." The Trial Judge's reasons are supported by almost 90 footnotes, many containing multiple references to the relevant documentary and testimonial evidence. The assessment of the integrity of Castor's books and records was based entirely on findings of fact and assessments of credibility. In the absence of a palpable and overriding error, the conclusions of the trier of fact must stand.

459. The sole example provided by Appellants in paragraph 374 AF of a purportedly determinative error with respect to **Castor's** records, is a supposed "appraisal"

[636] York-Hannover Consolidated Financial Statements for the three months ended December 31, 1988, draft issued March 10, 1989.
[637] An appraisal of the TSH dated May 3, 1991 which provided a value of $$85,240,000 for TSH presuming the completion of renovations at an estimated cost of $8M to $13M.

relating to the TWTC project which was a factor that Vance considered to modify his opinion. This document, however, is not an appraisal but rather an undated, unsigned estimate given by Coldwell Banker as a suggestion for a **listing price** prior to being granted the mandate to sell the lands.[638] Although documents of this nature are not reliable value indicators,[639] and the evidence, taken as a whole, indicated that this estimate of value could not be achieved in the marketplace, Vance accorded C&L the "*benefit of the doubt*" with respect to the value of the project in light of the many other material misstatements already identified.[640] In other words, Vance had already concluded that the financial statements should have included so many other LLPs that the addition of one more was unnecessary to affect his conclusion. Appellants also fail to point out that the subject document emanated from **YH's books and records**[641] and therefore it is irrelevant to the assessment of the integrity of Castor's books and records. Finally, Appellants are misleading when they fail to identify the actual Value Estimate prepared by Coldwell Banker in their footnote (which would have revealed that the value did not emanate from a signed and dated appraisal) but, rather, refer to D-952, a table that is Appellants' own work product and **not in evidence**.[642]

460. Appellants are further misleading when they challenge the statement of the Trial Judge that "*nothing is missing*" without putting that statement in context. As is evident from §§291 to 299, the Trial Judge's statement that "*nothing is missing*", relates specifically to C&L's unsubstantiated assertion that they relied on a number of documents identified in the AWPs that were never located for production at trial (Appellants' so called "*missing documents*").

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[638] PW-1161-24; Whiting, December 9, 1999, pp. 146-147.
[639] Appellants' expert Goodman dismissed an undated, unsigned appraisal of the MEC, PW-1108B, as unreliable (D-1312, pp. 127-129; Goodman, September 23, 2009, pp. 42-43).
[640] Vance did not opine that no LLP was necessary. He merely stated that due to some uncertainty in his mind, and because of: "*the material amounts of all of the other provisions*", it was not necessary to investigate this matter further: "*because the statements still end up materially misstated*." (Vance, April 21, 2008, pp. 43-44).
[641] Whiting, December 9, 1999, pp. 144-157.
[642] Vance, April 18, 2008, pp. 100-101.

461. One of the theories of the defence was that the auditors were the victims of a massive fraud, a "**theatre of misconception**",[643] such that they should be excused for not uncovering the true state of Castor's dismal affairs, even if they failed to perform their audits in accordance with GAAS. Rather than dealing with unproven allegations, the Trial Judge insisted that Appellants specifically identify the purported "*missing documents*" referred to in the AWPs relevant to the issues in dispute.[644] The evidence with respect to **each** purported "*missing document*" identified by Appellants was reviewed during legal arguments and is summarized at §§296 to 298. The evidence unequivocally supports the Trial Judge's conclusions with respect to these references that "*nothing is missing*".

462. It is noteworthy that the Appellants could never explain the incongruity of their theory of massive fraud on the auditor, as presented by two of their experts, with the opposite theory that all loans were "*good*" and that Castor carried on a legitimate business model, as postulated by their other expert Goodman. Appellants merely attempted (and continue to attempt) to obfuscate the lack of coherence in their legal theories by raising "*red herrings*" such as the supposed lack of integrity of Castor's books and records.

463. The Trial Judge did acknowledge that certain limited documents are missing from Castor's records, now in the possession of the Trustee in bankruptcy (e.g. in §§283, 297 with respect to Castor's loan ledger cards, although the information can be reconstituted from other records); however, these gaps were insignificant, when the integrity of the documentation was considered as a whole. The Castor books and records represent hundreds of thousands of pages of documents. The degree of completeness of the records in the possession of the Trustee in bankruptcy is truly extraordinary, as was recognized by the Trial Judge in §300.

464. In paragraph 373 AF, Appellants refer to the correlation exercise performed by Vance in which he compared thousands of figures recorded in the overseas

[643] Selman, D-1295, p. 26.
[644] Representations, September 20, 2010, pm., pp. 104-106.

accounting records with the comparable figures recorded in the AWPs. Appellants now assert that, since no similar exercise was performed with respect to Castor's other business records: "*there is no evidence that the documents now available to the Court are complete.*" There is no merit to this argument. The correlation exercise was an exceptional measure conducted in unique circumstances, and there was no obligation for Respondent to carry out a similar exercise with respect to Castor's other books and records. This exercise was necessitated[645] because of Appellants continued refusal to admit Castor's overseas accounting records into evidence, although it was never disputed that the accounting figures used by C&L for their audits (as recorded in the AWPs) were derived from these records.

465. The evidence reviewed by the Trial Judge to support her conclusion that: "*There is no credible evidence that the Castor documents that were shown to the auditors for the audits, and that are in the possession and control of the Trustee, are unreliable*", is described in §§284 to 291, including the evidence of the former employees of Castor and the C&L audit staff. As noted by the Trial Judge, all of the lay witnesses who were former Castor employees, whether called by the Respondent or Appellants, affirmed that the books and records that they reviewed in preparation for their testimony **were accurate and complete**.

5. The audited financial statements were materially misstated as a result of the failure to record LLPs on the individual groups of loans (projects)

466. In paragraphs 385 to 423 AF, Appellants purport to identify specific errors with respect to the Trial Judge's conclusion that material LLPs were required in 1988, and that the audited financial statements were materially misleading as a result thereof.

[645] Extract of Plaintiff's Reply to Defendants' Contestation of the Bill of Costs for the present litigation, para. 67, indicating, at para. 67.6, that Judge Carrière ordered that the expertise of Vance was required with respect to the correlation exercise.

467. In all cases, the Trial Judge carefully reviewed and analyzed the enormous documentary and testimonial evidence and came to reasoned conclusions as to the required LLPs for each grouping of loans. During the relevant years, the required LLPs were in the **hundreds of millions of dollars** such that the audited financial statements made a mockery of the actual financial position of Castor.

468. The uncontradicted evidence in the record was that "*Castor was trapped*" and that it had no choice but to tolerate the defaults of its most significant borrowers.[646] At §436, the Trial Judge determined as a finding of fact that:

> *"During the 1988 to 1990 period, and absent Castor's ongoing life support, Castor's principal borrowers were not financially viable."*

469. It is not open to Appellants to put into question the thousands of findings of fact made by the Trial Judge that, taken together, give support to her conclusions as to the disastrous financial state of the loans made by Castor. In view of space constraints, Respondent will not refute the innumerable, inaccurate and misleading statements contained in AF; suffice it to say that the Principal Judgment provides exhaustive detail in support of the required LLPs, and Respondent adopts the findings of the Trial Judge.[647]

470. It defies logic and common sense to disregard these multiple findings of fact and assessments of credibility in order to urge this Court to conclude that Castor's financial position was actually exemplary and that its financial statements did not even do justice to how good a company Castor actually was.[648] This cynical position is beyond absurd and contradicts the evidence that Appellants themselves sought to introduce into the Court record. In fact, Appellants themselves adduced evidence to try to establish that the situation with Castor's loans was so bad that an employee of Castor would be "fired" if he disclosed the

[646] §439.
[647] §§806-1327.
[648] D-1312, pp. 352-353.

reality of the situation to Castor's auditors.[649] Nor is this position consistent with Appellants' contradictory theory of fraud put forward by its own experts.

6. The audited financial statements contained material misstatements with respect to disclosure issues

471. In paragraphs 424 to 456 AF, Appellants purport to identify specific errors made by the Trial Judge when she concluded that the financial statements were misstated with respect to a number of disclosure matters. Again, Appellants have focused on the 1988 statements and have only referred to these issues in 1989 and 1990 in a cursory fashion. The failure to disclose material amounts of capitalized interest has been addressed above, in connection with the obligation to include a SCFP in the financial statements (RF, paras. 427 and following).

a) Related party transactions (RPTs)

472. At paragraph 436 AF, Appellants assert that the Trial Judge failed to apply GAAP for RPTs. Contrary to Appellants' pretention that there is no GAAP requirement to disclose related party transactions, s.3840 of the Handbook[650] provides otherwise, and s.3840.10 specifically states (in italics): "*When a reporting entity has participated in transactions with related parties during a financial reporting period, disclosure of those transactions should be made"* and s.3840.13 states (in italics) that the disclosure of RPTs should include a description of the nature and extent of transactions, a description of the relationship, and the amounts due to or from related parties.

