C A N A D A

PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

COURT OF APPEAL

C.A.M.: 500-09-

S.C.M.: 500-05-001686-946

ELLIOT C. WIGHTMAN ET AL.
[SEE ANNEX A]

APPELLANTS (Defendants)

v.

THE ESTATE OF THE LATE PETER N. WIDDRINGTON , in his lifetime domiciled and residing at 1, Doncaster Avenue, London, Ontario, N6G 2A1

RESPONDENT (Plaintiff)

INSCRIPTION IN APPEAL (NO. 1)
(Article 495 C.C.P.)

---

1. APPELLANTS/Defendants (hereinafter «Defendants») hereby inscribe in appeal from a final judgment rendered on April 14, 2011, by the Honourable Justice Marie St-Pierre of the Superior Court, district of Montreal (the *judgment*).

2. APPELLANTS/Defendants will also file separate inscriptions in appeal of two other final judgments rendered on the same day and dealing with pending objections and various motions presented by the parties during the trial.

3. For ease of reference, the present inscription in appeal, dealing with the principal judgment will be referred to as "Inscription in Appeal No. 1", the inscription in appeal dealing with the judgment on the pending objections will be referred to as "Inscription in Appeal No. 2" and the inscription in appeal dealing with the judgment on motions will be referred to as "Inscription in Appeal No. 3".

Introduction

A. The judgment under appeal ("the *judgment*")

4. The *judgment* condemns Defendants solidarily to pay $2,762,960 to the Plaintiff, together with interest and additional indemnity from the introduction of the action.

5. It also condemns the Defendants to the costs, including the costs related to the original hearing and inquiry held before the Honourable Justice Carrière from September 1998 until October 2006 and which was aborted because of health issues.

6. The duration of the proof and hearing in first instance was 260 days, from January 2008 to May 2010.

7. The duration of the oral argument was 10 days, after each side had first submitted:

(a) a written argument of 300 pages;

(b) a rebuttal of 50 pages,

together including more than 5,000 footnotes or endnotes, the vast majority of which referred to the evidence.

8. According to the instructions given by the trial judge, the written arguments, and thereafter the rebuttals, were filed by the parties on the same date, rather than Plaintiff submitting his arguments first, to be responded to by Defendants'.

9. At the outset of the trial, the trial judge indicated that, without committing herself to deciding the issue in a preliminary fashion, she wanted to hear the parties on the question of applicable law.

10. The oral argument of the parties regarding the issue of applicable law lasted three (3) days in April 2008, each side having first submitted a detailed written outline of its argumentation.

B. The fundamental issues of the present appeal

11. As will be more fully explained, on the facts of this case, the present appeal deals with numerous issues which shall be dealt with in five (5) general sections.

12. **The first section (Section I, *infra*, para. 45 to 149) deals with auditor liability in general vis-à-vis third parties and more particularly with the rules that are applicable to the extra-contractual liability of an auditor in Canada and in Quebec.**

This general issue raises three very significant questions:

(a) In a situation where the audit is performed by a national audit firm, where the audited corporation is a New Brunswick corporation, and where the plaintiff is domiciled in Ontario, what law is applicable to the extra-contractual liability of the auditor? Is it the law applicable to the audited corporation (*lex societatis*), the law

applicable to the audit contract (*lex contractus*) or the law applicable to the delict *(lex loci delicti)*? And if it is the latter, where does the delict occur?

(b) If the proper rule of conflict leads to the application of the Canadian common law (i.e. New Brunswick or Ontario law), did the auditor owe a duty of care to the plaintiff as per the principles enunciated by the Supreme Court of Canada in the *Hercules* decision?

(c) If the proper rule of conflict leads to the application of Quebec civil law, are the rules substantially different from the ones applicable to the rest of the country? From the point of view of a Canadian audit firm, do the rules governing its liability towards third parties differ according to where it conducted the audit or where it issued the audit report?

13. **The second general section (Section II, *infra*, para. 150-167) deals with a plaintiff's reasonable reliance on the audited financial statements, or causality, in a situation where such plaintiff was also a director of the audited corporation, thus putting in play the very important issue of a director's own responsibilities and of his ability to sue the auditor if he failed to perform his own obligations as director.**

14. **The third general section (Section III, *infra*, para. 168-232) deals with the trial judge's management of the trial and of the evidence, the manifest errors of law and fact committed in connection therewith, and how these errors are significant to the point of making the *judgment* unreliable to a reasonable observer.**

As more fully explained in this section, Defendants respectfully submit that the trial judge:

(a) insisted time and time again on the fact that Defendants had to present their evidence within the 120-day period that had been fixed by Chief Justice Rolland and rendered innumerable interlocutory decisions with that objective in mind, thus abdicating her judicial independence;

(b) allowed the Plaintiff to produce numerous new experts reports at the outset of the trial, in flagrant violation of the judicial contract that was entered into with Defendants and the Court when Chief Justice Rolland ordered a new trial, thereby causing irremediable prejudice to the presentation of the Defendants' case;

(c) despite Defendants' vigorous protestations, but with the consent of the Plaintiff's attorneys, has illegally put into place a «read-in» rule by which the contents of the expert reports were deemed to

be part of the evidence, in flagrant contradiction of the rules of evidence according to which the only expert evidence that should be considered by the Court is the *viva voce* testimony of the expert given at trial;

(d) was biased and erred in the assessment of the credibility of the expert witnesses, by systematically attacking the credibility of Defendants' experts while excusing Plaintiff's experts obvious shortcomings or bias;

(e) was biased and erred in the assessment of the credibility of ordinary witnesses, for example by considering Plaintiff's witnesses credible in spite of the fact that they participated in Castor's fraudulent maneuvers;

(f) has completely disregarded important elements of Defendants' evidence and/or totally failed to analyze legal arguments that were presented by the defence.

In light of these numerous errors, Defendants respectfully submit that a miscarriage of justice has occurred, with the consequences that the factual and legal conclusions reached by the trial judge in the *judgment* against the Defendants on all the issues are not reliable for a reasonable observer.

Defendants further submit that the Plaintiff has failed to discharge his burden of proof as he chose to establish his case by relying on expert evidence that was not legally introduced into the Court record in light of their breaches of the judicial contract by the filing of new expert reports and of the illegality of the "read-in rule". As a consequence, this Court should intervene and dismiss Plaintiff's action.

15. **The fourth general issue (Section IV, *infra*, para. 233-526)) deals with the numerous errors in law and in fact that were made by the trial judge in her analysis of Coopers & Lybrand's ("C&L") alleged negligence with respect to the audited financial statements, valuation letters and legal for life certificates, errors which are determinative of the issue and invalidate the conclusions reached in that respect.**

16. More particularly:

(a) With respect to the audit reports on the financial statements , the trial judge:

(i) completely disregarded important elements of Defendants' evidence, disregarded Plaintiffs' admissions or concessions by their experts that assisted Defendants, disregarded inconsistencies

among Plaintiff's experts and relied on illegal evidence to form the *judgment*;

(ii) misapplied the standards to be used in assessing whether the financial statements met generally accepted accounting principles (GAAP);

(iii) misapplied the standards to be used in assessing whether the audit met generally accepted audit standards (GAAS);

(iv) misinterpreted many of the corporate documents, resulting in a misunderstanding of Castor's transactions and the security it held and an erroneous interpretation as to their effect and validity, both in fact and law;

(v) failed to identify specific connections between violations of GAAP and breaches of GAAS, such that the *judgment* does not disclose a causal link between any fault that would have occurred in the conduct of the audit and the results of the company as portrayed by the financial statements;

(vi) adopted an inappropriate approach to the evidence of fraud and relied on a legal theory that has no basis in law to discard that defence.

(b) with respect to the valuation letters, the trial judge's analysis of the evidence is one-sided, fails to take into account overwhelming evidence: 1) as to the scope and purpose of these valuation letters; 2) as to the criteria for establishing value as per C&L's mandate; and 3) as to management representations as opposed to C&L's representations.

(c) with respect to the legal-for-life certificates, the trial judge's analysis of the evidence is superficial and clearly overstates the importance to be attached to these certificates, especially in the case of the late Peter Widdrington.

17. **A fifth section (Section V, *infra*, para. 527-564) deals with the assessment of damages, including the issue of whether or not the individual defendants (C&L partners) would be solidarily or "jointly" liable to the Plaintiff as well as the attribution of costs and the additional indemnity.**

C. PROCEDURAL BACKGROUND

18. The *judgment* was rendered after an exceptionally long trial, in a very unusual and rather complicated procedural context which must be explained in some detail before turning to Defendants' grounds of appeal.

1. The Castor actions

19. The Defendants, C&L and its partners for the relevant period, are defendants in the action in damages instituted in 1994 by the late Peter Widdrington ("Plaintiff") following the bankruptcy of Castor Holdings Ltd. ("**Castor**"), a New-Brunswick corporation for which C&L had been appointed to act as auditor.

20. In the wake of Castor's demise, in addition to the action instituted by Plaintiff herein, 96 plaintiffs (the "Castor plaintiffs")in 76 separate actions (the "other Castor actions") have instituted proceedings against C&L and its partners[1] in the total amount of $1,058,074,575.87.

21. In these actions, the Castor plaintiffs claim their alleged losses from C&L and its partners for the relevant years, essentially alleging that C&L negligently discharged its duties as auditor of Castor so that Castor's financial statements and other related documents (on which they allegedly relied for the purposes of investing in or extending credit to Castor) contained material misrepresentations.

22. Subsequent to the institution of the legal proceedings against C&L and its partners, 52 Castor plaintiffs in 50 of the 78 actions representing claims in the aggregate amount of $444,028,920.49 settled their claims or have desisted from their respective actions.

2. The impact of the *judgment* on the other pending Castor actions

23. On February 20, 1998, the Honourable Justice Carrière, then acting as coordinating judge for all the Castor actions, chose the present file to proceed first, the other Castor actions being suspended.

24. Justice Carrière also granted to the Castor plaintiffs in all other Castor actions a special status by which their counsel could appear before the Court in the trial of the present action and present evidence with respect to issues that are common to all actions.

25. On October 16, 2006, by a judgment rendered in another Castor action (the so-called "Chrysler case", no. 500-05-005391-931), the Honourable Associate Chief Justice of the Superior Court André Wery determined that the

---

[1] It is to be noted that the individual defendants in these various Castor actions (i.e. C&L's partners) are not always the same.

February 20, 1998 decision meant that no further evidence would be permitted in any other Castor action on the so-called "common issues", with the result that the *judgment* will be determinative in all other pending Castor actions as to the «common issues», including the crucial issues of negligence and applicable law (i.e. more precisely the rules of conflict to be applied to decide the issue of applicable law).

26. As a consequence, the present file is the only forum in which the parties were allowed to adduce evidence with respect to any «common issue», and this explains the extraordinary amount of resources that each side has spent, and is still spending, on the present file and the tremendous importance of the Widdrington trial for all parties to the Castor actions so that, despite the fact the Plaintiff in the present file is suing the Defendants for approximately 2.7 million dollars, the issues at stake are of great financial significance to the defendants to the Castor actions.

3. The ordering of a new trial

27. The first trial in the present action commenced in September 1998 and continued before the Honourable Justice Carrière until the month of October 2006, at which time it was suspended due to the judge's health condition.

28. At that moment, the Plaintiff had completed his evidence and the Defendants were not yet half-way in the presentation of their case.

29. In the summer of 2007, the Honourable Chief Justice Rolland informed the parties that Justice Carrière could not continue hearing the case.

30. During the numerous meetings held during the summer of 2007 before the Chief Justice to address the situation caused by the suspension of the first trial, Plaintiff's attorneys indicated to the Chief Justice that, if a new trial were ordered, they would be in a position to present their case in a judicial year (i.e. 120 days).

31. In those same meetings, Defendants' attorneys, who had not completed their evidence before Justice Carrière, always took the position that they could not accept in advance any time limit on the presentation of their clients' case and were not in a position to agree to be bound by any time limit, *a fortiori* by a 120-day time limit.

32. On September 7, 2007, the Honourable Chief Justice of the Superior Court François Rolland ordered a new trial in the present instance.

33. When he issued his Order of September 7, 2007 for a new trial, Chief Justice Rolland indicated that the overall objective was that a final judgment be rendered by the middle of 2010 (the time at which Justice Carrière had been expected to render judgment).

34. Chief Justice Rolland also indicated in his Order that the Plaintiff's had agreed to be bound by a 120-day limit for the presentation of their case and allocated the same period of time to the Defendants in light of the fact that, with the experience of the first trial and the commitment made by Plaintiff not to present new expert evidence, Defendants were in the privileged position of knowing **exactly** what evidence would be led against them by the Plaintiff:

> *"Puisque la preuve en demande est complétée, la défenderesse C&L & Lybrand sait d'ores et déjà la preuve qui sera faite en demande et est donc placée dans une situation privilégiée pour préparer sa preuve en défense .*

4. The filing of new expert reports and the "read-in rule"

35. When the new trial began in January 2008, the Plaintiff, without even asking the Court's authorization to do so and to the total surprise of the Defendants, filed into the Court record numerous new expert reports raising new issues or exploring in more depth other issues on almost every aspect that was material to the trial.

36. It is to be noted that, when they appeared before the Chief Justice in the summer of 2007, Plaintiff's attorneys were already engaged in the process of gathering those new expert reports but failed to disclose same to the Defendants or to the Chief Justice, leading the Defendants and the Chief Justice to believe that Plaintiff would indeed present essentially the same evidence, including expert evidence, at the new trial.

37. Indeed, in the meetings preceding the Order for a new trial, Plaintiff's attorneys had represented explicitly to the Chief Justice that for the new trial, they would limit the expert evidence to those of the experts who had testified in the first trial.

38. As they considered these new expert reports to be a manifest breach of the judicial contract entered into by plaintiff's attorneys in the presence of the Chief Justice, the Defendants vigorously opposed the introduction into the Court file of these new unauthorized expert reports, especially in light of the fact that Chief Justice Rolland's Order allocating them only 120 days to present their case was expressly premised on the fact that Defendants already "knew" Plaintiff's evidence, including notably the expert evidence, a premise that would not hold true if the new expert reports were allowed to be introduced:

> Cf. *Requête amendée des défendeurs pour faire rejeter du dossier, en tout ou en partie, certains rapports d'expert*, dated February 13, 2008.

39. On February 27, 2008, despite Defendants' objections, the trial judge allowed into the Court record all of Plaintiff's new expert reports, save one.

40. As a result, the premise upon which the Chief Justice's Order was based when he allocated to the Defendants a maximum 120-day period of time to make their case, namely the fact that Defendants already knew what evidence would be led against them, disappeared, and the Defendants have thereafter consistently reminded the trial judge that, especially in those circumstances, neither the Court nor the Defendants could be bound or even influenced by the time frame mentioned in the Chief Justice's Order of September 7, 2007.

41. In addition, on March 4, 2008, in response to an objection by the Defendants, the trial judge issued a ruling to the effect that all expert reports filed into the Court record would be deemed to have been read in full before the Court so that the testimony of the expert would not be necessary to introduce into evidence the contents of the reports.

42. The introduction of numerous new expert reports at the beginning of the new trial, combined with the ruling of March 4, 2008, permitted the Plaintiff to introduce into evidence massive expert reports containing new evidence using a fraction of the time that would have otherwise been needed to do so according to the rules of evidence governing expert testimony in Quebec, leaving on the Defendants the burden to use their allocated time to cross-examine Plaintiff's experts on the totality of this evidence, including on the new evidence contained in the new revised reports, and including cross-examination on sections of the reports that the expert(s) did not testify upon or refer to in their evidence in chief.

43. Neither the interlocutory judgment authorizing the Plaintiff to file new expert reports, nor the interlocutory judgment establishing the «read-in rule» could have been the object of an immediate appeal, as they both have the effect of permitting the introduction of evidence rather than excluding it.

44. Defendants therefore ask this Court to intervene and reverse the interlocutory decisions rendered by the trial judge on February 27, 2008 (new expert reports) and on March 4, 2008 (read-in rule)

SECTION I. RULES GOVERNING AUDITORS' LIABILITY

A. The erroneous application of Quebec law

45. One of the fundamental questions that arises from the present case raises the issue of what law governs the extra-contractual liability of an auditor: is it the law that creates the office of the auditor and define his duties, i.e. the law governing the corporation itself (*lex societatis*), the law of the audit contract (*lex contractus*) or the law where the delict or tort occurred (*lex loci delicti*)? [2]

46. With respect to the issue of applicable law (cf. paras 3370 to 3386 of the *judgment*), the trial judge erred in fact and in law in that she:

(a) wrongly applied the *lex loci delicti* to the liability of the auditor instead of the law that creates the auditor's office and defines his duties;

(b) wrongly applied the *lex loci delicti* to the liability of the auditor instead of the law applicable to the audit contract; and

(c) in any event, wrongly decided that the *locus* of the delict was in Quebec rather than Ontario although the Plaintiff was domiciled in Ontario, that it is in Ontario that he received and allegedly relied upon the impugned opinions, and that it is in Ontario that he suffered his prejudice.

47. The conclusions reached by the trial judge with respect to the issue of applicable law flatly contradict numerous relevant authorities, including decisions of the Supreme Court of Canada.

48. Indeed, the trial judge totally failed to mention and analyze most of these authorities, even though they were extensively pleaded before her by Defendants' attorneys, both orally and in writing.

49. The above-mentioned errors are determinative as they have led the trial judge to wrongly apply Quebec law rather than the Canadian common law principles.

50. Under the Canadian common law principles, it is only in **exceptional circumstances** (that are not present in the present case, cf. *infra*, para. 103 ff) that an auditor may be liable *vis-à-vis* an investor, as decided by the Supreme Court of Canada in *Hercules Management Ltd v. Ernst & Young*, (1997) 2 S.C.R. 165.

---

[2] As mentioned in the judgment (para. 3347), it is not disputed that the applicable rules of conflicts in that respect are those that were in force under the Civil Code of Lower-Canada as the relevant events took place before the coming into force of the Quebec Civil Code.

1. The trial judge erred by applying the *lex loci delicti* rule instead of Castor's *lex societatis*

51. For all relevant years, C&L had been appointed by Castor's shareholders to act as auditor as per the provisions of the *New Brunswick Business Corporations Act* («NBBCA»), the statute governing Castor (cf. para. 277 of *judgment*).

52. As long recognized by the case law and doctrine, and as expressly provided by the provisions of the NBBCA (Castor's governing statute), an auditor is an officer of the corporation, as it holds an office within the corporation's structure:

- Paras 105(1), 105(2), 106(1), 107(1), 108(1), 108(2), 108(3), 108(4) NBBCA;
- *Mutual Reinsurance Co Ltd.* c. *Peat Marwick Mitchell & Co.*, [1997] 1 Lloyd's L.R. 253 (C.A.): «*The Companies Acts provide for the appointment of auditors, normally by the company in general meeting and refer to such an auditor as holding «office». The implication is that auditors are appointed and are, whilst they hold office, officers of the company.*»

See also:

- *Re London and General Bank*, [1895] 2 Ch. 166 (C.A.);
- *Re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6 (C.A.);
- *R.* c. *Shacter*, [1960] 2 Q.B. 252 (C. Crim. A.) ;
- *Bell* c. *Klein*, (1955) 1 D.L.R. 37 (B.C. C.A.);
- G. Ripert et R. Roblot, *Traité de droit commercial*, 16th ed. (by M. Germain), Paris, L.G.D.J., 1996, paras 1335 à 1337;
- R. Contin, *Le contrôle de la gestion des sociétés anonymes*, Paris, Librairie technique, 1975, pp. 161-162.

53. According to the leading authorities, the issue of the personal liability of a person holding an office for a corporation is to be governed by the law creating and defining the office, i.e. the *lex societatis*, rather than by the *lex loci delicti*: this solution brings more coherence, fairness and predictability of results:

- D. Cohen, « La responsabilité civile des dirigeants en droit international privé », (2003) Revue critique de droit international privé 585;
- J. Talpis et J.-G. Castel, «*Interprétation des règles du droit international privé*», in La réforme du Code civil, tome III, 1993, P.U.L., p. 838;
- J. Talpis, *Aspects juridiques de l'activité des sociétés et corporations étrangères au Québec*, (1976) C.P. du N. 215, p. 235;
- A. Pillet, *Des personnes morales en droit international privé*, Paris, Sirey, 1914, p. 252;
- P. Arminjon, *Précis de droit international privé* commercial, Paris, Dalloz, 1948, p. 133;
- Y. Loussouarn, notes under Cour d'appel de Douai (December 1st, 1955), (1956) 45 *Revue critique de droit international privé* 490, pp. 495-96;
- *S.A. Africatours* c. *DIOP*, Cour d'appel de Paris, March 15, 1995, conf. by C. Cass., July 1st, 1997.

54. This solution is clearly established for the personal liability of the directors or officers entrusted with the management of the corporation and there is no

reason not to apply the same rule to the personal liability of the auditors who are also officers of the corporation:

- Y. Loussouarn et J.-D. Bredin, *Droit du commerce international*, Paris, Sirey, 1969, para. 378.

55. In the present case, the application of the *lex societatis* to the issue of the personal liability of the auditor would lead to the application of New Brunswick law and not to Quebec law.

56. Without any analysis of the above-mentioned authorities that were pleaded to her by Defendants' attorneys, the trial judge flatly rejected the application of the *lex societatis* by stating that any matter of civil liability of a wrongdoer "*is clearly characterized as a matter of civil liability. It is not a matter of status and capacity...*" (cf. para. 3375).

57. The only authority the trial judge referred to in support of her conclusion are statements contained in an article written in 1976 by Prof. J. Talpis which:

(a) at best, are not clear on the issue of what law applies to the liability of a corporate *officer* in the discharge of his duties;

(b) would, in any event, have been superseded by a 1993 article co-authored by Prof. Talpis where it is clearly stated that the *lex societatis* governs the issue of the personal liability of a corporation's officer[3].

58. The trial judge offers no explanation whatsoever as to why she rejects the views of the leading private international law authorities mentioned above according to whom the personal liability of a corporation's officer must be governed by the law creating the office and defining the officer's duties, i.e. the *lex societatis* of the corporation.

59. Indeed, despite the fact that Plaintiff's attorneys had agreed in their representations that according to the authorities the personal liability of the directors of a corporation is governed by the *lex societatis*, the trial judge's reasoning would nevertheless lead to the conclusion that even the liability of a director should be governed by the *lex loci delicti*, in total contradiction of the above-mentioned authorities.

60. The trial judge also stated that while the *lex societatis* governs the status and capacity of the corporation, the activities of the corporation are subject to the law of the place where such activities took place (para. 3376).

61. This distinction, between the law applicable to the corporation and the law applicable to its activities, is completely irrelevant to the issue of what law is

---

[3] J. TALPIS and J.G. CASTELI, « Interprétation des règles du droit international privé », in *La réforme du Code civil*, Tome III, 1993 P.U.L., p. 838

applicable *to the personal liability of the corporation's officers in the discharge of their duties*, which is a totally distinct question, as the above-mentioned authorities clearly show.

62. Moreover, it is illogical to state, on the one hand, that «*since Castor was incorporated under the New Brunswick Business Corporations Act, and C&L appointed as auditor by the shareholders, various sections of this Act are relevant*» to define C&L's duties (para. 277), while at the same time finding that the issue of the liability of the auditor (for a breach of these duties) is a matter that has nothing to do with the law governing the company.

63. In all logic, the law that creates the auditor's office and define his duties should also be applied to assess whether or not the auditor should be held liable, and to whom, if he has failed to perform his duties.

64. This is especially true as the trial judge has characterized the issues for conflict of laws purposes in the following manner:

> *"In essence, the questions that require adjudication are liability issues in relation to work done, audit and valuation, and opinions issued by accountants, namely in the performance of their duties as auditors to Castor».* (para. 3378, our emphasis)

65. At the very least, and contrary to what the trial judge has decided, the *lex societatis* governs the issue of C&L's liability *vis-à-vis* the Plaintiff for the investments he made when he was already a shareholder and a director of Castor. Clearly, the issue of the liability of the auditor vis-à-vis a person who is already a shareholder or a director of the corporation is governed by the *lex societatis*:

- *Pickles v. China Mutual Insurance Co.,* (1913) 47 R.C.S. 429, p. 438;
- J. Talpis, *Aspects juridiques de l'activité des sociétés et corporations étrangères au Québec,* supra, para. 39 ;
- P. Arminjon, *Précis de droit international privé commercial,* Paris, Dalloz, 1948, p. 134.

2. The trial judge erred in applying the *lex loci delicti* instead of the law applicable to the audit contract

66. According to the general principles of private international law, the law governing a contract (*lex contractus*) also governs the extra-contractual liability that may arise from a faulty performance of the obligations it contains:

- V. Heuzé, «*La loi applicable aux actions directes dans les groupes de contrats*», 1996 R.C.D.I.P. 243, at 261 ff.

67. This general principle, which ensures predictability and fairness to the parties, has been codified in article 3127 CCQ, and is an exception to the application of the *lex loci delicti* rule to extra-contractual liability:

- G. GOLDSTEIN, Commentaires sur l'article 3127 CCQ in *Droit international privé – La référence en droit civil*, Montréal, 2011, DCQ, paras 3127.550 and 3127.560.

68. In the case of an auditor, the issue of whether or not he will be liable *vis-à-vis* third parties in case of a faulty performance of its contractual duties as auditor is therefore governed, not by the *lex loci delicti*, but rather by the law applicable to the audit contract itself.

69. The contract entered into by a corporation and a person who is to hold the office of the auditor of the corporation is governed by the law that creates such office and defines the auditor's duties, such being at the very least the implicit intention of the parties to the audit contract, and it is indeed difficult to see how any other law could be applicable to such contract (art. 8 CCLC).

70. The contract entered into between Castor and C&L for the statutory audit of Castor's financial statements is thus governed by New Brunswick law and it is New Brunswick law that define the auditor's duties, as recognized by the trial judge at para. 277 of the *judgment*.

71. The trial judge, again without any analysis whatsoever, rejected the application of the *lex contractus* simply because there was no contract between Widdrington and C&L (para. 3380).

72. This reasoning is flawed: the fact that there was no contract between Widdrington and C&L does not prevent the application of the law governing the contract to the issue of the extra-contractual liability arising from a faulty performance of the audit contract.

73. The application of the law applicable to the contract entered into between Castor and C&L would have led to the application of New Brunswick law rather than Quebec law.

3. Subsidiarily, if the lex loci delicti is applicable, the trial judge erred in deciding that the delict occurred in Quebec rather than Ontario

74. The trial judge stated at para. 3382 that «*the lex loci delicti rule means the place where the alleged wrongdoings (reproached acts) took place, the place where the* ***wrongful activity*** *occurred*» (our emphasis).

75. She further stated at para. 3385 that «*the wrongdoings (reproached acts: the negligent issuance of audit reports, consolidated audited financial statements, valuation letters and Certificates for Legal-for-Life Opinions) took place in Montreal, at C&L's Montreal office where the* ***wrongful activity*** *(issuance of various misstated and misleading work products) occurred*» (our emphasis).

76. Again, this reasoning is in complete contradiction with the relevant principles of private international law, as expounded by the Supreme Court of Canada and other leading authorities, as to the *situs* of a delict or tort for the application of the *lex loci delicti* rule.

a) The trial judge erred in concluding that the delict occurs at the place of fault rather than at the place of the prejudice

77. One of the most basic question that arises from the application of the *lex loci delicti* is the determination of where the delict occurs when a fault committed in one jurisdiction causes an injury in another: does the delict occur at the place of the fault or at the place of the prejudice[4]?

78. The almost universal answer to this question is the following : the delict, for the purposes of the *lex loci delicti* rule, will be situated at the place where the prejudice occurs and not where the fault occurs, as a fault in itself (that is to say a fault that does not result in any prejudice) does not give rise to any *delict*:

- J.G. Castel, *Droit international privé québécois*, Toronto, Butterworths, 1980, p. 467;
- P.A. Crépeau, « De la responsabilité civile extracontractuelle en droit international privé québécois » (1961) 39 R. du B. can. 3, p. 16 (note 39);
- J. Walker, *Canadian Conflicts of Laws*, 6e éd., vol. 2, Butterworths, 2005, pp. 35-1 à 35-6, 35-17 à 35-21;
- Alex Weill, « Un cas épineux de compétence législative en cas de responsabilité délictuelle : Dissociation de l'acte générateur de responsabilité et du préjudice », in *Mélanges offerts à Jacques Maury*, t. 1, Paris, Dalloz et Sirey, 1960, p. 545;
- H. Batiffol et P. Lagarde, *Droit international privé*, 7th ed., t. 2, Paris, L.G.D.J., 1983, para. 561;
- G. Légier, « Sources extra-contractuelles des obligations : Détermination de la loi applicable », Juris-Classeur de droit international, Fasc. 553-1, 1993, para. 99;
- G. Holleaux, J. Foyer et G. de Geouffre de La Pradelle, *Droit international privé*, Paris, Masson, 1987;
- P. Mayer et V. Heuzé, *Droit international privé*, 8e éd., Paris, Montchrestien, 2004, pp. 500-507;
- Y. Loussouarn, P. Bourel et P. de Vareilles-Sommières, *Droit international privé*, 8e éd., Paris, Dalloz, 2004, pp. 533-39;
- D. Lasok & P.A. Stone, *Conflict of laws in the European Community*, Milton, England, 1987, para. 48.

79. This solution has been codified or adopted in various and numerous jurisdictions, including Quebec :

- art. 3126 Q.C.C.;

---

4 According to the authorities, a purely financial prejudice, such as the one allegedly suffered by the Plaintiff, is to be situated at the place where the plaintiff's patrimony is itself situated, i.e. in the present case, in Ontario: G. Légier, « *Sources extra-contractuelles des obligations : Détermination de la loi applicable* », *Juris-Classeur de droit international*, Fasc. 553-1, 1993, para. 118.D. Lasok and P.A. Stone, *Conflict of laws in the European Community*, Milton, England, 1987, pp. 394-395.

- art. 133 of the 1987 *Swiss Federal Act on private international law*;
- art. 4, Regulation of the European Parliament and Council on the law applicable to Non-Contractual Obligations;
- art. 11, *Private International Law (Miscellaneous Provisions) Act*, 1995 R.-U. c. 42.

80. This principle that the *situs* of a tort or delict is the place of where the prejudice occurs rather than where the fault is committed is perfectly in line with what the Supreme Court of Canada had stated in *Moran* v. *Pyle National (Canada) Ltd.,* (1975) 1 S.C.R. 393.

81. In that decision, in dealing with an issue of jurisdiction, the Court gave valuable indications as to the *situs* of a tort, stating that « *the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus (...) the predominating element is the damage suffered*» (p. 409).

82. Despite the weight of all these authorities, and in flagrant contradiction of them, the trial judge, again without any further analysis, concluded that the *lex loci delicti* rule means the place where the reproached acts (i.e. the faults) take place (para. 3382).

83. The authorities referred to by the trial judge in footnote 3655 of the *judgment* either contradicts her view (*Crépeau, Tolofson, Castel & Walker*) or do not address the specific issue of where to situate the delict when the fault occurred in one jurisdiction but causes injury in another jurisdiction (*Groffier, Pineau, Lister*).

84. More importantly, to support her conclusion that the *lex loci delicti* means the place where the «reproached acts» occur, the trial judge also referred to a statement of the Supreme Court of Canada found in *Tolofson* c. *Jensen*[5]: «*Ordinarily people expect their activities to be governed by the law of the place where they happen to be*...» (p. 1050).

85. Contrary to what the trial judge suggests, this statement of the Supreme Court, offered as a general justification for the *lex loci delicti* rule in itself, is not addressed to the specific issue of where to situate a tort when the fault and the prejudice occur at different places.

86. This becomes absolutely clear when the statement made by the Supreme Court in the preceding paragraph of the *Tolofson* case is taken into account:

> *«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 will be held to constitute the wrong».* (p. 1050, our emphasis)

---

5 (1994) 3 S.C.R. 1027.

87. Therefore, contrary to what the trial judge seems to suggest in paras 3384 and 3385 of the *judgment*, the *Tolofson* case does not support the proposition that the «wrongful activity» occurs where the «reproached acts» took place. To the contrary, it supports the proposition that, when the fault and the injury do not occur at the same place, the «wrongful activity» occurs at the place of injury, which is perfectly in line with what the Supreme Court had already said in *Moran*.

88. Basing itself on the principles enunciated in *Tolofson*, the Ontario Court of Appeal, in *Leonard v. Houle* (1997) 154 D.L.R. (4th) 640, expressly rejected the view that, for the application of the *lex loci delicti*, the «wrongful activity» occurs at the place of the fault:

> *"[While there may be situations where the issue of where the tort takes place will raise «thorny issues» and also raise issues of public policy, this is not such a case.* ***It seems clear to me that the wrong occurred in the province of Quebec because the injury occurred there****. [...] The activity which took place in the province of Ontario, even if found to be a breach of duty on the part of the Ottawa police, does not mount to an actionable wrong.* ***There is no actionable wrong without the injury. The place where "the activity took place" which gives rise to the action is in the province of Quebec».*** (pp. 646-647, our emphasis)

89. This Ontario Court of Appeal decision is a clear confirmation that, for the application of the *lex loci delicti* rule adopted in *Tolofson*, the delict (or the tort) is to be situated at the place of the prejudice and not of the fault. See also:

- *Ostroki* v. *Global Upholstery*, (1995) O.J. no. 4211 (Ontario S.C.);
- *Ross c. Ford Motor Co. of Canada,* (1997) N.W.T. no. 30 (N.W.T.S.C.);
- *Shane c. JCB Belgium N.V.* (2003) O.J. 4497 (Ont. S.C.);
- *Barclay's Bank PCL c. Inc. Incorporated,* (1999) ABQB 110, para. 42;
- *Bourque c. Procter and Gamble inc.,* [1982] R.P. 52 (C.S.), pp. 54-55;
- *A. Côté et Frères ltée. c. Laboratoires Sagi inc.*, [1984] C.S. 255, p. 259.

90. It is manifest that the reasoning adopted by the trial judge, according to which the «*lex loci delicti rule means the place where the alleged wrongdoings (reproached acts) took place*» (para. 3382) is erroneous and in total and flagrant contradiction to all the above mentioned relevant authorities which have not even been mentioned in her analysis, even though they were extensively pleaded by Defendants' attorneys, both orally and in writing.

b) The trial judge erred when she concluded that the alleged fault would have been committed in Quebec, rather than in Ontario where the impugned opinions were received and allegedly relied upon by Plaintiff

91. The evidence clearly establish that the Plaintiff received the relevant audit reports, valuation letters or legal-for-life opinions in Ontario, where he allegedly relied on them for his investments in Castor (cf. paras 3205 and 3240).

92. The case law, including that of the Supreme Court and of this Honourable Court, is **constant** to the effect that, where incomplete or misleading information is provided to a party who relies on it, the *locus* of the fault is to be situated at the place where the information is received by the plaintiff and not where it was prepared or issued by the defendant:

- *Air Canada* c. *McDonnell Douglas Corp.*, [1989] 1 R.C.S. 1554, p. 1569 ;
- *Carver Boat Corporation* c. *Arcand*, [1990] R.D.J. 633 (C.A.);
- *ABN Amro Bank Canada* c. *Hayward & Company Ltd.*, J.E. 99-1136 (C.A.);
- *Yufe* c. *Tapping*, [1986] R.J.Q. 1245 (C.S.);
- *Newage (Canada) Ltd.* c. *Canadian Pacific Railway Co.*, [1960] B.R. 956;
- *Royal Bank of Canada* c. *Capital Factors inc.*, J.E. 2004-1644 (C.S.), p. 7, conf. by J.E. 2004-2164 (C.A.);
- *Trans-Dominion Energy Corp.* c. *Total Return Fund inc.*, [1990] R.D.J. 479 (C.A.);
- *Original Blouse Co.* ltd. v. Bruck Mills Ltd, (1963) 42 D.L.R. (2d) 174 (B.C.S.C.);
- *Diamond* c. *Bank of London & Montreal Ltd.*, [1979] 1 All. E.R. 561 (C.A.), pp. 4-5;
- *Canadian Commercial Bank* c. *Carpenter* (1989), 62 D.L.R. (4th), 734 (B.C. C.-A.), p. 741;
- *Distillers Co. (Biochemicals) Ltd.* c. *Thompson*, [1971] A.C. 458 (P.C.), pp. 6-7;
- *Elguindy* c. *Core Laboratories Canada Ltd.* (1987), 21 C.P.C. (2d) 281 (Ont. S.C.);
- *Ennstone Building Products Ltd.* c. *Stanger Ltd.*, [2002] 1 W.L.R. 3059 (C.A.), p. 9;
- *Minster Investments Ltd.* c. *Hyundai Precision & Industry Co.* (1988) 2 Lloyd's Rep. 621 (QBD), p. 4.

93. Again, in flagrant disregard of these numerous authorities that were pleaded to her by Defendants' attorneys, both orally and in writing, the trial judge, without any analysis nor reference to any authority, decided that the place of the fault was where C&L's opinions were issued (para. 3385).

c) The trial judge was unduly influenced by the «test case» in applying and interpreting the *lex loci delicti* rule

94. It would appear that in her analysis of the applicable law issue, the trial judge has been unduly influenced by the fact that the present case is a «test case» on the common issues for all other Castor files, with the consequence that she felt bound to arrive at a conclusion where the same law would be applicable to all Castor plaintiffs.

