Court File No.: CV-14-10791-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C.C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **4519922 CANADA INC.**

AFFIDAVIT OF PHILIP MANEL
(sworn on July 13, 2015)

FISHMAN FLANZ MELAND PAQUIN LLP
Barristers and Solicitors
4100-1250 René-Lévesque Blvd. West
Montreal QC H3A 3H3

Avram Fishman
afishman@ffmp.ca

Mark E. Meland
mmeland@ffmp.ca
Tel: 514-932-4100

Counsel for the Creditors' Committee

Court File No. CV-14-10791-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C.C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **4519922 CANADA INC.**

AFFIDAVIT OF PHILIP MANEL
(sworn July 13, 2015)

I, Philip Manel, CPA, CA, CFE, CIRP and trustee in bankruptcy, practicing my profession at 1981 McGill College, 12th Floor, Montreal, Quebec H3A 0G6, am a representative of Richter Advisory Group Inc., the Castor Trustee, a Claimant in these CCAA proceedings.

1. I am providing this affidavit in support of the motion seeking a Sanction Order approving the CCAA Plan of Compromise and Arrangement (the "**Plan**") that has been proposed by the Applicant and which has been approved by the statutory majority of the two classes of Claimants voting thereon at the Creditors' Meeting held on July 7, 2015.

2. All capitalized terms not specifically defined in this affidavit have the meanings ascribed to them in the Plan.

3. I am advised that a group of eleven (11) Claimants represented by the same legal counsel (the "**Gambazzi Group**") voted against the Plan at the Creditors' Meeting and have filed a notice of motion opposing the granting of a Sanction Order by the Court.

4. Dr. Marco Gambazzi ("**Gambazzi**") was a director of Castor from 1979 or 1980 until its bankruptcy, and he was a director, with signing authority, of many of Castor's

subsidiaries, including C.H. International Finance N.V. and Castor Holdings International Finance N.V.

5. Gambazzi was also a director and advisor of all of the corporate entities in the Gambazzi Group, and was a shareholder of two such entities; namely, Marvin Company Ltd. and Orwamar Establishment.

6. The Castor Trustee disagrees with the position being put forth by the Gambazzi Group, and submits that the Plan, and the process by which it was conceived, are both fair and reasonable, and should be approved by the Court.

THE CASTOR BANKRUPTCY

7. Castor was a corporate entity with its principal place of business in Montreal, Quebec but with a number of subsidiaries outside of Canada. CLCA provided auditing and other professional services to Castor and certain of its subsidiaries until the company's bankruptcy in early 1992.

8. On July 9, 1992, Castor was confirmed to be bankrupt (with retroactive effect to March 26, 1992) and the Castor Trustee was named as trustee of the bankrupt estate. Shortly thereafter, Castor's subsidiaries were also subject to liquidation proceedings in various jurisdictions around the world.

9. Various proofs of claim were filed with the Castor Trustee for losses as at March 26, 1992 (the "**Castor Proofs of Claim**"); however, because the Castor estate did not have funds available for distribution as well as the considerable costs associated with properly reviewing each Castor Proof of Claim, the Castor Trustee delayed the task of allowing and disallowing the Castor Proofs of Claim until it became evident that there would be funds available to distribute.

10. As a result of a mediation process which commenced in mid-2014 in an effort to settle the Outstanding Litigation (discussed below), it appeared for the first time that funds

may become available to distribute to Castor's creditors. Consequently, in accordance with its duties, the Castor Trustee began the process of reviewing the Castor Proofs of Claim.

11. As part of this process, in October 2014, the Castor Trustee issued a notice of disallowance with respect to one of the Gambazzi Group members, International Finaco Establishment, and in January 2015, it issued notices of disallowance to the other Gambazzi Group members.

12. The reasons for such disallowances included, *inter alia,* that the Gambazzi Group Claimants' alleged investments in certain of Castor's subsidiaries were not guaranteed by Castor, and, accordingly, they were not creditors of Castor.

13. Furthermore, the evidence that each of the Gambazzi Group Claimants was the beneficial owner of the promissory notes on which its claims were based was insufficient. These promissory notes were, with one exception, issued to "Dr. Marco Gambazzi, in Trust" and not to the Gambazzi Group members directly, and no documentary evidence was provided by such Claimants clearly establishing that these promissory notes belong to them.