473. As an example of Appellants' incorrect assertions on the issue of RPTs, at paragraph 438 AF with respect to the Montreal Eaton Centre, Appellants assert that the evidence referred to by the Trial Judge does not support the conclusion that there was common control or significant influence through Stolzenberg but

[649] Mackay, August 26, 2009, pp. 8-30 (at p. 30); D-1347, section 12.3, pp. 189-190 (Reference is made to the testimony of R. Smith and Mackay given in the First Trial).
[650] PW-1419-2. The italicized sections of the Handbook are binding recommendations and must be followed: Vance, March 4, 2008, p. 107; April 7, 2008 (am), p. 8; Kingston, March 10, 2009, p. 95.

rather that he acted as a representative. This statement is contradicted by their own pleadings,[651] the opinions of their own experts[652] and the factual evidence, some of which is referenced in footnote 515 of the Principal Judgment.[653]

474. As a further example, at paragraph 439 AF, Appellants challenge the Trial Judge's conclusion that Gambazzi and E. Banziger exercised sufficient influence over Castor to be considered related parties. They assert that their signatures on loan documents and audit confirmations do not constitute sufficient evidence of their actual role in the entities involved. Again, Appellants' assertions are contrary to the admissions in their very own pleadings.[654]

475. Based on the evidence before her, including the multiple admissions by Appellants[655] and acknowledgments of undisclosed RPTs by their own experts,[656] Appellants cannot make a serious argument that the Trial Judge erred in concluding that the financial statements were misstated as a result of unreported RPTs.

b) Notes 2, 3 and 4 (the "Maturity Notes")

476. Liquidity is one of the key indices considered by readers of financial statements to determine solvency and the Trial Judge made no error when she concluded that the Maturity Notes were materially misleading and disclosed a false picture

[651] In para. 334 of their Plea, Appellants admit that Stolzenberg: *"either owned or managed"* 97872 Canada Inc., the 50% owner of the Montreal Eaton Centre.
[652] D-1295, p. 26, para. 4.1.11. Selman wrote in his report that: *"Mr. Stolzenberg was the owner of record of 612044 Ontario (PW-338) and through it, 97872 Canada (PW-565-1). These companies had a 50% interest in the MEC project (PW-565-7C)"*. Selman opined that Stolzenberg should have disclosed these RPTs to the Board and that Stolzenberg failed to advise C&L of the nature of his ownership interest in 612044 and 97872.
[653] §551. The footnote to this paragraph contains more than 30 references to evidence that support the Trial Judge's finding that: "*Castor's transactions with 97872 Canada and 612044 Ontario should have been disclosed*".
[654] At paras. 223 and 320 of their Plea, Appellants admitted that both Gambazzi and Banziger were involved in several related entities owned or controlled by Stolzenberg or in which the latter had an interest and which transacted with Castor and its subsidiaries.
[655] *Supra* note 525.
[656] §§1343, 2111, 2112.

of liquidity matching and solvency in each of the relevant years.[657] Lowenstein opined that for a reader of the financial statements it was: "*vital, essential*" "*to see that this company was matching its liabilities against its assets*".[658] Appellants expert Morrison testified that it was a reasonable expectation at the date the statements were prepared that assets shown as due in the following year would be collected[659] and that even a sophisticated reader would not doubt that the information in the Maturity Notes would be accurate with respect to the payment due dates of the assets and liabilities.[660] The liquidity tests prepared annually by C&L were based on the Maturity Notes and each year C&L erroneously concluded that Castor's liquidity was strong.[661]

c) The $100 million debentures

477. In paragraph 446 AF, Appellants suggest that the fact that this transaction was a cash circle does not necessarily make it invalid or suspicious and that there is no evidence that this resulted in misleading financial statements (in each year from 1987 to 1990). However, their expert Levi opined otherwise, in describing this transaction (as well as other circular transactions) as part of a fraud by management which, in this case achieved the objective of moving: *"$100 million of current liabilities to long term debt which had the effect of* ***improving the balance sheet appearance****."*[662] Appellants cite *Singleton* and, in footnote 504, assert that: *"The same error (i.e. equating a circular transaction to a sham that would have no 'true' effect) is made in respect of the Nasty Nine loans in 1990 […]*". This position is somewhat startling given the opinion of Appellants' expert

[657] §§661-664, 1392, 1664.
[658] Lowenstein, March 21, 2005, pp. 39-40. See also Jarislowsky, April 4, 2005, pp. 22–23, 141-142; See also Vance, March 12, 2008, pp. 98-99; Rosen, February 3, 2009, pp. 40-42.
[659] Morrison, October 10, 2006, pp. 140-143.
[660] Morrison, October 10, 2006, pp. 131-132.
[661] PW-1053-22, seq. p. 351, PW-1053-17, seq. pp. 382-383, PW-1053-21, seq. p. 373, PW-1053-17, seq. p. 18, PW-1053-12, seq. p. 74; The testimony of several of the experts as well as witnesses from C&L indicated that, on the basis of these Notes, Castor had no liquidity problem: Prikopa, January 12, 2005, p. 65; Lowenstein, March 21, 2005, pp. 40-41; Jarislowsky, April 4, 2005, pp. 141-142; Higgins, December 18, 1996, pp. 51-54; Cunningham, December 13, 1996, pp. 96-102; Selman, June 4, 2009, pp. 223-224.
[662] D-1347, pp. 60-64.

Levi that: "*[o]ne of the most **devious examples** of the circular transactions has been referred to as the "Nasty Nine" transaction"*, and that the purpose of the Nasty Nine loans was to give the false appearance that borrowers were in a position to make payments on their indebtedness to Castor.[663] This is entirely different from *Singleton* where the transaction at issue was determined, on the facts, to be a legitimate restructuring of the tax payer's affairs.The arguments of Appellants with respect to these circular transactions must be considered in light of their strategy to advance conflicting and irreconcilable expert evidence on this issue.[664]

478. The alleged benefits of the $100 million debentures transaction were described by C&L to Revenue Canada in March 1989[665] as having significantly expanded Castor's access to bank financing; undoubtedly, such banks and other users of the financial statements were misled with respect to Castor's liquidity. The Trial Judge made no palpable or overriding error in finding that this transaction, initiated in 1987, led to a material misstatement of Castor's financial position in the audited financial statements for the relevant years.[666]

d) Restricted cash

479. The non-disclosure of restricted cash falsely improved the appearance of Castor's liquidity and solvency.[667] Respondent's experts opined that Castor's audited financial statements were materially misleading in each of the relevant years as a result of the non-disclosure of restricted cash. Appellants' expert Levi agreed that there was a misstatement and a disclosure failure, at least with respect to the US$50 million 1990 year end transaction with Bank Gottard.[668] Respondent's expert Vance opined that additional restricted cash on deposit with

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[663] §1860; D-1347, p. 85.
[664] §324; For example, the opinion of Selman and Levi that various loans (such as the $40 million of loans known as the "Nasty Nine") were fraudulent cannot be reconciled with the opinion of Goodman that these same loans were made for a valid business purpose and were not misstated on the audited consolidated financial statements. (Goodman, October 9, 2009, pp. 160-171.)
[665] PW-1492-3A.
[666] §§685, 1394, 1666.

Credit Suisse London was not disclosed as such on Castor's audited financial statements, and that the monies were in fact pledged to secure a loan made by Credit Suisse Canada to Castor, in existence since 1985, and merely rolled forward in subsequent years.[669]

480. The Trial Judge reviewed the factual evidence and the respective positions of the parties and their experts and concluded that there were material amounts of restricted cash that were not disclosed during the relevant years.[670] Appellants have demonstrated no palpable and overriding error warranting appellate intervention with this conclusion.

e) Fee diversion

481. It was acknowledged by Appellants' expert Selman that the transactions related to the fee diversion were not concealed from C&L by Castor[671] and that the balances were above the materiality level set by C&L.[672] This diversion of fees was identified by Appellants' expert Levi as a fraud.[673] The Trial Judge concluded that the failure to disclose the fee diversion was a further breach of GAAS. Appellants have not identified any palpable or overriding error by the Trial Judge in her appreciation of the evidence.

