

CANADA

COURT OF APPEAL

PROVINCE OF QUÉBEC
REGISTRY OF MONTREAL

ELLIOTT C. WIGHTMAN *et al.*

Appellants

Nos.: C.A.M. 500-09-021691-118
(S.C.M. 500-05-001686-946)

v.

ESTATE OF THE LATE PETER N.
WIDDRINGTON

Respondent

**APPELLANTS' MOTION FOR STAY OF EXECUTION
OF A JUDGMENT PENDING APPEAL TO THE SUPREME COURT**
(Section 65.1(2) of the *Supreme Court Act*, R.S.C., 1985, c. S-26
and article 522.1 of the *Code of Civil Procedure*)

TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL,
SITTING IN MONTREAL, APPELLANTS RESPECTFULLY SUBMIT AS
FOLLOWS:

A. INTRODUCTION

1. By judgment dated April 14, 2011, the Superior Court of Quebec granted Respondent's action in the present case and condemned Appellants "jointly and severally" to pay Respondent an amount of \$2,672,960, together with interest and the additional indemnity from the date of service of Respondent's statement of claim, the whole with costs;
2. On July 25, 2011, this Honourable Court ordered Appellants to provide security for costs in the amount of \$16,900,000, which Appellants provided on October 17, 2011, as appears from the *Certificat de dépôt judiciaire* communicated herewith as **Exhibit R-1**;
3. On July 8, 2013, this Honourable Court issued its judgment in the present case (the "**Judgment**"), granting Appellants' appeal in part, reducing the amount of the condemnation to \$2,380,000, modifying the dates from which interest and the additional indemnity are due, and ruling that Appellants cannot be held solidarily liable for the amount of the condemnation. With respect to costs, the Court concluded that given its intervention with respect to three of the questions raised by the appeal, they should be limited to 85% of the total costs. A copy of the Judgment is communicated herewith as **Exhibit R-2**;

4. As a result of the intervention of this Honourable Court, the amount of the condemnation issued in favour of Respondent, including interest and the additional indemnity, represented \$5,061,254 as of July 12, 2013 (excluding costs);
5. Pursuant to orders rendered by the Superior Court, however, the final judgment on the merits of the present case will not only bind Appellants and Respondent. The present case having been designated as a "test-case", the final judgment's determinations with respect to certain issues (the "common issues") will bind the parties in all the outstanding "Castor files", i.e. the files instituted by other plaintiffs against Coopers & Lybrand, c.a. ("Coopers & Lybrand"), and some of its partners as a result of the collapse of Castor Holdings Ltd. ("Castor");
6. These so-called common issues essentially relate to the affairs of Castor, the issue of Coopers & Lybrand's negligence and the applicable rules of conflict of laws;
7. As of the date hereof, there are approximately 40 outstanding Castor files, representing claims in excess of one billion dollars (\$1,000,000,000) in capital and interests;
8. Appellants, who have filed a Notice of Application for Leave to Appeal before the Supreme Court of Canada, hereby respectfully request that the execution of the Judgment be stayed until such time as the Supreme Court has ruled on their Application for Leave to Appeal. A copy of Appellants' Notice of Application for Leave to Appeal before the Supreme Court of Canada is communicated herewith as **Exhibit R-3**;
9. As more fully appears from the foregoing reasons, the conditions for ordering a stay of execution are met in that Appellants' Application for Leave to Appeal raises serious questions of law, Appellants would suffer a serious or irreparable harm should the requested stay not be ordered, and both the balance of convenience and the preservation of the *status quo* clearly favour the granting of the stay;

B. APPELLANTS' APPLICATION FOR LEAVE TO APPEAL RAISES SERIOUS QUESTIONS

10. It is unquestionable that the Appellants' Application for Leave to Appeal raises serious questions – which said questions are questions of law of national importance, the whole as appears from Exhibit R-3:

Issue 1: Conflicts of law - Auditor liability to a foreign (non-client) third party?

Lex loci delicti or lex societatis – Private wrong or company law?

- a) Is the delictual liability of a corporation's auditor for a faulty performance of his duties as auditor governed by the *lex loci delicti* or by the company law that creates and defines his/her office, capacity and duties?
- b) Should the delictual liability of a corporation's auditor be governed by the same law that is applicable to the corporation? Does subjecting the directors and auditors to different laws in relation to financial statements and reporting lead to inextricable difficulties and conflicting results – including conflicting results across Canada?