95. Indeed, in their written argument, Plaintiff's attorneys invited her to reach such a «convenient» result (cf. Plaintiff's Argument, p. 224, para. 74).

96. This could explain why, despite all the authorities mentioned above (including binding decisions of the Supreme Court of Canada or of this Court), the trial judge decided that the *locus delicti* was the place where the impugned C&L's opinions were issued, thus making Quebec law applicable to all plaintiffs in all Castor files (cf. paras 3346 *in fine* and 3384 where «practical considerations» for the application of the *lex loci delicti* rule are mentioned).

97. The applicable legal rules of conflict cannot be ignored or modified by the Court to better fit the needs of a «test case», especially as such was imposed upon the Defendants by the Courts.

98. The procedural framework of a file, whatever it may be, does not modify the substance of the law, including the rules of conflict.

99. In *Canada Post* v. *Lépine*, (2009) 1 S.C.R. 549 (at para. 56), the Supreme Court of Canada held that, while national or multi-provincial groups of members are possible in class actions proceedings, it might be necessary to create sub-class of members where the applicable law is not the same for all of them. Very significantly, the Supreme Court did not say that the rules of conflict could or should be modified so as to render the class action proceedings more "convenient" by applying the same law to all the members.

100. Yet, this is exactly what the trial judge seems to have done by totally ignoring the numerous authorities mentioned above, or the principles they stand for, so as to attain the «convenient» result that the same law would apply to all Castor files.

101. Quite ironically, the application of Castor's *lex societatis* or of the law of the audit contract, as proposed by Defendants in their main argument, would have led to the same «practical result» of having only one law applicable to all Castor files (including the case of the Trustee in Bankruptcy, of a contractual nature which simply cannot be governed by the *lex loci delicti),* while respecting relevant case law and authorities.

102. **Conclusions on applicable law**: The above errors of law are of such importance as to invalidate the *judgment* in first instance as will appear in the following section.

B. The trial judge misapplied the principles enunciated in the *Hercules* decision, thereby subjecting C&L to indeterminate liability

103. Despite having decided that Quebec law applied, the trial judge indicated what her findings would have been had she concluded that the Canadian common law principles were applicable, notably on the issue of whether or not C&L would have owed a duty of care to the Plaintiff.

104. The trial judge found that C&L would have owed such a duty of care to the Plaintiff (paras 3486 ff.), and her conclusions rest on a manifest misapplication and misinterpretation of the principles enunciated by the Supreme Court of Canada in the *Hercules* case, notably with respect to the crucial notion of «indeterminate liability».

105. In *Hercules*, the Supreme Court of Canada established that it is only in exceptional circumstances that the auditor of a corporation will owe a duty of care to an investor, shareholder or creditor who has relied on the audit report to

make an investment in, or extend credit to, the audited corporation, as the auditors would otherwise be subject to a «*liability to an indeterminate class, for an indeterminate amount, and for an indeterminate time*», a result that is not socially acceptable.

106. According to the Supreme Court, in most auditor's liability cases, such risk of indeterminate liability will negate any *prima facie* duty of care that may be found to exist[6], save in the exceptional circumstances where two conditions are cumulatively met: 1) the auditor knew, when he issued his opinion, the identity of the plaintiff (or the limited class of potential plaintiffs) who would rely on his opinion, and b) that opinion was used by the plaintiff for the specific purpose or transaction that for which it was prepared by the auditor (*Hercules*, pp. 197-198).

107. In the *judgment*, the trial judge decided that C&L owed a duty of care to the Plaintiff essentially for the following reasons: 1) C&L knew that Castor's financial statements were widely distributed to wealthy individuals or entities in North America or Europe in order to obtain financing; 2) C&L knew that Castor was essentially an «investment club» composed of closely connected high net worth shareholders and lenders in North America and Europe, such as the Plaintiff, so that there would be a «limited class of potential plaintiffs» and 3) C&L knew that Castor needed audited financial statements, valuation letters or legal-for-life opinions for the purpose of raising money from various sources (paras 3510, 3517 and 3524 to 3526).

108. The trial judge concluded from the above that «*C&L knew an identifiable class of plaintiffs and of the various uses those plaintiffs would make of their work products*», so that «*the typical concerns surrounding indeterminate liability do not arise*» in the particular facts of the case (paras 3515 and 3527).

109. This is a manifestly erroneous application of the principles established by the Supreme Court of Canada in the *Hercules* case: the fact that the auditor knows that the audited financial statements will be used by numerous persons and for a wide range of purposes, including raising money or obtaining credit, or renewing loans already extended, does not eradicate the risk of indeterminate liability; indeed, the exact opposite is true.

110. Quite obviously, the condition that the auditor needs to knows the identity of the plaintiff (or of a limited class of potential plaintiffs) that would be relying on his opinion cannot be met in the present case as this is the *typical situation where there were no specific transactions envisaged when the audit reports, valuation letters or legal-for-life certificates were issued*, with the consequence that there cannot be a limited class of plaintiffs nor a determinate amount of potential liability.

---

[6] I.e. where it was reasonably foreseeable for the auditor that the plaintiff could reasonably rely on his opinion (*Hercules*, p. 188).

111. As the various Castor files establish by their very existence (i.e. various plaintiffs who entered into various transactions at various times with Castor), the fact pattern of the present case is exactly like that of the *Ultramares* case (NY Court of Appeal), the *Caparo* case (House of Lords) or the *Hercules* case (SCC), all leading appellate court cases where the auditor's opinions were used by the audited company to raise money or obtain credit from various sources and where no duty of care was recognized to the plaintiff in light of the obvious risk of indeterminate liability if such extended duty of care was recognized.

112. The «limited class» cannot be «*any potential reader of Castor's financial statements*» and the «specific purpose» cannot be «raising money for Castor» for such would render the requirements mentioned in *Hercules* meaningless. If such a broad and undefined class or general purpose were acceptable, the auditor, when issuing his report (or any opinion) would clearly not be in a position to ascertain to whom he might owe a duty and for what amount he could incur liability, which is exactly what the Supreme Court sought to avoid.

113. The trial judge considered that C&L knew that a «distinct group» was relying on its opinions, as Elliot C. Wightman ("Wightman") described Castor as a «*private investment club comprised of closely connected high net worth shareholders and lenders*», so that the class of potential plaintiff would not be not indeterminate (para. 3517).

114. This reasoning is manifestly erroneous: the «investment club» to which Wightman refered is a figure of speech, it is not a real «club» with real «members» as Castor was certainly open to obtain money or credit from anyone willing to invest or extend credit to it: there is thus no distinction between the public in general and the «club» referred to by the *judgment*, and, as a consequence, there is no limited class of potential plaintiffs within the meaning of the principles laid down in *Hercules.*

115. Clearly, the trial judge extended the duty of care, not only to the «members of the club», but also the «potential members» of the club (such as Widdrington before he made his first investment): «*Wightman considered Castor to be an investment club and the audited financial statements were distributed to and relied upon by the members and the potential members of the club*» (para. 3524).

116. But as soon as the duty of care extends to any *potential* member of the «club», this means that it would extend to any individual or entity that could be approached by Castor to obtain financing of some sort (shares, loans, debentures), and this in itself makes it impossible to have a «limited class of plaintiff» within the meaning of *Hercules.*

117. Moreover, the trial judge totally failed to mention and analyze the recent Supreme Court of Canada decision in *Design Services Ltd.* v. *Canada*, 2008

SCC 22, although mentioned by Defendants' expert Campion in his testimony[7], where the notion of a "limited class of plaintiffs" was examined by the Court.

118. The principles enunciated in *Hercules* and in *Design Services* lead to the inevitable conclusion that, contrary to what the trial judge has decided, to recognize a duty of care in the present case would clearly lead to indeterminate liability as there is no "defined class of plaintiffs" that can be linked to any of the audit reports, valuation letters or legal for life certificates.

119. The «class of potential plaintiffs» cannot be defined in so broad and loose terms as to render the concept meaningless:

- *Roy-Nat inc.* v. *Dunwoody*, (1993) BCJ. no. 2152;
- *Rangen Inc.* v. *Deloitte & Touche*, (1994) CanLII 1555 (B.C.C.A.);
- *Fraser* v. *Westminer Canada Ltd*, 2003 NSCA 76;
- *Mullin v. PWC*, 2003 PESCTD 82, paras 33-37, 40.

120. Moreover, and contrary to what the trial judge's reasoning would suggest, the «specific purpose or transaction» for which the auditor's statements are prepared cannot be an undefined general purpose, such as «raising money» or «obtaining credit» from various persons and sources; it must rather be, as indicated in *Hercules (*and *Caparo)*, a «*specific purpose or transaction*» that was in contemplation of the auditor when he prepared and issued his opinion; failing that, it is impossible to avoid the risk of indeterminate liability.

121. **Statutory audit.** The specific purpose for which the audit report was prepared and issued by the auditor in the present case was to provide Castor's shareholders with relevant financial information to oversee management at the annual meetings, exactly like in *Hercules* and *Caparo*. The letter of engagement specifically refers to the statutory requirements pursuant to which the audit report was prepared (Exhibit PW-1053-5A-1) and the audit reports were all addressed to Castor's shareholders and do not mention any other specific purpose.

122. In the *judgment*, the trial judge attempted to distinguish the *Hercules* case by stating that «*unlike the financial statements in Hercules, the Castor financial statements were not prepared for a statutory audit since Castor was not obliged by statute to produce audited financial statements*» (para. 3523).

123. This distinction is without any merit as nothing in the *Hercules* case indicates that the audited company was obliged by statute to have an auditor; moreover, since an auditor had been appointed by the Castor's shareholders (para. 277), Castor was indeed obliged by statute to provide audited financial statements at the shareholders at general meetings (art. 100(1)b) NBBCA).

124. **Valuation letters.** As appears on their face (Exhibit 6-1), the specific purpose of the Valuation letters was to provide information to the directors of Castor, as to the value of Castor's shares.

---

7 Campion, Aug. 31, 2009, pp. 170-175

125. According to the trial judge, these valuation letters were prepared in connection with the Shareholder's Agreement (para. 3056), but also for the purposes of *possible* issuance of treasury shares (paras 2790 and 3056).

126. It is to the noted, however, that the valuation letters of October 17, 1989, February 28, 1990, September 28, 1990, March 6, 1991 and October 22, 1991, which are the ones that Plaintiff allegedly relied on, do not mention that they were issued "*in connection of possible further issue of treasury shares*", but rather "*to update previous letters relating to valuations of shares prepared at various dates and for the information of the directors*".

127. Therefore, the relevant valuation letters were not issued for the purpose of a "*possible further issue of treasury shares*" contrary to what is suggested by the trial judge in para. 2970 of the *judgment*.

128. But even if this were the case, as no *specific* issuance of such shares (an emission of a definite number of shares for a definite amount) is ever mentioned in these letters, and as such issuance is only a possibility, the mere fact that these valuation letters would have been prepared for such generic purpose does not eradicate at all the risk of indeterminate liability.

129. **Legal for life certificates.** As appears (Exhibit PW-7), the specific purpose of the Legal for life certificates was to provide the company's lawyers with relevant information for the purposes of the preparation of the Legal for life opinions.

130. Again, as there was never any mention in these certificates of any specific envisaged transaction, such a generic purpose does not eradicate the risk of indeterminate liability.

131. In paragraphs 3530, the trial judge states that «*concerns over indeterminate liability have sometimes been overstated*» and refers to paragraph 33 (in fact it is 35) of the *Hercules* decision. A reading of that paragraph shows, however, that the Supreme Court of Canada essentially stated that, while it was «*aware of the arguments of some scholars to the effect that concerns over indeterminate liability have been overstated*», it specifically rejected their views and rather considered that granting a too liberal approach to the establishment of the duty of care would not only create indeterminate liability for the auditor, but also indeterminate litigation for the courts (which is exactly what the Castor litigation is about), both undesirable results.

132. Moreover, the trial judge stated that, on the facts of the present case, «*the court finds that deterrence of negligent conduct is an important policy consideration*» and referred in support to paragraph 35 (in fact 33) of the *Hercules* decision. Again, a reading of that paragraph indicates however, that, according to the Supreme Court: «*in the final analysis, [the deterrence factor in the case of auditor's liability] is outweighed by the socially undesirable*

consequences to which the imposition of indeterminate liability on auditors might lead».

133. The trial judge has therefore manifestly misapplied and misinterpreted the principles laid down in the *Hercules* and *Design Services* cases in reaching her conclusion that C&L owed a duty of care to the Plaintiff in the circumstances of the present case.

134. Combined with her error as to the applicable law, this misinterpretation of the principles enunciated in the *Hercules* and *Design Services* cases is determinative: if the auditor did not owe any duty of care to the Plaintiff, the latter had no recourse, even if C&L had issued negligent misrepresentations that were relied on by the Plaintiff, which is denied.

C. The trial judge has misapplied and misinterpreted the principles governing the liability of professionals *vis-à-vis* third parties under Quebec law

135. The trial judge manifestly erred in her analysis of the rules applicable to the liability of an auditor vis-à-vis third parties under Quebec law for the following reasons.

136. In the *judgment*, the trial judge essentially held, on the basis of the *Michaud*[8] or *Mallette*[9] decisions of this Court, that «*when auditors render professional opinions, they assume liability for the consequences of their representations, regardless of the of the intended purpose of the document*» (para. 3395).

137. Other decisions of this Court, that were not analyzed nor mentioned by the trial judge, have however established that a professional who renders an opinion for a specific purpose should not be held liable towards a third party who was not the intended recipient of such opinion or who relied on it for a purpose different than that for which it was prepared:

- *Placements Miracle inc.* v. *Larose*, (1980) C.A. 287 at 288-289;
- *Robinson* v. *Barbe*, 2000 R.R.A. 857 (C.A.), paras 47-50;
- *Caisse Populaire des fonctionnaires* v. *Plante*, (1990) RRA 250 (C.A.), p. 253;
- *BCIC* v. *General Appraisal of Canada*, (1993) J.Q. 1042 (C.A.), para. 8.

138. Defendants submit that the reasoning adopted by the Supreme Court of Canada in both the *Houle*[10] and *Bail*[11] decisions is not compatible with the *Michaud/Mallette* reasoning, which render a professional liable to any third party, irrespective of the intended purpose or recipients of the opinion, as this is the

---

8 *C.P. Charlesbourg* v. *Michaud*, (1990) R.R.A. 531 (QCCA).

9 *Agri-Capital Drummond inc.* v. *Mallette*, 2009 QCCA 1589, leave to appeal to the SCC denied (2010) CanLII 6341.

10 *Houle* v. *Canadian National Bank*, (1990) 3 S.C.R. 122.

11 *Bank of Montreal* v. *Bail Ltée*, (1997) 2 S.C.R. 554

equivalent of giving to non-clients the same rights and the same protection than that given by contract to the client.

139. In both *Houle* and *Bail*, it was however clearly recognized that the non-performance of a contractual obligation does not necessarily give rise to liability *vis-à-vis* third parties, as this would be contrary to the principle of relativity of contract.

140. On the basis of these Supreme Court decisions, and also on the basis of the *Hercules* decision, this honorable Court recently decided in the *Savard* case (leave to appeal refused by the SCC)[12] that, under Quebec civil law, a professional who is engaged by contract to give an opinion will not necessarily be liable vis-à-vis any person who may happen to rely on such opinion for any other purpose, as this would be both contrary to the principle of relativity of contract, and as this could also lead to indeterminate liability, as explained by Cardozo J. in the *Ultramares* decision.

141. The trial judge considered that the *Savard* case was not applicable as it did not deal with auditors' liability but rather with the liability of lawyers and that a legal opinion is intended for a specific client for a specified purpose, contrary to what would be the case with respect to an opinion issued by an auditor (paras. 3400 and 3401).

142. This is clearly erroneous in fact and in law for the following reasons.

143. First, while it is true that the *Savard* case dealt with the liability of lawyers, this Court saw fit, in order to determine what principles should be applied to lawyers, to resort to the principles established in the case of auditors. In these circumstances, it does not make any sense to limit the principles enunciated in the *Savard* case to the liability of lawyers and not to apply them to auditors.

144. Second, it is not true that audit opinions are intended for all people and for all purposes while legal opinions are for a specific client and purpose. This is exactly what the *Hercules* case is about: a statutory audit opinion, while it may happen to be read by many persons, is nevertheless provided for a specific purpose and it is only with respect to the limited class of persons who have relied on it for that specific purpose that the auditor may be liable. The fact that legal opinions are usually not disseminated to a large public (and this depends on the nature of the legal opinion), does not change the gist of the analysis: in order to avoid indeterminate liability, the professional issuing an opinion should only engage its liability to the persons that were the intended recipients of it and only if they relied on it for the specific purpose that for which it was prepared.

145. Finally, if legal opinions are not so largely disseminated, it should mean that the concern for indeterminate liability is <u>less</u> acute in the case of lawyers

---

[12] *Savard* v. *2329-1297 Québec inc.*, (2005) R.J.Q. 1997 (QCCA), leave to appeal to the SCC denied on March 2, 2006 (no. 31156)

than in the case of auditors. Yet, the trial judge considers the auditors, under Quebec law, to be liable «to the whole world», whereas this Court has decided in *Savard* that lawyers should not be, precisely because of the concern over indeterminate liability.

146. There is no reason why in Quebec, lawyers should be protected from indeterminate liability by application of the principles enunciated in *Bail* and *Houle,* while auditors would not be.

147. Clearly, the reasoning found in the *Houle, Bail and Savard* cases offers a way to harmonize the civil law principles of extra-contractual liability of professionals *vis-à-vis* non-clients with the applicable common law principles, so as to avoid a situation where Quebec professionals (auditors or others) would be subject to infinite liability «to the whole world», whereas their colleagues in the rest of Canada would not be.

148. To the contrary, the *Michaud/Mallette* reasoning, if confirmed, would create a major discrepancy between the rules applicable to Quebec professionals and their counterparts in the rest of Canada, a result that is not desirable in the contemporary world, especially within the framework of the Canadian federation and national professional firms.

149. The trial judge therefore erred in law when she rejected the application of the principles enunciated in the *Savard* decision to the liability of auditors; if these principles had been applied to Plaintiff's claim, it would have been dismissed as he did not rely on the audit report, valuation letters or legal for life certificates for the specific purposes that for which they were prepared.

SECTION II. THE ISSUE OF PLAINTIFF'S REASONABLE RELIANCE

A. Introduction

150. In paragraphs 3106 to 3344 of the *judgment*, the trial judge comes to the conclusion that Widdrington, for purposes of his investments in Castor, relied in a reasonable manner on the audited financial statements issued by the company as well as the valuation letters and legal-for-life certificates issued by C&L.

151. Generally speaking, the trial judge's review and analysis of the evidence leading to this conclusion can only be viewed as biased and one-sided. For the most part, they are essentially based upon the depositions in chief given by Plaintiff's witnesses at trial and fails to take into account very important admissions and/or contradictions arising from the examinations on discovery of Widdrington and his advisor Prikopa, the cross-examination of Plaintiff's witnesses at trial and the evidence of Defendants.

152. In paragraph 3324, the trial judge acknowledges that there were contradictions between Widdrington's testimony at discovery and his deposition at trial but goes on to suggest that they are relatively minor without explaining why. Her failure to provide adequate reasons on this important issue points to a strong bias in her analysis of the evidence.

153. The errors and omissions contained in the trial judge's analysis of the evidence on this issue are palpable and overriding errors within the meaning of this expression set forth in the decision of the Supreme Court of Canada in *Housen* v. *Nikolaisen*[13].

154. The very structure of the *judgment* on the reliance issue indicates that the trial judge's actual analysis of the evidence, including the credibility of the witnesses who testified on this issue, is superficial at best. Indeed, no less than 217 paragraphs (3106 to 3322) of this section of the *judgment* essentially provide her summary of the evidence, without substantive comments on her part, whereas only 22 paragraphs (3323 to 3344) do provide her actual analysis of the evidence, including her comments on the credibility of the witnesses. Given the size and complexity of the evidence presented on this important issue, Defendants submit that this portion of her *judgment* ignores several important aspects of the evidence.

155. One prime example is her hasty conclusion, in paragraph 3343, that Widdrington 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. Indeed, the duties and responsibilities of Widdrington during the two (2) years that he spent as a director of Castor constitute one of the

---

13 [2002] 2 S.C.R. 235.

issues on which a great time and energy was devoted by both parties both in evidence and in argument. Yet, there is very little analysis, if any, in her conclusions on this issue which justified a ruling of "*fin de non-recevoir*" (estoppel) against Widdrington or, at least, a finding of contributory negligence.

B. Ignorance or dismissal of other factors relied upon by Widdrington

156. In arriving at her conclusion that Widdrington actually relied on C&L's representations, the trial judge wrongfully ignored that the overwhelming evidence clearly demonstrates that other factors, the most important of which were Stolzenberg's strong personal influence on Widdrington and the latter's eagerness to develop a close relationship with Stolzenberg and become a director of Castor, played the leading role in his investment decision, to the point of relegating C&L's representations to a simple afterthought.

157. In paragraphs 3185 to 3269 inclusive, the trial judge provides a summary of her understanding of the chronology of events surrounding Widdrington's all three (3) investments in Castor. Here again, this historical account is almost entirely based upon the depositions in chief of Plaintiff's witnesses at the trial and downplays several factors, other than Widdrington's alleged reliance on C&L's representations, that played a decisive role in his decision-making process. Among the factors (some of which are mentioned in her chronology) that she wrongfully ignored or downplayed for purposes of her conclusions on reliance, are the following:

(a) The evidence showing that, from the moment of their first encounter in Davos in January 1986, Widdrington was very impressed by Stolzenberg and that, thereafter, he made every effort to develop a strong personal relationship with him, to the point of inviting him to special functions of Labatt at which non-Labatt people were normally not invited;

(b) The fact that it was Widdrington himself who organized the Taylor/Stolzenberg lunch at Labatt's offices in August 1986 referred to in paragraphs 3189 and 3190, which he later quoted as one of the positive factors he took into account for purposes of his December 1989 investment into Castor;

(c) The fact that the information contained in the so-called CIBC letter of January 1987, PW-2377 referred to in paragraph 3192, which he alleges to have relied on, was obviously incorrect and out of date and that Widdrington failed to properly use his contacts at the CIBC in order to obtain more accurate information about Stolzenberg and Castor;

(d) The fact that Widdrington's knowledge and trust of Stolzenberg was clearly enhanced as a result of his role as a director of Trinity

Capital from 1987 to 1991. It is important to note that there is no evidence supporting her conclusion, in paragraph 3327, that Widdrington's role in Trinity was very limited, and that, as an outside director, he was not involved in nor questioned the funding of Trinity's investment activities or any of its financial matters. This conclusion is in flagrant contradiction to the testimony given by Trinity Capital's president, James Binch, at his rogatory commission of October 2001. Binch testified that the board of directors at Trinity was an inquiring and good board and that Widdrington was an active participant in all of the discussions[14];

(e) The fact that Widdrington, as director of Trinity, personally approved and signed several resolutions[15] approving loans for millions of dollars extended by CHIO or CH Ireland to Trinity;

(f) The fact that Widdrington's role as director of Trinity should have enabled him to realize very early on that some of the loans being extended by Castor's subsidiaries were high risk;

(g) The evidence of Stolzenberg's unusual invitation by Widdrington to Labatt's Annual Meeting in September 1987, August 1988 and October 1989;

(h) The evidence that Wriddrington failed to properly use his contacts at the CIBC which would have enabled him to find out the true reasons as to why Castor refused to deal with the CIBC in December 1987, i.e.: that Castor did not want to disclose information about its mortgage portfolio, which she confirms in paragraphs 3193 and 3194;

(i) The letter, PW-34 (referred to in paragraphs 3101 and 3202) addressed by Widdrington to Stolzenberg in October 1988, clearly giving him a blank cheque as to how his first $200,000 investment was to be invested. This investment was made without any review whatsoever of Castor's financial information;

(j) The sequence of events that she describes in paragraphs 3205 to 3231 demonstrating that Widdrington literally rushed into his December 1989 equity in investment into Castor without taking the time to conduct a proper due diligence;

(k) The overwhelming evidence as to Widdrington's total failure to follow the advice given to him by his advisors with respect to his December 1989 equity investment, starting with the written

---

14 Binch, Oct. 30, 2001, pp. 209-212.
15 D-610, D-611, D-612.

memos submitted to him by Prikopa, PW-43-1 and PW-43-2, which are mentioned in paragraphs 3218 and 3220 respectively without any particular comment on her part;

(l) The evidence that Widdrington chose to purchase four (4) units instead of the three (3) units recommended by Prikopa in his handwritten memo, PW-43-2, essentially by reason of his eagerness to become a director of Castor, which required a minimum purchase of one million dollars ($1,000,000);

(m) The evidence showing that Widdrington made his decision to invest in December 1989 without consulting nor obtaining proper advice as to the exitability provisions contained in the shareholders' agreement, PW-2382, the existence of which is briefly mentioned in paragraph 3228;

(n) The evidence that the so-called portfolio analysis, PW-10-5, of December 22, 1989, the existence of which is mentioned in paragraph 3229, provided no useful information whatsoever as to the risks associated with Castor's loan portfolio;

(o) The evidence as to the disproportionate size of Widdrington's 1989 investment in Castor in relation to his portfolio at the time.

C. Ignorance or dismissal of Widdrington's reckless behavior

158. The trial judge also erred in fact and in law in arriving at the conclusion that Widdrington's alleged reliance on C&L's representations was reasonable in the circumstances. She failed to consider the overwhelming evidence showing that Widdrington was a very sophisticated investor, from whom a high standard of prudence and care would have been expected. More specifically, she failed to take into account the evidence showing that Widdrington, acting against the better advice of his team of advisors, behaved recklessly, and did not perform reasonable due diligence prior to making his investments in Castor.

159. Examples of the key elements of the evidence that the trial judge obviously ignored in arriving at her conclusion that Widdrington acted in a prudent and reasonable manner include the following:

1. Widdrington was a very sophisticated investor

(a) The overwhelming evidence showing that Widdrington himself, through his impressive educational background and successful career, together with his team of advisors, was a very sophisticated investor well versed in the interpretation and use of complex financial information, including GAAP financial statements and business valuations;

(b) The overwhelming evidence, including Widdrington's *resumé*, PW-12-1, showing that, during his career, Widdrington was a member of the board of no less than twenty (20) companies which included the CIBC, one of the largest banks in Canada, as well as Canada Trust Co Mortgage Company, Olympic Trust of Canada and Huron & Erie Mortgage Corporation, which provided him privileged access to information relating to financial and other markets, including real estate.

2. His first investment of $200,000 in October 1988

The evidence showing that, for purposes of his first $200,000 investment in October 1988, Widdrington literally gave a blank cheque to Stolzenberg and did not rely in any way, shape or form upon any representation by C&L.[16]

3. His equity investment in December 1989

(a) The evidence showing that the package of documents (PW-10, PW-10-1, PW-10-2 and PW-10-3) remitted by Stolzenberg to Widdrington for purposes of his December 1989 investment contained very little information, if any, about the nature of Castor's business or its outlook for the future;

(b) The fact that the said package of documents did not include a Legal for Life Opinion (issued by Castor's lawyers, Clarkson Tetrault, then McCarthy Tetrault) nor a "legal-for-life certificate" (issued by C&L for Castor's lawyers), which demonstrates that the said factors played no role whatsoever in Widdrington's equity investment of December 1989;

(c) In the case of the 1988 audited financial statements, PW-10-1, and the extract of earlier financial statements, PW-10-2, the evidence that Widdrington himself and his advisors knew very well or should have known that the said financial information was then almost a year old and that it provided no insight whatsoever as to Castor's outlook for the future. On this point, it is worth noting that the trial judge systematically ignored and did not even address important portions of the evidence arising from Widdrington's and Prikopa's discoveries, the cross-examinations of Plaintiff's expert and lay witnesses at trial as well as the testimonies of Defendants' experts confirming that it was not reasonable for Widdrington to rely on financial statements alone insofar as they provide no indication whatsoever as to Castor's prospects for the future;

---

[16] Nov. 9, 1995, pp. 21-22.

(d) In the case of the valuation letter of October 17, 1989, the overwhelming evidence showing that sophisticated investors such as Widdrington and his advisors should have immediately noticed that these valuation letters were not valuation reports as understood in financial circles and within C&L. Moreover, Widdrington and his advisors knew very well or should have known that these valuation letters were not prepared for investment purposes by outsiders but only for the information of Castor's directors;

(e) Widdrington's admission that he in fact made a connection between the October 17, 1989 valuation letter and the definition of "Valuation Report" found at page 4 of the shareholders' agreement, PW-2382, at that he further conceded that both were the same[17];

(f) The evidence to the effect that both the definition of valuation report in the shareholders' agreement, PW-2382, and the description of C&L's mandate in the first paragraph of all valuation letters, PW-6-1, clearly indicate that C&L prepared these letters in their capacity as auditors of the company and not as business valuators. As a consequence, Widdrington and his advisors knew or should have known that there were no mandatory reporting standards to be followed when C&L prepared the valuation letters;

(g) Widdrington's testimony to the effect that he understood very well the obvious link between the valuation letters and the financial statements of Castor, audited or not. He confirmed that the share valuation of $525 to $550 per share, found at the last page of the October 17, 1989 letter, was essentially a multiplication of the book value of $355.28 by the lower end of the range (1.5) of the price to equity ratio referred to in the third paragraph at page 5 for major Canadian public trust companies[18]. Widdrington also confirmed his understanding that the valuation letters and the financial statements were tied together and went as far as to draw a diagram (filed as D-632) showing that the fair market value of the shares were calculated by using, as the starting point, the information contained in the financial statements[19];

(h) Widdrington further conceded that there was no genuine market per se for Castor's shares[20];

---

17 Dec. 17, 2004, pp. 17-19.
18 Dec. 17, 2004, pp. 40-41.
19 Dec. 17, 2004, pp. 19-26 and 42.
20 Dec. 17, 2004, pp. 42-43.

(i) The overall evidence on the valuation letters, including Widdrington's testimony at trial, which clearly demonstrates that he fully understood the valuation letters were prepared to meet the periodic requirements of Castor's shareholders agreement, PW-2382, that they were prepared for the information of the directors and that they were not comprehensive valuation reports within the meaning as ascribed to this term in business and financial circles;

(j) The overwhelming evidence showing that Widdrington failed to follow Prikopa's advice, starting with his first memo of December 18, 1989, PW-43-1, providing his comments and advice with respect to Widdrington's prospective investment in Castor. This memo, as all others that followed, constitutes the most compelling demonstration that the material given by Stolzenberg to Widdrington for purposes of his investments in Castor, including the audited financial statements for 1988 and the valuation letter, did not contain sufficient information in order to allow Widdrington to carry out a proper assessment of the risks associated with his investments;

(k) Key examples of Widdrington's failure to follow up on the questions and concerns raised in Prikopa's memo, PW-43-1, include the following admissions from his November 9, 1995 discovery:

(i) He never personally investigated the quality of Castor's loan portfolio, even after he became a director and shareholder of Castor[21];

(ii) He did not personally look at the issue of matching maturities of mortgages and amounts owed by Castor, as indicated at item 4 of the risk factors listed in the memo[22];

(iii) He confirmed that, "... despite the fact that it was a large investment, I also had a lot of other things on my plate at the time and I relied on documents and interpretation of documents by Heinz." Widdrington totally overlooked the fact that most of Prikopa's comments were in fact questions[23];

(iv) He confirmed that he did not go back to Castor to try to either satisfy or respond to the concerns raised by

---

21 Nov. 9, 1995, pp. 21-22.
22 Nov. 9, 1995, p. 23.
23 Nov. 9, 1995, pp. 23-24.

Prikopa prior to investing, more particularly those raised at item 5 at page 2 of the memo[24];

(l) Wriddington's admission at trial that, from the moment of his initial investment as well as during his entire tenure as a director of the company, he did not ask Castor for answers to any of the issues or concerns raised by Prikopa in his initial memo, PW-43-1[25];

(m) Wriddington's admission that, at the time of his decision to invest on December 18, 1989, he had not yet received the shareholders agreement[26];

(n) The overwhelming evidence to the effect that the so-called "Mortgage Portfolio Analysis", PW-10-5, received by Prikopa on December 22, 1989, provided no information whatsoever as to the concerns expressed by Prikopa as to the quality of Castor's loan portfolio and the risks associated thereto;

(o) The overwhelming evidence as the disproportionate size of Widdrington's 1989 investment in Castor in relation to his portfolio.

4. Widdrington's total abdication of his duties as director of Castor

(a) The overwhelming evidence as to Widdrington's total abdication of his duties as a director of Castor, which not only kept him from reassessing the risks associated with his December 1989 investment but also those associated with the last investment in the amount of $292,560 which he made in October 1991;

(b) Examples of Widdrington's reckless behaviour as a director of Castor which can be found in the following admissions that he made during his November 9, 1995 discovery:

(i) He stated "let me repeat, I came on the board with the understanding that I knew very little about the company or the business. I was comfortable in the fact that the documentation had indicated the company was doing very well and had done very well without my help up to that point in time"[27];

---

24 Nov. 9, 1995, pp. 24-27.
25. Dec. 17, 2004, pp. 46-50.
26. Dec. 17, 2004, p. 14.
27. Nov. 9, 1995, p. 41.

(ii) He stated that he did not, at any time during his tenure as a director, raise any issue with the board about the business and affairs of Castor[28];

(iii) He stated that, at no time during his tenure as a director, did he ever inquire into particular loans or particular borrowers of Castor[29];

(iv) He did not recall specific discussions on the issue of related parties or any discussions or review of the annual financial statements[30];

(v) He did not recall that any director, including himself, would have raised the issue of who the borrowers of Castor were[31];

(vi) He did not recall any discussion at the board on the issue of capitalization of interest[32];

(vii) In response to a very general question[33];

"Q. *Did you do anything else specifically to try to understand the business and affairs of Castor?*

A. *No, really I can't recall anything specific*".

(c) The trial judge also totally ignored the compelling evidence found in Widdrington's cross-examination as to the discussions that took place during the board meetings concerning the resolutions of the loan committee which he did not specifically recall having read or having discussed in detail. More specifically, she ignored the evidence that Widdrington could not recall having read or discussed the loans involving the York-Hannover Group described in the resolutions of the board meetings of October 12, 1990 and March 21, 1991. Although he agreed that it appeared from these resolutions that there was a lot of business transacted between York-Hannover and Castor, he testified that he did not know anything about York-Hannover at the time nor did he ask. He did not make the connection between the York-Hannover Group and Karsten von Wersebe referred to in the attachment to

---

28. Nov. 9, 1995, p. 47.
29. Nov. 9, 1995, p. 49.
30. Nov. 9, 1995, pp. 50-51.
31. Nov. 9, 1995, p. 55.
32. Nov. 9, 1995, p. 65.
33. Nov. 9, 1995, p. 69.

the CIBC letter of January 1987, PW-2377, which he had allegedly relied upon when making his decision to invest[34];

(d) Despite these compelling examples, the trial judge came to the conclusion, in paragraph 3343, that "Widdrington 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";

(e) Furthermore, in paragraphs 3250 and 3327, she indicates that Widdrington, as an outside director of both Castor and Trinity, would have had lesser duties and responsibilities than other directors. By so concluding, she not only ignored the aforementioned evidence showing Widdrington's total abdication of his responsibilities as director, but also the more demanding and objective standard of director duties and responsibilities adopted by the Supreme Court in *Peoples Department Stores Inc. (Trustee of)* v. *Wise*[35]. This important Supreme Court decision is clearly to the effect that the distinction between an outside and an inside director proposed by Widdrington and his witnesses is without merit whatsoever;

(f) In her analysis of the responsibilities of a director, the trial judge also ignores what was then perhaps the most authoritative statements on the status of the law and practice on this subject, which is found in the Estey report which came out before the relevant years, in August 1986 (*Commission of Inquiry into the Collapse of the Canadian Commercial Bank* (CCB) *and the Northland Bank* by the Honourable Willard Z. Estey, PW-1422A);

(g) The compelling evidence as to Widdrington's total failure to follow the advice contained in all of the memos that Prikopa submitted to him during his entire tenure as a director of Castor from March 1990 to March 1992, including those filed as PW-44-1, PW-45, PW-46 and PW-47. Quite to the contrary, the trial judge mentions the existence of these memos in paragraphs 3232 to 3234 without indicating that they contained several questions, warnings and other concerns that Widdrington failed to follow up throughout his tenure as director of Castor.