F-4 <u>Share valuation letters</u>

1. The valuation letters contained material misstatements and were negligently prepared by C&L

482. The issue of the valuation letters is addressed by the Trial Judge at §§2957 to 3074. The Trial Judge sets out the relevant factual evidence, the positions of the parties and the expert evidence to support her reasons. The Trial Judge

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[667] §§565, 1349, 1649.
[668] Levi, January 28, 2010, pp. 38-39; February 2, 2010, p. 97.
[669] §689; Vance, March 13, 2008, pp. 43-47; PW-1053-75, seq. pp. 11, 24-25.
[670] §§710, 1415, 1689-1690.
[671] §2094; D-1295, pp. 345, 351-352, paras. 6.13.02. and 6.13.14.
[672] §2098, referring to Selman on May 22, 2009, pp. 59-60.
[673] §2100; D-1347, p. 236.

accepted, without reserve, the evidence of Respondent's expert Kingston, a chartered business valuator ("**CBV**"), with respect to the nature and purpose of the valuation letters and the applicable professional standards (§3061). Significantly, Appellants expert Selman, also a CBV, acknowledged that if the Court found that the valuation letters were valuation reports (which she did), then "*he had no quarrel with the practices and policies described by Kingston*."[674]

483. To support their assertions on the valuation letters, Appellants rely on the evidence of Wightman and Selman. However, the Trial Judge's analyzed in detail the credibility of Appellants' expert Selman (§3062) and of Wightman (§§3009 - 3010) and concluded that their evidence was not reliable or credible. Appellants surprisingly state in paragraph 510 AF that the Trial Judge ignored the opinion of Selman, although §§3038 to 3052 are devoted to a review of his opinions. There is clearly a difference between ignoring an expert's opinion and rejecting the opinion after due consideration. The opinion of Appellants' expert Morrison is referenced and accepted by the Trial Judge at §§2988 and 2990 on the issue of the valuation letters.

484. Appellants continue to disregard the role of the Trial Judge as gatekeeper of the evidence at trial,[675] and the previous decisions rendered with respect to the admissibility of this evidence. In the Widdrington Action, the decisions of the Superior Court, maintained by the Court of Appeal, held that through admissions in their pleadings, Appellants have entered into a judicial contract on specific issues pertaining to the valuation letters (including their purpose).[676] Consequently, it is clearly no longer open to Appellants to make arguments in AF that are contrary to these judicial admissions, as these matters have been definitively decided by the courts.

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[674] §3039, referring to Selman on May 22, 2009, p. 136.
[675] *R.* v. *J.-L.J.*, [2000] 2 S.C.R. 600, at para. 28: "*In the course of Mohan and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper*"".
[676] *Widdrington v. Wightman et al*., (May 20, 2009) Montreal 500-05-001686-946 (S.C.), leave to appeal denied by 2009 QCCA 1890; *Widdrington v. Wightman et al.,* (February 3, 2010) Montreal 500-05-001686-946 (S.C.), leave to appeal denied by 2010 QCCA 714.

485. The evidence demonstrates that the valuation letters were clearly a key tool in Castor's fundraising efforts to raise capital, generally prior to the year end.[677] In fact, Appellants' expert Morrison testified that he had no doubt that the valuation letters were used in raising capital.[678] However, in paragraph 502 AF, Appellants purport to rely on Wightman's testimony at trial to assert that C&L was not aware that the valuation letters were distributed beyond the directors of Castor. This clearly contradicts what Wightman wrote to Stolzenberg in 1987 (PW-665-2), the various references in the valuation working papers to the fact that the letters were to support an increase in capital,[679] and Wightman's knowledge with respect to the number of copies of the valuation letters printed. The Trial Judge found that Wightman's testimony on this point was not credible,[680] in addition to the numerous other contradictions in his testimony.[681]

486. In paragraph 493 AF, Appellants distort the Trial Judge's finding that the valuation letters were: *"to be used and were used for fund-raising purposes and C&L knew it,*" when they state that this means that they were: "*meant for the public at large*." The evidence with respect to the fundraising purpose of the valuation letters and C&L's knowledge thereof, is reviewed in the Principal Judgment (§§2977 - 2985). The evidence is clear that the valuation letters were not distributed to the public at large but were provided to a limited and select class of investors, described by Wightman as an "*investment club*."

487. Although undoubtedly the valuation letters are based on the results of the audited financial statements to establish book value, the applicable standards for the professional opinions provided in respect of the two documents are different and independent, as is recognized in the Principal Judgment.[682] Even though

[677] Simon, June 16, 2009, pp. 52-55, 60-61.
[678] Morrison, October 10, 2006, p. 121.
[679] See, for example, §2978, referring to an inter-office memo to Wightman where the purpose of the valuation is stated as to: "*prepare for possible new shareholders after board meeting*" (PW-1053-50B-2, seq. p. 493).
[680] §2977.
[681] §§909, 1032, 2293, 2994.
[682] §§3006 to 3013.

material misstatements in the financial statements will impact the valuation letters, the issue of C&L's negligence *qua* valuators is not merely derivative of their negligence as auditors, as suggested in paragraph 491 AF.[683] For example, Kingston opined that, **as valuators**, C&L had the **independent obligation** to consider the impact of Castor's practice of capitalizing interest:

> *"…from a valuation perspective, cash is king. It's an expression, but well used and well understood that if there is a significant difference between an earnings calculation and a cash flow calculation, you should always go to the cash flow because that ultimately is the true measure of return that an investor can realize. And that's ultimately, as a valuator, you're trying to... you're, in fact, trying to determine is the value to an investor."*[684]

488. In footnote 71 AF, Appellants incorrectly state that the valuation letters: "*did not address debentures, preferred shares or units forming part of Widdrington investments*." As noted by the Trial Judge in §3331: "*The valuation letters specifically referenced these components of the fundraising activities of Castor*."[685] Moreover, the values of the debentures and preferred shares are fixed and therefore do not require a valuation.

489. In paragraph 490 AF, Appellants incorrectly assert that the Trial Judge's conclusions that the 1988 valuation letters and legal-for-life certificate were "*faulty*" are *ultra petita* and based on no evidence. On the contrary, the conclusions cannot be *ultra petita* because the Trial Judge did not award more

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[683] In §3073, the Trial Judge cites 2 examples of work that should have been performed by C&L *qua* valuators prior to the issuance of the SVL dated October 22, 1991, relied on by Respondent.
[684] Kingston, March 9, 2009, pp. 134-135.
[685] See, for example page 5 of the October 17, 1989 share valuation letter (PW-6-1, Tab 20, also part of PW-10): *"Common shares are issued as part of a total package. As well as purchasing common shares at the issuance price, investors must also subscribe to 8%-preferred shares and convertible debentures. The latter bear interest at 9.5% in 1989. The dividend yield on the common shares is higher than prevailing rates of return. We have considered that the return on investment must be calculated on an overall basis. We estimate that the overall return, at an issuance price of $535 per common share, is 8.1% (including dividend and interest) in 1989 prior to investor tax considerations."*

than was asked for by Respondent, who alleged that C&L was negligent in 1988 when it issued these opinions and certificates.[686]

490. To the extent that Appellants are arguing that the Trial Judge was making a conclusion about the 1987 financial statements, which are referred to in the 1988 valuation letters and legal for life certificate, this argument is ill-founded as it is clear that the Trial Judge based her conclusions on the factual evidence with respect to 1988 and the work that should have been performed by C&L when they prepared these professional opinions. With respect to the 1988 valuation letters, the impact of capitalized interest on value, and the premium to be accorded to the value of the common shares over book value, were factors that required the exercise of professional judgment when these opinions were prepared in 1988. Moreover, the Principal Judgment contains numerous references to evidence of the problems plaguing Castor's loan portfolio in 1987 (e.g., with respect to YH, MLV and the 3 Skyline Hotels) as well as disclosure issues such as capitalized interest, the $100 million debentures (initiated in 1987), and restricted cash, such that it is wrong to assert that there was no evidence to support her conclusions.

F-5 Legal-for-life certificates

1. The legal-for-life certificates contained material misstatements and were negligently prepared by C&L

491. The issue of the legal-for-life certificates is addressed by the Trial Judge at §§3075 to 3105. The Trial Judge sets out the relevant factual evidence, the positions of the parties and the expert evidence to support her reasons. The Trial Judge accepted the expert evidence of Respondent's experts Vance and Lowenstein.

[686] Black's Law Dictionary, 8nd ed., St-Paul, Thomson West, 2004 at p. 1559. It has never been disputed that the relevant years for negligence include 1988. See Procès-verbal, May 19, 2010, Annex G, pp. 85-86 with respect to questions 58 and 63 (written legal arguments).

492. The undisputed evidence is that C&L in general, and Wightman personally, understood that by certifying Castor as "*legal-for-life*", they were validating the financial health of Castor to third parties.[687] The preparation of legal-for-life certificates requires professional care and diligence, as confirmed by Lowenstein and C&L's own policies.[688]

493. The legal-for-life certificates issued by C&L, which McCarthy Tétrault explicitly stated that they: "*have received, examined and are relying upon*",[689] allowed the Trial Judge to conclude that the misstatements in the legal-for-life opinions were the direct consequence of the misstatements in the certificates provided by Appellants (§3102).