What does the lex loci delicti rule now means?

- c) Which jurisdiction's law should be applied to delict claims when harmful material is prepared in one jurisdiction but is received, relied on and causes harm in another jurisdiction – the law of the jurisdiction where it was prepared and issued or the law of the jurisdiction where it was received, used and caused harm?

Issue 2: Should there be two standards or indeterminate liability for auditors in Canada?

- d) Should an auditor who issues an opinion be liable to anyone who happens to rely on it under either Canadian common law or Quebec civil law, irrespective of whether that person was an intended recipient or whether that person used it for a different purpose than that for which it was prepared?
- e) Is or should the result be materially different under Quebec law than under Canadian common law because of this Court's approach to its prior conflicting decisions and Supreme Court of Canada's analyses? Can or should the effects of the laws applicable in Canada be harmonized?

Issue 3: Can corporate directors avoid the consequences of their own negligence and illegal acts?

- f) Should corporate directors bear the consequences of their own faults or can they shift liability for their breaches of duty – for example, declaration of corporate dividends, including to themselves – over to auditors?

- g) To what extent does the characterization of "outside" director impact a corporate director's duty of due diligence?
11. The seriousness of the questions at issue in the context of Appellants' Application for Leave to Appeal is certainly highlighted by the sheer length of the Judgment (122 pages), which in itself demonstrates that the legal issues raised by the appeal are far from simple or devoid of merit;
 12. It is also important to note that on certain issues, the Court's own explicit reasoning underlines the fact that the legal issues at play are far from settled. This is especially evident in the Court's recognition that two different and contrary approaches co-exist in Quebec jurisprudence with respect to the liability of auditors towards third-party investors (cf. par. 212 of the Judgment);
 13. The importance of these questions raised by Appellants' Application for Leave to Appeal is also highlighted by the fact that the result of the Court's Judgment is that two radically different standards would, in Canada, apply to determine the liability of a corporation's statutory auditor vis-à-vis an investor, depending on where the auditor would have performed his work – and this, despite the fact that auditors across Canada apply the exact same auditing standards (GAAS) in the context of the exact same accounting framework (GAAP);
 14. Hence, if the conclusion of the Court in the present case were to be followed:
 - a) in *common law* provinces, an auditor's liability could not be engaged toward an investor barred very exceptional circumstances where the auditor has explicitly agreed to perform his duties for the benefit of the said investor; whereas
 - b) in Quebec, an auditor's liability would be engaged as soon as the investor can demonstrate the existence of a fault, a prejudice and a causality link;
 15. Another important element that underlines the seriousness of the questions raised by the Appellants' Application for Leave to Appeal is the fact that the present file is a test-case and that the Court's determinations on common issues will be binding in all other Castor files;

C. APPELLANTS WOULD SUFFER A SERIOUS OR IRREPARABLE HARM SHOULD THE REQUESTED STAY NOT BE ORDERED

16. Appellants would suffer a serious or irreparable harm should this Honourable Court refuse to order the requested stay and should Respondent seek to execute the Judgment prior to the Supreme Court's

ruling on Appellants' Application for Leave to Appeal. Indeed, it would be extremely difficult for Appellants to obtain reimbursement of the amount paid should they succeed in their appeal, and there is a real risk that Appellants could not obtain such reimbursement;

17. Respondent being the estate of an individual who died more than eight years ago, any payment made to Respondent would be distributed to the deceased's heirs;
18. Thus, in essence, any payment made in execution of the Judgment would in reality be made in unknown proportions to an unknown number of unidentified persons located in unidentified jurisdictions;
19. As such, any attempt by Appellants to recover the said payment in the event their appeal succeeds would at best be fraught with important difficulties — and at worse be impossible in whole or in part;
20. Firstly, any attempt to recover payment would require the institution of an unknown number of legal actions in various jurisdictions, which would in itself represents a serious prejudice for Appellants;
21. Secondly, there is no indication as to the financial situation, level of indebtedness or solvency of any of the heirs, and no indication that any of the heirs has assets in Quebec. As a result, there is a real risk that a portion of the payment would end up not in the hands of Respondent or of the heirs it represents, but rather in the hands of creditors of insolvent or nearly insolvent heirs, where it would be virtually irrecoverable;
22. There is therefore no way of knowing whether Appellants' would ever be able to obtain reimbursement of the amount of the condemnation should the stay be refused, the only certain thing being that obtaining such a reimbursement would present important difficulties for Appellants;
23. Furthermore, it should be emphasized that the individual Appellants in the present file are former partners of Coopers & Lybrand who are domiciled in various jurisdictions across Canada, most of whom are now retired from professional life, a factor which could greatly complicate efforts to recover the amounts paid by them in execution of the Judgment;