5. Widdrington's third investment in October 1991

(a) The compelling evidence demonstrates Widdrington's total failure to take into account the numerous warnings and red flags brought

---

34 Jan. 5, 2005, pp. 152-158 and 165.

35 *Peoples Department Stores Inc. (Trustee of)* v. *Wise*, [2004] 3 S.C.R 461.

to his attention before his last equity investment in Castor on October 25, 1991, including the following:

(i) The report by management as to a change of attitude by the banks towards Castor contained in Stolzenberg's letter of September 25, 1991, PW-17, addressed to Widdrington requesting an additional capital contribution;

(ii) The serious concerns and warnings contained in Prikopa's memo to him dated October 6, 1991, PW-47 with respect to this capital call. Quite to the contrary, the trial judge suggests in paragraph 3240 that Prikopa concluded in this memo "*that this was good investment for Widdrington*";

(iii) The alarming report by the chairman of Castor contained at page 3 of the minutes of the October 24, 1981, Castor Board Meeting, PW-51, as to a serious liquidity crisis which required additional capital in the order of fifty million ($50,000,000) to a hundred million ($100,000,000) for the company to make it to 1992. Despite this alarming report, the trial judge concludes in paragraph 3243 that "*Widdrington's decision to buy an additional unit in October 1991 was taken in a context where the overall impression about Castor's performance was very positive*";

(iv) Widdrington's own admission, both in discovery and at trial, that the atmosphere at the October 24, 1991 board meeting was very somber and that his decision to make his last investment on October 25, 1991, was made with the full knowledge of the risks associated thereto, as a gesture of solidarity like a baseball player "*taking one for the team*"[36] [37] [38];

(b) The overwhelming evidence confirming that Widdrington waited until after Castor's downfall in 1992 in order to ask the kind of questions about Castor's business that were raised in Prikopa's memos addressed to him between December 1989 and October 1991, as witnessed by his exchange of correspondence with Stolzenberg in March 1992, PW-55-1 and PW-55-2.

---

[36]. Nov. 9, 1995, p. 163-164, Q. 734-740.
[37]. Nov. 9, 1995, p. 177-178, Q. 806.
[38] Dec. 2, 2004, p. 53-56.

6. Absence of causality between the errors found by the trial judge in the audited consolidated financial statements for 1988, 1989 and 1990, and Widdrington's decision to invest in Castor

160. A plaintiff's burden of proof as to his actual reliance on audited financial statements is not discharged by merely showing that he looked at them. A plaintiff must prove which specific elements contained in the statements he actually relied upon for purposes of his investments. It is one thing for the trial judge to find that the financial statements were misstated with respect to certain GAAP requirements, but the evidence must also show that the plaintiff relied for his investments on these very specific misstatements.

161. More particularly, the trial judge found that the Castor audited consolidated financial statements for the relevant years do not present fairly in accordance to GAAP the financial situation of Castor due to: the absence of a Statement of Changes in Financial Position, undisclosed related-party transactions, artificial improvements of liquidity and undisclosed restricted cash, undisclosed capitalized interest revenue and inappropriate revenue recognition, the diversion of fees, and, finally, the understatement of loan loss provisions and overstatement of the carrying value of Castor's loan portfolio and equity. (para. 419 of the trial judge's *judgment*).

162. With respect to any of the misstatements enumerated above, save the last perhaps, there is not a shred of evidence that Widdrington, and/or his advisors, considered any of these as material to the decision to invest. On the contrary, with respect to Trinity Capital, which the Court held was a related party (para. 552) on whose board Widdrington sat, he failed to disclose this situation to the Castor board (and therefore to the auditor) after he joined it, despite a Castor resolution requiring disclosure of major related-party transactions (PW-1053-34-1) and the legal obligation to disclose material contracts or interests (NBBCA, s. 77(1)).

163. Another example is the absence of a Statement of Changes in Financial Position: obviously Widdrington could not have relied on this absence.

164. On the issue of the understatement of loan loss provisions and overstatement of carrying value of Castor's loan portfolio and equity, there is also no evidence as to what would have been a material amount for his investment decisions.

7. What the financial statements tell the reader

165. At pages 435-438 of the *judgment*, the trial judge asks a critical question, namely, what information would a reader of the financial statements glean from reading them. The only evidence she refers to is that of Lowenstein, Plaintiff's expert on reliance.

166. This in itself is a fundamental error of fact and law in that the trial judge failed to consider a significant amount of evidence, including Plaintiff's admissions, and the trial judge does not acknowledge anywhere that this evidence exists. This evidence includes:

(i) Handbook s. 1000.16, which outlines what level of knowledge and diligence is expected of a reader of financial statements;

(ii) Plaintiff's witness, Bernard Gourdeau, a trustee in Castor's bankruptcy and chartered accountant who made a presentation to the trial judge about the content of financial statements, whose testimony must be considered as an admission binding on all Castor plaintiffs, including Widdrington. Defendants refer specifically to exhibits PW-2893-8, PW-2893-9 and 2893-10, which demonstrate that a reading of the consolidated financial statements alone reveal that Castor's profit margin was shrinking and had become very thin by 1990, that Castor's profits were increasingly being earned in its offshore subsidiaries, not from its Canadian operations, and that there was an increasing and very heavy reliance on debt as opposed to capital and retained earnings as its source of funding;

(iii) The trial judge further fails to note that a reading of the 1990 unconsolidated financial statements demonstrates that the operations of the parent company produced a $9 million loss;

(iv) Selman's evidence as to what a reasonably diligent analysis of the financial statements would enable a reader to understand and what questions would be raised from such a reading. The trial judge also failed to consider Selman's evidence as to what questions a director would be expected to ask, given the information contained in the financial statements (May 7, 2009, p. 57-85; May 14, 2009, p. 116-176);

(v) Vance's evidence in cross, in which he agreed that charts prepared by Defendants (D-953 series) all contain accurate information taken from the financial statements alone (April 21, 2008) which demonstrates that the rate of growth was flat or declining and that the profit margin was declining;

(vi) Rosen's writings that indicate that investors should not rely solely on financial statements, in part because GAAP themselves are misleading (1095A; D-1095B; D-1095C; D-1095D, D-1260, D-1260-2, D-1101, D-1102));

(vii) Both Rosen's and Vance's testimony that they could tell from a reading of the audited financial statements alone that there was no Statement of Changes in Financial Position ("SCFP"), that no opinion was given on an SCFP (see paras 2160-2160 of the *judgment*), that various other issues were simply not addressed in the financial statements that gave rise to questions, and that most of the loan portfolio was likely being renewed year after year and not being paid in cash at maturity (April 16, 2008 p. 222-232, February 17, 2009 p. 106-119).

167. Had the trial judge considered this evidence, it would have been clear that despite the existence of positive indicators up to 1988 that Lowenstein pointed out, there were significant warning signs as to Castor's financial performance, a significant shift in Castor's profit patterns and a significant decline in growth rate in 1988-1990, particularly in 1990, which led to the parent company losing $9 million dollars, which was all apparent from a reading of the financial statements alone. Therefore, it would also have been clear to the reader that the information conveyed by the financial statements simply gave insufficient information, on their own, to be an appropriate basis for an investment decision.

SECTION III. MISCARRIAGE OF JUSTICE

A. Consideration of illegal evidence and undue limitations to Defendants' presentation of their case

1. The new expert reports and the "read-in" rule

168. As explained in the introduction (*supra*, para. 35 ff.), the trial judge erred in fact and in law in:

(a) authorizing the Plaintiff, at the outset of the trial and in blatant disregard of the judicial contract entered into before the Chief Justice by his attorneys on his behalf, to introduce into the Court record numerous new expert reports. At the same time, the trial judge maintained the 120-day time limit established by the Chief Justice, in spite of the fact that this limit was predicated on a premise that no longer existed, i.e. that the same expert evidence as that led in the first trial would be led by Plaintiff against the Defendants in the second trial;

(b) issuing a ruling according to which the content of an expert report, rather than the expert testimony at trial, would be deemed to have been introduced in evidence, thus contravening the clear provisions of the Civil Code, the Code of Civil Procedure, as well as the jurisprudence of this honourable Court.

169. As a direct consequence of these two decisions, the *judgment* under appeal is largely based on evidence that should not have been considered by the Court, either because it was illegally introduced into the Court record or constitutes illegal written testimony that is not proper evidence before the Court.

170. From the outset of the second trial to its end, the Defendants have objected to these decisions that could not be immediately appealed from. As stated above, Defendants are appealing them with the present inscription.

171. In the case of «read-in rule», the Plaintiff's attorneys first took the position that it was imposed explicitly or implicitly by the Chief Justice when he issued the Order for a new trial, although they eventually conceded such rule had no support in Quebec jurisprudence but should nevertheless stand because of the absence of any immediate appeal.

172. The "read-in rule" was not only illegal, but the trial judge did not apply it as articulated by her: When she decided the "read-in rule" would be applied, on March 4, 2008 (pp. 43-51), the trial judge indicated (and Plaintiff's counsel agreed) that the experts would have to address each chapter or subject-matter of his report.

173. Although the written arguments of the Defendants identified numerous topics on which one or more of the Plaintiff's experts did not testify to, the trial judge on numerous occasions only cites the written report in the *judgment*, indicating that she based herself on the report as the evidence .

174. In many of these instances, there was either no testimony at all given by the expert or the *viva voce* testimony actually contradicted the report or introduced significant nuances that the trial judge did not consider.

175. Moreover, in other instances, the rule led to a clear prohibition for the expert to give *viva voce* evidence on the topics that were covered in his report. At the very outset of the testimony of John Campion, Defendants' expert on the common law, the trial judge made the following comments *(*August, 31st, 2009, p. 35*)*:

> *"I will just make sure that you are well aware of the principles that apply in this Courtroom as far as expert testimony is concerned. I do know that the Defendants are of the opinion that this should not be the case, but I made rulings, there has been no appeal and this is the way I'm managing the trial. So, expert reports are as soon as they are recognized by their author, and this has to be done early on in this testimony, they are read in, deemed to be part of the evidence. I'm not accepting anyone telling me what I can read and what I have read, and the testimony viva voce is only to make sure that we are generally going through the principles or if there is anything special, details that need to be added, but I am not to accept that someone reads in front of me what I have already read, because I do have the first report and I do have the supplemental report, and I've been through cases that are mentioned, so I'm not planning to be seated here and listening to that for very long."* (our emphasis)

2. The 120-day limit

176. Manifestly, from the outset of the trial and until the end, the trial judge was unduly preoccupied with the "absolute need" to expedite matters so as to respect the timeframe mentioned in the Chief Justice Rolland's Order, to the point that the trial became "a trial by the clock" to the detriment of Defendants' right to a full and fair defence.

177. The very first paragraph of the *judgment*, where the trial judge states that "*time has come to put an end to the longest judicial saga in Quebec and Canada*", is a striking indication of her state of mind throughout the trial.

178. As a consequence, during the whole trial, the trial judge repeatedly insisted that the presentation of the Defendants' evidence should absolutely be made within the 120-day timeframe despite Defendants' attorneys representations that, in the circumstances described above, they were not in a position to present a full and complete defence for the Defendants within such timeframe.

179. Defendants submit that the fairness of the trial was tainted by the 120-day limit on the presentation of their evidence, ordered by the Chief Justice, when the factual assumptions under which such order was made were no longer valid.

180. The absolute need, in the eyes of the trial judge, to respect the 120-day limit for the presentation of the Defendants' case appears from innumerable comments made by her to the effect that, no matter what, Defendants would only get 120 days to present their case, by the formal rejection of various Defendants' witness lists which were incompatible with the said timeframe, and by numerous decisions on objections or other matters, where this *leitmotiv* is repeated time and time again, despite Defendants vigorous objection that this was insufficient, especially in light of the introduction of the new experts' reports combined with the «read-in rule».

181. There were numerous important other elements that illustrate the obsession of the trial judge in that respect, such as, without limitation:

(a) As stated on April 16, 2008 (p. 52-55), the trial judge decided to either refrain from asking questions to the witnesses or severely limit these questions thereby depriving the Court of more thorough explanations on difficult issues and depriving the parties of an opportunity to assess what part of their evidence required further explanation;

(b) To expedite matters, the trial judge allowed Gourdeau, a representative of the Trustee, to testify as a fact witness with respect to Castor's transactions --even though he did not have any personal knowledge of them--, on the basis that this would help her find her way through the masses of documents (January 17, 2008, p. 8-12). Not only did this mean entrusting a party to the litigation with a task that should always be done by the Court itself, but this permitted the Plaintiff to use his expert time on the technical issues without background input, whereas the Defendants' experts were obliged to first re-establish the events from their own point of view as the testimony of Gourdeau, was, as one would expect, biased. His testimony dealt only with the facts that supported the views of Plaintiff's experts, and was drenched with hindsight (January 30, 2008. p. 31);

(c) Contrary to normal procedure, the trial judge inappropriately required the parties to present their written arguments (on both the main issues and the pending objections) simultaneously rather than requiring the party with the burden of proof to argue first;

(d) Before the final oral argument of the parties, and forming part thereof, the trial judge put various questions in writing to their

attorneys and issued for each extremely rigid instructions as to the maximum time allotted to deal with them (15, 10, 5 or even 32 or 1 minute, cf. Annex A of the Procès-verbal of September 7, 2010), thus leaving Defendants' attorneys to answer very important questions with no reasonable time to deal with them in an appropriate manner;

(e) As explained above, in order to expedite matters, the application of a "read-in rule" that led to a complete reversal of the role normally played by an expert report (opening the door to the testimony but not evidence in itself) and the *viva voce* testimony of the expert (the only evidence that should be considered by the Court).

182. The list below is in no way complete but clearly indicates that the 120-day limit was, expressly or implicitly, an essential ingredient of almost every decision made by the trial judge during the trial. Defendants refer notably to the following comments or judgments:

> January 8, 2008, pp. 33-38; January 14, 2008 (Gourdeau, pp. 38-39); January 18, 2008 (Gourdeau, pp. 133-153); January 23, 2008 (Gourdeau, pp. 27-35, 44-46); January 29, 2008, pp. 201-205, 220-225; June 9, 2008 (Meeting, pp. 7-8, 207-214); November 3, 2008 (Prychidny, p. 13) January 6, 2009 (pp. 26-30); January 27, 2009 (pp. 6-7, 19-27, 85-86); February 5, 2009 (Rosen, pp. 203-204); February 24, 2009, p. 289`; February 27, 2009 (Rosen - pp. 126-133); March 24, 2009 (Rosen, pp. 8-16, 182); March 30, 2009 (Representations, pp. 7-10); May 13, 2009, p. 13-16; June 19, 2009, p. 16); September 3, 2009 (Goodman, pp. 6-9) P.V. which includes Annexe A;- September 23, 2009 (Goodman, pp. 9-26 & written judgment dated October 14, 2009); December 1st, 2009 (Representations, pp.19-38, 69-70 and written judgment dated December 3, 2009); February 3, 2010 (judgment rendered by the trial judge, pp. 210-211, 231-241); April 23, 2010 (pp. 31-32).

183. In itself, this situation would raise serious doubt in the mind of a reasonable person that the time given to the Defendants for the presentation of their case was not the result of a discretion exercised in a judicial manner but rather the result of an obsession with the time factor.

184. The trial judge, as any judge of the Superior Court in charge of a trial, has the duty to ensure that the duration of the trial is set in such a way to allow the parties to adduce all relevant evidence, in accordance with the principles now stated in art. 4.1 and 4.2 of the *Code of Civil Procedure*.

185. In the case at bar, this judicial discretion should have been exercised in light of all the circumstances, including the fact the Plaintiff was allowed at the outset of the new trial to produce into the Court record new expert reports, the entire contents of which were deemed to be evidence before the Court.

186. Instead of exercising her discretion in a judicial manner in light of all the relevant circumstances, the trial judge either considered herself to be bound by the time limits set out by another judge – albeit the Chief Justice – who was never seized with the trial, or was unduly influenced by them, thereby, in either case, contravening the cardinal and constitutional principle of judicial independence.

187. In the circumstances described above, the rigid application of a time-limit caused serious prejudice to the Defendants for many reasons.

188. First, the new expert reports and the "read-in rule" actually imposed a greater burden on the Defendants who were obliged, in cross-examination, to do extensive "reverse engineering" of the Plaintiff's experts' reports in order, first, to understand their positions and the evidence they considered in their reasoning, and then begin their cross-examination, all within the 120-day timeframe allotted to them.

189. Second, as the Defendants are and were of the view that the read-in rule was illegal, they did not want to establish their defence on such evidence. They were therefore obliged to have their experts address all the issues in their testimony, with the consequences that they did not, contrary to the Plaintiff, have the luxury of having many experts on the same issues;

190. Finally, with respect to the 120-day limit, Plaintiff (who had accepted to present his case within such a timeframe) was favored over the Defendants when the following factors are taken into account:

(a) as he had completed the presentation of his evidence in the first trial, Plaintiff could count on a tremendous mass of documentary evidence already in the record, whereas Defendants had not completed their presentation of their evidence in the first trial, and had to use their allotted time to complete their own documentary evidence;

(b) for the same reason, several of the Plaintiff's witnesses had already been cross-examined by the Defendants' attorneys at the first trial, giving them an advantage that did not exist for the Defendants' witnesses who appeared before the Court for the first time at the second trial;

(c) moreover, Plaintiff's witnesses who testified in the first trial had the opportunity to discuss the content of their testimony with Plaintiff's attorneys before giving their testimony in chief at the second trial.

191. The overall consequence of the time limits imposed by the trial judge is that the Defendants, in every strategic decision they had to take in the conduct of their defence, had to unduly restrain themselves, not only in the presentation of

their evidence (reducing their list of witnesses below what they considered to be a minimum or unduly shortening their examination in chief of the witnesses they finally chose to present) but also in the conduct of the cross-examination of the Plaintiff's witnesses, including expert witnesses, as the Court was constantly reminding them that they only would get 120 days and that they had to «make choices» in order to do so.

192. The prejudice suffered by the Defendants in the presentation of their evidence could thus not have been remedied, and was not remedied, by the attribution of some extra days that were ultimately conceded by the trial judge to the Defendants at the end of the trial, as these extra days could obviously not be used by the Defendants to re-do in an more appropriate and effective manner examinations in chief and cross-examinations that had already been completed.

B. Errors as to the assessment of the credibility and reliability of the accounting and auditing experts

193. In assessing and evaluating the credibility and reliability of the expert evidence of the accounting and auditing experts (and indeed the other experts as set out further in the present inscription), the trial judge erred in law in not consistently and uniformly applying the legal principles and tools set out in the jurisprudence and doctrine cited at paragraphs 326 to 330 of the *judgment*.

194. In addition, the trial judge concludes that with respect to two (2) of Plaintiff's experts, Vance and Rosen, there were concerns of credibility that would be "taken into account when the time comes to assess specific opinions (para. 350) and that such "is a factor taken into account when the time comes to assess opinions on specific topics", (para. 339) but then never does so. This failure to explain how these concerns in fact impacted her assessment of their opinions is an error of law.

195. Moreover, the trial judge manifestly erred in law in not entirely rejecting the testimony and evidence of one of Plaintiff's experts, Lawrence S. Rosen, whose evidence demonstrated unequivocally that he was not only a biased advocate, but that he had not done the work related to the evidence cited in support of his opinion, notably in respect of PW-3033 relating to the loan loss provisions, and in fact gave opinions to the Court that were inconsistent with accounting textbooks and articles he had written.

1. Experience of the experts

196. There is no doubt that Defendants' experts' experience was much more relevant and extensive than that of Plaintiff's experts, given the following evidence:

(a) Defence expert Selman had the Bank of British Columbia as a client ending in 1981 (*judgment* para. 369). The trial judge failed to mention that he was audit partner on this engagement for 11

years and spent significant time reviewing the loan files during that period. The Court also failed to mention that following this audit experience which no other expert had, Selman spent much of his practice as an expert witness in similar cases, thus developing knowledge as to standards and practices in this field as they evolved and were interpreted by numerous Canadian lenders, and that he acquired extensive audit committee experience (May 4, 2009 p. 48-56, 77-101,114 and 198-9);

(b) Defence expert Goodman's qualifications are partially described by the trial judge at paragraph 377 of the *judgment* as being "substantial relevant audit experience". This description does not refer to his testimony of September 3, 2010 p. 20-69 which demonstrates that his career changed in 1989 when he began to provide other accounting services to real estate and lending clients, including: valuation, preparation of loan loss provisions (LLPs) and review of clients' procedures for LLPs and business advisory (transaction based) and financial advisory (M&A, sales, restructurings) services and that he almost completely ceased his audit practice at that point in time;

(c) In contrast, none of Plaintiff's experts provided these additional services to clients as did Goodman, and with respect to their audit experience, none had experience that was even close to that of Selman and Goodman;

(d) Defence expert Levi's mandate was focused exclusively on whether there was evidence of fraud at Castor, and if so, whether its scope was such that an ordinary GAAS audit could not be expected to have detected it. Defendants never presented Levi as an expert for any other purpose. Fraud is a substantive defence raised by the Defendants and Levi has a specific fraud investigator designation that auditors do not necessarily possess. The trial judge held at paragraph 397 that he has "knowledge and experience that is directly applicable to this litigation";

(e) Plaintiff's expert Froese, whom the trial judge held in paragraph 340, had "knowledge and experience that is directly applicable to this litigation", had only one client that was a lender, and as the trial judge correctly stated, only worked on that audit prior to being named a partner, at which time his practice shifted to fraud detection and forensic accounting and not auditing. As an example of the trial judge's inconsistent application of the same criteria, Defendants contrast the statement at paragraph 368 that Selman's experience (11 years as audit partner for a Bank) was "limited" whereas Froese's few years as a junior on a merchant bank (which Froese said had similar loans as Castor) was

deemed "directly applicable". Defendants further note that the trial judge calls this experience on a merchant bank directly relevant notwithstanding the fact that on multiple occasions throughout the *judgment* in order to justify her reasoning, the trial judge called Castor "unique". (Nov. 10, 2008, p. 233-237, 248 ff, Dec. 3, 2008, p. 124-126, PW-2940);

(f) Plaintiff's expert Vance is also accepted by the trial judge as having "knowledge and experience that is directly applicable to this litigation", despite the fact that he admitted that he never audited a client like Castor (para. 333). In fact, his testimony reveals that he never audited any company whose business was to lend money (April 16, 2002, pp 21-24). Yet throughout the *judgment*, the trial judge prefers his opinions to those with greater experience on point;

(g) Plaintiff's expert Rosen was also found to have "knowledge and experience that is directly applicable to this litigation", despite the trial judge's recognition that he has never signed an audit opinion and he has never prepared financial statements for a company that has activities similar to Castor (para. 346). In fact, his testimony revealed that he has never signed an audit opinion or prepared financial statements for anyone (January 28, 2009, p. 202-207).

197. A reading of the *judgment* nevertheless reveals that on each point, the trial judge preferred the evidence of one or more Plaintiff's experts to the opinions of the undisputedly more experienced Defendants' experts. The only explanation to be found in the *judgment* is that the trial judge determined that Plaintiff's experts were more credible. This was based on egregious errors of fact and law with respect to the appropriate standards to apply to assess the credibility and reliability of experts, as set out below.

198. The trial judge held at paragraphs 362-363 and 401 that all Defendants' experts' mandates were unduly restricted as none dealt with the inter-relationship between GAAP (accounting) and GAAS (auditing), whereas the trial judge must address both. The trial judge then specifically determined, with respect to each of the three Defence experts who were called to testify on these issues, that this restriction impaired their credibility and the reliability and usefulness of their evidence.

199. First, it is not true that no Defence expert dealt with the relationship between GAAP and GAAS. Selman and Levi both did. (Levi, January 11, 12, 13, 14 and 27, 2010; Selman, May 5, 7, 8, 13, 14, 19, 20 and 21, 2009).

200. Second, there is no obligation in law, and no inference should be drawn, from the fact that a party engages different experts, with different backgrounds and specialties, to comment on different aspects of the case[39].

201. The trial judge's criticism at paragraph 401, that the Defendants' experts opinions can be rejected because they are "partitioned" (para. 401), whereas the *judgment* must address all issues, is an error of law. Each mandate that was given to the experts by Defendants took into consideration each expert's experience and particular field of expertise

(a) Regarding Goodman, who did in fact deal with GAAP but not GAAS on loan valuations, the trial judge found it "surprising and unreliable" that he did not offer a GAAS opinion for the reason that he was uncomfortable doing so (paras 380-381). This statement disregards the evidence cited above that his practice had moved away from auditing towards accounting and advisory services since 1989. This conclusion as to Goodman's credibility also derives from paragraph 317 of the *judgment*, where the trial judge, despite the uncontradicted evidence, contrasts the mandate given to Price Waterhouse in 1993 with the mandate given to Goodman in 2008, implying that the mandate was pared down to avoid unwanted conclusions. To the contrary, the uncontradicted evidence shows that until very close to the time that Goodman was expected to testify in the first trial, he had been part of a team from Price Waterhouse that was mandated by Defendants to opine on the GAAP and GAAS issues and that others on that team were tasked to deal with the GAAP disclosure and GAAS issues, given their experience. Those individuals, the late David Payne and later, the late David Scott, both died over the years that this litigation took. In other words, Goodman's role was not reduced between 1993 and 2008. (Sept. 3, 2009, p. 108-123). To the contrary, Goodman's mandate simply was not expanded to cover the areas his late partners had previously dealt with. As will be seen below, moreover, this situation occurred in respect of Froese's engagement, and was not perceived negatively or even commented upon by the trial judge.

(b) The trial judge also criticized the nature of Selman's mandate at paragraphs 365-375, stating that it was "narrowly circumscribed" to avoid commenting on various matters before the Court and that his methodology did not require that he bring to the attention of the Court information C&L should have requested from Castor. In fact, Selman did opine on GAAP and GAAS applicable to loans (May 7, 2009, p. 167-208; May 8, 2009, p. 6-100; May 19, 2009,

---

39 *Lindhal Estate* v. *Olsen,* 2004 A.J.967 (Alta, QB); *Rances* v. *Scaplen*, 2008 A.J.1323 (Alta, QB); *A.H. Coates & Sons* v. *John-Cor Development Ltd.* (1999) N.B.J.474.

p. 64-220). It is true, as stated in paragraph 317, that he did not provide detailed valuation calculations to permit him to compute an LLP. The trial judge totally disregarded the evidence that since 1998, when Selman filed his first report, his health declined, and that in 2005 (during the first trial) he was only able to provide an updated written report on the issues he in fact addressed in this trial and that he testified verbally on Vance's computation of LLPs (without even then providing his own), as by 2005 his health was such that he no longer had the ability to produce such a detailed report which would have had to have been substantially rewritten to account for all the evidence adduced since 1998 (May 5, 2009, pp. 40-42 and counsel submissions that day). In 2008, he was mandated to update his 2005 report and testify on all GAAP and GAAS issues except for the fact-intensive computation of LLPs, which Goodman provided. As for his methodology, he in fact gave the Court an opinion on the information that C&L should have requested in respect of the audit work on the GAAP disclosure issues, but ultimately concluded that further requests would not have led them to learn more than Castor wanted.

(c) At paragraph 402, the trial judge determines that Levi's opinion is of limited usefulness, inter alia, because he did precisely what he was mandated to do – i.e. comment on his specialty (fraud) rather than focus on what Selman and Goodman were better qualified to opine on. It is therefore an error in fact and law to find that his report was 'restricted'.

202. Subsidiarily, to the extent that the trial judge was correct in concluding that an expert's report is less useful or credible if it fails to cover all issues in dispute (a proposition that Defendants dispute) then similar analysis and reasoning must be applied to the Plaintiffs' experts, which the trial judge failed to do, disclosing her bias and yet another error of law:

(a) Despite the trial judge's finding that the Plaintiffs' experts' mandates were not limited, none of them provided a clear assessment of the required loan loss provisions based on either GAAP or GAAS. Rather than draw an adverse conclusion from this, the trial judge excuses this restriction to their mandate. (See *judgment* paras 331, 809-810, 1417-18, 1420 and 1696-7). In fact, as seen in paragraphs 823-5, 1424-6 and 1705-8 of the *judgment*, the ranges in proposed LLPs provided by Plaintiff's experts in 1988-1990 respectively are: **$185.1 million- $457.9 million; $123.6 million - $271 million; $331 million - $672 million**. Defendants note that if cross-examination is taken into account, these ranges would widen, as the impact of cross-examination was to reduce the lower end of the range in almost each case. Further, the trial judge has referred to the reports as

evidence without calculating the impact of errors or acceptable alternative views these experts conceded in their testimony. Even on the above figures, however, it is simply not possible that all these experts' views can reflect GAAP, given these ranges, yet the trial judge never considered the impact of this on the credibility or reliability of the opinions.

(b) More specifically, and contrary to the finding in paragraph 341 that Froese's mandate was not limited or restricted, the evidence reveals that Froese did not give an opinion on the GAAP or GAAS related to the disclosure issues before the Court and which consume an important part of the *judgment* (eg. Statement of Changes in Financial Position (SCFP), capitalized interest disclosure, related party transactions, maturity matching, restricted cash, $100,000,000 debentures). The trial judge further fails to address the fact that in 1997, Froese participated with other members of his then firm, Doane Raymond, in a report that was filed in the Court record (the "Doane Raymond Report") which addressed those disclosure issues. Froese also did not consider whether there was fraud and the impact of the fraud on the audit (*judgment* paras 2859 and 2869), despite the fact that he is a Certified Fraud Examiner and that his professional career after being named a partner at Doane Raymond has been in forensic accounting and the detection of fraud. (PW-2940). This is in stark contrast to the conclusions the trial judge reached regarding Goodman at paragraph 380.

(c) Similarly, even within the narrow range of topics Froese considered (valuation of Castor's loan portfolio from a GAAP and GAAS perspective), the trial judge did not consider it to be a restriction that Froese only looked at certain loans and excluded others that he had previously considered in the Doane Raymond Report:

- he failed to include an opinion on MEC for 1988, even though he had concluded that there was a surplus on this project in the Doane Raymond Report; (Dec. 4, 2008, p. 92-102, Jan. 9, 2009, p. 48-53, D-1071 and D-1079).

- he did not look at all YH-related loans, despite his admission in cross-examination that there would be changes to his computation if there were additional asset values his selection did not capture; (Nov. 11, 2008, p. 210-211).

- he did not provide any opinion regarding the TWTC project (para. 1271), notwithstanding the fact that he increased the number of loans he considered in the DTS group as compared to 1997 (January 12, 2009, p. 146-151).

(d) In respect of Rosen, the trial judge did not find any "restriction" as a result of the fact that he was not asked a single question in chief on volume 2 of his report dated October 1997 (the computation of the loan loss provisions, i.e. exactly the same subject matter that his contemporary, Selman, did not address and based upon which the trial judge reached negative conclusions as to Selman's credibility and reliability). The fact that the Plaintiff chose to file Rosen's report dated October 1997 at the trial in 2009 does not compensate for this failure, particularly in light of the fact that he was unable to respond intelligibly to questions in cross-examination as to what he had done in respect of the opinion he reached in 1997. Two examples illustrate this (others follow in the GAAP section of the present Inscription in Appeal):

- Footnotes to volume 2, created for the new trial, often referred to documents that were not even in existence when he wrote his 1997 report and Rosen could not explain what he based himself on, often simply saying that Plaintiff's attorneys paralegals had located the documents; (February 25, 2009, p. 12-29; April 7, 2009, pp. 145-151, 194-197 and 213-223).

- With respect to an entire chapter in this volume of his report he stated that he was "clueless" and "if my life depended on describing DTS to you, I couldn't" (February 19, 2009, pp. 62-63).

In addition to the foregoing, the *judgment* completely failed to consider the fact, as revealed by Rosen's invoices, that he spent very little if any time considering the massive amount of documentary and testimonial evidence that had been adduced since his 1997 report on the loan loss provisions was finalized and filed. This is especially revealing when one compares this to the massive amount of time spent analyzing the same evidence by Vance and Froese, the impact of some of this new evidence on Vance's opinion as set out below, and the apparent impact on Froese's opinion, as indicated above.

(e) Despite the trial judge's statement to the contrary (para. 337), Vance's work was restricted in that he did no research to supplement his knowledge in areas where he had no personal

> experience, despite the acknowledged GAAP and GAAS principles referred to in paragraphs 449 and 2130 of the *judgment* that such information as to industry practices is relevant to a GAAP determination and necessary for an auditor to perform a proper audit. (April 16, 2008, p. 63-65 and p. 120-122).

203. Therefore, the conclusion reached by the trial judge that the Plaintiff's experts are to be preferred in light of restrictions in the Defendants' experts mandate is an error of law and fact because the so-called restrictions, when properly understood, have no bearing on credibility issues, but rather support the proposition that each expert spoke to his specialty, and because the determination of the credibility of Plaintiff's and Defendants' experts was not even-handed.

204. In her assessment of the credibility and reliability of the Plaintiff's experts, the trial judge refers to a series of additional matters, acknowledging that they would impact on the weight to be given to the experts' opinions. Despite that, in the case of the Plaintiff's experts, the Court never once identified an issue on which less than full weight was given. The Defendants can only conclude that the trial judge ultimately ignored her own concerns and inappropriately applied two different standards, one to Plaintiffs' experts, and another to Defendants' experts. This constitutes an error of law.

205. Paragraphs 334-339 and 355-358 reveal that the trial judge concluded that there is no difficulty if Plaintiff's experts changed their views over time, advocated for their client's position and were reluctant to acknowledge errors, but that there is a credibility problem that Selman (para. 374) was reluctant to respond to a question on a single issue. (In fact, the passage footnoted by the trial judge shows that the trial judge was asking a general question, and Selman continued to bring the conversation back to the specific topic he had been discussing, and that when the lengthy exchange was completed, Selman asked the trial judge whether she had any other questions on the topic and the trial judge said "no". At worst, this demonstrates an honest, if failed, attempt to communicate and not any reluctance to reply).

206. The trial judge concluded that the evidence of Rosen put into question his credibility for numerous reasons, but none of these had any apparent impact on the *judgment* or on the trial judge's acceptance of his opinion:

(a) Rosen did not present competing views (para. 353);

(b) Rosen is a GAAP and GAAS detractor, changes his views to suit his audience and used this case as a platform for his advisory business (para 348-351 and 354 and 359). The trial judge also consistently failed to refer to a single extract of the numerous textbooks written by Rosen and used by accounting professors across the country that contradicted his testimony before the Court as to the prevailing standards; (D-1109, D-1258 series, D-

1260 series, D-1263 series) and failed to refer to other publications which demonstrate his public view (D-1095 series, D-1097, D-1098, D-1099, D-1100, D-1101, D-1102, D-1106, D-1107, D-1108, D-1264, D-1276, D-1278, D-1279, D-1280, D-1282, D-1284, D-1298, D-1299).

(c) Rosen failed his CBV exams and blamed the examiners for being out to get him. Rather than finding this to be a reason for him not to testify on valuation issues, the trial judge criticized the Defendants for not bringing those examiners to testify that they hadn't failed Rosen out of spite (para 352). (January 29, 2009, p. 111-120). This is a novel and unreasonable conclusion as to the burden of proof, to say the least;

(d) The trial judge does not refer to Rosen's opinion in the section of her *judgment* dealing with maturity matching for 1988, 1989 and 1990. Defendants refer to the cross-examination of Rosen on this point (February 19, 2009, pp 240-267; February 20, 2009, pp. 51-71; March 31, 2009, pp. 93-120 and pp. 143-145; PW-1489-1), some of which is referred to in paragraphs 355 to 358 of the *judgment*. In doing so, it is probable that the trial judge in fact found him to be unreliable, but did not say so, for fear that her finding as to his lack of credibility and unreliability on this issue should have impacted upon her use of his testimony on any other. This failure to address Rosen's testimony on this issue is an error of law.

(e) The trial judge notes in paragraph 1515 that Rosen did not prepare a "best estimate on the loan loss provisions", but failed to then cite the authorities and opinions that GAAP requires this and failed to address the impact of this failure on Rosen's opinion. (Handbook s. 3020.12; April 21, 2008, p. 9, 80-81; May 27, 2008, p. 135);

(f) The trial judge relies on Rosen for Meadowlark in 1989 (para. 1628, 1631) without noting that he admitted in cross that he had not read the audit working papers correctly. (April 8, 2009, p. 207-210). Such a fundamental error should have impacted his credibility.

(g) At paragraph 2875, the trial judge refers to Rosen's explanation for producing his additional report, without referring to the evidence from the pleadings and the cross-examination that demonstrate that this was a false statement. (February 17, 2009, pp. 160-196; pp. 216-217)

207. The trial judge concluded at paragraph 334 that the fact that Vance made changes in his loan loss provisions from the first trial to the second trial is not

determinative because "all experts have made changes". What the trial judge fails to mention and address in her assessment of his credibility and reliability is the fact that Vance gave false testimony to the Court during cross-examination as to the reasons for the most significant change to his opinion. This in itself ought to have seriously impacted the credibility and reliability of his opinions and invalidated any reliance on same (April 21, 2008, pp. 152-169). The trial judge also concluded at paragraph 335 that the fact that Vance had been cross-examined in the first trial and debriefed was neutralized by the fact that Defendants had unprecedented tools to cross-examine Vance, namely his prior testimony. This is an error of law, particularly when one considers the fact that because of the Court's imposed time limitations, and the trial judge's repeated queries as to the estimated length and duration of Vance's cross-examination, as well as the read in rule, Defendants were unable to properly utilize the so-called "unprecedented tools".

208. For the Ottawa Skyline Hotel (OSH), the trial judge prefers Vance's computations to Goodman's after indicating at paragraphs 1212 (for 1988), 1597 (for 1989) and 1954 (for 1990) that the most significant difference between them was how they interpreted the appraisals. Not only is this an inappropriate selection between two schools of thought (as she stated the rule at paras 266-8), but Vance based his computations on an adjustment he made to the appraisal, and admitted in cross that he lacked the qualifications and knowledge to do so (July 7, 2008, pp. 17-27, 165-168; April 18, 2008, p. 157-161)

209. In paragraph 339, despite the fact that the trial judge concludes that there were a few occurrences where Vance was reluctant to qualify an opinion or acknowledge a mistake (which in itself is not accurate as this occurred several times), the trial judge concludes there is no negative impact on his credibility or reliability.