494. The two legal-for-life opinions that were provided to Widdrington, in PW-12, Tab 12, dated March 22, 1990 and PW-14, Tab 11, dated March 22, 1991 are based on the certificates in PW-7, dated February 16, 1990 and February 15, 1991 respectively, as stated at the beginning of these opinion letters. Respondent's investment advisor, Prikopa, viewed the legal-for-life designation to be a positive factor to support the conclusion that the company was profitable.[690]

495. In paragraph 513 AF, Appellants assert that because Respondent only saw the legal opinion: "*there was no actual reliance on any C&L representation*." However, without C&L's certification that Castor satisfied the tests for legal-for-life status, there would not have been any such opinions. C&L associated themselves with the information that appeared in the opinion letters, and

[687] §§3092, 3093, 3094 and 3096.
[688] §3100; Lowenstein, March 21, 2005, p. 82.
[689] §§3085-3086; PW-2473, Tab 5, pp. 10-12, Tab 6A, pp. 10-12, Tab 7A, pp. 10-13, Tab 8A, pp. 10-13.
[690] Prikopa, January 12, 2005, pp. 152-155; January 13, 2005, pp. 10-11.

understood that investors would rely on their certification of Castor's financial stability and health. In such a circumstance, it is obviously false to claim that there was no reliance on C&L's representation.[691]

G. THE JOINT AND SEVERAL LIABILITY OF PARTNERS & COSTS

G-1 The Trial Judge correctly concluded that Appellants are jointly and severally liable towards Respondent

496. In Section VI AF (paragraphs 514 to 522), Appellants state that the Trial Judge erred in law when she concluded that the individual partners of C&L Canada were solidarily liable for the debts of the partnership.

497. C&L is an Ontario partnership and it is notable that, in contrast to the governing law for the issue of negligence, Appellants never alleged that the applicable law governing the liability of individual partners is that of Ontario. In the absence of any such proof, there is no dispute that the Trial Judge correctly stated in §3597 that Quebec law applies to the determination of whether C&L's partners are solidarily liable.

498. The Trial Judge considered the relationship between articles 1106 and 1854 CCLC and concluded, in §3603, that article 1106 CCLC applies. The Trial Judge rejected Appellants' argument that article 1854 CCLC provides a specific exemption from the application of this principle with respect to partnerships. Article 1854 CCLC provides that partners are not jointly and severally liable for the debts of the partnership. The Trial Judge correctly stated that the term "*debts*" in article 1854 CCLC comprises **only** the partnership's **contractual obligations**, relying on the 2000 decision in *Bélisle-Heurtel* v. *Tardif*.[692]

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[691] See *Demers* v. *Hatch et al*., AZ-96011181 (C.A.); *Fortier* v. *McDuff*, 2010 QCCQ 7643. In these decisions, land surveyors provided information that was incorrect to notaries who relied on that information to the detriment of their clients. The clients were able to sue the surveyors although they did not see their reports.

[692] *Bélisle-Heurtel* c. *Tardif*, REJB 2000-20086 (C.S.) at para. 182 [*Bélisle*].

499. The decision in *Bélisle* was rendered after the reform of the Civil Code and therefore the issue of partnership liability was considered in reference to article 2219 CCQ. Appellants argue in paragraph 517 AF that *Bélisle* is therefore not relevant to the issue of C&L's liability as article 2219 CCQ corresponds to articles 1855 and 1856 CCLC, not article 1854 CCLC. However, while article 2219 CCQ is not the successor provision of article 1854 CCLC, it is incorrect to assert that the two articles are unrelated.

500. Articles 1855 and 1856 CCLC are to be interpreted in conjunction with article 1854 CCLC in the chapter entitled: "*Of the obligations of partners toward third persons*". The Court in *Bélisle* based its decision on the fact that the words "*acte **conclu*****"** were employed by the legislator. The language used by the legislator in articles 2221 and 2254 CCQ similarly identifies contractual relationships as these provisions provide that: "*the obligations have been **contracted***" and refer to: "*debts **contracted***". The Trial Judge was correct in relying on the reasoning of the Court in *Bélisle* to interpret article 1854 CCLC, as applying only to contractual obligations.

501. Appellants incorrectly assert that in *Pérodeau v. Hamill:*[693] "*the Supreme Court expressly stated that the distinguishing factor between art. 1854 and 1856 is not the nature of the liability, as being contractual or extracontractual*".[694] In fact, in paragraph 518 AF, Appellants admit that the decision was rendered: "*without mention that this would only apply to contractual debts as opposed to other debts of the partnership.*"[695] It is not surprising that the Supreme Court did not address the distinction between contractual and extra-contractual liability since the partnership debt was considered a contractual obligation, and so this distinction was not in issue. The decision in *Pérodeau* does not deal with the nature of the

[693] *Pérodeau* v. *Hamill*, [1925] S.C.R. 289 [*Pérodeau*].
[694] AF at para. 518.
[695] *Ibid*.

liability of C&L to Respondent in respect of their extra-contractual obligations.[696] Both the Court of Appeal and the Superior Court have, in subsequent decisions, held that the professional fault of a partner results in solidary liability among all partners.[697]

502. These post-*Pérodeau* decisions, like the Trial Judge's interpretation of articles 1106 and 1854 CCLC, are consistent with the law in the rest of Canada which provides that partners are jointly and severally liable for the extra-contractual faults committed by their partners in the normal course of business of a partnership. For example, section 11 of the Ontario *Partnership Act*[698] stipulates that, where a partner causes a loss or injury to a third party in the ordinary course of the business of the firm, the partnership is liable to the same extent as the partner who committed the fault. Section 13 of the *Partnership Act* stipulates: i) that partners are jointly liable for the obligations contracted by the partnership (as does the Civil Code); and ii) that partners are severally liable for the obligations of the partnership (like the Civil Code's provisions with respect to mandate and extra-contractual liability).

503. Finally, in paragraph 520 AF, Appellants incorrectly state that article 1106 CCLC does not apply to situations where one person may be legally liable for the fault of another. Appellants refer to the Supreme Court decision in *Modern Motors Sales Limited* v. *Masoud*,[699] and Taschereau J.'s statement that there would be no solidarity between the employee at fault and the employer since there was no common offence. The statement of Taschereau J., in *obiter*, in a 1953 decision does not represent the currently applicable legal principle. There was no appeal

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[696] The decision has been criticized in the doctrine because, even though there was a contract, the claim related to a breach of a professional obligation (See: Hervé Roch and Rodolphe Paré, *Traité de Droit Civil du Québec*, Montréal, Wilson Lafleur, 1942 at 402).
[697] *Sumabus inc.* c. *Daoust*, [1994] J.Q. no. 2667 at para. 42; *Laidley* c. *Kovalik*, 1994 CanLII 5878 (QC CA) at p. 2; *Verrier* c. *Malka*, AZ-50401934 (C.S.), aff'd 1998 CanLII 12884 (QC CA).
[698] R.S.O. 1990, c. P.5, s.11.
[699] [1953] 1 S.C.R. 149 at p. 156.

on this point and the solidary condemnation stood. However, since 1953, the contrary position has been adopted, including by the Quebec Court of Appeal.[700]

G-2 The Trial Judge appropriately exercised her discretion to condemn Appellants to pay the full costs of the First Trial and the New Trial, as well as the additional indemnity

504. In part B of Section VI AF (paragraphs 524 to 559), Appellants state that the Trial Judge erred in condemning them to pay all of the costs on the common issues, arguing that:

i) the Widdrington Action represents a small amount of the total damages claimed in the Castor Actions and therefore the award of costs incurred in respect of the common issues is disproportionate; and

ii) it is unfair that they be condemned to pay the costs of Respondent's experts incurred in respect of both the First Trial and the New Trial.

1. The costs incurred on the common issues in the Widdrington Action

505. As aptly stated in §3627: "*adjudicating on costs is a matter of fairness, equity and justice must prevail.*" The award of costs is an exercise of the Trial Judge's discretion[701] and an appellate court will not interfere in a judge's exercise of that discretion unless the principles of law applied are incorrect, or the decision is so clearly wrong as to amount to a manifest injustice. Such intervention is rare.[702]

506. The Trial Judge was best placed to assess the appropriateness of the award of costs. She considered the unique circumstances of the litigation and properly exercised her discretion to reject Appellants' argument that costs should be allocated on a *pro rata* basis such that Widdrington would only be able to recover

[700] *Deguire Avenue Ltd.* v. *Adler*, (1963) B.R. 101; *Larouche* v. *Gravel*, 1990 R.R.A 53 (C.A.).
[701] This is not disputed (see, for example, AF at paras. 545 to 547).
[702] *Hamilton*, *supra* note 151 at para. 27; *Abdelnour c. Banque HSBC, autrefois Banque Hong Kong du Canada*, 2006 QCCA 1348 (CanLII) at para. 42; followed in *Groulx, supra* note 151 at para. 93.