D. THE BALANCE OF CONVENIENCE AND THE PRESERVATION OF THE STATUS QUO FAVOUR THE GRANTING OF THE STAY

24. Whereas Appellants would suffer a serious and irreparable harm should the execution of the Judgment not be stayed, Respondent would, on the other hand, suffer no prejudice should a stay be ordered;

25. Indeed, Respondent's capacity to obtain payment of the condemnation would in no way be imperiled by a stay since the amount of the security furnished by Appellants pursuant to this Court's order (*i.e.* \$16,900,000) far exceeds the amount of the condemnation in capital, interest and additional indemnity (*i.e.* \$5,061,254);
26. The existence of the security furnished by Appellants thus guarantees that Respondent will lose no right and suffer no prejudice by reason of the requested stay;
27. A stay of execution pending a decision of the Supreme Court on Appellants' Application for Leave to Appeal is the only way to maintain the *status quo* between the parties;
28. Should Appellants' Application for Leave to Appeal be granted by the Supreme Court, execution of the Judgment will automatically be stayed by the filing and serving of Appellants' Notice of Appeal and their furnishing of security pursuant to section 65 of the *Supreme Court Act*, R.S.C. 1985, c. S-26;
29. In the event that Appellants' Application for Leave to Appeal is dismissed by the Supreme Court, the requested stay will only have had the impact of delaying by a few months payment of the condemnation;
30. On the other hand, in the event that Appellants' Application for Leave to Appeal is granted by the Supreme Court, the requested stay will only have had the impact of preventing Respondent from taking an unjustified advantage of the gap between the time judgment of the Court of Appeal was rendered and the time when the automatic stay of execution provided by section 65 of the *Supreme Court Act* will become effective;
31. As appears from the above, the balance of convenience clearly favours the granting of the requested stay of execution of the Judgment.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present motion;

ORDER that execution of this Honourable Court's judgment dated July 8, 2013 in the present case be stayed until:

Thirty (30) days after judgment of the Supreme Court of Canada granting Appellants' Application for Leave to Appeal; or

Judgment of the Supreme Court of Canada dismissing Appellants' Application for Leave to Appeal;

THE WHOLE, without costs.

MONTREAL, July 15, 2013

(s) Heenan Blaikie LLP

HEENAN BLAIKIE LLP
Attorneys for Appellants
ELLIOTT C. WIGHTMAN *et al.*

TRUE COPY

Heenan Blaikie LLP

HEENAN BLAIKIE LLP

AFFIDAVIT

I, the undersigned, **Yvan Bolduc**, attorney, practising my profession at the firm HEENAN BLAIE, at 1250, René-Lévesque Blvd. West, Suite 2500, in the City and District of Montreal, Québec, solemnly declare as follows:

1. I am one of the attorneys for the Appellants in the present case;
2. All the facts contained in the present Appellants' Motion for Stay of Execution of a Judgment pending Appeal to the Supreme Court are true;

AND I HAVE SIGNED

(s) Yvan Bolduc

YVAN BOLDUC

Solemnly affirmed to before me, in the
City of Montreal, this 15th day of July
2013

(s) Diane Bergeron No. 88,555
Commissioner of Oaths for all the
judicial districts of Quebec

TRUE COPY
Heenan Blaikie LLP
HEENAN BLAIE LLP

NOTICE OF PRESENTATION

TO : Me Mark E. Meland
Me Leonard W. Flanz
Me Avram Fishman
Me Margo Siminovitch
Me Betlehem Lala Endale
Fishman Flanz Meland Paquin
1250 René-Lévesque Blvd. West
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Montréal, Québec H3B 4W8

Attorneys for Respondent

TAKE NOTICE that the *Appellants' Motion for stay of execution of a judgment pending appeal to the Supreme Court* will be presented for adjudication before the Honourable Court of Appeal of Quebec, sitting in and for the District of Montreal, at the Court of Appeal, 100 Notre-Dame Street East, Montreal, in room RC-18, on Wednesday, July 31, 2013 at 9:30 a.m., or so soon thereafter as counsel may be heard.