210. In paragraph 1719, the trial judge criticizes Lapointe for never having acted as an expert before a court on the issues he was mandated to opine on, without indicating that this was also true of Vance when he was retained and first testified before the Superior Court in 2000 in the present case.

211. At paragraphs 1511, the trial judge notes that Froese did not give value to Mr von Wersebe's personal guarantee and noted that C&L had never looked at von Wersebe's financial situation. She fails to mention that Froese also never looked at von Wersebe's financial situation. (Jan. 12, 2009, p. 35-68).

2. Other Matters Affecting Defence Experts

212. The trial judge also noted other reasons for her rejection of the credibility and reliability of the Defence experts, which reasons are inconsistent with other conclusions she reached and disclose a palpable failure to understand the testimony given or otherwise constitute errors of fact and law.

a) Selman

213. Selman is criticized (para. 375) for principally being a critic of Plaintiff's experts. However, during the trial (February 27, 2009 p. 109) the trial judge suggested that Defendants not waste time cross-examining Rosen and should use Defendants' experts to criticize Plaintiff's as is normally done. Therefore, not only does this criticism betray a misunderstanding of the burden of proof, pursuant to which Defendants might well engage an expert to do nothing other than comment on Plaintiff's experts, but a reversal of the standard that the trial judge herself considered appropriate. This is an example (and there are many throughout the *judgment*) of the trial judge literally copying a written argument made by Plaintiff without due and appropriate consideration of the merits of same.

214. Selman is criticized for being unable to explain why certain changes had been made from his 1998 report to his 2008 report. That is not correct. He explained that there was an intervening report, produced in 2005 for the trial before Justice Carrière and which accounted for the evidence produced in the first trial, and that in preparation for this trial he had updated the 2005 report. As a result, if a change had been made from 1998 to 2005, he had not focused on it and did not recall. (May 5, 2009, p. 38-42; May 25, 2009, p. 51-56). This should be contrasted with the trial judge's acceptance of Rosen as a credible expert, who filed (but never testified to) a volume on LLPs written in 1997 and despite there being a chapter on DTS he admitted he was "clueless" about it (see above).

b) Goodman

215. Goodman is found not to be credible (paras 388-391) for testifying that he has no financial interest in the outcome of this litigation. Whether his firm, PwC, has any interest in the outcome of this litigation is the subject of separate proceedings. The *judgment* therefore inappropriately rules on a matter that the Court was not seized with. Goodman testified that he referred the matter to the lawyers and the CEO of the firm and was told that he has no financial interest. The trial judge completely misunderstood and/or misstated Goodman's testimony on this issue, as a reading of the passage referred to reveals. September 3, 2009 pp. 131, 191-200 and October 8, 2009 p. 200)

216. The trial judge expressed concerns (para. 392) that Goodman did not consider related party transactions or fraud as between Castor and its auditors when assessing LLPs. This reveals a serious misunderstanding of GAAP, as such considerations are irrelevant to measurement (value) issues. (D-1104 and D-1282 – a sworn affidavit signed by Rosen and an article written by Rosen).

217. The trial judge states that Goodman was inconsistent in his methodology (para. 395) regarding the usefulness of signed versus unsigned documents, which is not supported by the reference footnoted. In fact, it was Plaintiff's

experts (and the trial judge) who relied on the unsigned appraisal that was not on letterhead and not given to Castor until mid-1991 that Goodman was explaining his reluctance to use. (PW-2908, vol. 3, p. 43; January 7, 2009, p. 126-143; April 8, 2009, p. 15-18. Moreover, the trial judge is inconsistent in the application of her reasoning, in that the evidence revealed Plaintiff's experts rejected documents that were put to them on the basis they were unsigned or that were signed but in their view "preliminary", and yet the trial judge found no inconsistency in these same experts' use of an unsigned document. (See Vance's refusal to use D-580, para 537 or PW-1108A but reliance on PW-1108B, July 7, 2008, pp. 239-244).

c) Levi

218. In paragraphs 398, 400 and 402, the trial judge held that Levi's mandate "excluded whether there was a failure of GAAS", and "does not address GAAP and GAAS compliance by the auditors". This is a manifest error of fact and law, in that Levi's mandate specifically included a consideration whether the Defendants applied ordinary GAAS in determining whether they could have detected the fraudulent transactions he identified.

219. In paragraph 409 the trial judge criticizes Levi for having only reviewed testimony that was provided to him – not all testimony. However, this is not supported by the evidence at footnote 391, where he indicated that he or his staff reviewed testimony, and when he believed it was relevant, he would ask for all additional evidence on specific topics. Moreover, no similar finding is made concerning Plaintiff's experts, who did exactly the same thing or even less. (Rosen, February 19, 2009, pp. 207-224; pp. 229-232; Froese, Dec. 4, 2008, p. 15-16, 166-169 and 190-191; Vance, April 17, 2008, p. 158-230)

220. At paragraph 416, the trial judge held that Levi's bills could be viewed as 'fraudulent' when viewed in accordance with the test for fraud he proposed. The trial judge failed to refer to the statement made by Plaintiff's counsel, with whom she agreed, (February 3, 2010 p. 204) that it is **inappropriate to interpret documents 10-20 years after the fact** without considering the explanations of those involved at the time. Defendants reiterate that this is precisely the problem with the trial judge's interpretation of the working papers and the 'missing documents' issue.

221. As a result of the foregoing, the trial judge manifestly erred in fact and in law in her application of the standards to be applied in assessing the credibility and reliability of the experts. The trial judge, based on these errors of law, rejected Defendants' experts, and therefore relied exclusively on the opinion of Plaintiff's experts and. As a result, she applied inappropriate and erroneous standards to the GAAP and GAAS issues before the Court. These errors are fundamental and pervasive and were determinative in her conclusions, such that, on their own, these errors invalidate the *judgment*.

C. Errors as to the assessment of lay witnesses and documentary evidence

1. Lay witnesses

222. In this regard, the trial judge held that each of R.B. Smith (Castor employee), Whiting (YH employee), Prychidny (YH employee), Strassberg (DTS auditor) and Moscowitz (DTS employee), and various lawyers who worked at McLean & Kerr to have been credible and reliable witnesses. The *judgment* completely fails to address the credibility issues surrounding these witnesses and failed to consider relevant evidence that went to their credibility as well as to the fraud defence. The *judgment* fails to distinguish between the honesty of a repentant liar when faced with a trial process and that same person's willingness to produce false documents and provide false information 20 years earlier. Some specific manifest errors of fact and law relating to credibility are summarized below, and the impact of this evidence and the failure to consider the credibility issues surrounding same is further detailed in respect of each GAAP topic, or in respect of the GAAS issue and the fraud issue below.

a) R.B. Smith

(a) The trial judge completely fails to address the impact of the fact that Smith was examined, cross-examined and then debriefed by Plaintiff's counsel after the first trial, which resulted in Smith providing his evidence in a "scripted" manner.

(b) In finding Smith to be credible and his evidence reliable, the trial judge failed to consider the cross-examination which demonstrated him to be an evasive witness who had provided self serving evidence in chief that was so rehearsed and well tailored to Plaintiffs' theory of the case as to render it implausible. (Sept. 17, 18, 22, 23 and 24, 2008).

(c) In finding Smith's testimony to be relevant (and sometimes conclusive on various issues), the trial judge failed to consider *inter alia* that: (1) he admitted that he did not tell the auditors what he told the Court on the basis that they did not ask the "right" question; (2) that it was his view of his role that he was to toe the party line as directed by Castor and Stolzenberg in respect of the loans and that he was not to provide what he, a senior vice president, personally believed in respect of the value of the security and collectability of the loans; (3) that he was not a Chartered Accountant and had no GAAP training; (4) that he was not in the "inner sanctum" and had no personal knowledge of the meetings and negotiations between YH and Castor (which were conducted, from Castor's perspective, by Stolzenberg and Dragonas). (Sept. 16, 2008, p. 13; Sept. 17, 2008, p. 16-21, 35-

41, 86-89, 113-118, 130-136, 205-206, 212-213; Sept. 22, 2008, p. 53-54, 70, 82, 96-97, 118; May 14, 2008, p. 65-67, 69, 182-183; May 15, 2008, p. 7-8, 35, 70, 115, 118-122);

(d) The trial judge completely failed to consider the impact of the allegations of fraud made against Smith in the proceedings brought by the Trustee in Bankruptcy. (PW-8A, paras 64-66)

(e) The trial judge completely failed to consider the fact that Smith was sued by BHF Bank, one of the Castor plaintiffs, for violation of the *United States Racketer Influenced and Corrupt Organization Act* in connection with his role and activities while employed by Castor, and then gave testimony as part of his obligation undertaken to settle this claim as well as the Trustee's claim (D-201A, D-201B, D-201C, September 17, 2008, pp. 12-13).

(f) The trial judge completely failed to consider the fact that Smith admitted that he received very large bonuses for "successful years" that were timed to be paid after the audit; (September 17, 2008, p. 30; pp. 162-163, D-125, D-127, D-128, D-129).

(g) With respect to the "Nasty Nine", the trial judge completely failed to consider the fact that Smith admitted that he had been a willing participant in an elaborate plan conceived of by Dragonas, along with other Castor employees and lawyers, to create companies documents, loan agreements and payment trails in order to conceal the truth from C&L about the relationship between Castor and YH (September 17, 2008, pp. 222-224; 144-148, 151-153, September 23, 2008, pp. 104-105).

b) D. Whiting

(a) The trial judge completely failed to assess the impact of the evidence referred to below on Whiting's credibility, as well as upon the defence of fraud. In this respect, the Court appears to have been influenced by her conclusion in the Judgment on Objections that Whiting was a witness called by Defendants. In respect of this issue, Defendants refer the Court to their Inscription in Appeal on the Judgment on Objections.

(b) The trial judge completely failed to assess whether Whiting prepared documents that were designed to help Castor obtain a clean audit opinion, as evidenced by: i) the memo he wrote indicating that negotiations would be suspended until after Castor's audit was complete to keep Castor's representations "on an even keel" (D-213); ii) his preparation of 1990 financial statements for the Nasty Nine companies in 1992 even though he

did not believe the transactions had taken place (PW-1176 and February 8, 2000, pp. 52-86); iii) his testimony on "audit-driven transactions" (February 14, 2000, pp. 9-14); iv) his signature on all confirmation replies that essentially advised C&L that YH's books matched Castor's books in 1990, despite the fact that he had instructed the YH bookkeeper not to adjust YH's books to reflect the $40 million payment in interest until later (February 14, 2000, pp. 54-58); v) his conviction on disciplinary charges for signing false confirmation replies to C&L omitting reference to the side letters on von Wersebe's personal guarantee. In respect of the latter point, the trial judge excluded the evidence of the conviction, a decision that has been appealed from in Inscription in Appeal No. 3;

(c) The trial judge failed to assess the fact that none of the YH financial statements that Whiting prepared subsequent to receiving YH's auditors draft adverse opinion, PW-1148A (and upon which financial statements Plaintiff's experts heavily relied), contained any of the losses YH's auditors had recommended, nor did the Court assess the impact of Whiting's testimony explaining the reasons why he did not do so.

c) W. Prychidny

(a) The trial judge completely fails to address the impact of the fact that Prychidny was examined, cross-examined and then debriefed by Plaintiff's counsel after the first trial, which resulted in Prychidny providing his evidence in a "scripted" manner.

(b) The trial judge erred in fact and in law in preferring Prychidny's testimony at trial in that despite any purported honesty displayed on the stand, his testimony referred to in the GAAP section below reveals that he prepared memos and other documents that he believed to be false, according to that same testimony. The trial judge further failed to appreciate the significance of this testimony in respect of the defence of fraud;

d) Moscowitz and Strassberg

(a) The trial judge's assessment of their credibility was impacted by a decision that Defendants are appealing (see Inscription in Appeal No. 2) not to admit parts of their testimony and exhibits that are inconsistent with the thesis put forward by the Plaintiff regarding when Moscowitz and Strassberg concluded that D.T. Smith should have booked losses;

(b) Further, with respect to the credibility of Strassberg, and despite the fact that the trial judge included a footnote reference in

> paragraph 1061 in the Judgment on Objections to Strassberg's testimony as to his firm's document retention "policy", the trial judge did not note that the testimony in question makes clear that not only was there no written policy, but more importantly that Strassberg testified that the policy was an "understanding", not written, and that pursuant to same, records more than five (5) years old should have been disposed of. The trial judge also fails to note that the same testimony reveals that, despite the fact that Strassberg testified that he looked for the records for the first time in 1999, and despite the five (5) year "policy" referred to, the 1988, 1989 and 1990 audit working papers were destroyed at the latest sometime in 1995 but the audit working papers from 1991 and 1992 had not been destroyed, despite the fact that under the "policy", they ought to have been destroyed by 1997 at the latest.

223. In many cases, the trial judge confuses two questions: "Were these witnesses honest when they testified in Court?" and "Were these witnesses honest when they prepared documents and provided information at the time relevant to the proceedings?" Defendants submit that it is impossible to answer both questions in the affirmative on the basis of the evidence in the record, and that the trial judge's failure to address this central issue as to their credibility and reliability is an error of fact and law of sufficient importance to the point of invalidating the entire *judgment*.

224. Having confused and failed to address those questions, the trial judge then accepts their current testimony, which Defendants submit results from an egregious error of fact and law in the appreciation of the evidence.

225. Subsidiarily, even assuming they were finally telling the truth to the Court, the appropriate standard on which to determine whether GAAP was met in Castor's financial statements in 1988, 1989 and 1990, is the state of Castor's knowledge at the time that each year's financial statements were completed, and not their evidence at trial. Indeed, on this issue, the trial judge completely fails to consider a revealing statement from Vance as to his use of the trial testimony (Vance, April 17, 2008, p. 189-196). This is clear from the trial judge's citation of the relevant Handbook provisions at paragraphs 473-475 of the *judgment*.

226. In addition, the trial judge fails to deal with a glaring omission in Plaintiff's case, an omission which by itself should cast significant doubt as to their ability to meet their burden of proof, and this despite the fact that it was specifically raised in Defendants' argument. After correctly finding that management prepares and is responsible for the financial statements, and the GAAP decisions relating thereto (paras 271-272), the trial judge does not address the fact that the Plaintiff failed to call the individuals who actually were responsible for preparing the financial statements and making the decisions on the GAAP disclosure issues and value of the loans, namely Dragonas, Goulakos and Stolzenberg

(Gourdeau, Jan. 14, 2008, p. 121). The trial judge nevertheless makes rulings on "Castor's intent" that are critical to the GAAP issues.

2. Documentary Record

227. In paragraphs 278 to 304 of the *judgment*, the trial judge addresses what she calls the books and records issue. At paragraphs 299 and 300, the trial judge concludes that the concern about the books and records has no basis, given the documentation that exists and the correlation between the documents and the working papers, as well what she calls the "degree of completeness" of the Castor records. The manner in which the trial judge has addressed the issue completely ignores the Defendants' arguments, in that this issue is directly relevant to the GAAP issues as well as the defence of fraud. The trial judge has concluded that it is appropriate to make a ruling based on the documents now before the Court, despite clear indications that these are not the same documents found in Castor's files by the Trustee, available to Castor at the time or put before the auditors.

228. By using the documentary evidence indiscriminately – i.e., without regard to its source or whether and when it was known to Castor and without considering that there were other documents then available that are no longer available, the trial judge committed manifest errors of fact and law by disregarding the following facts or not considering their impact on the GAAP issues and the defence of fraud:

- the length of time that has elapsed;
- the state of the records found by the Trustee (Gourdeau, Feb. 19, 2008, pp. 191-192 and 202-217)
- the commingling of documents by the Trustee to the point that he can no longer state with certainty which were in Castor's files (Gourdeau February 19, 2008, p. 214-217; February 22, 2008, p. 61-63);
- evidence of document shredding that occurred after Castor filed for bankruptcy protection in February 1992 and prior to the Trustee taking possession of the premises in July 1992, and which occurred under the watch of Smith and other witnesses called by Plaintiff (September 17, 2008, p. 23-24; video produced as D-644 & D-941; February 18, 2008, p. 270-274; February 19, 2008, p. 190; January 14, 2008 p. 96-97; April 17, 2008 p. 74-76);

- the fact that many documents were out of the Trustee's control for long periods of time (PW-2391-5 and Feb. 19, 2008, pp. 58-61 and 142-146; PW-2391-2 –Jan. 14, 2008 p. 98-104 and p. 135-140; PW-2393-1);

- the fact that the evidence of 'completeness' that the trial judge relied on was with respect to accounting documents only, but not the loan file documentation;

- the evidence of the working papers and the auditor testimony as to what they saw; and

- that there were in fact critical documents in Castor's possession or that Castor had access to at the time that have not been found and yet which have been referred to in the *judgment* as the basis of a finding of negligence.

as the following examples show:

(a) In paragraph 689 the trial judge refers to a pledge agreement that was never found, despite the ease for Plaintiff to have produced it had it existed, as the other party to the transaction was a Castor plaintiff.

(b) The trial judge fails to refer to Smith's testimony that information that assisted Castor in understanding the prevailing price level of DTS homes is no longer in Castor's files (June 10, 2008, p. 29-30)

(c) In paragraph 871, the trial judge finds that no Mullins 1988 appraisal existed despite the evidence of the working papers and the auditor, which the trial judge simply omits (Daniel Seguin, Dec. 12, 1995, questions 495 to 511, p. 166-172)

(d) In paragraph 1268 the trial judge states that there is "no evidence in the record" that the TWTC appraisal referred to in the 1988 working papers exists. This is not only a contradictory statement – the working paper itself is evidence, but once again, the auditor who wrote that working paper testified otherwise, and there is no finding regarding his lack of credibility (Daniel Seguin, Jan. 17, 1996, p. 29-31)

229. The consequences of the trial judge's errors of law and fact with respect to the documentary evidence are serious, and have a direct consequence on the conclusions reached. One example suffices. In respect of one project (TWTC),

for one year (1990), the consideration by Vance of a single appraisal that he claimed not to have seen during the first trial, caused him to reduce his LLP, which had ranged up to $80,000,000, to zero. (April 21, 2008 p. 30-31, 92-94 , p. 170-171; April 21, 2008, p. 1 to 171; D-952).

D. Consequence of the above

230. As a result of all of the above, and as is also explained in other sections of the present inscription, the *judgment* demonstrates a systematic bias in the assessment of the credibility of the witnesses and evidence, and, moreover, discloses a variety of errors of law, omissions of significant facts, inconsistent applications of principles and clear instances of misunderstanding of the technical issues (cf. Section IV, *infra*). The rush to finish was at the expense of understanding the issues; so that the conclusions in fact and in law reached by the trial judge in the present case are inherently unreliable to a reasonable observer.

231. Moreover, it is manifest that, without the expert evidence illegally considered by the Court as per the introduction of the new expert reports and the "read-in rule', Plaintiff, who has chosen to base his case on such evidence, has not discharged his burden of proof.

232. As a result, the *judgment* under appeal should be reversed by this Honourable Court.

- *Sharbern Holding inc.* v. *Vancouver Airport Centre Ltd.,* 2011 SCC 23 (May 11, 2011), par. 173 to 178.

SECTION IV. ERRORS IN THE ANALYSIS OF C&L'S NEGLIGENCE

A. Audit reports on the financial statements

1. Misapplication of GAAP – General – All Years

233. The trial judge misapplied GAAP in coming to the conclusion that the financial statements were misstated. Although individual GAAP errors will be addressed in respect of the relevant items in the financial statements, the trial judge has made three fundamental and overarching errors that permeate the entire decision, in respect of both GAAP and GAAS. As a result of these errors of fact and law, the trial judge assessed the financial statements (and ultimately, Defendants' work) on the basis of erroneous legal, accounting and auditing standards.

a) Two Schools of Thought

234. The first overarching principle, true under both GAAP and law, is that set out in the *judgment* at paragraphs 266-268, namely, the trial judge's recognition that she could not choose between two (2) schools of thought, and that once two (2) schools of thought were demonstrated to exist, Castor was entitled to choose between them and the C&L cannot be negligent for not insisting on a different presentation.

235. Despite this, the trial judge erred in her application of this principle in at least five ways:

(a) First, as a result of the foregoing errors of fact and in law in assessing the relative credibility and experience of the experts, the trial judge failed to give proper consideration to the Defendants' experts' views, leaving her with the Plaintiff's experts' views only, which she then accepted, regardless of their relative merit had the same tests for credibility been applied by her to them, as she was required to do;

(b) Similarly, by accepting the view of a Plaintiff's expert found in the report that the Plaintiff filed and on which he gave no testimony, or by not considering the testimony that differed from the report, the trial judge at times inappropriately 'created' a second school of thought to select from, whereas in reality only one view, that reflected in the testimony of the Defendants' expert, was validly in evidence;

(c) The trial judge sometimes accepted the views of the Plaintiff's experts without considering the evidence in the record of authoritative textbooks or the writings of the Plaintiff's witness Rosen that either contradicted those stated views or

demonstrated that another school of thought was generally accepted;

(d) Despite recognizing, at paragraph 449 of the *judgment*, that GAAP is comprised of the Handbook as well as principles that are generally accepted by virtue of their use by a significant number of entities, the trial judge rejected evidence of what other entities were doing at the time or maintained objections to evidence that demonstrated what other entities were doing, thus disregarding a generally accepted school of thought. In fact, the entire section of the *judgment* on GAAP principles (p. 88-91) fails to refer to anything outside the Handbook, despite the production of numerous CICA publications, recognized literature and textbooks and articles written by Plaintiff's expert Rosen that demonstrated the applicable GAAP principles;

(e) In some instances, the trial judge in fact noted a dispute amongst experts and without giving reasons to prefer the credibility or experience or research of one of them over the other, in fact "chose" one school of thought.

236. Specific examples of these errors of fact and law will be given in relation to specific financial statement items, below.

b) Hindsight

237. The second overarching principle, again true in GAAP and law, is that hindsight is not to be used, as seen in the *judgment* at paragraphs 269-270 and in the Handbook section cited at paragraph 475.

238. In addition to the errors regarding the source and completeness of documents now in the Court record, the trial judge simply disregarded this principle on numerous occasions where it was very clear that the documents that Plaintiff's experts relied on to reach their GAAP conclusions were either not in existence or had not been sent to Castor until after the completion date of the financial statements in question. (April 7, 2009, p. 186-197, 212-215; Jan. 7, 2009, p. 126-143, 210-211, 215-224; April 10, 2008, p. 142-144; July 7, 2008, p. 95-99, 264-267; Jan. 9, 2009, p. 36-38, 66-70, 98-102; Dec. 5, 2008, p. 123-124; Jan. 12, 2009, p. 222-232; June 13, 2008, p. 192-194; May 5, 2010, p. 33-35, 41-42; April 17, 2008, p. 199-233; D-137, D-145, PW-1070E5, PW-1108B, D-586).

239. In addition to specific examples of this fundamental error that will be addressed in connection with the specific financial statement items, the following are some general examples:

(a) During the trial, on April 18, 2008, p. 71-72 the trial judge considered relevant the fact that Castor went bankrupt with almost no assets in 1992;

(b) At paragraphs 811, 1419 and 1698, the trial judge states the conclusion regarding the sufficiency of Castor's LLPs in each year as follows: "Taking into account the facts as they unfolded, viewed and analyzed in the context of the relationship between Castor and YH, the obvious conclusion is..." (our emphasis). The underlined words, together with a review of the evidence she based her *judgment* upon, shows that the trial judge in fact used hindsight in assessing the required LLP;

(c) For example, in paragraph 1501, the trial judge refers to Vance's reliance on financial statements that were or should have been available to C&L, disregarding the fact that many of these were in fact prepared long after the period they refer to. As a result, even accepting the theory that C&L should have insisted that Castor make a formal request on YH for these documents, and that YH would have complied with such a request (an assumption which Defendants submit bears no relationship to the facts in evidence), the financial statements prepared at that time would not necessarily have been the same as those finally produced later – even if for the same "as at" date. The trial judge also disregards the fact that there were multiple financial statements from multiple sources (see Gourdeau testimony Feb 22, 2008 p. 61-63) and that Plaintiff's experts arbitrarily chose among them;

c) Defendants' Technical Material

240. Throughout the *judgment*, the trial judge refers to C&L's internal technical materials in her reasoning on the applicable GAAP and GAAS standards. This is an error of law, and the trial judge fails to mention that experts for both Plaintiff and Defendants agreed that these internal technical materials were not "generally accepted" and therefore not the appropriate standards to use (eg. see Froese December 4, 2008, p. 227-231). These are private documents, not shared amongst firms, and the opinion for which C&L is sued clearly articulates GAAP and GAAS as the standards they applied. Specific examples of the trial judge's use of these technical materials will be given in relation to specific financial statement items.

241. Moreover, as this is an obvious error of law, it demonstrates that the *judgment* on all these points has been inappropriately influenced by extraneous matters and must be overturned.

2. 1988 Financial statements – GAAP Issues

a) SCFP/Capitalized Interest/Fairness

242. The trial judge held that the 1988 financial statements did not meet GAAP because a SCFP which disclosed what portion of Castor's interest income was derived from capitalization of interest revenue was not presented. As indicated in

paragraphs 515 and 542, the criticism regarding the presentation of a SCNIA rather than an SCFP is based on the proposition that a properly presented SCFP would have disclosed the amount of capitalized interest revenue.

243. Plaintiff's argument, which the trial judge adopted, is that there are three (3) possible bases for the asserted GAAP requirement that this be disclosed: a specific article in the Handbook requires it; the requirement for an SCFP implies it; or overall "fairness" demands it.

244. The trial judge's analysis begins (p. 96-103) with a discussion of the evidence surrounding the evolution of Castor's Statement of Changes. This is irrelevant, as it delves into years prior to 1988, which are not in dispute and therefore Defendants never presented a defence to the criticisms of prior years' work. Nonetheless, this evidence clearly influenced the trial judge's conclusions.

245. The trial judge's analysis overlooks the accounting principle set out at paragraph 547 of the *judgment* that the auditor cannot oblige the client to disclose something that GAAP does not require. Therefore, regardless of the historical rationale for Castor's choices, the only proper question before the Court was whether GAAP required a SCFP that disclosed capitalized interest revenue as a separate item. Had the trial judge considered the issue appropriately, the answer is clear: there were two schools of thought, and in fact, the school of thought adopted by Castor was the majority view.

246. In fact, the trial judge's historical review contains a significant error, which itself caused her to conclude at paragraphs 531 and 491 of the *judgment* that the debate between the two (2) schools of thought that had previously existed was resolved in 1985 when amendments to s. 1540 "came into effect".

(a) First, contrary to what the trial judge stated, as the Introduction of the Handbook clearly states, the date (in this case October 1985) referred to in brackets refers to the date the amendment is introduced. However, it comes into effect for financial years beginning after that date. In other words, in Castor's case, the amendments to s. 1540 applied for the first time for the year ended December 31, 1986;

(b) Moreover, the trial judge's adoption of Vance's testimony that the debate ended in 1985, making pre-1985 publications irrelevant, selectively refers to only a part of Vance's testimony on point. The following day, May 28, 2009, pp. 9-10 Vance confirmed that the amendments in question did not introduce the SCFP, but "...replaced a section that was called "Statement of Changes in Financial Position" that had a much more loser (sic) definition of "funds" and presentation requirements".

(c) A reading of the Anderson textbook referred to by the trial judge (and Vance) in paragraph 531, PW-1421-7 pp. 584-585, demonstrates that the professional debate was not over the contents of the section (which Vance testified had been tightened up) but over whether this statement was required to be provided at all, given the language of the Handbook (including the word "normally" found in S.1000.04, which was in fact codified as part of the Handbook in 1988 to be immediately effective).

(d) Therefore, the debate as to whether a SCFP was necessary did not end in 1985, as Defendants show below.

247. The trial judge made numerous errors in determining that an SCFP that segregated capitalized interest revenue from other revenue was required, including:

(a) failure to refer to the evidence of all the experts including, for example the analysis of financial statement precedents researched by Selman. (May 8, 2009, p. 188-197, D-1295-2 (Exhibit 1); D-742; May 13, 2009, p. 32-46);

(b) selective reference to Handbook provisions; (Handbook Introduction to Accounting Principles; PW-1419-12; Selman, May 13, 2009, p. 103-108; Vance, May 27, 2008, p. 185-193);

(c) failure to refer to all the evidence found in textbooks and articles, including those written by Rosen after the amendment to s. 1540. (D-1258-1, p. 609, 640; March 30, 2009, p. 134-140; May 13, 2009, p. 85-96, D-1295 section 4.5.4.17-4.5.4.19; D-491-10, p. 400; May 27, 2008, p. 153-157, especially p. 156; D-491-1, p. 473; D-491-10, p. 412-413; May 27, 2008, p. 191-193, 206-207, 216-220; D-491-10, p. 412-413; April 22, 2009, p. 85-87; D-1280, Financial Post March 7, 2009; D-1260-3; D-1260-4, D-1278 Bottom Line, March 1994; D-1299 Canadian Business February 17, 2003; D-1279 National Post June 14, 2006; D-1276 Canadian Business February 12, 2007; March 30, 2009, p. 157-168; March 31, 2009, p. 26-27);

(d) failure to refer to all CICA publications. (May 8, 2009, p. 11-18; D-1296, p. 3, item b; May 13, 2009, p. 85-101; Pw-1432A, par. 8.42-8.44; D-659-1 (re 4.5.8.04)A; May 8, 2009, p. 187-188; May 27, 2008, p. 229-238; D-659-1 (re 4.5.8.04)A, Richmond Savings Credit Union – p. 43; Great West Life p. 50; Hong Kong Bank of Canada – p. 51; Scotiabank – p. 250; May 13, 2009, p. 103-108; D-1295 s.4.5.4.23; D-659-1(4.5.8.17); May 13, 2009, p. 96-103, D-1295 s.4.5.4.21; D-659-1 (re 4.5.8.15)A);

(e) failure to refer to the extensive evidence that contradicts the position taken by Vance and adopted by the trial judge at paragraph 511 as to what other industry participants were in fact disclosing. (May 8, 2009, p. 184-193; D-659-1 (re: Exhibit 4)-27; D-669-1 (re: 4.5.8.06; D-659-1 (re: Exhibit 4)26; May 13, 2009, p. 55-59; 659-1 (re: 4.5.3.23)C, particularly p. 24 and 19; May 13, 2009, p. 36-41; May 28, 2008, p. 82-84; D-508-6; May 13, 2009, p. 46-63; March 31, 2009, p. 16-20 and 24-28);

(f) failure to refer to the evidence that demonstrated that the statement included by Castor, regardless of its name, provided no less information than SCFPs that other lenders were providing during the relevant years in financial statements that received clean audit opinions as being in accordance with GAAP. (PW-2690; D-1295, p. 134; May 13, 2009, pp. 74-86, D-1302);

(g) reference to non-authoritative sources to support the conclusion, including for example C&L's technical materials at paragraph 526;

(h) failure to refer to the governing statute. (NBBCA s 100, May 13, 2009, p. 120-5; D-1295, p. 128; May 27, 2008, pp. 202-204; October 9, 2009, p. 99);

(i) Although a GAAS issue, Defendants further note that no reference is made to the engagement letter PW-1053-5A-1, pursuant to which Castor engaged C&L to opine on its SCNIA, not a SCFP. As the Board of Directors bears responsibility for the engagement of the auditors, disregarding this evidence is particularly egregious in a case taken by a Board member.

248. Clearly recognizing, although not stating overtly, that there was no consistent clear evidence that GAAP required such disclosure, the trial judge appealed to the fairness "standard", after concluding at paragraphs 729-730, that based on promotional brochures used by Castor and **on which C&L gave no opinion**, third parties might be misled as to the proportion of Castor's income that was received in cash each year.

249. In addition to the same type of errors made with respect to the SCFP listed above, the trial judge made the following errors in dealing with the "fairness" issue as it related to capitalized interest:

(a) The technical authorities cited at pages 161-169 of the *judgment* are incomplete or are cited without any conclusion, in circumstances where a fair reading of the authority would lead to the conclusion that no such disclosure was commonly made and that the "fairness" principle did not supplement that 'gap'. (See Handbook, PW-1419-2A S. 5400.11 and .12; PW-1419-3A, S. 5400.15 and .16);

(b) incomplete reference to the evidence of Plaintiff's experts Rosen and Froese by omitting their evidence, whether from cross-examination or from their prior publications or reports that supports the Defendants. (May 28, 2008, p. 249-250; February 25, 2009, p. 75-76; June 11, 1009, p. 50; PW-1421-22, p. 553, footnote 18; PW-2370-4A, the BC Company Act 1979, s. 212(2); 1980, D-1258, p. 15-17, particularly p. 16; Plans to Reform Canada's Securities Rules "Hot Air", Investors Digest of Canada – July 18, 2003 (D-1098); May 28, 2008, p. 199-200; Feb. 25, 2009, p. 125-128; Vance, May 28, 2008, p. 249-250; February 25, 2009, p. 75-76, June 11, 2009, p. 50; May 7, 2009, p. 107-111);

(c) erroneous application of the *Kripps, Ter Neuzen and Roberge* decisions;

(d) failure to consider the evidence of Plaintiff's experts that in fact the financial statements would not be misleading to a reasonable user prepared to study the financial statements with reasonable diligence. (Lowenstein, March 21, 2005, pp. 38-39); Vance April 16, 2008, pp. 222-252; May 27, 2008, p. 1524; Rosen February 17, 2009, pp. 115-119; March 30, 2009, pp. 114-122; D-510-22 and D-510-23).

250. These errors are too numerous to identify in the present inscription in appeal, and many more were listed by the Defendants in their written argument, which the trial judge largely ignored. However, the following evidence, none of which is referred to or addressed in the *judgment* illustrate the point:

(a) Froese, who was not mandated to give an opinion on this topic for the current trial (although this was not noted as a "restriction" by the trial judge), when confronted with what was written in the Doane Raymond Report he had signed (D-1071), admitted (December 4, 2008, p. 92-102) that it was his understanding that there was no specific requirement to disclose the extent of capitalized interest revenue under GAAP in 1988-1990, including as part of a SCFP;

(b) Rosen, when asked about the wording of the Handbook and whether it absolutely required a SCFP, admitted (March 30, 2009 p. 154-155) that the language used could have been in deference to legislation containing statutory differences. The trial judge disregarded this testimony, as well as the Introduction to the Handbook, which states that statutes prevail over the Handbook, and then despite this Handbook provision, compounded her error by failing to consider that Castor's governing statute, NBBCA does not require a SCFP.

(c) D-742, an April 1989 letter from the Superintendent of Financial Institutions to the CICA regarding the Handbook section on SCFP, states: "Existing formats provide virtually no useful information for banks. Yet, there is a real need for good liquidity, cash flow and capital management information. In our view the guidance in Section 1540 of the Handbook is not sufficient."

(d) With respect to "fairness", Vance testified on March 4, 2008, p. 88 as to what the term "presents fairly" actually means, and explained that it was introduced to warn readers that the standard was something less absolute than "true and correct";

(e) Rosen wrote in a 1999 textbook, not changing the earlier version despite the intervening Kripps decision that: (D-1260 and D-1263) 1) GAAP and GAAS do not require that financial statements be "fair" or 'tell the truth'; 2) financial statements do not express "truth" or "reality"; 3) the auditor does not say that his client has followed the best GAAP, but merely "a" GAAP; 4) What is fair to one group may not be fair to another group; 5) GAAP is not "truth" and accounting deficiencies can render financial statements of little use for many credit and investment decisions; and 6) auditors cannot prevent management from using a GAAP that is not the best GAAP. He continued to complain about lack of "fairness" as a GAAP concept in D-1058;

(f) With respect to whether Kripps introduced a new concept that was simply not generally known in 1988-1990, as reflected in PW-2370-5A-C, an affidavit filed by the president of the CICA with the Supreme Court of Canada, which demonstrates that the CICA did not agree that the British Columbia Court of Appeal accurately captured what accountants generally believed to be the relevant principles during the relevant years (and indeed, after the relevant years). (See also Anderson PW-1421-9 and PW-1421-22);

(g) As to whether Castor's financial statements were in fact misleading to a reasonably informed reader due to the absence of this information, both Vance (April 16, 2008 p. 222-232) and Rosen (February 17, 2009 p. 115-117) stated that a review of the financial statements alone (namely without any of the thousands of documents and accounting records before the Court) allowed them to note the absence of a SCFP as well as the absence of disclosure of capitalized interest.

(h) In fact, the interpretation given by the trial judge is exactly the opposite of that reached by the CICA in publications dated 2001 (D-520) and 2003 (D-659-1(re:4.4.08)A and B), when section 1500.05, cited by the Court, was in the process of being

amended, particularly when viewed in light of previous pronouncements (May 7, 2009, p. 86-94; D-1295 S. 4.5.1.02; D-519, p. 67; May 7, 2009, p. 92-102; Handbook Release no. 8).