0.4% of all of the costs actually incurred to litigate the common issues. The Trial Judge considered Appellants' so called concern that a court might dismiss a plaintiff's claim in the pending cases (i.e. on the issues of causality/reliance and damages) but did not believe this concern justified a reduction of the costs, noting that if other plaintiffs were not successful, Appellants could be entitled to costs against them.[703] As stated in §3633, the decision in the Widdrington Action ends the debate on the common issues for **all of the Castor Actions**[704] and, by far, the majority of costs were incurred in respect of the common issues.[705] In light of these circumstances, it would have been manifestly unjust for the Trial Judge to have either mitigated the costs or acceded to Appellants' theory of a *pro rata* award of costs, or to have postponed the award of costs.

507. It is clearly erroneous for Appellants to assert that their proposed solution would have been: "*the only one which could have been adopted as the result of properly exercised judicial discretion.*" They cite no doctrine or jurisprudence to support this proposition. In fact, there is no legal precedent for the attribution of costs on a *pro rata* basis, as this theory has never been applied by a Canadian court, and it certainly has not been applied in the Widdrington Action where costs have been awarded by this Court and/or by the Superior Court on several occasions without any reduction on a *pro-rata* basis.

508. Finally, it is hypocritical and inconsistent for Appellants to argue **in the same Factum** that it was manifestly unfair of the Trial Judge to condemn them to the costs in respect of the trial on all of the common issues, while at the same time, asking this Court to maintain the appeal and to award: "*costs, including expert costs, in both Courts,*" without suggesting that such costs be reduced on a similar

[703] §§3637 and 3638.
[704] See also *Dunn, supra* note 9 at para. 47, in which Associate Chief Justice Wery also stated that the decision in the Widrrington Action would end the debate on the common issues for all of the Castor Actions.
[705] In the Judicial Bill of Costs submitted by Respondent dated July 21, 2011, total costs of $15,932.395.87 are claimed, including costs of $12,950,953.82 for the expertise on the common issues and $1,415,453.55 for rogatory commission examinations related to the common issues (note that these figures are slightly revised amounts submitted after July 21).

basis.[706] Appellants also previously unsuccessfully requested[707] an increase in the security for costs provided by the foreign plaintiffs in the other Castor Actions to cover **all costs incurred in the Widdrington Action** as a result of the status which they had been given with respect to the common issues. Such costs were estimated by Appellants at $22 million, and included all experts' fees in both trials. Appellants maintained this position in their written arguments submitted to the Trial Judge, asking that the plaintiffs in the Castor Actions be held solidarily liable for all costs incurred in the Widdrington Action.[708] They cannot, therefore, now argue that the Trial Judge manifestly erred by not rationing the costs as a function of the amount claimed in the Widdrington Action.

2. The costs of the First Trial and the New Trial, including all experts' costs and the additional indemnity

509. The general rule, provided in article 477 CCP, is that the losing party assumes **all** costs. Pursuant to article 466 CCP, a judge assigned to hear a case re-entered on the roll, such as the Widdrington Action, is **obligated** to rule on costs including: "*those relating to the original inquiry and hearing, according to the circumstances.*"

510. The Trial Judge held that Appellants had failed to convince the Court that she should depart from the general rule that the losing party should pay costs or that such costs should be reduced.[709] As appears from *BMW Canada inc. v. Automobile Jalbert Inc*.[710] (relied on by Appellants at paragraph 545 AF), this Court affirmed that in matters relating to costs, it will only intervene: *"si la*

[706] In AF at para. 551, Appellants write: "*no party should be responsible for the costs of the first trial"*.
[707] Defendants' Amended Motion for a Declaration in relation to costs and for additional security for costs, dated October 7, 2008.
[708] Defendants' argued that: "*For the reasons already stated in the said Motion, which are herein reiterated by the Defendants mutadis mutandis, and in light of the very peculiar circumstances of the present file, the Defendants submit that the Plaintiffs to the Castor litigation should be solidarily (or, subsidiarily, conjointement) liable to the Defendants for the* ***costs of both trials***."
[709] §3619.
[710] 2006 QCCA 1068 at para. 249.

decision du premier juge crée une injustice réelle ou manifeste." The issue therefore is limited to whether there has been a manifest injustice.

511. It is evident that the Trial Judge did not err in her application of articles 466 and 477 CCP when she awarded costs of the First Trial in addition to the costs of the New Trial, without reducing the costs of the experts. In fact, as mentioned above, Appellants have previously taken the position that in the event that they would be successful, they should be entitled to all such costs, including experts' fees and the **full costs of the First Trial**. As appears from paragraphs 19, 22 and 25 of their (unsuccessful) Motion[711] to increase the security for costs payable by the foreign plaintiffs in respect of the Widdrington Action made at the start of the New Trial, Appellants anticipated a claim for costs of more than $22 million if Respondent's action were unsuccessful, including more than $11 million for expert fees from the First Trial as well as an anticipated $4 million for expert fees in the New Trial. As noted above, Appellants also maintained that they should be entitled to all costs relating to both the First Trial and the New Trial in their written submissions to the Trial Judge.

512. The Trial Judge appropriately considered the circumstances, and recognized that Appellants should be responsible for all of the costs because, *inter alia*, the quantum of such costs incurred by Respondent was a **direct consequence** of Appellants' litigation strategy. Contrary to Appellants' assertion in paragraph 547 AF, the reasons for the excessive length of the entire litigation were appropriately considered.[712]

513. Appellants assert that they should not be blamed for the length of the First Trial and direct this Court's attention to the time (during the First Trial) devoted by Vance to corrections of the transcripts (paragraphs 536–537 AF). However, they fail to mention that the corrections of the transcripts of Vance were made at the

[711] Defendants' Amended Motion for a Declaration in relation to costs and for additional security for costs, dated October 7, 2008.
[712] §§3629 and 3630.

request of Judge Carrière[713] and, at first, with the consent of Appellants.[714] Throughout the First Trial, Judge Carrière insisted that this work be continued as he found it to be useful to his appreciation of the rather complex evidence.[715] Similarly, Appellants argue that the time devoted to the correlation exercise performed by Vance in connection with Castor's European records was excessive. Appellants neglect to mention that the exercise was rendered necessary because of their unreasonable and continued refusal to admit into evidence by consent the books and records of Castor's foreign subsidiaries.[716] They also fail to mention that the Trial Judge expressly stated that the correlation exercise was useful to her.[717] Moreover, and ironically, in paragraph 373 AF, Appellants suggest to this Court that a similar correlation exercise should have been performed for Castor's other books and records to ascertain their completeness**!**

514. Concerning the experts' costs, Appellants incorrectly state in paragraph 546 AF that: "*the trial judge completely omitted any analysis of the second paragraph of article 477 C.C.P*," which would have permitted her to reduce the costs relating to experts if she had found them to be unreasonable, or had she found that one expert would have been sufficient. However, as clearly appears from her reasoning, the 2nd paragraph of article 477 CCP was without a doubt considered when she held that the reports and testimonies of Respondent's experts were not only useful, but, in the circumstances of the case, they were necessary:

> *"[321] Plaintiff's experts were assigned similar mandates, and* ***each brought a unique perspective and experience to his assessment of the***

[713] Vance, January 10, 2001, pp. 13-17.
[714] Vance, January 10, 2001, p. 16.
[715] Vance, January 7, 2003, pp. 116-120.
[716] During Ernst Gross' examination, Appellants objected to the filing of the foreign books and records stating that he was not the competent witness to file such documents and that it can only be filed by Edwin or Juerg Banziger (October 1, 1998, pp. 576-578; May 17, 1999, pp. 95-97), but on two occasions, Appellants objected to the filing of the foreign records by Juerg Banziger alleging that he was not the proper witness to file same; their objection, however, was dismissed by Judge Carrière on July 7, 2005 as well as by the Trial Judge on April 7, 2008.
[717] §§287, 290, 299 and 300.