AND DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, July 15, 2013

(s) Heenan Blaikie LLP

HEENAN BLAIKIE LLP
Attorneys for the Appellants
Elliott C. Wightman *et al.*

TRUE COPY


HEENAN BLAIKIE LLP

SCC File No.:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)**

BETWEEN:

ELLIOT C. WIGHTMAN, et al (see Annex A)

**APPLICANTS
(Appellants)**

-and -

ESTATE OF PETER N.T. WIDDRINGTON

**RESPONDENT
(Respondent)**

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(ELLIOT C. WIGHTMAN, et al, APPLICANTS)
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)**

TAKE NOTICE that the Applicants, Elliot C. Wightman, et al, hereby apply for leave to appeal to the Court, pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, from the judgment of the Court of Appeal of Quebec, docket no. 500-09-021691-118 (500-05-001686-946), made July 8, 2013, and for such further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

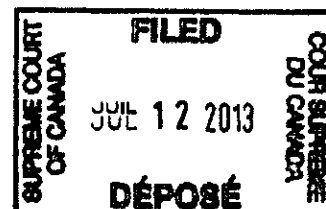
Issue 1: Conflicts of Law - Auditor Liability to a Foreign (Non-Client) Third Party?

Lex Loci Delicti or *Lex Societatis* – Private Wrong or Company Law?

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Which jurisdiction's law should be applied to delict claims when harmful material is prepared in one jurisdiction but is received, relied on and causes harm in another jurisdiction – the law of the jurisdiction where it was prepared and issued or the law of the jurisdiction where it was received, used and caused harm?

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Should corporate directors bear the consequences of their own faults or can they now shift liability for their breaches of duty – for example, declaration of corporate dividends, including to themselves – over to auditors?

To what extent does the characterization of "outside" director impact a corporate director's duty of due diligence?

Dated at the City of Ottawa, in the Province of Ontario, this 12th day of July, 2013.



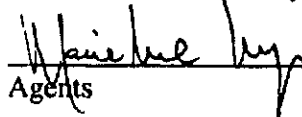
Applicant

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**Co- Counsel for the Applicants, Elliot C.
Wightman et, al.**

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AND TO :

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NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

ANNEX A

RENÉ M. AUBRY
JOHN D. BALL
JEAN BEAUDRY
MARCEL BERTRAND
GEORGES F. FOURNIER
GILLES GAGNON
IAN GERGOVICH
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JEAN-GUY MARTIN
PIERRE SECCARECCIA
BERNARD R. SMITH
JACQUES ST-AMOUR
NORAH K. TAYLOR
MICHAEL WHITWORTH
ELLIOT C. WIGHTMAN

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-and -

MICHEL BÉDARD
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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
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STEPHEN H. FREEDHOFF
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ROBERT E. LAMOUREUX
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ROBERT E. LOWE
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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

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-and –

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-and –

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GERARD A.M. LUIKX
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-and –

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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

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-and -

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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

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-and -

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

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

-and -

LAWRENCE R. COSMAN
HUGH R. TIDBY

**R. DALE URQUHART
PETER WILSHAW**

Ms. L.G. Wittrien in her quality of Executor and Trustee of the Estate of the Late
GLENN L. WITTRIEN

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

-and -

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

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

-and-

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

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

-and-

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

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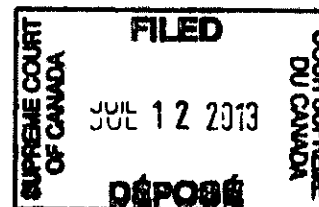
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Re: Elliot C. Wightman et al. v. The Estate of the Late Peter N. Widdington, et al.
SCC File No.: N/A

Please find enclosed letter to the Registrar and Notice of Application for Leave to Appeal and Certificate of Counsel which we are serving upon you pursuant to the Rules of the Supreme Court of Canada and as a courtesy.

Marie-France Major
Marie-France Major

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