251. As a result of these numerous errors of fact and law, the trial judge's conclusions on this issue are fundamentally flawed. The question is not whether the trial judge's conclusion is "better" or "right", but whether a reasonable practitioner had to conclude that GAAP required the disclosures suggested by Plaintiff and adopted by the trial judge. The clear answer is that, at best, there were two schools of thought.

b) Related Party Transactions

252. The trial judge made at least three different rulings as to whether GAAP was breached as a result of a failure of the financial statements to disclose all related party transactions, which rulings are not consistent:

(a) At paragraph 419, the trial judge states that the financial statements were misstated due to undisclosed related party transactions;

(b) At paragraph 543, the trial judge states that there is "no doubt" there were undisclosed related party transactions;

(c) At paragraph 564, the trial judge states that it is "highly probable" that more related party transactions needed to be disclosed given the "strong indicia" in the evidence, but that such indicia are "not enough to reach final conclusions".

253. The point that the trial judge fails to properly consider, once again, is that whether or not it is NOW possible to reach a conclusion, based on evidence NOW available after years of forensic investigation costing millions of dollars conducted by the Trustee in Bankruptcy and accounting experts who are also certified fraud examiners, as well as the evidence revealed during the litigation, is an entirely separate question as to whether, on the basis of information known to Castor at the time, much of which is simply unavailable (for example, not only did Plaintiff not call Stolzenberg, who certainly could have advised as to his specific relationships at the time, he objected to the production of Stolzenberg's transcript evidence taken by the Trustee in Bankruptcy), these transactions were reportable.

254. A specific example of the trial judge's disregard for the hindsight rule regarding related party transactions is found in paragraph 1150 of the *judgment*, where in the discussion of the Calgary Skyline, the trial judge refers to a financial statement note in support of her conclusions. However, the financial statements in question were dated April 1991, after the 1988-1990 financial statements and the audits were completed. (PW-465B)

255. In addition, once again, despite partially setting out the correct GAAP test (control over both contracting entities regarding the transaction) at paragraph 546-7, the trial judge then concludes that many transactions were in fact related party transactions without referring to any evidence of such control on BOTH sides of the transaction in support of her conclusions.

256. For example, in paragraph 560, the trial judge correctly holds that in an "in trust" relationship, it is the relationship between the principals that matters. In paragraphs 561 and 563, the trial judge then refers to numerous documents signed by Gambazzi and Banziger, without indicating how they exercised the requisite control over Castor despite uncontested evidence that Stolzenberg was the controlling mind of Castor (Wightman Sept. 8, 1995 p. 182-185; Feb. 8, 2010 p. 118-121, 127-130, 137-140; Feb. 9, 2010 p.97-101 and 164; JC Dec. 2, 1996 p. 33-35; BW Oct. 28, 1996 p. 219; Jean-Guy Martin January 5, 2010 p. 96-97, 100-102, 132; January 6, 2010 p. 62-65, 108-110, 164-166, 205-207 and 215-219; January 7, 2010 p. 61; M-B. Ford, December 7, 2009 p. 154-165; BM August 24, 2009 p. 175, 188-189; MS April 23, 2009 p. 137-138, 180-183, 189-191; R.B. Smith May 14, 2008 p. 41; September 24, 2008 p. 85; Michael Dennis September 8, 1995 p. 38-39) and without noting the evidence that they regularly acted in a trust or agency capacity for the other party (March 26, 2009 p. 171). In fact, there is no evidence in the record as to the relationship between these two men and their other clients for whom they transacted.

257. The trial judge made an unsupported finding as to the nature of Castor's investment portfolio at paragraph 423. Defendants assume the trial judge was referring to R.B. Smith's testimony, for the proposition that "relationship" loans comprised 95% of Castor's portfolio and "third party" loans were the remaining 5%. (May 14, 2008, p. 67-69). First, at best Smith was describing Castor Montreal's portfolio only, as he admitted that he was unaware of and not involved in the Castor European loan portfolio. More to the point, he was not an accountant and therefore this testimony could not have been legally accepted as an opinion as to the identification of related party loans.

258. Finally, the trial judge failed to consider the impact that her finding regarding the existence of undisclosed related party transaction has on her conclusions on fraud.

c) Maturity Matching

259. Three specific errors of fact and law invalidate the trial judge's conclusions on maturity matching in 1988 (and for that matter in all three (3) years):

(a) The trial judge inappropriately adopts the language used by the Plaintiff to describe Notes 2-4 of the financial statements 'liquidity testing' whereas the financial statements clearly state that the disclosure refers to contractual maturity. The trial judge ignores

the evidence of the difference between these concepts, including D-510-20.

(b) The trial judge's analysis at paragraphs 568-664 is a GAAS analysis that never deals with the fundamental GAAP question – i.e. regardless of the audit, were the maturity dates as reflected in Notes 2-4 substantially correct? As a result, the trial judge does not review the significant amount of evidence referred to by the Defendants at trial that establish, on the basis of Castor's accounting records and other documents, that these notes were substantially correct. An example of an error of fact and law that arises from this is found at paragraph 656, where the trial judge misinterprets the change in the contract between the parties that results from the creditor advising the debtor that a due date on the loan was waived.

(c) The trial judge failed to understand the significance of her own finding in paragraph 655, namely, that the financial statements had to disclose the contractual maturity dates, regardless of potential rollovers or renewals. For example:

(i) The observation at paragraph 657 (and 2176) that it was improbable that a particular debtor could repay its loan upon maturity: that is a collection issue (going to the question as to whether an LLP was required), but it has nothing to do with the maturity date.

(ii) The observation at paragraph 2175 that the reality of Castor's business was that it was renewing loans at maturity on a regular basis (since the underlying security was tied to long-term development projects). Once again, if that business objective was achieved by one-year loans that had to be renegotiated each year, then the maturity dates had to reflect the legal terms.

d) $100,000,000 debentures

260. The trial judge's conclusion at paragraph 685 that the $100,000,000 debentures were circular and that (therefore) the financial statements were misleading is an error of fact and law.

261. Regardless of whether the transaction was circular, the question the trial judge failed to adequately address was whether the transaction created valid legal rights and obligations (assets and liabilities) that could not simply be removed from the financial statements. (This accounting and legal issue arises in respect of other transactions, so the following comments apply to other cash

circles described by the trial judge: eg. Paragraphs 657 and 1123 re Lambert; 956, 978-9, 1492, 1850, 2596 re year-end circles and the Nasty Nine.)

262. In short, a circular transaction is not by itself either invalid or suspicious, as set out by the Supreme Court of Canada in *Singleton* v *Canada*, (2001) 2 S.C.R. 1046, particularly paragraphs 32, 34 and 43 of Justice Major's judgment: there is a real effect of legal relations that entities enter into, regardless of the purpose behind those transactions – and the fact that the transactions are implemented by a "cheque shuffle" on the same day does not detract from the fact that the resulting effect is that in fact one loan is paid and another is actually contracted.

263. The issue in this case is one of GAAS, not GAAP – it was that C&L were not told of the circle that created the $100,000,000 debentures, so C&L were not given an opportunity to draw their own conclusions, an issue the trial judge does not address, even in the section of the *judgment* on fraud. This concealment, however, does not change the fact that Castor had a real asset and a real liability at the end of the transaction (as in *Singleton*).

264. A similar error made by the trial judge is the implicit finding that the financial statements were misstated through artificial inflation of liquidity, as the *judgment* implies (given the heading at p. 144 under which this section appears). That is exactly contrary to the Supreme Court's reasoning in *Singleton.* Instead, as Selman stated in the testimony referred to in the *judgment* at paragraph 2179, at most the problem was one of disclosure, which would not necessarily have been material.

e) Restricted cash

265. The trial judge makes a number of palpable errors of fact and law in the section on restricted cash for 1988.

266. The trial judge fails to apply the correct burden of proof on the fundamental GAAP issue as to whether the cash on deposit at Credit Suisse Zurich in 1988 was restricted, or pledged. No pledge was ever produced (despite the trial judge's finding that the Castor documents are remarkably complete, and despite the fact that Credit Suisse was a Castor plaintiff and could have produced at trial the pledge agreement proving the alleged restriction).

267. The trial judge erred in law and was inappropriately influenced by events that occurred and disclosures not made in the 1985-1987 financial statements, which are not at issue.

268. The trial judge assumed that the same arrangements as she found existed in 1985-7 continued to exist in 1988, without any evidence to support this finding.

269. The trial judge ultimately adopted a theory put forward by Vance as to the interpretation to be given to the words 'payment obligation' that appeared in 1988

on a Credit Suisse confirmation. However, that theory is contrary to the ruling of the Irish Court (D-582, p. 3) which, in relation to litigation between a Castor subsidiary and Credit Suisse over a 1989 pledge document, after hearing evidence of the parties concerned, defined a payment obligation exactly as Wightman had explained it (December 3, 1996, p. 41-44 questions 139-153) namely to the effect that as Castor's main relationship with Credit Suisse was in Europe, the European head office had given comfort to the Toronto branch that any loss on this account would be absorbed by the European operations, as between Credit Suisse entities.

270. The trial judge's GAAP conclusion is therefore the result of the foregoing errors of fact and law.

271. The trial judge further failed to consider the impact that the existence of such a pledge, when considered with Castor's representation letters, would have on her conclusions regarding fraud.

f) Fee Diversion

272. The trial judge's analysis of the fee diversion issue confuses GAAS and GAAP, and as such is an error of fact and law.

273. From a purely GAAP viewpoint, despite the conclusion at paragraph 419 that something about the "reality" of this diversion caused the financial statements to be misleading, the trial judge does not provide any reasons as to the required GAAP or how the required GAAP was breached.

274. The trial judge's analysis relates to the alleged GAAS failures, which is irrelevant and prejudicial if there are no GAAP misstatements, and even that analysis fails to address the fraud issue.

275. The conclusion in paragraph 419 is directly contrary to the concession made by Vance in cross and cited by the trial judge in paragraph 2087 that the fee diversion had no impact on the income statement, and therefore no impact under GAAP. As such, the trial judge reached a GAAP conclusion that is completely unexplained and unsupported.

276. Although the trial judge refers to the accounting entries in her GAAS discussion at pp. 418-434, the following points illustrate the trial judge's failure to grasp the GAAP point that Vance had conceded:

(a) There is no dispute, based on evidence now before the Court (including David Smith's testimony cited at para. 2074) that amounts were paid to David Smith. The issue is whether this was a diversion or a legitimate commission arrangement (as the evidence cited in para. 2073 indicates);

(b) If this was a legitimate commission arrangement as between Castor and David Smith (and/or anyone else), there would be no need for that to be recorded in the loan agreement as between CHIO and any particular DTS operating company, as the trial judge appears to expect in paragraph 2059, and the financial statements would be in accordance with GAAP.

(c) Even if Castor had not properly approved the fee payment (i.e. in that sense, it was a "diversion"), then there would still be no impact on the financial statements as stated in paragraph 2087.

g) LLPs

277. The trial judge made numerous errors in respect of the conclusion that "huge" LLPs were required in each of the three years, both with respect to general GAAP issues regarding the computation of LLPs and with respect to the specific loans on which it was held that such loss provisions were required. (*judgment* paras: 1042, 1521, 1802, 2097 and 2184).

i. General GAAP Issue: Wrong standards

278. Despite the fact that GAAP is the correct and only standard upon which the Court was to judge the financial statements, at paragraphs 809-810, 1417-18, 1420 and 1696-7, the trial judge states that it is not necessary to identify with precision the amount of the required LLP as long as she concludes that it was large enough to show that the financial statements did not meet GAAP.

279. However, financial statements must contain numbers, and one therefore must ask oneself why it was not possible that, with three Plaintiff's experts all testifying on the same matters with the benefit of years of forensic investigation and trial, this task could not be accomplished. A careful reading of the *judgment* discloses that in fact the trial judge used non-GAAP principles in reaching her conclusions:

(a) In paragraphs 1138 and 1144 of the *judgment*, the trial judge states that the evidence is equivocal. However, "equivocal" evidence is an insufficient basis under GAAP to record a loss provision - the Handbook requires the loss to be probable (s. 3020.12).

(b) The trial judge often finds that the required provision was "huge". "Huge" is a meaningless term. In determining whether the LLP was so large that the financial statements were materially misstated under GAAP, materiality must be considered. The trial judge's comments on materiality (paras 2123-2153) never lead to a conclusion as to what the appropriate level of materiality should have been with respect to each element of the financial statements, for each year. Clearly, this means that the financial

statements were being judged by some measure other than GAAP.

ii. General GAAP Issue: Confusing GAAP Concepts

280. The trial judge further fails to clearly identify the interrelatedness of various issues, making it appear to a reader of the *judgment* that numerous mistakes occurred, when in fact the concepts referred to are all different ways in which an accountant can address a perceived problem of collectibility. For example:

(a) As all Plaintiff's experts stated (and as the trial judge indicated in para. 997), interest revenue that is determined to be probably uncollectible would either be reversed (i.e. the revenue not recognized) OR would be included in the LLP, but not both, as paragraph 419, 4th and 5th bullets imply.

(b) Similarly, a careful reading of the expert testimony cited by the trial judge discloses that putting loans on a non-accrual basis is exactly the same thing as not recognizing interest revenue – as soon as it is determined that the borrower cannot repay the balance as at year-end, for example, no further interest would be accrued.

iii. General GAAP Issue: Cross-Collateralization

281. The trial judge rejected the Defendants' position, explained by Goodman, that GAAP permitted a lender to consider whether a loan security deficiency in one project could be made up for by a surplus in another project where the debtors were the same or within the same group and treated as such by the parties. The trial judge's conclusion in this respect is based on numerous errors of fact and law, including:

(a) applying a legalistic approach to a GAAP issue (i.e. the wrong standard).

(b) failing to consider the practical options Castor in fact had and had already implemented that would allow it to achieve cross-collateralization without specific mortgages or agreements;

(c) ignoring evidence given by the Plaintiff's experts that demonstrates that this was a normal practice of the day which, as the trial judge previously indicated, is relevant to a GAAP consideration and that in fact both the Plaintiff's experts and Castor treated each of the YH group and the DTS group as single borrowing groups (Vance, April 21, 2008 p. 13-17, PW-1480, April 10, 2008 p. 150-1; Froese January 12, 2009 p. 148-153 as corrected, January 9, 2009 p. 40-59 and 121-122; Rosen, PW-3033 vol. 2 App. C p. 9)

(d) disregarding Goodman's evidence setting out his experience as to what other lenders were doing, despite ruling that it was relevant (see Objections #70 and #72 in the Judgment on Objections) (September 22, 2009, p. 104-107; October 8, 2009, p. 98-99);

(e) disregarding the stated principle that the Court should not choose between two schools of thought;

(f) ignoring evidence of Castor's actual negotiations and business relationship with YH, as evidenced by contemporaneous documents and instead preferring the testimonial evidence of R.B. Smith who admitted that he was not privy to these matters, as he was not part of the inner circle; and

(g) ignoring admissions made by Plaintiff.

282. In fact, the trial judge's conclusion at paragraph 1022, namely that Castor's business did not contemplate such "set-off" is contradicted by a number of the trial judge's findings of fact, including:

(a) Paragraphs 192-193 set out clearly that TWTC was used to cross-collateralize other YH debt;

(b) Paragraph 1003 refers explicitly to a concession by Froese in cross-examination that a surplus in 1988 in MEC would cause an adjustment to his YH LLP calculations (reducing them);

(c) Paragraph 1062 describes how year-end allocations were made from other YH debt in account 46 to MEC which constitutes cross-collateralization.

283. Examples of Plaintiff's admissions that were ignored by the trial judge include documents prepared by and testimony of Gourdeau, the Trustee, (PW-2893-13, January 16, 2008 p. 65-68; January 16, 2008, p. 117; January 18, 2008 p. 27; January 22, 2008 p. 75-76 and PW-1056-B; January 22, 2008 p. 100-101; February 20, 2008 p. 22, 25-27 and PW-2893-19, PW-2893-20, PW-2893-60; February 20, 2008 p. 29-32; February 22, p. 57-59)

284. The trial judge further held at paragraph 1138 that the Toronto Skyline Hotel and Lambert are not to be grouped with YH and at paragraph 1191-1193 that the Calgary Skyline Hotel is not to be grouped with YH, without referring to any evidence. In fact, the trial judge disregarded the evidence of the Trustee and the Plaintiff's experts listed above as well as the following, more specific testimony of the Trustee and other witnesses (February 20, 2008 - p. 184; Jan 21, 2008 p. 9) (November 24, 2009, p. 20-35 undertaking #2; April 30, 1999, p. 63; May 11, 1998, questions 14a-14u, 16; Apr. 28, 1999 p. 54- 55 and 164-165; Apr. 29, 1999 p. 152-157; PW-1209)

285. The trial judge further ignored the admissions made on this issue by Widdrington himself in his Re-re-amended Declaration with Particulars at paragraphs 89 (and in particular p. 1 of PW-33 forming part of that paragraph), 109, 111, 114 (and in particular PW-33a forming part of that paragraph) and 120b.

286. In sum, the appropriate test is how an accountant would view this issue. The trial judge ignored the evidence of Plaintiff's experts as to how these matters were generally dealt with during the relevant years and ignored the fact that Plaintiff's experts' methodologies reveal that their use of this GAAP analysis was contradictory (as the trial judge noted at paragraphs 2033 and 2034, Vance and Froese disagreed with each other on this point in connection with the DTS group). The trial judge also fails to note that Gourdeau's presentation and testimony (PW-2893-20; Jan. 17, 2008, p. 31-36; Feb. 20, 2008, p. 22-33; Oct. 26, 2009, p. 35-36; PW-1419-2 S. 1000.27; May 4, 2010, p. 110-113; Feb. 22, 2008, p. 93-96) as the representative of one of the Castor plaintiffs, and upon whose proceedings all Castor plaintiffs relied, including Widdrington, revealed exactly how an accountant deals with such matters, namely in the manner proposed by Defendants' expert Goodman. Therefore, even if the trial judge was correct in disregarding Goodman's evidence (which is disputed), the trial judge should nevertheless have accepted that his methodology was, at a minimum, an acceptable alternative within GAAP.

iv. Specific Loans

a. Maple Leaf Village (MLV) – 1988

287. The trial judge concludes in paragraphs 908-915 that a $40 million LLP was required on this group of loans in 1988, on the basis that:

(a) the $104 million value in the appraisal report on a portion of MLV's assets (PW-494 appraising the hotels/museum components) available to the Court was not reliable;

(b) the entire project, including other assets some of which were assessed in another appraisal (PW-496) at $26 million, that all experts used (see para. 903) were not worth more than $100 million; and

(c) Castor would not exercise all its contractual rights of recovery.

288. Each of these stated reasons are based on serious errors of fact and law.

289. First, the trial judge notes in paragraph 890 that one of Plaintiff's experts, Rosen, also used the $104 million value. The trial judge fails to note, however, that this $104 million value also only deals with the hotels/museum components and that more significantly, the computation from Rosen's report that is footnoted in the *judgment*, is the same on this point as that presented by Goodman, who in

fact adjusted that $104 million value to $91.7 million (as seen in D-1332). The trial judge also disregarded the impact on the credibility of Vance and Froese resulting from their cross-examinations in which they conceded that certain aspects of their calculations could have been adjusted to provide reasonably acceptable alternatives, and that they further agreed that such adjustments would be necessary to match the methodology they used for MEC, therefore demonstrating that these two (2) experts adjusted their methodology between projects to suit the outcome they were seeking. (January 7, 2009 p. 12-23 and January 27, 2009 p. 114-115; June 12, 2008 p. 224-235; June 13, 2008 p. 8-12; May 28, 2008 p. 154-156; June 12, 2008 p. 239-240; December 11, 2008 p. 56-64; January 6, 2009 p. 166-167; January 6, 2009 p. 173-175; June 12, 2008 p. 242-244).

290. Therefore, by stating that this value is unreasonable, the trial judge not only erred by arbitrarily selecting between two expert views, she did so in circumstances in which both those views were presented by Plaintiff's own experts, and ignored the Defence expert whose qualifications were, and were described by the trial judge, as more extensive than any other expert.

291. Second, in determining that the value of the entire project was only worth $100,000,000, the trial judge accepted a theory proposed by Vance and Froese as to the meaning of notes made in the working papers and relied on testimony given by Prychidny regarding PW-499B (para. 909). The trial judge does not address the evidence that puts Prychidny's testimony into context (PW-499E; PW-499; PW-499A; PW-499D; PW-499F; D-1034; D-1035; PW-2928; D-1312 p. 477-480 and Goodman, Oct. 6, 2009 p. 6-28; D-1333). She also makes the hindsight error of ignoring the contemporaneous documents – i.e. what Castor would have had access to at the time – regardless of what Prychidny chose to say at a trial over 20 years later as to their accuracy.

292. The trial judge also discounts the evidence of the value of the amusement park rides, thus preferring the opinions of Vance and Rosen to that of Froese and Goodman (para. 904). Once again, this is selecting between two views, in circumstances in which the rejected view was presented by one of the Plaintiff's own experts, and by the Defence expert whose qualifications were, and were described by the trial judge, as more extensive than any other expert.

293. Third, in rejecting the opinion that Castor had other sources of recovery, the trial judge applies an inappropriate bankruptcy-type legalistic approach to the loan rankings without considering:

(a) Goodman's explanation (October 6, 2009, p. 164-229; D-1335 and D-1336);

(b) Froese's testimony in cross-examination that if valid these represented security (January 7, 2009, p. 42-47; January 12, 2009, p. 62-64); and

(c) the wording of the Gambazzi pledges which do not require the mortgages to be exercised first. (D-576, D-577, D-578, D-580, PW-2177; PW-912; D-1335). In short, the Gambazzi pledges provide value in excess of the hotel assets.

294. As for the proposition that Castor would not contemplate suing Stolzenberg or von Wersebe on their commitments, this misunderstands the nature of their obligations (these were "puts", to be exercised by Castor's debtors, not Castor (PW-907 (Runaldri); PW-912 (Trade Retriever); PW-2756 (Charbocean); PW-157 (Harling International); D-659-1 re 4.1.15A; PW-1187B; D-213). Moreover, nobody with authority to make such a decision testified, although Plaintiff could have asked Widdrington, as a Plaintiff and Board member, to explain this highly unusual business philosophy, or could have called Stolzenberg or Dragonas to explain why they believed that no LLP was required in 1988.

b. YH Corporate, 1988

295. The trial judge concluded that a "huge" LLP was required in 1988 on this group of loans. Neither the components of the group of loans (which each Plaintiff's expert described differently) nor the meaning of "huge" were determined.

296. In addition, the trial judge committed the general errors identified above, relying on Plaintiff's experts reports for LLP computations which themselves relied on YH financial statements that the Plaintiff was unable to prove were in Castor's records and were often prepared well after the financial statement completion date, in many versions; and rejecting cross-collateralization as an appropriate GAAP alternative. For example, at paragraphs 972-3, the trial judge refers to a draft adverse opinion given to YH by its own auditors, PW-1148A which was dated well after Castor's 1988 financial statements were released, and for which there is no evidence (or reason to believe) was ever given to Castor.

297. More specifically, at least four errors were made in relation to the loans that were included in this group.

298. First, regarding the loan from CFAG, the trial judge erred in fact and law in its description of the underlying loan structure and who the debtors were. The trial judge concluded at paragraph 1013 that "notwithstanding the 1982 agreement" (PW-1178; see also PW-1171-1), this loan was owed ONLY by YH.

(a) It is an error of both GAAP and law to ignore the agreements between the parties. That agreement demonstrates that YH had a co-debtor, namely Investamar, whose inability to pay was not proven by Plaintiff, nor even the subject of any evidence adduced by him. Investamar's involvement is supported by other evidence (PW-1136-4; PW-1137-1 and PW-1137-3; PW-1136-5c, pw-1138-

1 and PW-1136-5; PW-1180; PW-1182; PW-1137-5; PW-1136-5A; Feb. 8, 2000, p. 110-112; PW-1179; D-1080; Feb. 8, 2000, p. 110-114; Feb. 15, 2000, p. 141-147; Nov. 17, 1999, p. 176-191) including testimony of Whiting, which the Plaintiff's experts admitted they had not considered (yet this failure to read Whiting's testimony was not perceived by the trial judge as a "restriction").

(b) The trial judge also failed to refer to Froese's evidence on this loan. In fact, when the above evidence was put to him in cross-examination, he conceded that his LLP would have to be adjusted to account for these new facts that he had not previously considered. (January 9, 2009 p. 183-214; January 12, 2009 p. 24-27; January 27, 2009 p. 120-123, PW-2941-1). Therefore, when the trial judge determined at paragraph 1013 that "Plaintiff's experts position on the CFAG loans must prevail", she did not address the fact that there was more than one position and that one of Plaintiffs' experts agreed with Defendants.

299. Second, regarding Hazelton Lanes, the trial judge made an error of fact and law in failing to consider the market value of the project, treating the loan as if unsecured (paras 964-965). The trial judge's analysis and conclusion is based on one document, PW-1059-4. The trial judge ignores Smith's testimony that PW-1059-4 was false, ignores the precise wording of the document and ignores other documents that clearly disclose that Castor indeed held a security interest. (Vance April 14, 2008 p. 140-142; PW-1059-2; September 18, 2008 p. 106-108; July 7, 2008, p. 176-179).

300. Third, in paragraph 438, the trial judge erred by adopting an **opinion** of a lay witness, Smith, that the failure of YH would lead to the failure of Castor. The trial judge disregarded the opinion given by an expert, Goodman, that although YH was insolvent, this did NOT entail Castor's insolvency, an opinion the trial judge expressed agreement with during the trial (September 16, 2009 p. 143).

301. Fourth, the trial judge made an error of law by misinterpreting the documentary evidence to conclude at paragraphs 989-990, 1000 (see also paras 1480, 1518, 1786-7, 1801), that von Wersebe's guarantees on two of the YH corporate debts were limited to exclude the value of his European holdings and whether any limitation in fact existed as at December 31, 1988. These conclusions are manifestly incorrect when the documents themselves are considered:

(a) The evidence relied on by the judge in paragraphs 989 and 1000 indicates that the limitation only came into existence in 1989 (see also D-215-2A);

(b) The interpretation given to the scope of the limitation at paragraphs 989 and 1518 is incorrect, nor does it consider all of

the documentary evidence (D-1312, Table KvW.5; PW-1054-10-1 tab 1 and tab 14; PW-1058-1 and PW-1053-23, E-187).

(c) As indicated in Inscription in Appeal No. 3 filed by the Appellants, the trial judge's conclusion also fails to consider the ICAO judgment disciplining Whiting with respect to this issue.

302. Once the foregoing errors are taken into account, the evidence establishes that Plaintiff's experts either failed to consider whether von Wersebe had the means to honour these guarantees or concluded that he could have. (Vance April 14, 2008 p. 142-144; Froese PW-2941-3 vol. 4 par. 2.117 and 2.201 and Nov. 28, 2008 p. 78-80, p. 91-93, 164-165; January 12, 2009 p. 35-68; April 14, 2008 p. 142-144). The burden to show that the financial statements were incorrect rests on Plaintiff, who failed to bring any witness with personal knowledge surrounding the negotiations or relating to von Wersebe's net worth during the relevant years.

303. As a result, the trial judge's conclusion as to the need for a provision for the YH loans is incorrect for all three years.

c. Montreal Eaton Centre (MEC) 1988

304. The trial judge concluded at paragraphs 1077-8 that no LLP was required on this project in 1988. The trial judge rejected Goodman's opinion that a surplus of $73.4 million existed, (Report D-1312, Table MEC.11, September 22, 2009, p. 202-208) but a close reading of the reasons indicate that some surplus was available, but the trial judge failed to quantify it. The trial judge's analysis discloses the following errors of fact and law:

(a) First, by failing to quantify the surplus, if Defendants prevail with respect to the issue of cross-collateralization, and because there is no quantification of what "huge" means, there is not sufficient reasoning in the *judgment* to determine whether an overall LLP was required in 1988 (see D-1312-5, in which Goodman computed an overall surplus of $120,000,000 on YH loans). The same error occurs for 1989 and 1990. The *judgment* is therefore deficient and erroneous in law, an error sufficient on its own to invalidate the entire *judgment.* This issue is of central importance in that a judgment must be rendered for each financial year.

(b) Second, by her failure to recognize the importance of ruling on the amount of the surplus, the trial judge is repeating her error regarding cross-collateralization, which itself flies in the face of R.B. Smith's evidence (September 15, 2008 p. 171-172 and PW-1056A, B, C and D) that Castor intended and in fact used the MEC surplus to back-stop other YH under-secured positions.

(c) Third, in rejecting Goodman's use of PW-1108A, the trial judge fails to mention that another accountant, whom she found to be reliable, Rosen, also used the value contained in PW-1108A (PW-3033, App. B p. 21; PW-3033-3), disclosing three (3) errors previously noted in this inscription in appeal, namely, discarding evidence that does not support the desired conclusion; selecting between two views as to appropriate GAAP values, in a circumstance where Plaintiff's experts themselves hold both views and discarding the view of the most qualified expert.

(d) Fourth, in determining that the costs to complete deduction should not include future interest, the trial judge relied on Vance alone, ignoring the evidence of every other expert and the accounting authorities the Defendants presented, which all agreed that GAAP of the day permitted a choice. The trial judge therefore erred in fact and law in respect of the standard she had previously accepted regarding two (2) schools of thought (D-1316 and testimony Goodman, September 16, 2009, p. 94-106; D-1295 Selman report 4.5.2.20 and 4.5.2.23-4.5.2.32 and Selman, May 8, 2009, p. 58-64, 68-77; September 15, 2009, p. 190; September 22, 2009, p. 163-169; September 23, 2009, p. 123-127; October 29, 2009, p. 93-103; September 16, 2009, p. 93-99; "Incorporating the Time Value of Money", p. 12 and 72 D-1113; September 16, 2009, p. 109-124; PW-1432-A pars. 8.46 and 8.47; D-1277-1 p. 29-34; Issue BN4 p. 29 and 34 and BN5 p. 34, D-487-5; May 7, 2009, p. 169 and 190-193; Selman, May 7, 2009, p. 189-194, May 8, 2009, p. 44-47; D-487-6 and D-1295 report par. 4.5.2.19 and following; CA Magazine "Counting the True Cost of Loan Impairment" by John Sloan, May 1994; June 10, 2009, p. 90-92 and D-1295 report 4.5.2.23; D-491-1A; December 10, 2008, p. 32-35; January 13, 2009, p. 106-107; April 7, 2009, p. 65-67; Febuary 25, 2009, p. 90-91).

305. In addition, although not indicated as being relevant to the 1988 conclusion, the trial judge erred in paragraph 1034-1041 on an issue that becomes relevant in 1989 and 1990: the trial judge discloses a complete lack of understanding of the legal ramifications of the fact that Castor's mortgages on the MEC included *dation-en-paiement* rights (PW-1063-5, clause 17; PW-1063-5B-2, clause 17, PW-1102A-4, PW-1102B-2, clause 4.6, PW-1102B-5, clause 4.6) and holds that Castor would not have benefited from the residual equity in the project. As an additional reason to fail to give value to this right, the trial judge states that Castor lacked the intent to exercise its rights, relying on Smith's testimony, who admitted that he was not in the "inner sanctum", was not involved in negotiations with YH and who identified Dragonas as the person most knowledgeable about this project (Sept. 17, 2008, p. 15-17; Sept. 15, 2008, p. 158-164; Feb. 23, 2009, p. 213-215). Plaintiffs did not meet their burden of proof to present the best evidence, which they could have done by calling Dragonas.

d. Toronto Skyline Hotel (TSH) 1988

306. The trial judge concluded at paragraphs 1136 – 1141 that if the loans to Lambert (the parent of the Topven companies that held the Toronto Skyline Hotel) are excluded, there would be sufficient security to cover the loans to the Topven companies. However, an $18 million LLP was required once the Lambert loans were considered. This conclusion accepts Plaintiff's argument that Lambert had no sources from which to repay its loans, other than the residual value of the TSH.

307. The trial judge's finding that Lambert had no other sources to repay its loans is based entirely on prior year working papers (para. 1100), rejection of an inference Defendants had drawn from the fact that Lambert paid more interest than could have come from the operations of TSH (para. 1123) and the trial judge's rejection of Ford's testimony that she saw financial statements of Lambert that showed that it had marketable securities (para.1139) (PW-1053-89-4, B36; PW-1053-87-4; PW-1053-89-4, p. B-30, p. 249 and B-36, p. 255; Nov. 9, 1995, p. 41, q. 107-110; Nov. 14, 1995 q.186-189, p. 63-67; Nov. 14, 1995, p. 71-82, q. 199-266; Nov. 14, 1995, p. 151-154, q. 455-465; Nov. 15, 1995, q. 463-468, p. 160-161; Sept. 5, 1996, p. 128-131, q. 537-548; Ford, Dec. 7, 2009, p. 170-181, Dec. 11, 2009, p. 76-87; Dec. 11, 2009, p. 115-121; Nov. 14, 1995, p. 63-67, Q. 187, particularly question 14). This discloses the following manifest errors of fact and law.

308. First, the trial judge has effectively reversed the burden of proof, basing herself on what she describes is equivocal evidence (para. 1138) which in itself is an error of law, in that once the trial judge concluded that the evidence was "equivocal", the trial judge had no choice but to reject Plaintiff's position, given the burden of proof. The trial judge then further erred in law by obliging Defendants to show that Lambert had funds to repay (i.e. to show that the financial statements were correctly stated) rather than obliging the Plaintiff to show otherwise;

309. Subsidiarily, Defendants assert that they have nevertheless met the inappropriate and unlawful burden imposed on them by the trial judge:

(a) What Lambert's resources may or may not have been in 1986 cannot provide any GAAP evidence as to what its resources were in 1988, and the 1986 financial statements were not at issue in this trial;

(b) The trial judge failed to refer to the testimony of Martin, who wrote the 1986 notes in question, or to the conclusions contained in working papers of 1987 (January 5, 2010 p. 137-161; PW-1053-31, sequential p. 278, note 11; August 28, 1996, p. 240-241; January 7, 2010 p. 182-192; PW-1053-93-2 B26 and PW-1053-93 p. 35; April 7, 2009 p. 172-173; January 7, 2010 p. 202-210);

(c) The Court failed to refer to the other testimonial and documentary evidence supporting the existence of Lambert's financial statements and other resources (PW-1053-89-4, B36; PW-1053-87-4; PW-1053-89-4 p. B-30, p. 249 and B-36, p. 255; November 9, 1995, p. 41, q. 107-110; November 14, 1995 q. 186-189, p. 63-67; November 14, 1995, p. 71-82, q. 199-266; November 14, 1995, p. 151-154 , q. 455-465; November 15, 1995, q. 463-468 p.160-161; September 5, 1996, p. 128-131, q. 537 – 548; December 7, 2009 p. 170-181, December 11, 2009 p. 76-87; December 11, 2009 p. 115-121; November 14, 1995, p. 63-67, Q. 187, particularly question 14; PW-2270, see clause 2(c) and PW-1195 and PW-1196; April 29, 1999, questions 56 - 58, p. 41 and 42)

(d) The trial judge failed to account for the fact that neither R.B. Smith nor Prychidny, who were responsible for the Toronto Skyline Hotel project from Castor's and YH's perspective, respectively, knew anything about the Lambert loans (September 23, 2008, p. 57-61; PW-499F).

(e) The trial judge's statement in paragraph 1123 that the Lambert interest was paid by cash circles is incorrect with respect to 1988: the experts who discovered cash circles behind some of Lambert's payments of interest expressly stated that they found no such circle for the 1988 payments, which could not have come from the TSH operations (June 13, 2008 p. 152-158; Dec. 11, 2008 p. 162-169)

(f) In any event, the cash circles involved other companies who, according to law (*Singleton, supra*) thereby contracted valid loans, and there has been no evidence adduced as to whether those companies had assets to pay.

310. But for these errors, the trial judge would have concluded that insufficient evidence exists to conclude that a loss provision was required on the Lambert loans in 1988.

e. Calgary Skyline Hotel (CSH), 1988

311. The trial judge concluded at paragraph 1193 that the security deficiency in connection with CSH loans could not be made up for by any surplus elsewhere in the YH group and that a "material" LLP was required. In coming to that conclusion, the trial judge rejected Goodman's opinion that von Wersebe "owned" CSH and Lambert. (In fact Goodman applied the Handbook requirement of control over the asset found in Handbook s. 1000.27 – see October 26, 2009 p. 40-61 and not ownership, which is not necessary for cross-collateralization under GAAP.) The trial judge made a number of palpable errors of fact and law in this regard.

312. First, by not identifying what amount of LLP was required, and by not having determined what "material" means, the *judgment* on this point is erroneous, as argued above. In addition, the range of LLPs proposed by Plaintiff's experts starts as low as $3.8 million (para.1181) and there is no evidence in the record that this would be sufficient to require an adjustment to the financial statements.

313. Second, in the analysis of the ownership of CSH, the trial judge recognizes that it was owned by Skyview, which was in turn owned by Skyeboat and 321351, but almost the entire analysis deals with the ownership of 321351. 321351 held only 30% of the common shares of Skyview, and Skyeboat had the controlling 70% interest (PW-468 and PW-470). As a result, the trial judge's comments as to the uncertainty of ownership of 321351 is irrelevant to the issue being decided. This is but one example of the trial judge adopting without analysis the Plaintiff's written argument (p. 56, 3rd paragraph), more examples of which will be identified in argument.