> ***fundamental questions that the Court must answer*** *in this auditors' negligence case.*
>
> *[322]* ***Plaintiff's experts, with distinctly different background and experience****, all independently arrived at the same conclusion that the audited financial statements of Castor for 1988, 1989 and 1990 contained material misstatements that should have been identified and would have been identified by C&L but for their negligent audit work.*
>
> *[3634] Neither the Plaintiff nor the Defendants have challenged the quantum of the professional services rendered by the experts that appeared before the Court even though all invoices were introduced in evidence.* ***Comparing one invoice with the other, comparing Plaintiff experts' invoices with Defendants experts' invoices, confirms time spent and hourly rates are alike****.*
>
> *[3635]* ***There is not a doubt that the reports and the testimonies of the Plaintiff's experts were useful. In fact, in the circumstances of the case, they were necessary****. Therefore the Court finds that all experts' costs should be part of the costs adjudicated to Plaintiff*." [emphasis added]

515. Since the Trial Judge found that the Respondent's experts' reports were not only useful but necessary, it is clear that she exercised her discretion fairly when she chose not to reduce these costs (§3639). Respondent bore the burden of proof on the issue of professional negligence and needed to adduce sufficient evidence from experts with different backgrounds and experience to prove that the various theories put forward by Appellants and their experts were without merit and did not represent an "*accepted school of thought*." In the circumstances, any reduction of the costs of Respondent's experts would have been manifestly unfair to Respondent.

516. Appellants are misleading when they write in paragraph 553 AF that Respondent's counsel took the position that the expert evidence on GAAP was unnecessary and implicitly invited the Court to set that expertise aside. On the contrary, the expert evidence on GAAP was required because Appellants would not admit that the consolidated financial statements were materially misstated and contrary to GAAP, although the evidence, including that of their experts,

should have made this issue indisputable.[718] Not surprisingly, in AF, Appellants continue to argue that GAAP was complied with, relying primarily on the opinion of their expert Goodman, and that the Trial Judge erred in concluding otherwise.[719]

517. Appellants further misrepresent the situation when they state (in AF at paragraphs 533 *et seq*.) that the expert reports filed into the Court record for the First Trial were not used by the parties in the New Trial. Rosen's initial report dated October 1997 was used in the New Trial.[720] The October 1997 reports of Vance and Froese were updated for the New Trial to reflect additional evidence produced into the record but were largely founded on the work initially performed.[721]

518. In paragraphs 542 to 544 AF, Appellants suggest that the issue of costs was a secondary consideration, in an effort to justify their failure during the New Trial to challenge the reasonableness of the costs of the experts. This assertion is incorrect as the issue of costs was included in the questions[722] that the parties had to expressly address in their written arguments submitted to the Court. As well, the Trial Judge, on more than one occasion, clearly informed the parties that she would rule on the issue of the costs of the First Trial as well as the New Trial and provided the parties with the opportunity to make additional

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[718] *Supra* notes 407, 408.

[719] Notably, Appellants have admitted certain GAAP misstatements in Inscription #1, para. 438, when they allege that: *"The trial judge fails to consider and address the evidence and the impact of fraud in respect of the GAAP misstatements, including related party transactions, restricted cash, $100 million debentures, fee diversion, and information regarding certain of the loans."*

[720] Rosen's 1997 Report is cited in the Principal Judgment (see, for example, footnote 293) and is referred to in Appellants' Factum (see, for example, AF at para. 324).

[721] Vance, March 4, 2008, pp. 40-41 (direct exam); April 18, 2008, pp. 30-35, 117-119 (cross-exam); Froese, December 2, 2008, pp. 189-193 (cross-exam), January 27, 2009, pp. 35-37 (re-direct exam).

[722] See Procès-verbal, May 19, 2010, Annex G: "Q. 175: *If costs, including costs of experts, are attributed in favour of Defendants, in whole or in part, is liability for the costs limited to the estate of the late Peter Widdrington, or from all the other Plaintiffs in the Castor Actions who may claim to benefit from the present judgment with respect to "common issues" and, if so, in what proportion?*" and "Q. 176: *What award of costs should be made in the present case?*"

representations to the Court on the issue of costs.[723] In fact, a separate hearing date was set aside to hear oral representations specifically on the issue of costs.

519. In *Nadon c. Montreal (Ville de)*,[724] the court stated that it is within a Trial Judge's discretion to mitigate the costs related to the experts but that, if a party wishes to challenge the reasonableness of such costs, the issue **must be raised** before the trial judge.

520. Concerning the additional indemnity award, Appellants have provided no reason to justify their assertion that Respondent should not be entitled to same from the date of the institution of his action, and in fact, did not even argue this point before the Trial Judge. Furthermore, despite the assertion in paragraph 552 AF that they bear no responsibility for the length of the trial, it is clear from the Principal Judgment that the Trial Judge did, in fact, blame the inordinate length and expense of the Widdrington Action on Appellants' litigation strategy. It is clear from the many judgments referred to in the Introduction to RF that numerous judges of this Court and the Superior Court are of the same opinion.

521. Appellants have not raised any legal error or factual circumstance that would justify the intervention by this Court in the Trial Judge's exercise of discretion in the award of costs.[725]

H. THE APPEAL OF THE JUDGMENT ON OBJECTIONS[726]

H-1 Rulings on objections

522. In the Judgment on Objections, the Trial Judge made her rulings with respect to hundreds of objections raised during the trial or during rogatory commissions. In

[723] Representations, September 30, 2010, pp. 233, 238-239; October 1, 2010, pp. 186-195.
[724] 2010 QCCS 5734 at para. 58.
[725] D. Ferland & B. Emery, *Précis de procédure civile du Québec*, vol. 1, 4e éd., Cowansville, Yvon Blais, 2003 at pp. 736-737.
[726] It appears that Appellants have abandoned their appeal with respect to the Trial Judge's conclusions on objections # 3, 7, 8, 30, 39, 42, 43, 50, 60, 89, 96, 104, 109, 117, 118, 139, 140, 141, 142, 143, 145, 147, 148, 149, 150, 151, 153, 155, 156, 157, 158, 159, 160, 161, 162, 381, 408, 452, 453, 456, 459, which they had initially raised in their Inscription in Appeal no. 2 at paras. 8-52, 73-115, 129-142, 147-151, 159-170, 179-181.

her judgment of 229 pages, the Trial Judge explained the nature of each objection, set out the positions of the parties and then provided her decision supported by the relevant evidence, doctrine and jurisprudence.

523. In Section V AF (paragraphs 560 to 572), Appellants state that the Trial Judge erred in her rulings with respect to 21 of such objections. However, Appellants have not identified any errors that justify the intervention of an appellate court. Furthermore, none of the purported errors raised by Appellants in Section V of AF would have affected the Trial Judge's conclusions, which were not based on any one fact but, rather, on thousands of individual findings of fact.

H-2 The decisions maintaining in whole or in part certain objections raised by Respondent

524. The Trial Judge's analysis and decision with respect to **objection 71** are set out at pages 58 to 73. The Trial Judge allowed Goodman's expert evidence with respect to the factual basis used to support his opinion but did not allow his testimony as proof with respect to the real estate market on the basis that the witness was not qualified as an expert on the economic environment and the information was not relevant.

525. There is no error of law or fact in the Trial Judge's decision. Appellant produced another expert witness[727] to testify on the economic environment through whom evidence with respect to the real estate market could have been legally adduced. Goodman was not qualified as an expert in this field.

526. The Trial Judge also made no error in disallowing Goodman's evidence with respect to loan-to-value ratios and the reporting of LLPs used by other lenders in 1988. With respect to the research performed by Goodman as to whether other lenders involved in the real estate sector recorded LLPs, this information is clearly irrelevant as to whether Castor, based on the facts specific to its situation,

[727] Lajoie, October 16, 17, 18, 2006 (direct exam), November 19 and 20, 2009 (cross-exam).

should have recorded LLPs.[728] Without knowing the precise factual situation with respect to these other lenders, it is impossible to extrapolate any common principles in their application of GAAP. Further, Goodman's comparison of Castor's loan-to-value ratios with those employed by other institutions and his assessment of what he believed to be normal behaviour of borrowers during the construction phase of a project[729] are not GAAP issues, are beyond his expertise as qualified by the Court,[730] and are irrelevant to an assessment of Castor's behaviour. Moreover, this comparison reflects the incorrect characterization of the nature of Castor's business as relating only to development projects.

527. Furthermore, contrary to his stated methodology, Goodman relied on information subsequent to February 15, 1991 when he prepared the impugned Tables in his report.[731] Goodman was also inconsistent in assuming the role of the "*hypothetical preparer of Castor's financial statements,*" but then speculating about information that was not in Castor's records and for which there was no evidence that such information had been seen by any member of Castor's management.

528. The Trial Judge's analysis and decision with respect to **objection 80** are set out at pages 80 to 81. Appellants appeal the Trial Judge's ruling that exhibit D-846 (and its English translation, D-846T) are inadmissible. On December 7, 2009, the Trial Judge maintained the reserve on D-846 because it was not filed by the proper witness and, accordingly, it constituted hearsay evidence. Appellants elected not to call a competent witness to produce this document, such as von Wersebe, a resident of Ontario. This was Appellants' right but an arguably questionable litigation decision does not justify appellate review.