314. Third, with respect to the ownership of Skyeboat, the trial judge made the following errors of fact and law;

(a) As the trial judge states at paragraph 1188, Baudet (the president of Lambert) testified that it was beneficially owned by Lakeland and Lambert, both of which were ultimately controlled by von Wersebe (April 30, 1999, p. 63; May 11, 1998, questions 14a-14u, 16; Apr. 28, 1999 p. 54- 55 and 164-165; Apr. 29, 1999 p. 152-157; PW-1209). However, the trial judge failed to mention the other evidence Goodman relied on to support this conclusion, which includes contemporaneous documents prepared by Whiting, along with his testimony. (PW-1187A and PW-1187B; PW-1157; February 14, 2000,p. 18-20; PW-499C-1; January 20, 2000, p. 66-70, 75, and 89-90; and February 14, 2000, p. 64-68; PW-192 and PW-193).

(b) The evidence referred to by the trial judge in paragraph 1192, 1st bullet, to support her rejection of this view, is:

- irrelevant (PW-234, PW-235, PW-236A and PW-236B are all in relation to Topven – i.e. the Toronto Skyline Hotel, not the Calgary Skyline Hotel which not only demonstrates that the trial judge did not correctly understand the evidence, but is also an indicator that she adopted Plaintiff's arguments without analysis or due consideration of Defendants' arguments);

- demonstrates hindsight (PW-465B and PW-466C are both dated April 7, 1991);

- says nothing about the issue (PW-1463-10); or

- in fact demonstrates that Lambert and Lakeland are the owners of Skyeboat (PW-1086A and PW-1086-4).

As for the testimonies referred to, Smith's chart at PW-1086A states clearly that Lakeland and Lambert owned Skyeboat, Whiting's testimony referred to by Goodman (cited in the preceding paragraph) also leads to that conclusion, and Baudet testified (cited in the preceding paragraph) that Stolzenberg was acting in trust for von Wersebe when he provided instructions.

315. Defendants submit that the trial judge made a fundamental error of fact and law in paragraphs 1080 and 1081, which may explain some of this confusion. There is no contradiction between the evidence that von Wersebe beneficially owned Lambert, and the evidence that "neither Prychidny nor Whiting believed that the ownership of the Toronto Skyline Hotal resided within the YH Group". The evidence demonstrates that von Wersebe's holdings were much more extensive than what was contained within the YH Group of Canadian companies that these men worked for, and what these two (2) witnesses "believed" is not evidence of ownership or control under GAAP or at law.

316. As a result, the trial judge's conclusion on CSH is based on fundamental errors of fact and law and must therefore be overturned.

f. Ottawa Skyline Hotel, 1988

317. The trial judge concluded that as between the only two experts who testified on the project, Vance and Goodman (para. 1212) (another example of a restriction on the other Plaintiff's experts mandates not noted by the Court), Vance "prevails", and that a "material" loan loss provision was required. For the same reasons as stated above, this conclusion is too imprecise under GAAP and at law and is as such an error of law.

318. In addition, the trial judge erred in preferring the witness whose credentials, as described by the trial judge (see above) were clearly inferior.

319. Even more egregious, on this project, Vance's opinion was based on his own recasting of an appraisal, which he admitted he had no competency to perform, and his admission that he would not base an LLP on his own calculations (July 7, 2008 p. 17-27). Plaintiff has therefore not met his burden of proof. Consequently, the trial judge erred in law in concluding to an LLP on this project.

320. As a result, the only opinion before the trial judge with any credibility is Goodman's. The trial judge not only failed to address the admissions referred to above, but despite her conclusions at paragraph 339 that she would apply her findings as to Vance's credibility further in the *judgment*, she does not do so here.

g. Toronto World Trade Centre (TWTC), 1988

321. The trial judge concluded in paragraph 1293 that no surplus was available in 1988 on the TWTC project. No decision is made regarding a loan loss provision, nor whether a surplus would appropriately have been used to offset deficiencies in other YH positions.

322. In failing to determine that a surplus was available, the trial judge erred in fact and in law on numerous points:

(a) Paragraph 1280, which states that Rosen was the only expert to opine on the required LLP for TWTC in 1988, is incorrect. As paragraph 1271 notes, Vance withdrew an LLP he had computed in his 1997 report. On March 4, 2008, p. 40-41, he stated that the change in his opinion was due to his consideration of an appraisal that "would appear on the face of it to provide value for the loan". His rationale for failing to conclude one way or the other, as described by the trial judge in paragraph 1271, is patently absurd: if there was sufficient information prior to considering that appraisal to compute a LLP in 1997, how does the addition of more information render the situation more uncertain?

(b) Failing to appreciate that in fact Vance had decided that there was no need for an LLP, but refused to say so as this would not be in his clients' interests, was a palpable error of the trial judge regarding her assessment of Vance's credibility. This is compounded by the fact that Vance admitted that he was shown this appraisal in cross examination in the first trial on August 31, 2004 and that he subsequently provided Justice Carrière with two updated loan loss calculations which ignored it. The cross-examination of why and when he changed his opinion on TWTC demonstrated that Vance misled the Court about his reasons for the change in both his report and his testimony, and yet despite this, the trial judge makes no finding as to his credibility, despite

her statement at paragraph 339. (Vance, April 15, 2008 p. 45-46; Vance, April 21, 2008 p. 163-166)

(c) The trial judge further failed to consider Defendants' calculations that demonstrated that by using Vance's analysis as set out in his report (PW-2908, volume 2, p. D-4) and the value from the appraisal that caused him to withdraw his LLP (PW-1161-24) a surplus of $20,000,000 would be computed.

(d) Moreover, Rosen did not testify on this topic in chief. Therefore, Goodman's opinion that there was a surplus of $26.6 million (para. 1281) is the only valid expert opinion. The same is true with respect to 1989 (para. 1618) and 1990 (para. 1963).

(e) Compounding this legal error further, paragraph 1280 of the *judgment* refers only to Rosen's report, omitting his evidence in cross-examination in which he admitted numerous errors or omissions in his report, and was unable to explain the basis of the data he used to permit the Court to determine whether that data was in evidence or allow the Defendants proper cross-examination. (PW-3034 p. 59; Feb. 19, 2009 p. 232-240 and April 8, 2009 p. 77-197). The report conclusions simply did not survive the cross-examination, leaving aside the fact that Rosen violated the trial judge's own ground rules for the "read-in" rule.

323. As a result, once again, Plaintiff did not meet his burden of proof, and Goodman's conclusions are the only expert views in the record. The trial judge therefore inappropriately substituted a lay view for a professional computation.

324. The trial judge also erred in rejecting Goodman's opinion, as the testimony referred to in the *judgment* at footnote 1383 does not support the conclusion reached in paragraph 1292. To the contrary, Goodman testified that he had considered the appraisal in question, but by oversight failed to list it in his report. In fact, a review of his report D-1312 p. 207ff indicates that he considered a broader range of value indicators for this project than any of the Plaintiff's experts did for this or any other single project.

325. Finally, TWTC provides an example that demonstrates that the trial judge's general statement at paragraph 426 that in most cases the borrowers did not comply with any of their covenants, is not supported by the evidence. In paragraph 1270 the trial judge states that YH did not meet its covenant to provide financial statements, and refers to PW-1068-1. That is loan 1067, which according to paragraph 1228, represented $15.5 million of the total $47.7 million of Castor exposure on that project. Castor had one other small loan to YH on this project, but as seen in paragraph 1228, $28.6 million was loaned/invested to TWDC, TWTCI and TWTCP. The trial judge fails to mention that there were financial statements of the actual developments and for TWTCI. (PW-1167-1, PW-1167-2, PW-1069-29A)

h. Meadowlark

326. The trial judge rejects Goodman's opinion that there was a surplus, (D-1312, p. 251-265; Sept. 24, 2009, p. 82) and refers to, but does not adopt Rosen's conclusion that there was need for a LLP (para. 1327).

327. The trial judge rejects Goodman's view on the basis that the property value he used for his calculation is "totally unreasonable" (para. 1326). However, as is clear from paragraph 1318, there was an appraisal dated July 18, 1988 which provided exactly that estimate of value. In criticizing Goodman at paragraph 1322 for failing to deduct costs to complete the recommended retrofit, the trial judge failed to consider the reasons given on the same and next page of the very transcript cited and failed to consider his testimony in chief on September 24, 2009, p. 84-111.

328. By referring to Rosen, the trial judge erred in law as her conclusions were based upon his report, as he did not testify in chief on this or any other LLP opinion.

i. Summary on 1988 LLPs

329. The trial judge made palpable errors of fact and law with respect to overarching issues affecting the entire analysis of LLPs for 1988 and in respect of the individual loans in which a determination was made that an LLP was required for 1988. The resulting conclusion that Castor's 1988 financial statements were misstated as a result of understated LLPs, improper revenue recognition and/or failure to put loans a non-accrual basis is therefore manifestly unfounded in fact and law.

330. The trial judge further erred in fact and in law in not giving effect to an appropriate GAAP methodology of offsetting security deficiencies against surpluses with respect to all loans and properties controlled by Karsten von Wersebe. This alone would eradicate the need for any adjustment to Castor's financial statements, even if the trial judge were correct with regard to all the individual loan loss provisions that she found were required.

j. Summary on GAAP, 1988

331. The trial judge erred in fact and in law in determining that Castor's financial statements were not in accordance with GAAP in 1988.

3. GAAP 1989

332. As many of the trial judge's errors were the same in 1989 as in 1988, Defendants refer to their comments for 1988, *mutatis mutandis*, and add the following with respect to additional errors of fact and law.

a) Maturity Matching (notes 2-4 of the financial statements)

333. The trial judge's entire analysis of the facts in respect of 1989 is an audit assessment, and not GAAP. The conclusions at paragraph 1390-1392 refer only to some of the transactions that are discussed at paragraphs 1350-1389. There is therefore no conclusion on many of the transactions that are discussed in the *judgment.*

334. Even on that restricted basis, there is no GAAP conclusion: paragraph 1392 simply says that "Given Castor's global situation (...) Vance's opinions prevail." The only reference to Vance's opinions in that section is found at 1383 and 1384, both of which reflect his opinions on GAAS, not GAAP.

335. Therefore, the trial judge erred in fact and law in concluding that the 1989 notes were misstated under GAAP.

336. Subsidiarily, the transactions referred to in paragraph 1392 (i.e. those detailed in paragraphs 1355-1357, 1362-1367, 1371-2 and 1390-1391) were all Castor borrowings with short-term maturities or interest re-pricing or repayment dates within a longer-term or an evergreen facility provided by Castor's lenders. The trial judge misread Simon's testimony referred to in footnote 1445, when the entire page cited and the following page are taken into consideration. Defendants refer to the actual agreements noted in the *judgment* which demonstrate that in substance, the longer maturity presentation was accurate, and to determine otherwise (if that is what the trial judge did) would be an error of fact and law.

337. Subsidiarily, Defendants refer to Selman's opinion as set out in the *judgment* which demonstrates that at best, the agreements are capable of two (2) interpretations, and the reasoning that "Castor's global situation", "the purpose and contents of the notes" is not a sufficient reason to prefer one expert over another in such circumstances.

b) Restricted Cash

338. The pledge in question was unenforceable, as the trial judge recognizes in paragraph 1409. Therefore, any disclosure that the amount was restricted would have been an error under GAAP.

339. The trial judge nevertheless concludes that the cash had to be disclosed as restricted because "no evidence shows that Castor would have been aware of the unenforceability of the pledge". This disregards the fact that:

(a) Castor's financial statements which it prepared (*judgment* paras 271-272) did not disclose the pledge; and

(b) the representation letters in 1989 and 1990 (PW-1053-17, p. 75-77, PW-1053-72, p. 60-62, D-58, PW-509; PW-1053-12 p. 221-

223, PW-1053-13, p. 30-32 (item 3B)) which expressly state that none of Castor's assets are encumbered.

340. Had this evidence not been disregarded, the trial judge's finding in paragraph 1409 would have prevailed (as it should have in any event).

341. In fact, if the trial judge's interpretation were correct, then the signatures on the representation letters would have been deceitful representations to C&L, which the Court does not deal with in her section on fraud.

342. In addition, the Court's analysis of the Defendants' position regarding the deposit of £18.8 by Castor Ireland in Credit Suisse in Europe (and whether or not the financial statements should have disclosed it as restricted due to a pledge securing a loan by Castor from Credit Suisse in Canada) misses a fundamental point, not addressed in the GAAP or GAAS section. (Although a GAAS point, Defendants raise it here for purposes of clarity.)

343. The evidence is clear that the audit of Castor's Irish subsidiary was not performed by C&L, but by C&L Ireland. (Rogatory Commission of Cunningham, November 24, 1998, p. 36-39; PW-508; PW-509). This means that C&L were the primary auditors and that C&L Ireland was the secondary auditor, a relationship that has very specific meaning and consequences both in law (s. 110(2)-(4) of the NBBCA) and under GAAS (s. 6930 of the Handbook). If an error was in fact made in failing to identify the cash as restricted, it was an error of C&L Ireland, and this would not constitute a GAAS breach by C&L, as there was no evidence that they failed to do what was required to permit them to rely on the results communicated to them by the secondary auditor. The trial judge disregarded that distinction, an egregious error of law.

344. Vance had commented on this matter in his report, but admitted in cross-examination on June 6, p. 17-18 that he had misquoted the Handbook section. The result was that his opinion was wrong. The trial judge made no mention of this in her discussion of Vance's qualifications or credibility, as she said she would in paragraph 339.

345. Related to this issue is the trial judge's mischaracterization of the relationship between the Defendants and other C&L firms internationally, who are not Defendants. For example, in paragraph 1408, the trial judge refers to Cunningham as "an Irish partner of C&L", which is simply unsupported and not accurate. To misunderstand the difference between "an Irish partner of C&L" and "a partner of C&L Ireland" is a fundamental misunderstanding and error of fact and law, as revealed in her description of the relationship between Cunningham and C&L in paragraph 118 and the heading above paragraph 116 of the *judgment*.

346. Had these errors of law and fact not been made, it would have been recognized that the issue of the Irish "pledge" was a red herring, for all issues other than the fraud perpetrated by Castor on C&L.

347. The error of not understanding the interplay among various C&L firms also arises on a different topic (fee diversion) in paragraphs 2108-2110 where the trial judge appears to misunderstand the chronology of the different audits being performed by C&L and by C&L Cyprus, the whole as appears from the working papers referred to.

c) LLPs, 1989

i. Maple Leaf Village, 1989

348. At paragraphs 1461 to 1463, the trial judge makes the same error as had been made regarding management contracts in paragraph 1118, namely, accepting Prychidny's trial testimony that contradicts his contemporaneous writings regarding the value of the MLV assets (and the management contracts). Regardless of the credibility issue, the more significant point is that Castor's financial statements are not in violation of GAAP if Castor management were told what was in the document at the time, and there was certainly no breach of GAAS if Castor (and therefore C&L) were unaware of Prychidny's true views as explained to the Court 20 years later. This is moreover a violation of the trial judge's own warning against the use of hindsight.

349. The trial judge also failed to refer to two other pieces of documentary evidence that existed at the time the financial statements were completed that corroborate Prychidny's memo that there was value to the excess land (PW-1070E-5 and PW-493 bates p. 28-9 as explained in D-1334).

350. Had the trial judge not committed the above errors of fact and law as to what was available to a preparer of the financial statements at the relevant time, the conclusion as to the value of the MLV assets would have been different and no loan loss provisions would have been determined to be required.

ii. YH Corporate Loans

351. An example of the use of hindsight occurs in paragraphs 1504 and 1506, where the trial judge refers to experts who relied on PW-1149 (Whiting's "fair value" balance sheet of YH for 1989) as relevant in light of PW-1148A (a draft adverse opinion of YH's auditors on YH's financial statements). As indicated above, there is no evidence that YH showed Castor PW-1148A, so any use of that document to test the reasonability of PW-1149 is use of hindsight. (See paragraphs 473-5 of the *judgment* and April 21, 2008 p. 9 and p. 80-81; May 27. 2008 p. 135). This also occurs at paragraph 1546 in respect of MEC.

352. Had this error and other errors referred to above in respect of 1988 not been made, the conclusion as to the need for a LLP on this selection of loans would have been different.

iii. MEC

353. At paragraph 1527, the trial judge states that Vance and Froese took future interest into consideration as part of costs to complete. The trial judge failed to refer to the cross examination of Froese (Jan. 27, 2009, p. 134-136 and 169) in which he admitted that this methodology was contrary to his stated GAAP position in respect of a different project (DTS) and that his opinion in respect of MEC was based entirely on hindsight. This is an error of fact and law, and a violation of the trial judge's own conclusions on the use of hindsight.

354. In paragraph 1549, the trial judge prefers the appraisal used by Vance to the one used by Goodman. The trial judge fails to note that Froese used the same appraisal PW-1108A as Goodman (para. 1525), as did Rosen (April 8, 2009 p. 10-11 and PW-3033 vol 2 App B p. 30-31). Therefore, it is clear that Vance represents a minority view among Plaintiff's experts.

355. Had this evidence been considered, even without Goodman's and Selman's views on this issue being taken into account, the trial judge would have recognized that GAAP permitted two alternative treatments.

356. As a result, the conclusion at paragraph 1550 that there was no surplus would clearly have been different but for these errors of fact and law.

iv. TWTC

357. In concluding on TWTC for 1989, the trial judge holds that there was no surplus available to cure deficiencies in other loans. None of the expert witnesses who testified drew that conclusion. The trial judge is either therefore relying on Rosen's report (which he admitted in cross-examination on April 8, 2009, p. 77-207 contained numerous errors in calculation or referred to evidence that he was no longer able to identify) or is coming to a conclusion that differs from the expert evidence. In addition and more importantly, Rosen admitted in cross-examination that he had disregarded the same appraisal (PW-1161-24) that caused Vance to fundamentally change his opinion. The trial judge's statement that she is applying her reasoning for 1988, *mutatis mutandis* also disregards the evidence that the development of the TWTC project advanced during 1989 (PW-1167-3, PW-1167-4, PW-1069-20 and PW-1069-23) such that even if there had been no surplus in 1988, it is inappropriate to assume that the same position was true in 1989.

358. As a result, the decision rejecting Goodman's surplus computations is ill-founded.

v. Meadowlark

359. At paragraph 1631, the trial judge prefers Rosen's opinion to that of Goodman.

360. However, Rosen never testified on this in chief and in cross admitted that he was in error. (April 8, 2009, p. 207-210, and 1989 audit working papers BB40, PW-1053-18-2 p. 117).

361. Had the trial judge only considered the evidence lawfully before her, only Goodman's opinion was available.

362. By disregarding Rosen's admission of errors in his own calculations, the trial judge clearly adopted as her own an erroneous view, and failed to take into consideration whether the type of error committed by Rosen should have influenced the assessment of his credibility and qualifications.

vi. Summary on 1989 LLPs

363. The trial judge made palpable errors of fact and law with respect to overarching issues affecting the entire analysis of LLPs for 1989 and in respect of the individual loans in which a determination was made that an LLP was required for 1989. The resulting conclusion that Castor's 1989 financial statements were misstated as a result of understated LLPs, improper revenue recognition and/or failure to put loans a non-accrual basis is therefore manifestly unfounded in fact and law.

364. The trial judge further erred in fact and in law in not giving effect to an appropriate GAAP methodology of offsetting security deficiencies against surpluses with respect to all loans and properties controlled by Karsten von Wersebe.

365. As a result, the conclusion in respect of 1989 LLP's is unreliable and an error of fact and law.

vii. Summary on GAAP, 1989

366. The trial judge erred in fact and in law in determining that Castor's financial statements were not in accordance with GAAP in 1989.

4. GAAP 1990

367. As many of the trial judge's errors were the same in 1990 as in 1988 and 1989, Defendants refer to their comments for 1988 and 1989, *mutatis mutandis*, and add the following with respect to additional or new errors of fact and law.

a) State of the Economy

368. At paragraph 1637, the Court concludes that during 1990, the Canadian and American economy went into a recession. While this is true in hindsight, the trial judge failed to consider the evidence of the same expert she cites that the depth or length of the recession was not generally recognized until long after.

369. The trial judge also refused to admit research conducted by Defendants' GAAP and GAAS experts on how and when this recession in fact was recognized by real estate lenders and how it impacted upon entities active in the real estate market – (September 21, 2009, p. 124-127; September 21, 2009 p. 143-145; September 21, 2009, p. 97 -150; Oct. 8, 2009 p. 102 – 133; Oct. 28, 2009 p. 27-29, 39-42, 48-80) and particularly how and when lenders to real estate companies and their borrowers were accounting for that in their financial statements, and then disregarded their opinions on the point (May 5, 2009 p. 145-146; May 5, 2009 p. 221-222; October 30, 2009 p. 156; October 8, 2009 p. 113-120; 122; September 21, 2009 p.p. 103-104, 123-127; D-1312 p.p. 73-83; September 21, 2009 p. 136-137; p. 141-143; p. 146-149; September 22, 2009 p. 59)

370. The trial judge nevertheless permitted Plaintiff's GAAP and GAAS experts to testify in reliance on newspaper articles for the same point, despite their admissions that they had no other knowledge and were perhaps confused in their recollection of the timing of events (April 7, 2009 p. 134-135; April 7, 2009 p. 137-139; May 26, 2008 p. 166-167; July 8, 2008 p. 54-58);

371. This demonstrates the lack of even-handedness in the trial judge's approach to the evidence offered.

372. The trial judge further disregarded or refused to admit the evidence of Defendants' experts as to how accountants and auditors would react to a change in the relevant market.(September 21, 2009 p. 98-103; D-1277-1 Issue BN2, p. 22, 23 and 26; PW-1419-2, s. 3020.07, introduction on page 10, Additions and revisions item 1, s. 1000.05, s. 1506.21 and s. 1506.22, s. 1000.45(b); May 19, 2009 p. 169-171; D-1312 at p. 73-91 and 553-564, D-1295, p. 11-21 and related Exhibits; Goodman, October 28, 2009 p. 51-80; October 8, 2009 p. 122; October 8, 2009 p. 113-120; 122; January 12, 2009 p. 195-197; May 5, 2009 p. 146; May 5, 2009 p. 156-173 and D-1295 par. 3.01; May 5, 2009 p. 159-166 and D-1295 pars. 3.02, 3.03, 3.16 and 3.18; May 5, 2009 p. 164-165 and D-1295 pars. 3.09 and 3.10; May 5, 2009 p. 156 and D-1295par. 3.06; May 5, 2009 p. 145-146; September 21, 2009 p. 103-104, 122-126; September 21, 2009 p. 122-130; D-1312, Tables CREE.1 (p. 74), Table CREE.2 (p. 75); September 21, 2009 p.p. 134-135; D-1213, page. 81 Table CREE.6; September 21, 2009 p.p. 130-134; D-1312, p.p. 77-79 Tables CREE.3, CREE.4 and CREE.5; September 21, 2009 p. 135-137 D-1213, p. 82-88 Tables CREE.7 to CREE.13 inclusive).

373. This flawed analysis directly informed the trial judge's decision to prefer the Plaintiff's experts views on the LLPs that were required in 1990 (eg. Paragraph 1779 re MLV and 2042 re DTS), and this error of fact and law

therefore has a pervasive effect rendering the 1990 conclusions on LLPs unreliable.

b) Related Party Transactions

374. At paragraph 1646, the trial judge concluded that the loan to 687292 was a related party transaction, despite the fact that not a single expert had identified it as such. The trial judge's only source of information were lay witnesses (para. 1648) whose views as to what was required for related party status cannot validly be substituted for the views of experts. This conclusion is therefore an error of law. Moreover, the trial judge fails to consider the impact this finding of fact has on her fraud analysis.

c) Maturity Matching

375. The trial judge fails to consider that Vance's testimony as referred to at paragraph 1661 is clearly an opinion on GAAS, not GAAP, and commits an error of law in applying these GAAS opinions to the GAAP issue.

376. Conversely, the trial judge disregards the detailed GAAP testimony of Selman (May 21, 2009, p. 79-173 referring to D-1295, par. 6.9.49 to 6.9.76; D-1295-1A).

377. As a result, by adopting Vance's conclusion at paragraph 1664, the trial judge has failed to determine whether GAAP was violated.

d) Restricted Cash

378. The trial judge's conclusion at paragraphs 1688-1690, adopting Vance's view that there was a valid pledge in place as at year end 1990 on Castor's deposit in Bank Gotthard, does not address the evidence raised by Defendants, including what is referred to in paragraphs 1672 and 1678 and the evidence that the pledge was never validly in place. The trial judge further fails to consider that Castor's corporate minutes for 1990-1991 (PW-2400 series) indicate no authorization for any such pledge and that the representation letter signed for 1990 declares that no assets are encumbered (PW-1053-12-5, p. 221-223; PW-1053-13-9, p. 30-32; PW-1053-71-18, p. 179-181).

379. Had this evidence been appropriately considered, the opposite conclusion would have been reached, given the burden on Plaintiffs to demonstrate that the financial statements were incorrect.

e) LLPs

i. YH Corporate

380. The trial judge once again prefers Plaintiff's experts, referring to their reports and discarding their testimony in cross. As an example of the seriousness

of this omission, and its impact on their credibility, the Defendants refe to Vance's testimony on the CFAG loans in 1990.

381. In his report, Vance recommended a CFAG provision of $20 million in addition to his provision on YHDL loans; in cross-examination, he admitted this was a double count; in re-direct, he quantified this double count at $2.8 million; in cross-examination on the re-direct, he quantified this double count at $22.8 million, which he said was immaterial; in rebuttal he said he had erred when he admitted a double count, and that it was not a double count because he did not consider it a Castor loan, but that if it was a Castor loan, the double count was $2.8 million; in cross-examination on the rebuttal, in reply to a question about Investamar, he stated that the evidence showed a direct link to YH, as the interest on the CFAG loan was being charged to account 46 (PW-2908, vol. 3, p. 30; July 7, 2008 p.228-232; Sept. 2, 2008 p. 117-120; Sept. 3, 2008, p. 151-161; Apr. 13, 2010 p. 232-234; May 4, 2010 p. 103-104, D-1080).

382. As a result, the Defendants do not know which calculation the trial judge is relying on when she adopts Vance's conclusions in paragraph 1802, and further note that despite these glaring contradictions, the trial judge does not address why this is not a situation where paragraph 339 applied. Moreover, Vance's inability to deal coherently with the evidence should have caused the trial judge to doubt his conclusions and his qualifications, under the standard the trial judge said she would apply.

383. Of more significance, this demonstrates the degree of error that has affected the *judgment* as a whole by the reference of the trial judge to experts' reports as evidence under the "read-in" rule without regard to the testimony in cross-examination.

ii. Nasty Nine

384. The trial judge's conclusions as to who owed Castor $40,000,000 on the loans referred to as the "Nasty Nine" is based on a number of findings that simply do not flow from the evidence.

385. In paragraph 1821, the trial judge cites MacKay's testimony for the proposition that he was unaware that YH or von Wersebe were responsible for them. A simple reading of the first paragraph of the extract reproduced in the *judgment* indicates the opposite.

386. In concluding that von Wersebe had not signed his personal guarantees on these loans as at December 31, 1990, the trial judge:

(a) disregarded the signed, dated documents (PW-1064-VM series) found in Castor's safe by the Trustee.

(b) Relied on hearsay evidence as to what Dragonas told MacKay (para. 1815), and yet refused to permit Defendants to file Dragonas' own testimony on that topic (Judgment rendered by Justice Saint-Pierre dated February 11, 2010 and Judgment rendered by the Court of Appeal dated April 16, 2010), despite her statement during the trial at May 27, 2008 p. 6-7 that this was part of the record.

(c) Relied on Smith's evidence that he was never told that von Wersebe would be signing guarantees for these loans (para. 1820), without referring to his testimony that he was not in the "inner sanctum", was not involved in the negotiations between Castor and YH, and did not know everything that Stolzenberg did about YH and von Wersebe (May 15, 2008, p. 8, 35, 70, 115, 118-122; May 14, 2008, p. 65-67, 69, 182-183; Sept. 22, 2008, p 53-54, 70, 82, 96-97, 118, 122-126; Sept. 17, 2008, p. 16-17, 20, 113-114, 205-206, 212-213).

(d) Misconstrued Smith's hearsay testimony at paragraph 1820. Although Smith testified that after the audit he was told by Dragonas that Wightman had been advised that the guarantees had been obtained, this does not mean that Wightman was told after the audit. There is no evidence of any meeting between Wightman and Dragonas after the audit with respect to these issues.

(e) Disregarded PW-1176.

387. The trial judge's second conclusion, that the guarantees had not been signed by February 15, 1991 is not based on any additional evidence and therefore is even less supported.

388. This mismanagement of the evidence renders the conclusion erroneous, with a clear impact on the final determination as to Castor's inability to recover the $40,000,000 (para. 1868), particularly as these guarantees, on their face, had no restrictions (Froese Jan. 12, 2009, p. 68; Goodman Oct. 7, 2009 p. 171-178).

389. Any conclusion that the Nasty Nine were uncollectible simply because they were a circle, without reference to YH assets or the guarantees is, in addition, contrary to the holding in *Singleton v R* (supra).

390. The trial judge then confuses GAAP with GAAS and at paragraph 1825 (and para. 2593) criticizes C&L for not confirming the Nasty Nine. The trial judge fails to refer to any expert evidence that this was required (there is no such evidence) nor to the evidence the trial judge reproduced in paragraph 1812 that the number and amounts of these loans were designed by Dragonas precisely to fly under the radar on the sampling for confirmation. Moreover, the trial judge fails to note that the purpose of confirmation is existence, and that Smith testified

(Sept. 17, 2008 p. 203) that these were not fictitious. These errors of law in respect of the trial judge's appreciation of the evidence impacts the trial judge's determinations on GAAS and fraud (dealt with below).

391. The trial judge's comments regarding Goodman at paragraph 1867 further discloses the lack of even-handedness when dealing with Defendants' experts. It is true he refused to change his opinion on the Nasty Nine guarantees when confronted with the proposition that von Wersebe was not a shareholder or director of Pustul, that he was not named in the corporate resolution, and that he never signed the promissory note or other documents. However, the documents used to support these hypotheses were all backdated, and thus constituted hindsight (Mackay Aug. 25, 2009, p. 130-137; Alksnis Feb. 8, 2006, p. 88-97, PW-1064-1-3). Moreover, the trial judge does not refer to the fact that Goodman was weighing that evidence against the signed and dated guarantees as well as other evidence he had brought to the Court's attention (D-205; D-205-1; Goodman Nov. 24, 2009, p. 7-9; D-1312-4 Undertaking #1b; Alksnis, Feb. 7, 2006, p. 182, 196, 197, Feb. 8, 2008, p. 54-57, 64-66, 71, 83, 84, 139-141, 150; Blake, June 18, 2009 p. 96-97, 147-148; Nov. 24, 2009 p. 7-9; D-1312-4 Undertaking #1a). The trial judge also failed to note that Froese stated that these loans had been guaranteed. (Froese Nov. 28, 2008 p. 76-78; PW-2941-3 vol 4 para 2.181 and 3.1).

iii. MEC

392. The trial judge's analysis of MEC in 1990 is fraught with hindsight, including references to evidence of discussions within YH for which there is no evidence that Castor was aware of (paras 1890-1891); reliance on experts who used appraisals, and acceptance of values in those appraisals (PW-1108B and PW-1108C) that according to the uncontested evidence of Smith (Sept. 24, 2008 p. 24-25) as well as on the face of the documents themselves, were not signed, not on letterhead, and not in Castor's possession before the financial statements were completed (para. 1892).

393. This not only breaches the hindsight rule recognized by the trial judge, but Rosen testified (April 8, 2009, p. 15-18) that he was unaware of Smith's testimony, and if it were the case that Castor did not have the document, then he should not have used it.

394. As all Plaintiffs' experts used one or both of these appraisals, the trial judge's conclusion that their opinions prevail (para. 1902) is an error of law.

395. The proposition that had C&L but asked for an updated appraisal they would have received something similar to PW-1108B not only repeats Plaintiff's arguments without analysis, but is an egregious error of fact and law, in that it assumes that a final version of this appraisal exists, and further does not consider that if Royal Lepage was not prepared to sign it and put it on its

letterhead in September 1990 or even by May 1991, the final result might well have changed.

396. On a further point, the trial judge rejects Goodman's analysis, and says at paragraph 1906 that in order to execute its security, a number of debts would have to have been paid in priority to Castor. The trial judge has clearly failed to understand Goodman's analysis, as his computation clearly shows that he deducted all of those prior claims (D-1312-1 MEC.13 (revised) and D-1325 as amended by D-1339 to arrive at $42.5 million per D-1312-6; Sept. 22, 2009 p. 172-221; Sept. 23, 2009 p. 27-143; Oct. 8, 2009 p. 195-199; Nov. 2, 2009 p. 123-129; Dec. 3, 2009 p. 98-112, 127-131 D-1326; D-1327; D-1339 ; D-1312-4 #10-13 incl.).

397. As a result, the trial judge's rejection of Goodman's position is an error of law.

iv. TSH

398. Another example of hindsight is found in paragraph 1926, where the trial judge refers to a May 1991 appraisal. Although not used in the conclusion, this demonstrates a disregard for fundamental GAAP and legal principles.

v. DTS

399. In addition to all the general issues discussed above, the trial judge's DTS analysis is affected by hindsight, application of US GAAP, an inappropriate conclusion regarding the impact of auctions, and an inconsistent reliance on Froese.

400. The most significant hindsight error is the acceptance of the testimony at paragraph 2025 of Strassberg, Moscowitz and David Smith that Strassberg's view that provisions of approximately $40,000,000 were required in DTS's own financial statements as at the end 1990, was a view he reached in February 1991. The actual financial statements showing that result were only issued in 1992 (PW-2319), and therefore were not available before the completion of Castor's financial statements. The acceptance of testimony rendered almost a decade later as to the timing of Strassberg's view is contradicted by March 1991 financial statements he provided to DTS in 1991 for purposes of filing tax returns for 1990, where the only losses on the various projects that were taken were for future interest (of about $12-13 million) (D-347; D-348; Strassberg Feb. 5, 2001, p. 1758-1762).

401. The reliance on these 1992 financial statements by the trial judge and Plaintiff's experts Froese and Vance also has for effect to import US GAAP for developers (the basis of preparation of PW-2319) into Castor's financial statements that were prepared on the basis of Canadian GAAP for lenders. (Goodman, Oct. 28, 2009, p. 100-106, 148-151, 167-173; D-1312 p. 581-584; Froese, Jan. 13, 2009, p. 57-59; Selman, May 8, 2009, p. 63-64; Oct. 8, 2009, p.

167-173; Dec. 3, 2009, p. 21-32). The experts agreed that U.S. GAAP differs from Canadian GAAP, and that GAAP for developers differs from GAAP for lenders.

402. The trial judge further states (para. 2007), without support, that the auctions held by DTS negatively impacted the sales price of the remaining homes. This is contradicted by evidence the trial judge ignored that indicates that the auctions were used to clear out less desirable lots, and that the remaining homes, which the evidence demonstrated DTS did not intend to sell by auction, would command premium prices. (PW-1114-14, PW-1114-14A, PW-1114-24, PW-1118-11, PW-1119-11, D-403)

403. Finally, the trial judge adopts Froese's views at paragraph 2047 with respect to future interest, but does not accept his methodology with respect to cross-collateralization (Froese Jan. 12, 2009, p. 149). The trial judge also used his report computations without considering changes he admitted would be appropriate, but did not make to his report, namely, the admission that had he applied his 1997 methodology to his current selection of loans for the DTS project (which he agreed a reasonably competent accountant could do under GAAP), it would result in a nominal or no loan security deficiency and that if he then made those corrections that he admitted were appropriate, there would have been a surplus (Jan. 12, 2009, p. 176-185). As another example of the trial judge's double standard on credibility, she criticizes Goodman for a change in his opinion on future interest between 1997 and 2008, but does not comment upon the significant changes to Froese's opinion summarized above.

404. The net result of correcting these errors would be a determination that no LLP was required.

vi. Summary on 1990 LLPs

405. The trial judge made palpable errors of fact and law with respect to overarching issues affecting the entire analysis of LLPs for 1990 and in respect of the individual loans in which a determination was made that an LLP was required for 1990. The resulting conclusion that Castor's 1990 financial statements were misstated as a result of understated LLPs, improper revenue recognition and/or failure to put loans a non-accrual basis is therefore manifestly unfounded in fact and law.

406. The trial judge further erred in fact and in law in not giving effect to an appropriate GAAP methodology of offsetting security deficiencies against surpluses with respect to all loans and properties controlled by Karsten von Wersebe.

407. As a result, the conclusion regarding 1990 financial statements is unreliable and erroneous in fact and law.

f) Summary on GAAP, 1990

408. The trial judge erred in fact and in law in determining that Castor's financial statements were not in accordance with GAAP in 1990.

5. GAAS: Did C&L conduct the 1990 audits in accordance with GAAS in relation to the items on which there were GAAP violations?

409. The trial judge's *judgment* on GAAS, which begins at p. 450 of the *judgment*, is fundamentally flawed in a number of ways.

a) No distinction between different years

410. First, the trial judge does not consistently distinguish between the audit work in 1988, 1989 and 1990. This means that the trial judge may well have inappropriately attributed breaches to the wrong audit team. Therefore:

(a) if the outcome of the appeal is to overturn the decision on GAAP in any one of the three years, it will not be clear whether GAAS was also breached in that year;

(b) Widdrington allegedly relied upon the 1988 audited financial statements for his 1989 equity investment. If the judgment on GAAP or GAAS for 1988 is overturned, his action must be dismissed.

b) No causal connection

411. Second, it is only if GAAP was not met on a specific financial statement item that there is a need to answer the question as to whether that failure should have been detected by an appropriately performed audit (GAAS) on that item. Otherwise, there is no causal connection between the departure from GAAP and the audit negligence, and no causal connection between the audit negligence and the Plaintiffs' investment decisions.