[728] Goodman, September 21, 2009, pp. 103-130.
[729] D-1324; Goodman, September 22, 2009, pp. 151-158.
[730] Judgment by Justice St-Pierre dated December 3, 2009 at paras. 74-75 (re: qualification of Goodman).
[731] D-1312, pp. 104 and 107, being CREE.19 and CREE.20.

529. D-846 is a financial statement for YH AG, an entity that was neither a guarantor of any loan from Castor[732] nor a borrower of Castor. Appellants seek to produce this as evidence that the guarantees by von Wersebe of certain of Castor's loans to Canadian YH entities constituted valid security. However, D-846 does not disclose if von Wersebe owned the shares personally or otherwise or whether such shares were pledged; therefore, D-846 cannot, by itself, make proof of von Wersebe's personal net worth. D-846 is dated in July 1991 and was not part of Castor's records. Appellants' argument in paragraph 566 AF that other documents subsequent to the issuance of the 1990 financial statements (on February 15, 1991) have been admitted into evidence is specious and misleading. The exhibit is solely related to the issue of GAAP and whether the financial statements were materially misstated. In this context, the relevant date is February 15, 1991 as acknowledged by Appellants and their expert on GAAP.[733] A later date (late October 1991) is relevant to the issue of the valuation letters because Widdrington relied on the valuation letter dated October 22, 1991 in making an investment in Castor two days later.

530. Appellants further argue that exhibit D-846 is a York-Hannover business record and, as such, could have been admitted under the business record exception provided by article 2870 CCQ. Appellants incorrectly state that the Trial Judge was inconsistent in her application of the evidentiary principles with respect to business records, referring to the rulings to admit into evidence PW-1136-5 and PW-3089. However, the factual situations were different and the Court properly allowed the production of these documents for the following reasons:

- PW-1136-5 was filed by Whiting by consent when the parties agreed to file extracts of Whiting transcripts. Other similar documents were filed by Appellants without objection;[734]

[732] Goodman, October 8, 2009, pp. 12-13.
[733] AF at para. 356; Goodman, October 26, 2009, p. 74; December 3, 2009, p. 103.
[734] PW-1136-5C and PW-1136-5D (Financial Statements of KVW Investments Ltd.).

- PW-3089, which is a commitment letter and part of Castor's records, was produced pursuant to article 2870 CCQ because the conditions for the exception of hearsay evidence were satisfied.[735] For example, the information contained therein is corroborated by other documentary evidence produced as part of Castor's books and records.

531. Appellants argue that the Trial Judge's decision is inconsistent with her ruling to allow the production of an undated and unsigned appraisal of the MEC, PW-1108B.[736] However, the circumstances were quite different. The effective date of the appraisal was indicated on PW-1108B as September 1, 1990 and provided an estimate of value of $241 million. Corroborative, contemporaneous evidence in the Court record was consistent with that estimate of value, for example, a memorandum written by Whiting on September 11, 1990.[737] D-846 was not available before February 15, 1991 and there is no corroborative evidence for the values contained therein.

532. In paragraph 567 AF, Appellants cite *R.* v. *Lavallée*[738] for the principle that an expert may refer to hearsay evidence when providing his opinion. However, Sopinka J. stated that a distinction must be drawn between evidence that an expert obtains within the scope of his expertise (e.g. a doctor relying on the observations of colleagues) and evidence that an expert obtains from a party to litigation touching a matter directly in issue. As stated by Sopinka J.: "*Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information."* As affirmed in subsequent decisions, the Court in *R. v. Lavallée*

[735] See Schoffel, May 14, 2010, pp. 7-15 for the decision rendered by the Trial Judge.
[736] Appellants assert that the production of PW-1108B constituted hindsight (AF, footnote 410) and Respondent has answered this allegation in the Arguments addressing that allegation.
[737] PW-1159-6: memorandum from Whiting to von Wersebe, dated September 11, 1990, indicating the market value of MEC to be between the range of $225-275 million.
[738] [1990] 1 S.C.R. 852 at p. 48.

maintains its skepticism of expert opinion based on hearsay evidence of the latter nature.[739]

533. In the present instance, the evidence in dispute constitutes hearsay that was provided to the expert by a party to the litigation and the inherently suspect nature of the evidence is exacerbated by the fact that the expert seeking to rely on the evidence (Goodman) was found by the Trial Judge to have an interest in the litigation.

534. The Trial Judge's analysis and decisions with respect to **objections 126** and **127** are set out at pages 133 to 137 and relate to exhibits D-848,[740] D-1351[741] and D-1353.[742] Appellants appeal the Trial Judge's ruling that these exhibits constitute hearsay and are therefore inadmissible, in light of the fact that the preparer of D-848 and D-1351, Paul Quigley ("**Quigley**"), testified *viva voce* and identified his source materials.

535. These documents are intended to make proof of von Wersebe's personal net worth and therefore the value of his guarantees provided to Castor as security for certain of the YH loans. D-848, a net worth statement of von Wersebe, records financial information gathered from different documents that Quigley did not prepare and he had no personal knowledge of the source or reliability of the information,[743] for example, D-1351, filed, *inter alia*, in support of D-848. As a result, D-848 and D-1351 still constitute hearsay evidence. Moreover, the documents relied on by Quigley to prepare D-848 were out of date and therefore the information was not reliable. Appellants elected not to call a competent witness to produce and explain the contents of these documents such as von Wersebe, a party living in Toronto and available. This choice does not justify appellate review.

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[739] *R.* v. *Dean*, 1992 ABCA 109, Major J.A. (as he then was).
[740] Personal net worth statement of von Wersebe.
[741] 1987 audited financial statements of Raulino. Note: Raulino Treuhand is not a borrower of Castor.
[742] Memorandum from Mr. Quigley.
[743] Quigley, March 15, 2010, pp. 77-93.

536. Exhibit D-1353 is an assessment of the fair market value of the shareholders' equity of KVW Holding AG in December 1986, an entity that was not a borrower or guarantor of Castor. As correctly stated by the Trial Judge, financial information from 1986 cannot be relied on to establish the net worth of von Wersebe for the period of 1988 to 1990. The Trial Judge was best placed to determine the probative value to be given to this and the other documents.

537. The Trial Judge's analysis and decision with respect to **objections 402-407** and **409** are set out at pages 186 to 190 and relate to exhibits D-405-1, D-430, D-432, D-438, D-439, D-440, and D-466. Appellants appeal the Trial Judge's ruling which disallowed the production of these documents on the basis that they are relevant to the appreciation of Ira Strassberg's ("**Strassberg**") testimony and his credibility. Strassberg was the auditor of the DTS group of companies, a large borrower during the relevant years, and testified in the context of a rogatory commission examination. The Court correctly applied the rules of evidence stating that pertinent evidence will only be part of the court record if it is legally produced. The Trial Judge did not accept Appellants' argument that, although the documents were not filed by the competent witness, they were admissible under the business records exception (article 2780 CCQ). The Trial Judge took into consideration the following facts:

- The documents are report control sheets and draft financial statements of the D.T. Smith companies. They are unsigned, have no auditors' letterhead and were prepared and reviewed by people other than Strassberg.

- The documents are dated subsequent to the issuance of the 1990 Castor's financial statements and are not relevant to the issues in the Widdrington case;

- Strassberg testified[744] that even though he was in charge of supervising all of the audit work, he was not involved directly or indirectly in the preparation, proofreading or approving the unsigned financial statements;

- C&L never asked for and never looked at the draft or unaudited financial statements;[745]

538. These documents were filed into the Court record for identification purposes only pending their production by a competent witness.[746] Appellants elected not to call a competent witness to produce these documents. Again, this decision does not justify appellate review.

H-3 <u>The decisions dismissing certain objections raised by Appellants</u>

539. **Objection 88** was treated by the Trial Judge in paragraphs 479 to 487 and relates to Goodman's knowledge of the Bank of Montreal's ("**BMO**") situation with respect to its loan to the MEC in 1992. At paragraph 563 AF, Appellants argue that the amount that may have been obtained after Castor's bankruptcy in 1992 is irrelevant. However, as noted by the Trial Judge in §485, the objective was not to establish BMO's situation *per se*, but rather to verify Goodman's knowledge thereof, taking account of his methodology and the information otherwise used or provided. In the circumstances, it is a question of credibility, and art. 314 CCP provides that a party may establish in any manner whatsoever grounds he may have for objecting to a witness.

540. **Objections 369 to 373** are treated collectively by the Trial Judge in paragraphs 786 to 803, and she refers to the same reasoning with respect to **objections 454, 455, 457 and 461**. The objections raised by Appellants relate to Strassberg's use of the 1991 audit working papers for the DTS group of

[744] Strassberg, November 2, 2000, p. 192; November 29, 2000, pp. 1101-1108; November 30, 2000, pp. 1291-1293, 1343-1345, 1396-1398, 1451-1458, 1464, 1470-1481; February 8, 2001, pp. 2351-2353.
[745] R. Smith, June 10, 2008, pp. 39-40.
[746] Justice Carrière allowed the filing of these documents on the condition that either Messrs. Alan Dule, Peter Quinn, Maurice Rosen, or Chris Longing will be called to testify and provide context to the documents (See, Testimony of Strassberg that are indicated under footnote 744).

companies to support his testimony with respect to the 1990 financial results for these entities. As a matter of fact, the 1990 working papers were destroyed some time prior to Strassberg's testimony at a rogatory commission examination.[747]

541. At paragraph 570 AF, Appellants argue that Respondent: "*failed to show the required diligence to avoid the destruction of the 1990 working papers, and thus did not meet the standard of article 2860 C.C.Q*." The Trial Judge considered this argument and rejected it in light of the applicable principles, which must be interpreted restrictively.[748]

542. Royer's *La preuve civile* articulates the applicable principles.[749] The Trial Judge correctly stated that the documents in issue were in the hands of third parties, over whom Respondent had no control, and were destroyed in the normal course of business of the Rogoff accounting firm. There is no error of fact or law in the Trial Judge's conclusion that the destruction of these documents was not due to anyone's negligence or bad faith. Moreover, the Trial Judge noted that the witness had personal knowledge of the facts (the financial condition of the DTS group at year end 1990) and that his testimony was corroborated by the testimony of other witnesses. The Trial Judge found the testimony of all of these witnesses credible and reliable.[750]

I. THE APPEAL OF THE JUDGMENT ON MOTIONS[751]

I-1 <u>The refusal to admit into evidence the rulings of a disciplinary tribunal in Ontario</u>

543. In Section VI AF, pertaining to the Judgment on Motions (paragraphs 573 to 580), Appellants state that the Trial Judge erred in refusing the production into

[747] Strassberg, November 1, 2000, pp. 46-48.
[748] Commentaires du Ministre de la Justice, art. 2860.
[749] Jean-Claude Royer, *La preuve civile*, 4e éd., Cowansville, Yvon Blais, 2008 at pp. 1156-1157.
[750] §§2009, 2022, 2024 and 2025.
[751] It appears that Appellants have abandoned their appeal with respect to the Trial Judge's conclusion on the admissibility of Gregory T. Gaudette's affidavit, which they had initially raised in their Inscription in Appeal no. 2, at paras. 91-115 (Objection no. 117-118) and Inscription in Appeal no. 3 at paras. 8-14.

the Court record of the proceedings and three judgments (the "**OICA Documents**") rendered by the Disciplinary and Appeal Committees of the Ontario Institute of Chartered Accountants ("**OICA**") regarding Whiting.

544. Whiting was the Senior Vice-President of York-Hannover Developments Ltd. ("**YHDL**").[752] Whiting was called by Respondent to testify *viva voce* before Judge Carrière in the First Trial about the relationship between the YH group of companies and Castor, as well as the financial condition of the YH entities he was involved with.

545. Shortly after his testimony in the First Trial was completed, a complaint against Whiting was filed with the OICA by Michael Tambosso, one of the Appellants, which resulted in the hearings before, and the judgments of, the OICA. During the New Trial, Appellants sought the production of the OICA Documents for the purpose of challenging the **credibility** of Whiting (paragraph 13 of the Judgment on Motions); however, in AF, Appellants now assert that the intended purpose of producing these documents is to challenge the assumption of Vance (Respondent's expert witness) that Whiting would have provided honest information to Castor and to C&L.

546. The issue of the production of the OICA Documents arose early in the New Trial. In **mid-February 2008,** the Trial Judge ruled that Whiting would be the proper witness to file the OICA Documents and to defend himself, if necessary. This ruling was reiterated in May 2008.[753] It is significant that Appellants omit these facts from AF.

547. Additional facts were summarized by the Trial Judge in the Judgment on Motions at paragraphs 10 to 12. In 2008, at the start of the New Trial, Whiting was identified on Respondent's list of witnesses. However, before the defense (Appellants) began to present their case, Respondent determined that he was

[752] §§130-134 provide a summary of Whiting's role in the YH Group.
[753] Gourdeau, February 18, 2008, pp. 137-144. The issue arose again a few months later and a similar ruling was rendered during Vance, May 27, 2008, pp. 70-76.

satisfied with the documentary evidence produced into the Court record and announced to the Court that Whiting would not be called to testify by Respondent.

548. In **January 2009**, Appellants made the decision to call Whiting as their own witness, as evidenced by the Defendants' list of witnesses as at January 22, 2009 in which they estimated 2 days for their examination of this witness in chief**,** for the purpose, *inter alia*, of **the production of documents**. In a revised list of witnesses prepared as at February 12, 2009, Whiting was still listed by Appellants as their witness; however, Appellants confirmed in a footnote that they intended to ask the Court for permission to file extracts of Whiting's testimony from the First Trial.[754] Appellants clearly understood at that time that they would not be able to produce the OICA Documents into evidence if Whiting did not testify *viva voce* before the Trial Judge.

549. Subsequently, the parties agreed to a process whereby Appellants would identify the extracts of Whiting's testimony that they wished to produce into the record and that Respondent could then complete such evidence (in a form of virtual cross-examination) by filing other extracts thereof. The Trial Judge allowed the production of all of these identified extracts of testimony into evidence.[755]

550. In the particular factual circumstances, the Trial Judge correctly stated, in paragraph 12 of the Judgment on Motions, that Whiting became Appellants' witness. At no time did the Trial Judge indicate that Appellants could not call Whiting to testify *viva voce* if they believed that additional evidence was required as part of their defense. Pursuant to article 310 CCP, a party cannot impeach the credibility of his own witness and cannot prove that his witness made inconsistent statements (allegedly Whiting's trial testimony before Judge Carrière

[754] Procès-verbal of March 24, 2009, Annex A, page 4, footnote 14.
[755] Letter from Me Gary Rosen of Heenan Blaikie to Justice St-Pierre dated April 30, 2009; Letter from Me Gary Rosen of Heenan Blaikie to Me Gilles Paquin of FFMP dated April 30, 2009; Letter from Me Gary Rosen of Heenan Blaikie to Justice St-Pierre dated June 17, 2009.

versus his testimony to the OICA), **unless the witness has been afforded the opportunity to be questioned on the subject**.

551. The principles articulated in article 310 CCP reflect the House of Lords' decision in *Browne v. Dunn.*[756] These long-standing principles, as expressed by the House of Lords, explain why it would be contrary to our fundamental principles of justice to allow Appellants to produce the OICA Documents into evidence without calling Whiting to testify.[757]

552. Whiting is a resident of Ontario. Many of the lay witnesses called by Appellants to testify before the Trial Judge were also residents of Ontario. It would not have been difficult for Appellants to call Whiting to testify *viva voce* with respect to the OICA Documents, if this evidence was really important to their defense. In the circumstances, it is extraordinary that Appellants are asking this Court to ignore a fundamental principle of justice.

553. Although not relevant to the pure question of law that is at issue, two additional points should be made with respect to Appellants' purported reasons to admit this evidence. Firstly, Appellants suggest that the OICA Documents support their assertion that Whiting was not honest with C&L with respect to von Wersebe's guarantees of certain loans and the YH adverse opinion (to support their theory of the case that a fraud was perpetrated against the auditors); however, C&L never considered the guarantees or the adverse opinion as part of their audits, and the Trial Judge found that because of this fact, the evidence did not allow her to conclude that the auditors were misled by Whiting.[758] Secondly, there is a fundamental contradiction between the purported reasons for filing the OICA Documents and the opinion of Appellants' expert, Goodman, who relied on von

[756] (1893) 6 R. 67, H.L.
[757] Representations, March 17, 2010, pp. 59-61.
[758] Representations, March 17, 2010, pp. 34.

Wersebe's guarantees as valid support for the YH loans (to support the theory of the case that the loans were good, i.e. there was no fraud).[759]

[759] Representations, March 17, 2010, p. 35

PART IV: CONCLUSIONS

554. For the foregoing reasons, Respondent respectfully submits that the Principal Judgment, the Judgment on Motions and the Judgment on Objections are well-founded in fact and in law and, accordingly, Respondent respectfully submits that this Honourable Court should **DISMISS** Appellants' appeals, with costs in both courts.

Montreal, February 1, 2012

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PART V: AUTHORITIES

CERTIFICATE OF RESPONDENT'S ATTORNEYS

We the undersigned, **FISHMAN FLANZ MELAND PAQUIN LLP,** certify that the present factum is in conformity with the rules of the Court of Appeal of the Province of Quebec.

Montreal, February 1, 2012

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