412. However, the trial judge's conclusions (see for example para. 37) do not tie the GAAP and GAAS breaches together. Examples of GAAP breaches, or of evidence relied on by the Court to determine GAAP breaches, for which there is no corresponding decision as to a GAAS failure include:

(a) The GAAP analysis on related party transactions at pages 113-117 for 1988 (paras 1335 and 1645 for 1989 and 1990) does not identify with precision which transactions were in fact obliged to be disclosed as between related parties, and there is no reference in the *judgment* to the significant amount of evidence as to the prevailing GAAS standards or the evidence that C&L respected same; which includes evidence given by Plaintiff's experts and in

the case of Rosen, certain of his writings which state clearly that auditors are not obliged to "go looking" for related party transaction (S. 3840.07 (PW-1419-2) and Auditing Guideline on Related Party Transactions par. 11 (PW-1419-2A); Auditing Guideline on Related Party Transactions, par. 6 (PW-1419-2A); Rosen March 24, 2009 p. 192-193; Froese Dec. 5, 2008 p. 129-132; Selman May 13, 2009 p. 142-147 and 176-177; PW-1053-22-7; MBF, Nov. 7, 1995 p. 128-132, Dec. 7, 2009 p. 151-152; Penny Heselton, Apr. 26, 1996, p. 119-121; Wightman Sept. 6, 1995, p. 179-180, July 18, 1996, p. 110-114, July 19, 1996, p. 33-37, Feb. 9, 2010 p. 168-169; Ken Mitchell Apr. 24, 1996, p. 104-106, question 358; D-961; June 4, 2008 p. 105-109 and 169-171; Selman, May 14, 2009 p. 27-31; PW-1421-10, p. 847-848; D-1295 section 6.2.06; Apr. 6, 2009, p. 74-76. Canadian Business Dec. 22, 2003, D-1284; Dec. 10, 2008 p. 165-168; June 4, 2008 p. 159).

(b) Similarly, the section in the *judgment* on the $100 million debentures at paragraph 667-685 deals only with GAAP, not GAAS and is improperly influenced by what was done in 1987, a year not in dispute;

(c) At paragraph 972-973, in the GAAP analysis, the trial judge refers to PW-1148A, a draft adverse opinion given to YH. There is no evidence it was given to Castor, much less C&L, and none of Plaintiff's experts suggested that C&L should have discovered its existence;

(d) At paragraphs 119-123 and 1562, the trial judge makes reference to Lambert cash circles. Again, none of Plaintiffs experts suggested that C&L should have discovered this circle.

413. An example of the opposite error (determining that a GAAS failure occurred, with no finding of any related misstatement in the financial statements) is found in paragraphs 2521-2528 and 2559-2569, where the trial judge found fault with audit procedures applied to a group of loans (DTS) in 1988 and 1989 on which no need for an LLP was alleged by Plaintiffs.

c) Wrong standards

414. Third, the Court erroneously considered C&L's internal guidance as GAAS (para. 2191). This error is repeated in many other specific paragraphs of the *judgment*, including:

(a) Paragraphs 737-738 and 2403-2405 regarding an internal file review for 1987 (a year not in dispute)

(b) Paragraphs 1734, 1735, 1737, 1749, 2012 regarding the state of the economy

(c) Paragraphs 2033 regarding cross –collateralization

(d) Paragraphs 2206-7 regarding Independence

(e) Paragraph 2309 regarding Planning

(f) Paragraphs 2358 and 2362 regarding supervision and review

(g) Paragraphs 2390 – 2393 regarding documentation

(h) Paragraphs 2849 and 2852 regarding fraud

(i) Paragraphs 2941 on the year end cash circles

(j) Paragraph 3095 regarding legal for life certificates

415. But for this error, a different standard would have been applied, with different results.

d) Specific Issues

416. The trial judge's findings are grouped under the following general topics: objectivity/independence, planning, due care/appropriate training, supervision and review, sufficient appropriate audit evidence, working papers, wrap-up meetings, omissions, comments regarding individual projects. The errors noted above apply to each of these and Defendants set out below additional specific errors of law and fact.

i. Independence

417. The first GAAS breach found by the trial judge is a breach of objectivity by the audit partner (GAAS of the day required objectivity, not independence, two separate concepts). The trial judge lists a series of facts at paragraphs 2208-2292 regarding the relationship of the audit partner to Castor and Stolzenberg, but does not link those facts to any of the correctly stated rules governing objectivity and independence at the time listed in paragraphs 2202-2205 (although the ethics rule of independence is not dispositive of a civil dispute). In fact, the facts disclose nothing unusual given the practice and rules of the day as set out in the evidence (Froese, Dec. 8, 2008, p. 156-158, Levi, Feb. 2, 2010, p. 52-53). There is no evidence and no authority of the day, for example, that ties payment of fees, introduction to a client of business opportunities for its consideration, or provision of other accounting services, to independence. The only "standard" that the trial judge ties these facts to is C&L's internal guidance, which she correctly describes at paragraph 2206 as a matter of partnership governance.

418. The trial judge applied the wrong standard. This is not only a legal error, but tainted the judge's view of Wightman, and must be seen to have influenced

her assessment of his credibility and testimony, which then had significant effect on all substantive issues he testified about.

ii. Planning

419. First and foremost, any comments about planning cannot be dispositive. It is perfectly possible to have adequate planning but inadequate performance, or inadequate planning but acceptable performance. The trial judge's conclusion at paragraph 2342 displays the danger of failing to recognize this fundamental issue: the trial judge holds that the planning was inadequate and that this had "a serious and negative impact" on the audit work. That statement accepts a cause-and-effect relationship that does not exist and inappropriately coloured the trial judge's entire approach.

420. The trial judge held that in order to appropriately plan an audit, an auditor must understand the client's business. Defendants agree with that general proposition. However, the trial judge's characterization and understanding of Castor's business, set out in pages 12-13 of the *judgment*, is flawed as the following examples show:

(a) At paragraph 49, the Court states that YH and DTS were Castor's two main clients. This is a distorted view, based uniquely on Plaintiff's presentation which focused on a non-representative selection of loans and which made assumptions that are contrary to the trial judge's own findings. For example, the "YH Group" as identified by this evidence (PW-2893 and particularly PW-2893-19, PW-2893-20, PW-2893-25, PW-2893-64 and related testimony of B Gourdeau, the Trustee (Jan. 17, 2008, Jan. 21, 2008) includes all the loans connected to the Toronto and Calgary Skylines, the MEC loans owed by 97872 and 612044, the MLV loans owed by "offshore investors" and the Ottawa Skyline Hotel in 1990, all of which the trial judge held to be owned outside the YH group (or in the case of MLV investors were never alleged to be owned within the group) (paras 1138, 1191-93, 550-551, 867-8, 911 and 1025). The same evidence shows clearly that the "California Group" (DTS) is smaller than the "European" and "other" groups, so it is not known whether other clients were larger. This issue recurs in paragraphs 57, 59, 60, 423, 426, 431 of the *judgment*.

(b) In paragraphs 53 and 2312, the trial judge refers to Castor's representations in its brochures, a document C&L did not opine on and then in paragraph 2313, noted that Castor was in fact a long-term lender. C&L in fact audited Castor as a long-term lender, but recognized, as the trial judge did in paragraph 655, that financial statements disclosures must nevertheless reflect the actual terms of its contractual agreements.

(c) Paragraphs 55-62 are based on inadequate evidence, which never included the evidence of the people whom all witnesses and parties agreed were those who actually ran Castor or were close enough to Stolzenberg to know what his intentions and strategies were, namely, Stolzenberg, Dragonas and Goulakos and Baenziger (March 24, 2009 p. 217-220; Apr. 22, 2009 p. 151-152; March 26, 2009 p. 170-173; Dennis Sept. 8, 1995 p. 38-39; Vance Apr. 7, 2008, p. 80-81, May 13, 2008, p. 20-21; Rosen Apr. 22, 2009 p. 151-152, March 26, 2009 p. 170-171; Vance May 13, 2008, p.161-201. Froese Dec. 9, 2008, p. 71-155. Rosen March 26, 2009, p. 81-93, 101-129, 136-148; March 24, 2009, p. 217-218, and Feb. 27, 2009, p. 170; PW-1053-23 p. 129-130; Daniel Seguin Jan. 18, 1996, p. 18-19; PW-1053-19-17; Vance PW-2908 p. S-13-14; Apr. 18, 2008 p. 56-57; May 13 2008 p. 153-156; Rosen, Feb. 27, 2009, p. 170-171; Wightman Sept. 8, 1995 p. 182-185; Feb. 8, 2010 p. 118-121, 127-130, 137-140; Feb. 9, 2010 p.97-101 and 164; Janet Cameron Dec. 2, 1996 p. 33-35; Bruce Wilson Oct. 28, 1996 p. 219; Jean-Guy Martin Jan. 5, 2010 p. 96-97, 100-102, 132; Jan. 6, 2010 p. 62-65, 108-110, 164-166, 205-207 and 215-219; Jan. 7, 2010 p. 61; Maribeth Ford Dec. 7, 2009 p. 154-165; Barry Mackay Aug. 24, 2009 p. 175, 188-189; Manfred Simon Apr. 23, 2009 p. 137-138, 180-183, 189-191; Ron Smith May 14, 2008 p. 41; Sept. 24, 2008 p. 85; Michael Dennis Sept. 8, 1995 p. 38-39; March 26, 2009 p. 171). Again, at best, Plaintiff only presented evidence of a selected portion of Castor's loan portfolio and presented no evidence that it was representative of the entire portfolio.

(d) Paragraphs 55-56: It is true that most of the loans made to real estate developers were short term. The trial judge relies on Smith for the proposition that Castor "had no choice" but to renew them. This testimony did not refer to the loan documents and other evidence that demonstrated that Castor's business model was in fact to continue to lend by short term loans that were renewed until the projects under development or properties in refurbishment were ready to be refinanced or sold, which would often be for longer periods. The shorter contractual terms were an important part of Castor's ability to charge fees and renegotiate terms and security each year. (May 28, 2008 p. 127-142 . These included: CSH - PW-1087-4 and PW-1087-5; the back-to-back loans; the Skyline loans - PW-1053-12-1 sequential p. 90, D-575, p. 1 items 3a and 3b (the pricing was based on a 5-year term) PW-167x, PW-167v ; MLV(interest was capitalized via loans in Europe); see also TWTC - PW167cc – p. 2; TWTC – PW-1053-23-7 p. E-107, Smith Sept. 17, 2008, p. 19-20, 24, 98-100; May 28, 2008 p.143-144; May 19, 2009 p. 213-215) It also disregards Smith's own testimony that he was not in the "inner sanctum".(May 15, 2008, p. 7, p. 70; May 14, 2008, p. 65-67, 69 and 182-183)

(e) Paragraph 58 assumes that all loans that are not directly secured by mortgages on real estate are 'equity' loans. This ignores the

fact that although Castor took other forms of security, 90% of the loans considered by the Court were 'asset-backed' - in other words, value of the security held by Castor consisted of the market value of real estate. (Sept. 22, 2009 p. 41-44, 152-155 and D-1321; Sept. 22, 1995 p. 4-5)

(f) In paragraph 61, the trial judge states that the greater the borrowers' failure to pay interest, the more income Castor could recognize. This is erroneous as it implies that when a borrower in fact pays, the lender's revenue is less than when the amount remains payable.

(g) In paragraph 62, the trial judge describes what every lending business does – it borrows to lend - but in language that betrays a misunderstanding that this is completely normal and expected (and certainly should not be a surprise to Plaintiff who had been on the CIBC Board for 15 years). In fact, Plaintiff's own evidence shows that Castor's increasing dependence on debt rather than equity to provide its working capital was apparent on the face of its financial statements (PW-2893-10).

421. In summary, these examples demonstrate a misunderstanding of Castor's business which necessarily led to a wrong starting point for the discussion of audit planning.

iii. Due care/ appropriate training

422. The trial judge's comments at paragraphs 2343-2356, are premised on a misunderstanding of Castor's business, as described above. For example, as an asset-based lender taking long-term projects as security, it makes sense that the audit would focus on appraisals of market value rather than borrower financial statements. The trial judge disregarded what Plaintiffs' expert Rosen wrote in his accounting textbooks (D-1260-5 Accounting – A Decision Approach, 1999– p. 417-420; D-1263-1 Accounting – A Decision Approach, 1986 at p. 244-245 and 372-375: Apr. 6, 2009 p. 150-154) that due to GAAP limitations, creditors use borrower financial statements to determine the nature of their assets, not their value and that long term lenders usually do not even seek the borrower's general purpose financial statements.

423. Given the above, the trial judge's conclusions are erroneous as to the required GAAS.

iv. Supervision and Review

424. The trial judge cites the appropriate Handbook section in paragraph 2357 regarding the supervision of assistants (i.e. junior staff), which specifically refers to determining whether their work was properly executed by "such means as observation, discussion and review". From that point, the trial judge's focus is on

"review" only. The trial judge failed to consider the evidence that the managers supervised the juniors by observation and discussion (Belliveau April 1, 1996, p. 55-56; April 2, 1996, p. 268-271; May 22, 1996, Q. 1424 and 1425; Mitchell, April 24, 1996, p. 26-29

425. Therefore, the trial judge's conclusions are flawed in that evidence that leads to a very different conclusion has not been considered.

v. Sufficient audit evidence/omissions

426. At paragraph 2366, the trial judge comments negatively on the lack of experience of the audit staff. This is completely contradictory to her acceptance of Rosen and Vance as having "knowledge and experience that is directly applicable to this litigation", despite the fact (as seen in paras 333, 340 and 346 in the *judgment* and evidence cited above) that their experience regarding the audit of loan portfolios was no better than that of Defendants' staff.

427. At paragraph 2368 the trial judge finds that the working papers were insufficiently documented to "permit an external review at a distance in time". This highlights the trial judge's complete failure to recognize that the purpose is not to permit an **external** review at a **distance in time**, but an **internal** review **prior to release** of the financial statements, when the client's documents are available to consult.(Selman May 19, 2009, p. 30-36)

428. Paragraphs 2369-2374 and 2436-2457 are all premised on the failure to understand that even where the security was not a direct mortgage, Castor was an asset-based lender, and C&L's audit steps were focused on that fact.

429. These fundamental errors informed the trial judge's conclusions, which are therefore unreliable.

vi. Working Papers

430. Paragraphs 2378, 2382, and 2383 describe a number of standards regarding audit working papers that are unsupported. As the Handbook indicates and as Selman and Rosen explained, and as Vance indicated was true of his own work, although the documentation standard is part of GAAS, failure to keep a record does not mean the work is not done. (June 1, 2009 p. 81-90; Apr. 6, 2009, p. 174-187; Selman May 19, 2009, p. 30-36; Apr. 17, 2008, p. 118-119).

431. As a result of these errors, the trial judge's conclusions as to C&L's working papers are manifestly erroneous.

vii. Wrap-up meetings

432. The trial judge's assessment of the wrap-up meetings, as stated in paragraph 2434 is based on a comparison of the credibility of the testimony given by R.B. Smith and Wightman. In addition to comments on Smith's credibility set

out above, Defendants point out that Smith's testimony is that he was not present at the 1988 and 1989 meetings and that he only attended a part of the 1990 meeting. Therefore, he cannot have known what transpired in his absence.

433. The trial judge's conclusion therefore wrongly reverses the burden of proof and disregards the best evidence rule. Even without Wightman's uncontested evidence, the Plaintiff has not proven what was discussed or not discussed, as he never called Stolzenberg to testify. The trial judge's conclusion is therefore an error of law.

viii. The projects

434. This portion of the *judgment* (paras 2458-2752) suffers from all the errors of fact and law set out above and therefore the conclusion would have been different had appropriate standards and legal tests been applied.

435. In addition, at paragraphs 2462-2466, the trial judge adopts an interpretation of s. 5360 of the Handbook regarding the auditor's use of appraisals, which was not universally agreed to by the experts, even if one considers only the Plaintiff's experts (May 19, 2009 p. 123, 134-136; Nov. 12, 2008 p. 189-194; May 19, 2009, p. 123-126, 134-169). As indicated above, given the nature of Castor's business, the fundamental, appropriate focus of the audit was the valuation of the underlying properties on which recovery of the loans ultimately depended. As a result, the test for audit performance applied by the trial judge breaches the trial judge's stated rule that where there are two schools of thought, the professional cannot be faulted for having selected one of them (para. 266-8).

436. Finally, throughout this portion of the *judgment* there are assertions as to what C&L should have done that are not referenced to any footnote. In each case, it is because such audit steps were not required. The only possible legal conclusion is that Plaintiff did not meet his burden of proof on those points.

e) Summary

437. The trial judge's conclusions on GAAS do not link the GAAS failure to the GAAP misstatement, are based on a misunderstanding of Castor's business, disregard the evidence and are therefore incorrect in fact and law.

6. THE ISSUE OF FRAUD

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;

439. The trial judge fails completely to consider the impact of the admissions of the fraud that was committed by many of the "who's who" described in her

judgment as well as fraud that was identified and pleaded by the trustee in bankruptcy in separate proceedings filed by the trustee and the Castor Plaintiffs against Smith, Stolzenberg, Gambazzi and others;

440. The trial judge, despite concluding that Gambazzi lied (see paras 680, 1678. 2065, 3570, as well as the Judgment on Objections, para. 606) and that he was directly involved in transactions that were misstated, fails completely to assess the impact of this on the defence of fraud. Moreover, and despite the fact that Defendants made submissions in this respect, the trial judge failed to address whether Gambazzi and the entities he represented should be permitted to benefit from the common conclusions or the costs award;

441. The *judgment*, including the manner in which the trial judge defines the questions concerning fraud, betrays a bias and an unwillingness to consider Defendants' arguments from the outset. For example at paragraph 404, the trial judge defines the fraud issue before her in a restricted manner, noting that the Defendants are not sued for failing to have detected fraud. That is incorrect. The Defendants are sued for failing to have discovered that the financial statements that Castor prepared and has responsibility for, were materially misstated under GAAP. Defendants' defence, as set out in their plea, is that the financial statements met GAAP, but if the evidence, whether documentary or otherwise showed that information was not known to them because the application of GAAS would not have detected it because of fraud (in the sense described in the Handbook s. 5300.43), the action should be dismissed.

442. The trial judge made several fundamental errors of law and fact in her consideration of the defence of fraud. The evidence clearly discloses that fraud was committed by senior management of Castor in that they deliberately organized various transactions to conceal the identity of the parties to the transactions, and to conceal the underlying purpose of various transactions. There is uncontested evidence that documents were concealed from C&L (Froese, Dec. 9, 2008, p. 71-85; Jan. 9, 2009, p. 78; Jan. 12, 2009, p. 69-72 and 89-90; Dec. 8, 2008, p. 71-86; Jan. 7, 2009, p. 78-81).

443. First, the trial judge concludes at paragraph 2780 that GAAS required the auditors to plan their audit to address the risks of "material fraud". This is not only an error of fact and law but is contrary to the expert evidence cited by the trial judge at paragraphs 2788, 2825, 2849 and 2874 as well as the clear statement by Vance that an audit could not be conducted without the assumption that management is acting in good faith (April 16, 2010, p. 33). This error permeates the *judgment* on fraud, in that the trial judge concludes that the alleged GAAS failures meant fraud could not be a defence.

444. Second, the trial judge adopted as her own a legal theory that has no precedent and appears to be based on the methodology employed by Froese, who has a CFE designation but whose mandate was restricted so as not to include fraud (para. 2859). However, on cross-examination Froese conceded

that despite extensive experience as a fraud expert, it is not a theory he had ever applied or seen applied before (Froese, Dec. 5, 2008, p. 42-45; Dec. 4, 2008, p. 172-174)).

445. That theory is that evidence of fraud by Castor in its dealings with Defendants can be ignored if there is no evidence that C&L asked a specific question in relation thereto or a precise fraudulent answer was given. Put another way, rather than consider the impact of fraud and whether, given the evidence of fraud, ordinary GAAS would have detected the alleged misstatements, the trial judge held at paragraph 2186, that if GAAS procedures were not properly conducted, then management fraud cannot be a defence. In paragraph 2763, the trial judge goes even further and despite concluding that "fraud might have been a barrier to the auditors identifying irregularities", states that fraud is not a defence because of the C&L's "improper and deficient performance". This is contrary to a long line of caselaw, cited to the judge by the Defendants and not referred to in the *judgment*, that an auditor has no positive duty to detect fraud, is a 'watchdog', not a 'bloodhound' and is entitled to assume management's good faith (*Guardian Ins. Co.* v. *Sharp* (1941) S.C.R. 164, p, 169-170; In re London General Bank (no. 2), (1895) 2 Ch. 673; In Re Kingston Cotton Mill Co. (no. 2) (1896) 2 Ch. 279; R.M.A. *Restaurant Management Ltd. V. Gallay*, J.E. 96-586 (S.C.); *Sarraf* v. *Awad*, J.E. 95-1881 (S.C.)).

446. Third, aside from the lack of a legal basis for this proposition, this concept that the trial judge need only decide whether the fraud was "against C&L" rather than only against the company or third parties (see para. 2113 re fee diversion, for example), overlooks the following very significant facts:

(a) the Plaintiff was a member of the Board of Castor from the beginning of 1989; and

(b) the Board has the primary obligation to prevent fraud (see paras 2847, 2849 and 2874).

447. As a result, the trial judge has framed the question in a way that prevents a proper assessment of the validity of Widdrington's claim or the validity of the fraud defence.

448. Fourth, this approach to the defence of fraud ignores the principle of causality: the audit error must be causally connected to the GAAP misstatement. Much of the *judgment* offends this principle, as has already been identified. Therefore, it is not sufficient in law for the Plaintiff to prove that a proposed GAAS procedure was not performed. He must also demonstrate, on a balance of probabilities, that had that procedure been performed, C&L would have discovered the facts of which they had been unaware and that this would have led them to a different conclusion. This causal link is assumed by the *judgment*, but it is based on the unproven assumption that the reply, document or representation received to the unasked question would have been of a nature to

alert C&L to a problem, rather than done in a way to allay suspicions and provide further comfort them.

449. Although such an assumption might be permissible in circumstances where there is no evidence of fraudulent behaviour by management, it is an error of law, and is insufficient to discharge Plaintiff's burden of proof, where the contrary is the case. As the trial judge ruled early during trial, it is relevant to know what kind of characters C&L were dealing with, as this would affect the audit (January 31, 2008 p. 35-36).

450. Fifth, this error of law is further demonstrated by the trial judge's fundamental confusion, as seen at Paragraphs 2666-2667 of the *judgment*, between what C&L knew, what it should have known and what it could have known. This last category of "could have known" cannot in law be combined with the other categories without specific evidence that the questions that the trial judge determined that the auditors should have asked would have been responded to with the same replies given at trial. In light of the evidence of fraud at Castor in its relationship with C&L and others, and the willingness of third parties such as lawyers and chartered accountants to participate in the fraud, no such assumption can be made. Yet this assumption underlies the entire *judgment*. Examples include:

(a) the fact that Castor created or used "convenience" companies (eg. in relation to the Nasty Nine and the $100 million debentures);

(b) Castor instructed staff not to show certain documents or to provide incomplete and misleading answers to direct questions (Smith, Sept. 22, 2008, p. 116 ff; Mackay, Aug. 26, 2009, p. 29-30 and 70 ff.);

(c) Evidence of Smith's and Whiting's complicity in misleading the auditors (eg. in respect of the Nasty Nine), which was ignored by the trial judge in her determination as to whether they were credible;

(d) Evidence relating to the integrity of the books and records, including the movement of records offshore, the shredding of documents, etc., all of which occurred under the watch of Plaintiff's witness, Smith (para. 283);

(e) The trial judge's misunderstanding of the source of information found in the audit working papers that is therefore wrongly attributed to C&L, whereas in fact these were the auditors' record of representations made by Smith (eg. para. 2360) (Smith, May 14, 2008, p. 76, Sept. 22, 2008, p. 257-258; Pierre Lajeunesse, Sept. 30, 1996, p. 45-46; François Quintal, Nov. 29, 1995, p. 57)

As a result, it is an error of fact and law for the judge to conclude that "had they asked" C&L would have found or been told something other than what Castor wanted them to know.

451. Sixth, the trial judge was inconsistent in her application of whether evidence of what C&L "could have known" is relevant to the judgment. Despite this being the cornerstone of the decision on negligence, in paragraph 578 of the *judgment* on objection #108, the trial judge states: "*Le Tribunal doit décider des questions en litige à la lumière de la preuve des faits qui se sont produits, légalement administrée, et non pas en fonction de ce qui aurait pu se produire si ces faits avaient été autres*".

452. This inappropriate reference to what C&L "could have known" also offends the rule against hindsight. As the expert evidence indicated, once you know what actually happened, it is easy to identify audit procedures that would detect it (eg. Levi p. January 27, 2010 148-149). But audit steps are not designed with that knowledge.

453. These errors of law led the trial judge to commit additional manifest errors of fact and law, as can be seen from the following examples:

454. Nasty Nine: The *judgment* identifies the following facts regarding the conduct of McLean & Kerr in respect of the loans called the "Nasty Nine" at para 1807 -1811, 1816-17 (Alksnis, Feb. 7, 2006, p. 181 ff., Feb. 8, 2006; Smith, Sept. 22, 2008, p. 92-114; Mackay, Aug. 25, 2009):

(a) Money was sent from Castor to McLean & Kerr in trust for 9 separate companies, which McLean & Kerr had either created or taken off the shelf – these were recorded as loans to the nine companies and presented and seen as such by Coopers;

(b) The same money came back into Castor, in different amounts and on different days, from McLean & Kerr, acting in trust for 4 different YH entities to pay interest on 5 separate loans. Again, the receipt of these funds were recorded in Castor's records as interest payments by these YH entities and seen as such by Coopers;

(c) McLean & Kerr provided the documentation for the nine new loans, including preparing and signing promissory notes and commitment letters, signed after February 7, 1991 but back dated to 1990 (Smith, Sept. 22, 2008, p. 106-112; Alksnis, Feb. 8, 2006, p. 88-97; Mackay, Aug. 25, 2009, p. 131-133; Blake, June 18, 2009, p. 96-97, 147-148), in time to be shown to Coopers;

(d) McLean & Kerr received instructions to create the nine companies and process and paper these transactions (both the moneys

coming in and going out) from nobody except Castor, but acted as described above in any event;

(e) Despite this evidence, the trial judge states at paragraphs 2889-2890 that the evidence does not show that McLean & Kerr would have produced whatever documents were required to satisfy Coopers and that there is no reason to believe that they would not have told C&L the truth, had C&L asked.

(f) In the context described above, the trial judge's conclusions constitute a manifest error of fact and law.

455. Character of Stolzenberg and Dragonas. Perhaps the most egregious example of the trial judge's failure to grasp the significance of the facts is the conclusion at paragraph 2882. Prychidny knowingly signed a false document in 1992. In addressing Defendants' defence of fraud, the trial judge essentially concludes that having behaved badly once, and having shown contrition, she does not believe that this implies that Prychidny would have produced or accepted to produce other false or misleading documents. In reaching that conclusion, she points to the "special circumstances" that surrounded Prychidny's signature in 1992, without noting what they were: Prychidny testified that he did so because Stolzenberg and Dragonas told him he would not leave the restaurant they were in without signing it (Prychidny, Nov. 3, 2008, p. 114-117). The point that the trial judge failed to address is what this says about the character of Stolzenberg and Dragonas who, as seen above, were the principal architects of Castor's business strategy and whom the Plaintiffs never called to testify, as well as what it says about Prychidny's willingness to accede to their demands that he sign a fraudulent document.

456. The trial judge's failure to recognize the significance of this evidence with respect to the causal connection between any GAAS failings and the alleged misstatements is a fundamental error of law and fact.

457. Restricted Cash. This is a specific example where the trial judge's assumption that if different forms had been sent to various banks, C&L would have received a different reply), is simply contradicted by evidence of what in fact happened (PW-1134 Bates 2525; APG-5-27B; PW-1134 Bates 2600; PW-1053-12, p. 221-223; PW-1053-13, p. 30-32 (item 3b).The trial judge's conclusions on fraud, moreover, disregards not only the impact of this evidence but also the representation letters (identified above), signed by Stolzenberg and others, that no assets were encumbered.

458. Seventh, the trial judge makes another error of law in connection with the fraud defence at paragraph 2763: "even though fraud might have been a barrier to the auditors identifying irregularities, the alleged fraud cannot serve to relieve C&L of the responsibility...". Two obvious flaws exist:

(a) The trial judge failed to determine whether or not fraud was a barrier to the auditors identifying irregularities. This is an error of law that goes to the heart of the defence. Had the trial judge taken that step as she ought to have, on the evidence identified above, the obvious answer would have been "yes";

(b) This error leads the trial judge to miss the point that if the fraud was in fact such a barrier, then it was a barrier despite the application (or not) of GAAS (as is evident from paras 2765, 2775 and 2849 of the *judgment*).

459. Specific instances where this erroneous legal view was applied to the facts, giving rise to manifest errors of fact and law include the following examples:

(a) Related Party Transactions and Restricted Cash. At paragraphs 2934-2935, the trial judge states that the representation letters were inaccurate regarding related party transactions and restricted cash, but then says that a representation letter is not a substitute for SAAE and that had Defendants complied with GAAS, they would have become suspicious. The error of fact and law that the trial judge commits is that although a representation letter is not a substitute for SAAE, the Handbook and Plaintiff's experts agreed that it is audit evidence without which the audit opinion would never be issued (Handbook, s. 5300. 19(b)(iii), April 16, 2008, p. 33-34, Jan. 7, 2009, p. 92-94, and April 6, 2009, p. 113, where Rosen stated that he had indicated in an expert opinion that these letters constitute audit evidence, in order to avoid arguing with the lawyer, a statement the Court failed to consider in assessing his credibility).

(b) In numerous places, the *judgment* refers to Defendants having failed to ask for specific information. However, by failing to consider what had in fact been told to C&L by Castor and whether that information was sufficient to put C&L "off the scent", it is impossible to draw a legally sound conclusion as to whether the fraud was a barrier in the audit. An example of this is the significance that the judge places on the fact that C&L were unaware of the auction sales in DTS, without considering that no expert suggested that an auditor performing a GAAS audit would even consider asking whether the homes had been auctioned if none of the material indicating such activity had been placed in the files he was given to review.

(c) The *judgment* also concludes that C&L did not ask for documents or representations which were in fact asked for, sometimes specifically (for example the 1990 working papers E65d and E65e, PW-1053-15, p. 130-131 are notes of replies given by

Smith to specific questions that were asked) and sometimes by way of representation letters and requests for schedules to be prepared in advance of the audit (D-28, D-29-1, D-30).

(d) The trial judge concludes that Smith did not volunteer information to C&L, but says this must be weighed against the negative information that he provided (paras 2880 and 2881). A reading of the testimony referred to establishes that this is restricted to one project in one year, and the fact remains that whatever Smith "thought" about the loans or projects, he never told the auditors what he believed. The trial judge completely fails to assess the significance of Smith's as well as Castor management and employees's failure to be truthful and transparent in their dealings with the auditors, the evidence of which was set out by Selman and Levi in their testimony (For example: Levi, Jan. 14, 2010, p. 194-200; Selman, May 6, 2009, p. 83-95; Levi, Jan. 13, 2010, p. 76-80; Selman, May 14, 2009, p. 53-55) and which was uncontradicted.

460. Eighth, in failing to come to a conclusion as to whether the fraud was a barrier to the auditors' discovery of irregularities, the trial judge fails to consider the impact of many of the facts she found to be true:

(a) Dragonas and Goulakos were C&L's contacts for the audit (para. 92) and prepared the financial statements for Castor (Gourdeau, Jan. 14, 2008, p. 121). At paragraph 379 the trial judge states that Goodman's report was written from the hypothetical honest preparer of Castor's financial statements ... and that **such a person never existed.**

(b) The judgment on objections (#18), admitted as relevant exhibits D-250-D-258 that show Dragonas receiving a "pay-off" after the audits were completed, but these facts are never referred to by the trial judge in her assessment of the fraud defence.

(c) The trial judge missed the obvious implication – Castor's financial statements were prepared by dishonest management. This has critical significance in GAAS and law, and leads to the exoneration of the auditors;

461. Finally, the trial judge accepts the proposition that there were enough 'red flags' to put Coopers on the alert. However, the trial judge's analysis of these is flawed, as it fails to consider much of the evidence. As an example, at paragraph 2863 the trial judge cites Froese who refers to the testimony of Penny Heselton, who was on the audit for one year, for the proposition that the client had requested that if anyone worked on the Montreal side, they would later not work on the European side. The court ignored the fact that Ms. Ford, who in fact

worked on the European side in all three years in question, had previously worked on the Montreal side (Ford, Dec. 7, 2009, p. 32-34).

462. The trial judge also commits manifest errors of fact and law in her assessment of the credibility and weight to be afforded to the experts in that it links what it portays as their testimony on GAAS failures as a reason not to accept their opinions on fraud, without considering their opinions or the evidence they relied upon. For example, the trial judge refers to Selman's testimony that he did not consider the possibility that Wightman's lack of objectivity was an explanation for the alleged misstatements, (para. 2800) but does not in any way explain how this means that Selman's conclusions that fraud prevented the detection of several alleged misstatements and impacted the audit generally were wrong.

7. Conclusion on negligence

463. The *judgment* is therefore unfounded in fact and in law in that serious and pervasive errors invalidate the three (3) central conclusions:

(a) The Plaintiff has not discharged his burden to demonstrate that Castor's financial statements for 1988, 1989 and 1990 did not meet GAAP.

(b) Subsidiarily, the Plaintiff has not discharged his burden to demonstrate that C&L failed to conduct an audit in accordance with GAAS in respect of any specific financial statement assertion on which it is determined that GAAP was not met.

(c) Subsidiarily, the evidence demonstrates on a balance of probabilities that Castor's management, with the assistance of third parties, deliberately set about to mislead C&L, such that GAAS procedures could not have been reasonably expected to uncover audit evidence that Castor did not want the Defendants to have. As a result, even if GAAP and GAAS were breached with respect to the same financial statement item in any of the years in question, such GAAS breach bore no causal relationship to the financial statements as presented.

B. The valuation letters

464. In paragraphs 2957 to 3074 of her *judgment*, the trial judge concludes that the valuation letters, PW-6, issued from time to time by C&L, provided an unqualified opinion by C&L of the fair market value of Castor's shares which could be taken at face value. She held that the valuations contained therein were wrong and misleading, and concludes that C&L were negligent in their preparation.

465. Defendants respectfully submit that the trial judge's analysis of the evidence leading to these conclusions is largely one-sided and that it fails to take into account overwhelming evidence as to the scope and purpose of the valuation letters, the criteria for establishing value as per C&L's mandate and the management representations contained therein.

466. The errors and omissions contained in the trial judge's analysis of the evidence on this issue are palpable and overriding errors.

467. In paragraph 2969, the trial judge notes that C&L was asked to assist Castor as auditors and professional accountants in establishing the fair market value of its common shares, which is expressly stated in the description of C&L's mandate contained in the first paragraph of all of the letters. For example, the letter of October 17, 1989 (PW-6-1) states:

> *"You have asked us as auditors and professional accountants to assist you in establishing the fair market value of the common shares of Castor Holdings Ltd. ("Castor") on or about October 1, 1989. The purpose of this evaluation is to update previous letters relating to valuation of shares of Castor prepared at various dates and for the information of the directors."* (our emphasis)

468. Despite this evidence and the clear language used in the first paragraph of all valuation letters, the trial judge concludes in paragraph 2985 that C&L knew that the share valuation letters were being used as a promotional tool to convince both the new and the current investors of Castor that the subscription prices were appropriate and that the share valuation letters were included in the presentation packages sent to prospective investors.

469. In reaching this conclusion, the trial judge ignored that all 24 letters were addressed not to prospective investors, but rather to Stolzenberg as President and CEO of Castor and that the valuations contained therein were for the information of the directors. The trial judge also disregarded the fact that Widdrington himself admitted that while reviewing the October 17, 1989 valuation letter, he did notice that the first paragraph thereof clearly mentioned that it was to update previous letters and that it was for the information of the directors[40].

470. In paragraphs 2972 to 2974, she takes note of the testimony of Wightman, Michael Dennis ("Dennis") and Widdrington himself as to the connection between the valuation letters and the mechanism referred to in the shareholders' agreement, but nevertheless concludes, in paragraph 3062, that defendants' expert *"Selman's opinions, resting on the basic premise that the sole purpose of the valuation letters would have been to comply with the terms of a shareholders' agreement and that C&L was ignorant of any other use, do not hold water."*

---

[40] Dec. 17, 2004, pp. 14-15.

471. Her dismissal of the obvious link between the valuation letters and the mechanism set forth in the shareholders' agreement is largely based upon the views expressed by Plaintiff's experts who testified on this subject. This is an serious error on her part as no weight can be assigned to the opinion of Plaintiff's experts on the scope and purpose of the valuation letters for three simple reasons:

(a) None of them had first-hand knowledge as to the nature of the mandate given by Castor to C&L in connection with these letters;

(b) They chose to ignore or disregard the description of the scope, purpose and use of the letters described in the first paragraph thereof;

(c) The issue of "purpose" was one of fact, not of expert opinion.

472. The trial judge also erred in fact and in law by failing to acknowledge that the only witnesses who testified that had knowledge about the scope and purpose of the valuation letters were Wightman, who signed most of the letters on behalf of C&L, and Dennis[41], who was a director and the corporate secretary of Castor at all relevant times. Both of these witnesses clearly acknowledged that there was a link between the valuation letters and the mechanism referred to in the shareholders' agreement. She also failed to take into account the important admission contained in Widdrington's own testimony on this subject.

473. The trial judge also erred in fact and in law in concluding, at paragraph 2975, that the fact that none of the valuation letters referred to the shareholders' agreement is neither a oversight nor a mistake: there is simply no evidence in the record allowing her to reach this gratuitous conclusion, quite to the contrary.

474. In paragraphs 2977 to 2982, the trial judge casts doubt on the credibility of Wightman's testimony that he did not know that the letters were distributed to persons other than the directors because he had no explanation for why they issued 100 copies.

475. Defendants respectfully submit that this is highly misleading and unfair to Wightman insofar as the judge quotes no reference to Wightman's testimony while she knew or should have known that Wightman testified during his discovery that the request for additional copies might have been made to his secretary by Stolzenberg's secretary[42]. Wightman also indicated that the letters were also distributed to Castor's shareholders who may have been 40 or 50 at the time[43], some of whom were corporate entities. She also fails to mention that

---

41 Insérer référence

42 Wightman, Aug 13, 1996, p. 91, Q. 307

43 Wightman, Aug 13, 1996, pp. 91-92; Feb. 10, 2010, pp. 131-138.

Simon testified that C&L was not informed that the valuation letters were used to solicit investors[44].

476. In paragraphs 2983 and 2984, she dismisses, as neither credible nor reliable, Wightman's testimony to the effect that when C&L prepared the valuation letter of October 22, 1991, it had not been advised that Stolzenberg had recently made a cash call on the shareholders and was organizing a board of directors meeting for that purpose.

477. Her conclusion in this regard is grossly unfounded in fact and in law and is largely based upon a report made by Stolzenberg to the directors at a board meeting held two (2) days later, on October 24, 1991, which meeting was not attended by Wightman.

478. The trial judge also failed to take into account expert evidence as to what financial statements tell the reader (cf. *infra,* para. 165 ff.).

479. In paragraphs 2987 to 2989, she discusses the trends in performance shown in the valuation letters and notes that Defendants' expert Morrison admitted that the results were very exceptional and that Castor's share valuation trend was more impressive than either that of the Bank of America or the Royal Bank of Canada during the same period.

480. What the trial judge failed to mention about Defendants' expert Morrison is that he clearly stated, both in his written report, D-866-1, at page 13, and his testimony at trial, that:

> *"If Widdrington had waited for the shareholders' agreement before deciding, as he should have, a sophisticated investor with his experience should also have noted that the 'valuation letters' he used were addressed to Stolzenberg, and were clearly to meet the periodic requirements of the Castor shareholders' agreement. In my opinion, Widdrington should have known that these letters were much more superficial than normal valuation reports."*

481. Here again, this demonstrates that the trial judge made a biased and one-sided analysis of the evidence and failed to take into account the very essence of the testimony given by several witnesses, including Morrison.

482. In paragraphs 2993 to 3005 inclusive, the trial judge criticizes the price to equity ratio attributed to Castor in C&L's valuation letters in comparison to publicly traded trust companies.

483. In this section of her analysis, the trial judge totally ignores and fails to even mention the important evidence presented on this issue at trial by defendants' expert Selman.

---

44 Simon, June 17, 2009, pp. 151-152.

484. During his testimony at trial, Selman explained that it should have been apparent to readers who understood the nature of investment decisions, such as Widdrington, that the direct comparison of a private company's stock with publicly traded stock was, in itself, superficial. Selman also stated that it should have been clear to such a reader that a comparison with the major Canadian trust companies was not useful although this was the basis on which the shareholders agreed on having these prepared on a consistent basis year after year. In other words, what the shareholders knew was that they could get out of the company on the same basis as they got in. Selman also specified that the reference to Canadian public trust companies was just a yardstick which was suitable to the shareholders as long as it was used year after year[45].

485. By failing to even address this important evidence by Defendants' expert, the trial judge erred in fact and in law and consequently assigned disproportionate importance to the reference to the price to equity ratios of major Canadian public trust companies referred to in some of the valuation letters.

486. In paragraphs 3006 to 3013, the trial judge discusses the valuation and professional standards applicable to the valuation letters and dismisses summarily Wightman's testimony to the effect that the valuation letters did not constitute a valuation assignment within the meaning of C&L's internal technical policy statement TPS-A-602.

487. This conclusion is unfounded in fact and in law insofar as, once again, Wightman was one of the only witnesses truly familiar with the scope and purpose of the mandate given by Castor to C&L with respect to the valuation letters. In addition, the judge made an error in failing to take into account that Wightman's testimony on this issue was not contradicted by any other witness.

488. In her analysis of the valuation letters and of the professional standards applicable to them, the trial judge also fails to take into account the fact that, even though some of C&L's business valuators (Bernard Lauzon and Jacques St-Amour) participated in their preparation, virtually all of the valuation letters were signed by Wightman who was not a member of the CICBV. In addition, the first paragraph of all the letters clearly indicates that they were prepared by C&L as "*auditors and professional accountants*" and not as business valuators.[46]

489. In paragraphs 2014 to 3052 inclusive, the trial judge provides an overview of experts' opinions, starting with Plaintiff's expert John Kingston in paragraphs 3015 to 3035. Even though she acknowledges in footnote 3267 that Defendants' expert Don Morrison testified on the issue of valuation letters at trial, nowhere in her analysis of the expert evidence is there a single comment addressing Morrison's testimony on this subject.

---

45 Selman, May 22, 2009, pp. 130-131. See also May 26, 2009, pp. 171-178.
46 Selman, May 22, 2009, pp. 126-130.

490. In her comments on Plaintiff's expert Kingston's testimony, the trial judge concludes in paragraphs 3030 to 3033 that he demonstrated that C&L did not follow the applicable practices and policies in many respects, which practices and policies were codified in the CICBV 1989 Code of Ethics and the 1992 CICBV Standard 91-1.

491. Her analysis of Kingston's evidence on this subject is seriously flawed in that it fails to take into account the true criteria used by C&L for establishing value.

492. For example, the trial judge ignores the fact that the first valuation letter was completed by C&L as auditors and professional accountants in 1980 and that all subsequent letters were updates of the original mandate. Furthermore, the shareholders' agreement provided that the valuation was to '*be prepared on a basis consistent with the assumptions used in prior years*". At the time the first engagement was concluded, there were no standards in place for such an engagement.

493. Furthermore, the disclosure standards for a report, CICBV 91-1, did not come into effect before May 1992, well after the issuance of the last valuation letter in October 1991[47]. Consequently, there were no mandatory reporting standards in existence when C&L completed its last letter issued in October 1991.

494. In any event, Defendants submit that C&L's valuation letters prepared from October 17, 1989 to October 22, 1991 were in compliance with the CICBV Code of Ethics and, most notably articles 4.01 to 4.10 thereof dealing specifically with the contents of valuation reports. The trial judge failed to take into account that nowhere in the evidence of Kingston, is there any suggestion that C&L's valuation letters violated these specific provisions of the Code of Ethics.

495. As to Kingston's testimony to the effect that the CICBV 1989 Code of Ethics reflected the existing practices at the time, the trial judge erroneously failed to take into account Wightman's uncontradicted testimony to the effect that the valuation letters did not constitute a valuation assignment within the meaning of C&L's internal technical policy statement TPS-A-602, which is perfectly compatible with the requirements stated in Castor's shareholders' agreement with respect to the formula to be followed for the determination of the value of its shares[48].

496. In paragraph 3035, she concludes her comments on Kingston's evidence by stating that this expert demonstrated that C&L should have concluded that the fair market value of Castor's shares could be as low as nil for the period between 1988 and 1991.

---

47 Kingston, March 10, 2009, pp. 79-81 and 103.

48 Wightman, Feb. 10, 2010, pp. 144-149, incl. PW-1420-1B (TPS-A-602)

497. Defendants respectfully submit that this conclusion is grossly unfounded in fact and in law.

498. Indeed, even though she confirms that Kingston did not attempt to determine the fair market value of Castor's shares at any stated date, the trial judge fails to mention that Kingston himself admitted that had such a mandate been done, it would have required an incredible amount of work[49]. Accordingly, Kingston's opinion as to the so-called material overstatement of Castor's value must be disregarded insofar as this determination was simply not part of his mandate, with the result that Plaintiff has failed to discharge his burden of proof on this issue.

499. The trial judge also fails to mention that Kingston testified that he did not use the CICBV standards for the purposes of his report because the said standards related to the issue of valuation reports where a valuator has been hired to render an independent opinion on the value of a company, which was not his mandate in this case[50]. Here again, this important omission greatly reduces the value and credibility of Kingston's opinion as to the co-called material overstatement of Castor's value by C&L.

500. In her comments at paragraphs 3036 and 3037 on Plaintiff's expert Lowenstein's evidence on reliance, the trial judge notes the latter's opinion that *"for a conservative careful institution or organization, such as a major accounting firm* (such as C&L), *to incorporate that in a valuation report suggests that before doing so — one would expect that before doing so, they would be very confident in that statement."*, implying that she personally agrees with this statement.

501. Here again, this conclusion is totally unfounded in fact and in law, and demonstrates that her analysis of the evidence is biased, selective and one-sided.

502. Indeed, the very wording of the excerpt from the October 22, 1991 valuation letter quoted in paragraph 3036 is clearly to the effect that the reference to the slowdown in the real estate market in North America is a representation by management.

503. The trial judge also erred in fact and in law in failing to consider or even address Wightman's testimony to the effect that the source of all the factual information contained in the valuation letters came from Stolzenberg[51]. More precisely, she failed to take into account that the information contained in the third paragraph at page 4 of the October 22, 1991 letter referring to the real estate slowdown in North America and adding that, because of the slowdown,

---

49 Kingston, March 10, 2009, pp. 9-10, 35-37.
50 Kingston, March 10, 2009, pp. 54, 65-66.
51 Wightman, Feb. 10, 2010, pp. 151-153.

additional opportunities would be available to Castor, all came from Stolzenberg[52].

504. In paragraphs 3048 to 3050 of her analysis of Selman's evidence, she quotes excerpts from the evidence pertaining to demonstrate, *inter alia*, that Selman's 1998 report which stated that the valuation letters should have contained a warning, that the expression of opinion was based on a very limited assumption and might not be appropriate for the readers' purpose, was not reproduced in his 2008 report for reasons that Selman was allegedly unable to explain at trial.

505. These comments are inaccurate and misleading in that the trial judge fails to add that Selman testified that he did not believe that the absence of warning was a problem from the point of view of the users of the valuation letters because the users were directors of the company, or the company itself, not outsiders, with the result that those directors knew exactly what was being done because these letters were being prepared on a basis consistent from one letter to another as if they were a chain. So, while he acknowledged that it would have been better if C&L had put a qualification in the letter, he testified that he did not think that it was necessary to do so[53].

506. In paragraphs 3053 to 3055 of her conclusions on the valuation letters, the trial judge suggests that the letters contain misleading information and overstated valuation essentially for the same reasons as those outlined in her conclusions on the financial statements, the net earnings and the $100M debenture transaction.

507. Accordingly, the Defendants respectfully submit that each of their grounds for appeal from the trial judge's conclusions on these issues apply *mutatis mutandis* to their appeal from the finding of negligence as it relates to the valuation letters.

508. In paragraphs 3056 and 3057 outlining her conclusions as to the purpose of the valuation letters, the trial judge refers to the so-called admission contained in paragraph 401 of Defendants' plea to the effect that C&L would have known that the valuation letters were to be used in connection with the issue of new shares. On this point, the Defendants refer to the judgment rendered on April 16, 2010 by Justice André Rochon of the Court of Appeal on their motion to appeal from a ruling made by the trial judge with respect to these admissions in which he clearly stated that the said rulings would not have for consequence to set aside evidence legally made or limit Defendants' arguments in any way with respect to the purpose of the valuation letters."[54].

---

52 Wightman, Aug. 13, 1996, pp. 142-143 and at trial, Feb. 10, 2010, p. 153.
53 Selman, May 25, 2009, p. 129.
54 C.A. judgment by Justice André Rochon, April 16, 2010, para. 11.

509. Accordingly, Defendants respectfully submit that the trial judge erroneously failed to take into account other important evidence, starting with the testimony of Wightman and Dennis and the admissions made at trial by Widdrington himself, showing the close connection between the valuation letters and the mechanism referred to in Castor's shareholders' agreement.

510. In paragraphs 3058 and 3059 outlining her conclusions as to the nature of the opinion contained in the valuation letters, she suggests that, without a definition of fair market value mentioned in the valuation letters themselves, reference to the definition used by valuators is appropriate.

511. Here again, this conclusion is unfounded in fact and in law insofar as Castor's shareholders' agreement, PW-2382, as signed by Widdrington himself, contains definitions of both "fair market value" and "valuation report", which clearly describe the mechanism to be used by the auditors for the determination of the fair market value of Castor's shares.

512. This ill-founded conclusion is the result of the trial judge's decision to dismiss the overwhelming evidence showing the close connection between the valuation letters and the mechanism set forth in Castor's shareholders' agreement.

513. In her conclusion on negligence at paragraphs 3060 to 3074, the trial judge is critical of Selman's opinion as to the connection between the valuation letters and the shareholders' agreement.

514. Defendants respectfully submit that Selman's opinion is much more in line with the uncontradicted evidence that the trial judge chose to ignore. Furthermore, he was not the only expert to express the opinion that there was indeed a link between the valuation letters and the shareholders' agreement. More precisely, the trial judge chose to totally ignore the evidence presented by Defendants' other expert Morrison at trial[55] to the effect that Widdrington knew or should have known that the purpose of the valuation letters was to meet the requirements of Castor's shareholders' agreement and that they were much more superficial than normal valuation reports.

515. In paragraphs 3063 to 3065, the trial judge criticizes C&L for having failed to include disclaimers, qualifications or restrictions in the valuation letters, going as far as to add that this was not an oversight but a conscious gesture.

516. In reaching this gratuitous conclusion, the trial judge obviously failed to take into account the restrictive description of C&L's mandate outlined in the first paragraph of all 24 letters, PW-6-1.

---

[55] Lowenstein, March 21, 2005, pp. 134-135; Lowenstein, March 23, 2005, pp. 61-62; Morrison, Oct. 5, 2006, pp. 112-113; Morrison, Oct. 10, 2006, pp. 198-199; Morrison, Oct. 11, 2006, pp. 15-16.

517. The trial judge's comments also ignore the fact that C&L's language went as far as the *Code de déontologie* permitted, by setting out a restrictive description of intended recipients and use in the first paragraph of all the letters. Including an express limitation of liability or reserve would have been a breach of section 3.01.06 of PW-2311.

518. In paragraph 3067, the trial judge also criticizes C&L for having associated themselves with Castor's financial information and general information, with Castor's unaudited financial statements, with perspectives on the state of the economy, on the state of the lending business and on the opportunities for Castor.

519. Defendants submit that this unfounded conclusion totally ignores the very language of the valuation letters as to the material and other sources of information consulted by C&L as well as to the methodology followed for determining fair market value. It should have been clear to any experienced reader such as Widdrington that several of the factual statements contained in the letters originated from Castor's own management as opposed to C&L. For example, any experienced reader knew or should have known that the reference to "unaudited statements" necessarily meant that C&L had not proceeded to any audit of the said financial statements.

C. The legal-for-life certificates

520. In paragraphs 3075 to 3105 of her *judgment*, the trial judge concluded that the mistakes made in the audits of Castor's financial statements were repeated when the auditors produced the legal-for-life certificates, which resulted in C&L negligently representing that Castor had passed to the required tests and was worthy of legal-for-life status, when it should not have been.

521. Defendants respectfully submit that the trial judge's analysis of the evidence leading to this conclusion is superficial at best and that it clearly overstates the importance to be attributed to the legal-for-life certificates issued from time to time by C&L, especially in the case of Widdrington.

522. Defendants submit that the trial judge's conclusions are totally unsupported in that there is simply no evidence of the standards for the preparation of legal-for-life certificates nor of the criteria dictated by the various statutes under which the legal-for-life opinions were issued.

523. In the particular case of Widdrington, it is important to note that the package of documents (PW-10, PW-10-1, PW-10-2 and PW-10-3) remitted to him for purposes of his December 1989 equity investment did not include a legal-for-life opinion nor a legal-for-life certificate. Accordingly, and contrary to what is alleged in paragraphs 14 and 70 of Widdrington's declaration, there is no question that the legal-for-life certificates issued from time to time by C&L played no role whatsoever in Widdrington's equity investment of December 1989.

524. As for his second equity investment of October 25, 1991, the only evidence worth mentioning is that when Widdrington testified that he reviewed the directors' book, PW-12, for purposes of Castor's shareholders meeting of May 8, 1990 in Zurich, he mentioned having noticed McCarthy Tétrault's legal-for-life opinion of March 22, 1990 found at tab 12 of the book. All that meant to him was that "*it made it possible for pension companies, insurance companies and so forth to invest in Castor because it had been recognized that Castor was an entity that had been in business for a while and that it had sort of an ongoing successful track record.*"[56].

525. As this was Widdrington's only testimony on the subject of the legal-for-life opinions issued by McCarthy Tétrault, there is simply no evidence that the legal-for-life certificates issued from time to time by C&L for Castor's lawyers for the purpose of their opinion (which certificates were not even included in the directors' book and were therefore never seen by Widdrington) played any role whatsoever in Widdrington's decision with respect to his investments in Castor.

526. Finally, Defendants submit that the trial judge erred in law when she concluded that the Court can take judicial notice of the various statutes mentioned in the legal-for-life opinions (para. 3101). Contrary to what the trial judge asserted, article 2809 of the *Quebec Civil Code* only permits the Court to have judicial notice of the law of other Canadian provinces if there is an allegation in the proceedings. The mere fact that such statutes are mentioned in an exhibit does not relieve the Plaintiff from alleging the content of the foreign law if such is necessary to his claim.

---

56 Nov. 30, 2004, pp. 140-141, 162.

SECTION V. DAMAGES, NATURE OF LIABILITY OF INDIVIDUAL DEFENDANTS AND COSTS

A. Assessment of damages

1. Introduction

527. In paragraphs 3539 to 3590 of her *judgment*, the trial judge concludes that Plaintiff Widdrington successfully discharged his burden of proving fault, damages and causality and therefore decided to award him the full amount of his claim of $2,672,960.

528. Here again, Defendants respectfully submit that the trial judge's analysis of the evidence leading to this conclusion is one-sided at best, and that it essentially relies upon the depositions in chief of Plaintiff's witnesses at trial.

529. The errors and omissions contained in the trial judge's analysis of the evidence on this issue are palpable and overriding.

2. Widdrington's first claim in the amount of $1,422,960

530. With respect to Widdrington's first claim in the amount of $1,422,960 representing the full refund of the total amount of his investment in and loans to Castor, the trial judge failed to consider the compelling evidence showing that none of Widdrington's three (3) investments can be attributed to his reasonable reliance on the auditors reports on the financial statements of Castor, the valuation letters issued by C&L or the legal-for-life certificates issued to McCarthy Tetrault for purposes of their Legal for life opinions. The overwhelming evidence clearly shows that the determinative factor that led Widdrington's three (3) investments was his absolute faith and blind trust in Stolzenberg.

531. In arriving at her decision with respect to Widdrington's claim in the amount of $1,422,960, the trial judge also erred in fact and in law by failing to take into account evidence and legal arguments submitted to her showing the absence of causality:

(a) The fact that Widdrington's investments in Castor, which were a mixture of common and preferred shares as well as some subordinated and convertible debentures, were subordinated to all bank loans and advances and notes payable of the corporation and that, in the event of any insolvency, bankruptcy or similar proceedings, the holders of secured and unsecured debt would receive payment in full in principal and interest before the debenture, preferred share and common share holders would receive any payment;

(b) The fact that, given the terms and conditions of Castor's shareholders agreement, PW-2382, Widdrington knew or should have known that there was no free market for Castor's shares and that he could not dispose of them without the consent of his fellow directors and shareholders;

(c) The fact that the main and immediate cause of the creditors losses was the collapse of Castor in 1992 which, according to the evidence, was itself due to the meltdown of commercial real estate values commencing in the early 1990's;

(d) The fact that the evidence demonstrates that if there were departures from GAAP in Castor's audited financial statements, it would not be due to any failure by C&L in applying GAAS, but rather to the false representations that were made to the auditors by Castor's management and other third parties, the concealment or failure to provide relevant information and the total failure of Castor's directors to discharge their legal duties;

(e) The trial judge's failure to apply the benefit rule which requires that the gains obtained by Widdrington by reason of his investments in Castor be deducted from the award of damages;

(f) The fact that the Trustee's action taken against C&L in file no. 500-05-003843-933 should take precedence over Widdrington's claim.

3. Widdrington's second claim in the amount of $1,250,000

532. As for Widdrington's second claim item in the amount of $1,250,000 representing the costs for the settlement out of Court of the petition and legal action (PW-1 and PW-8A) taken against him by Castor's Trustee, the trial judge's decision to award the said claim item failed to take into account the following evidence and legal arguments:

(a) The fact that Widdrington settled the Trustee's claims for personal reasons which have nothing whatsoever to do with his alleged reliance on C&L's representations for purposes of his investments in Castor[57];

(b) The fact that these legal proceedings were instituted against him by the Trustee essentially by reason of his failure to properly discharge his duties and responsibilities as a director of Castor. On this point, Defendants respectfully submit that the conclusions

---

[57] Widdrington, May 22, 1998, p. 17 and Dec. 3, 2004, pp. 125-128.

contained in the judgment[58] rendered on July 30, 2008 by the Honourable Justice Louise Lemelin on the trustee's petition seeking the reimbursement of the dividends paid to Castor's directors fully apply to Widdrington;

(c) This obvious contradiction: how could Widdrington claim from Defendants an amount paid by him to settle claims made against him on the basis of his own negligence;

(d) For the reasons outlined more specifically in the section of this inscription dealing with reliance issues, Defendants strongly take exception with the judge's conclusion, in paragraph 3574, 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*";

(e) For the same reasons, Defendants also take exception with the judge's conclusion, in paragraph 3585 that "*While it might not have been the case for other directors of Castor who had a different and more extensive knowledge of Castor's affairs, the Court finds that Widdrington did discharge his duties as a director of Castor: Widdrington acted with care and due diligence in the circumstances.*". Indeed, this conclusion seems to imply that Widdrington, by reason of his total lack of knowledge of Castor's affairs, would have lesser duties and responsibilities than other directors such as Gambazzi who was found by Justice Louise Lemelin to have failed to honour his obligations as a director of Castor. Quite to the contrary, Widdrington's wilful blindness as to Castor's affairs during his entire tenure of two (2) years as director of the company constitutes even more reckless behaviour than that of other directors who had more extensive knowledge of Castor's affairs;

(f) More generally, the considerable doctrine, case law and other relevant material submitted to her on the issue of directors' duties and responsibilities (including the Estey Commission Report, PW-1422A).

B. The issue of the "joint" or solidary liability of C&L partners

533. As noted by the trial judge, although C&L is an Ontario partnership, the issue of whether the liability of the individual partners is joint or solidary must be decided by Quebec law because none of the parties invoked or proved Ontario law on this issue (para. 3597).

---

[58]. Dans l'affaire de la faillite de Castor Holdings Ltd; RSM Richter Inc. v. Gambazzi et al, CSM 500-05-001584-925, July 30, 2008 (Louise Lemelin, j.c.s.) 2008 QCCS 3437.

534. The trial judge however erred in fact and law when she decided that, under Quebec law, C&L's individual partners for the relevant years are solidarily liable to the Plaintiff.

535. Under the *Civil Code of Lower Canada (*CCLC*)*, in force when the relevant events occurred, a partnership of accountants was considered a civil, not a commercial partnership, with the consequence that *as per* the unequivocal text of art. 1854 CCBC, the individual partners are liable jointly (*"conjointement"*) and not solidarily for the debts of the partnership.

536. C&L, the partnership, was Castor's auditor as per art. 2 of the NBBCA, so that the extra-contractual liability of the auditor vis-à-vis the Plaintiff would be a debt of the partnership, not that of any individual partner.

537. The trial judge erred in law when she restricted the application of art. 1854 CCLC to contractual debts, as opposed to other debts, as the text of the provision does not make any such distinction.

538. The trial judge failed to mention or analyze the decision of the Supreme Court of Canada in *Pérodeau v. Hamill*[59] (although it was pleaded to her by Defendants) which held that the liability of the partner in a civil partnership for the debts of the partnership is «joint» and not solidarily without any mention that such would only apply to contractual debts as opposed to other debts of the partnership.

539. Moreover, the only decision that she cited in support of such restriction (*Bélisle-Heurtel*) does not support her conclusion as it deals with an article of the Quebec Civil Code which is unrelated to the former art. 1854 CCLC.

540. The trial judge also considered that the individual partners were solidarily liable in application of art. 1106 CCLC.

541. This article only applies to situations where a delict or quasi-delict has been committed by one or more persons, who are all at fault; it does not apply to situations where one person may be legally liable for the fault or act of another person or entity, as was clearly indicated by the Supreme Court of Canada in the *Masoud Modern Motors* decision[60].

C. Attribution of costs and additional indemnity

542. The trial judge condemned the Defendants to pay the full costs of both the first and the second trial with interest and the additional indemnity, including the costs of all Plaintiff's experts for both trials.

---

59 (1925) S.C.R. 289

60 (1953) 1 S.C.R. 149, p. 156.

1. The trial judge manifestly erred in condemning the Defendants to pay all of the costs on the common issues in the Widdrington trial

543. In the unique procedural framework of the present file, that is to say a test case on the common issues (negligence, rule of conflict for the applicable law) but not on the others (causality/reliance, damages), it is manifestly unfair, and an error of law, to condemn the Defendants to pay all the costs to the Plaintiff, including the costs on the common issues, without even knowing if the actions of the other Castor plaintiffs in the other Castor actions will succeed.

544. As recognized by the trial judge, Defendants are right to say that it is possible that a Court will dismiss the other Castor plaintiffs' claims in the other pending Castor actions if they do not discharge their burden to prove causation or damages, but she nevertheless refused to share on a *pro rata* basis the costs related to the evidence on the common issues amongst all these cases.

545. Plaintiff's claim was for an amount of $2.7M or 0.4 of 1% of all the Castor actions pending against Defendants. Manifestly the enormous costs incurred in relation to the common issues – millions of dollars – would not have been incurred for the sake of Plaintiff's claim alone, but was incurred by all sides because his case was transformed into a **test case** for all pending Castor actions amounting to more than $600M in 1993 dollars. In fact all the other Castor plaintiffs had standing to make evidence in this case and one, Chrysler, participated throughout via their attorneys.

546. In light of these unique circumstances, the only fair solution as to the costs related to the trial on the common issues is the one proposed by Defendants, namely that all the costs related to the common issues incurred in the Widdrington case should be dealt with on a *pro rata* basis with all the other pending Castor actions.

547. Defendants submit respectfully that the proposition put forward by them is the only one which could have been adopted as the result of a properly and judicially exercised discretion by the trial judge. The latter's rulings on the issue of costs could lead to a flagrant and serious injustice to both Plaintiff and Defendants.

548. Indeed, if this Honourable Court maintains the appeal and reverses the *judgment*, it will be unfair for Plaintiff – whose claim is only for $2.7M – to bear all the costs including the costs related to the common issues which will run in the millions of dollars.

549. Similarly it is unfair to condemn Defendants to pay in this case all the costs on the common issues without knowing if the Castor plaintiffs' actions in the other Castor actions will succeed.

550. The solution put forward by Defendants on the sharing of costs is also in line with the principles adopted by the other main Castor plaintiffs in that regard, as appears from the "Participation Agreement" they adhered to: R-19.

551. The trial judge's ruling on costs manifestly fails to consider that the Widdrington case is unique in Quebec's jurisprudence in that it is a "test case" on some issues only, and that this was imposed on the Defendants.

552. The intervention of this Court is therefore warranted to correct such a patent injustice and to order that the costs related to the trial of the common issues be dealt with on a *pro rata* basis in each case.

553. The application of the *pro rata* solution would lead to a condemnation of Defendants to pay in this case – should their appeal fail – 0.4 of 1% of the costs on the common issues.

2. The trial judge erred in condemning the Defendants to pay the full costs of the first trial and the additional indemnity

554. According to art. 466 CPC, when a judge is called upon to hear a new trial, he or she «*shall rule on the costs, including those relating to the original inquiry and hearing, according to circumstances*».

555. As explained in the introduction (paras 27 ff.) of the present inscription in appeal, when the first trial was aborted, due to Justice Carrière health issues, the Chief Justice ordered *a new trial* as opposed to the continuation of the first hearing.

556. Since the trial was a new trial, and not a continuation of the original hearing, most of the original expert evidence, to which was devoted most of the first hearing, was not used by the parties in the new trial.

557. Defendants cannot be blamed for the fact that the first trial aborted, nor can they be blamed for the unusual length of the original inquiry and hearing.

558. This is especially true as more than 80 days (two thirds of a judicial year) of Vance's testimony were devoted to «corrections» to his testimony in spite of Defendants' objections.

559. Also, the «correlation exercise» that was done by Vance at the instigation of Plaintiff during the first trial to compare the documents found in the Trustee's files with those referenced in the audit working papers, and which was allowed by Justice Carrière under the express undertaking of Plaintiff's attorneys that it would take a «couple of days» lasted in fact approximately 33 days in chief (to be contrasted to less than one hour in the second trial).

560. Defendants submit that, in these circumstances, the trial judge did not exercise her discretion in a judicial manner when she condemned them to the full

costs of the first trial, including the full costs of experts, without any analysis and without any consideration of the above factors but simply on the facts that they were not successful in their defence.

561. As clearly appears from the present inscription, Defendants' defence is certainly not frivolous and raises serious issues of fact and law.

562. In light of the special and unusual circumstances described above, and except for the costs related to evidence that was used in the second trial, no party should be responsible for the costs of the first trial, including the costs of experts.

563. For the same reasons, if the present appeal is dismissed, Defendants should not be condemned to pay the additional indemnity for the full period between the introduction of the Plaintiff's action and the date of judgment, as no responsibility can be assigned to Defendants for substantial parts of that unusually long period of time.

564. Finally the Defendants should certainly not bear the costs related to the new expert testimony introduced by Plaintiff in the second trial should this Court rule that such introduction was illegal. Even if such introduction is ruled to be legal, this Honourable Court should take into account that Plaintiff's attorneys took the position in their written argument that in our case expert evidence on GAAP and other issues was not necessary and implicitly invited the Court to set them aside. This position was not referred to, nor considered by the trial judge in assessing costs.

FOR ALL THE ABOVE REASONS, APPELLANTS/Defendants THEREFORE RESPECTFULLY REQUEST THAT THE COURT OF APPEAL:

With respect to the interlocutory judgment dated February 27, 2008 by which the trial judge dismissed in part the *Requête amendée des défendeurs pour faire rejeter du dossier en tout ou en partie, certains rapports d'expert*, dated February 13, 2008:

MAINTAIN the appeal;

GRANT the Defendants' Motion dated February 13, 2008 to the extent that it was not granted by the trial judge;

With respect to the interlocutory judgment dated March 4, 2008 by which the trial judge established a «read-in rule» with respect to expert reports:

MAINTAIN the appeal;

DECLARE that the rule applied by the trial judge according to which an expert report filed into the Court record is deemed to form part of the evidence, without all the parties' consent, is null, void and of no effect;

With respect to the final *judgment* rendered on April 14, 2011:

MAINTAIN the appeal;

DISMISS Plaintiff's action;

THE WHOLE with costs throughout.

NOTICE of the present Inscription in Appeal No. 1 is given to **Fishman Flanz Meland Paquin**, attorneys for the RESPONDENT/Plaintiff.

NOTICE of the present Inscription in Appeal No. 1 is given to attorneys for other plaintiffs (pending lawsuits): **Gowling Lafleur Henderson** (Me Jack Greenstein, Q.C.); **Stikeman Elliott** (Me Stephen W. Hamilton), **Langlois Kronström Desjardins** (Me Raymond Langlois, Ad. E.), **Robinson Sheppard Shapiro** (Me Charles E. Flam) and **Lavery** (Me Sylvie Boulanger).

MONTREAL, May 13, 2011

HEENAN BLAIKIE S.E.N.C.R.L., SRL/LLP

HEENAN BLAIKIE LLP
Attorneys for APPELLANTS/Defendants
ELLIOT C. WIGHTMAN ET AL.

TRUE COPY
Heenan Blaikie LLP
HEENAN BLAIKIE LLP

ANNEX A

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

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

and

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

LIONEL VÉZINA

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

and

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

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

and

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

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

and

SPENCER H. CLARK
ROBERT B. LEMON
ALLAN A. McDERMID
IAN D. McINTOSH
JOHN M. SAVEL

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

and

A. JOEL ADELSTEIN
TREVOR J. AMBRIDGE
DAVID H. ATKINS
SHARON BACAL
RONALD B. BLAINEY
HUGH J. BOLTON
J. DOUGLAS BRADLEY
DONALD A. BROWN
HAROLD A. BURKE
RICHARD S. BUSKI
TONY P. CANCELLIERE
DENNIS H. CARTWRIGHT
PAUL G. CHERRY
CHRISTIE J.B. CLARK
GRAHAME J. CLIFF
JAMES S. COATSWORTH
GEOFFREY A. COOKE
WILLIAM J. COTNAM
PAUL W. CURRIE
RICHARD C. CURTIS
KEVIN J. DANCEY
ALEXANDER M. DAVIDSON
ALAN G. DRIVER
J. PETER ECCLETON
H. GLENN FAGAN
BRIAN C. FOLEY
DAVID FORSTER
STEPHEN H. FREEDHOFF
A. RIK GANDERTON
ANTHONY F. GIBBONS
PAUL B. GLOVER
J. BRYAN GRAHAM
GARY J. HASSARD
BRENT D. HUBBARD
ROBERT M.C. HOLMES
BRENDA J. HUMPREYS

ROBERT H. JOHNSON
ROBERT E. LAMOUREUX
PETER K. LANE
DEAN R. LEVITT
ROBERT E. LOWE
C. ANDREW McASKILE
JILL H. McALPINE
ISRAEL H. MIDA
PAUL J. MURPHY
ROBERT J. MUTER
BARRY J. MYERS
GABRIEL NACHMAN
BERNARD J. NISKER
RICHARD C. PETIT
W. DAVID POWER
RICHARD ROHDE
JAMES S. SALOMAN
CHARLES L. SEGUIN
Alan Smith, in his quality of Executor and Trustee of the Estate of the Late
CHRISTINE E. SINCLAIR
DAVID W. SMITH
ROBERT J. SPINDLER
A. DEAN SUMMERVILLE
MICHAEL A. TAMBOSSO
MICHAEL R. VAN EVERY
DEREK W. WILLIAMS
LAURENCE H. WRAGG

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

and

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

Chartered accountants, carrying on

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

and

ANTHONY J. PANICCIA
PAUL J. CHARKO
LORIS MACOR

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

and

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

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

and

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

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

and

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

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

and

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

Chartered accountants, carrying on

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

and

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

Chartered accountants, carrying on business in partnership under the firm name and style of Coopers & Lybrand - Chartered Accountants, having a place of business at 1111 West Hastings Street, in the City of Vancouver, Province of British Columbia

and

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

Chartered accountants, carrying on business in partnership under the firm

name and style of Coopers & Lybrand - Chartered accountants, having a place of business at 1701 Hollis Street, Suite 1200, in the City of Halifax, Province of Nova Scotia

and

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

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

and

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

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

and

DAVID G. ARSENAULT
C. MARY H. BEST
BRIAN W. CAMERON
IRWIN W. ELLIS
RALPH H. GREEN

J. WALTER MacKINNON
JOHN M. MULLIGAN
MICHAEL L. O'BRIEN

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

and

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

Defendants

N° C.A.: 500-09-
N° S.C.M. 500-05-001686-946

COURT OF APPEAL
REGISTRY OF MONTREAL

ELLIOT C. WIGHTMAN ET AL.

[SEE ANNEX A]

APPELLANTS/Defendants

v.

THE ESTATE OF THE LATE PETER N. WIDDRINGTON

RESPONDENT/Plaintiff

INSCRIPTION IN APPEAL (NO. 1)
AND ANNEX A
(Article 495. C.C.P.)

COPY FOR Mes Fishman Flanz Meland Paquin
(Me Avram Fishman et al.)
1250 René-Lévesque Blvd. W, Suite 4100,
Montreal, Qc H3B 4W8
Attorneys for RESPONDENT/Plantiff

Code: BJ-0039 Our ref. : 013384-0001

M^e Yvan Bolduc, Ad. E. Telephone : 514.846.2222
Fax : 514.846.3427

Heenan Blaikie LLP
AVOCATS/LAWYERS
1250, René-Lévesque Blvd. West, suite 2500
Montréal (Québec) H3B 4Y1

13/05/11 à 14h2