14. The Gambazzi Group Claimants have appealed the disallowances of their Castor Proofs of Claim, and such cases are presently pending before the Quebec Court.

CASTOR LITIGATION

15. In 1993 and 1994, most of the creditors who filed Castor Proofs of Claim, including the Gambazzi Group (with the exception of International Finaco Establishment), instituted actions against CLCA and its individual partners (the "**Defendants**") in the Quebec Court, alleging that the professional negligence of CLCA was the direct and immediate cause of the losses that they had suffered (the "**Castor Plaintiffs**").

16. It was evident from the outset that the costs relating to the determination of the negligence of CLCA, a crucial element required to establish Defendants' liability, and the common costs of such litigation would be enormous and could not be supported by the

Castor estate or any single Castor Plaintiff. It was also clear that all of the Castor Plaintiffs could benefit by collectively supporting such common costs with a view to achieving a final judgment on the issue of negligence, a necessary element to establish the liability of the Defendants.

17. As a result, in 1993, and on the directions of the inspectors in the Castor estate, the Castor Trustee reached out to all of the Castor Plaintiffs with the view to assembling a group which would assume the financial burden of the common costs related to the Castor Litigation; such as, for example, the costs related to conducting the extensive examinations on discovery of the audit staff members who worked on the Castor audits, as well as to the litigation support provided by the Castor Trustee to ascertain the professional faults of CLCA.

18. The Castor Plaintiffs represented by the law firm Fishman Flanz Meland Paquin LLP ("**FFMP**"), as it is now designated, agreed to work as a group along with Chrysler to finance the common costs of the Castor Litigation. The Castor Plaintiffs represented by FFMP were composed of two groups of plaintiffs/claimants: the German Bank Group and the Canadian Bank Group. FFMP is also counsel to the Castor Trustee in its action against Defendants and in related litigation such as the Insurance Action and the Bulk Sale Action. Insofar as the Insurance Action is concerned, the Gambazzi Group members were not parties of record and they never intervened in such proceedings before the Quebec Court.

REFUSAL OF THE GAMBAZZI GROUP TO PARTICIPATE IN COMMON FUNDING

19. The Gambazzi Group was represented by the Montreal law firm Robinson Sheppard Shapiro ("**RSS**"), which still represents the Gambazzi Group to this date with respect to all proceedings in Quebec.

20. As well, RSS is the Quebec counsel for a group of German Castor Plaintiffs often designated as the Fromm group (the "**Fromm Group**"). Members of the Fromm Group

also filed Castor Proofs of Claim. Certain members of the Fromm Group also filed Proofs of Claim in the CCAA Proceedings and have voted in favour of the Plan.

21. As part of the Castor Trustee's efforts to amass as large a group of contributing creditors as possible, so as to reduce the burden on individual Castor Plaintiffs, the Gambazzi Group, through their legal counsel RSS, was invited to join the participating creditors. The matter was discussed on a number of occasions and by mid-1995, RSS advised the Castor Trustee and FFMP that the clients that RSS represented, including the Gambazzi Group, were unwilling to commit to financing the common costs of the Castor Litigation against the Defendants, despite the fact that all of the Castor Plaintiffs would benefit if CLCA was determined to be negligent.

THE CASTOR TRUSTEE'S DIVIDEND ACTION, THE TEST CASE JUDGMENT AND GAMBAZZI'S ALLEGED RELIANCE ON CLCA'S PROFESSIONAL OPINIONS

22. In December 1992, the Castor Trustee instituted proceedings in the Quebec Court against the directors of Castor, including Gambazzi, in order to recover approximately $15.5 million which was improperly declared by the board of directors as a dividend in 1991, at a time when Castor was insolvent.

23. In his defense to that action, Gambazzi argued that he should be absolved from liability for his participation in such decision, and alleged that he relied on the audited financial statements of Castor in order to inform his decision to approve the declaration of the dividend at issue in the proceeding.

24. On July 30, 2008, Justice Lemelin of the Quebec Court rendered a judgment in favour of the Castor Trustee (*Castor Holdings Ltd (Syndic de)*, 2008 QCCS 3437, the "**Lemelin Judgment**"), in which she held that Gambazzi was responsible for improperly declaring the dividend, concluding that he was heavily implicated in Castor's business and that he must have been aware of certain misrepresentations in the audited financial statements. Consequently, she rejected Gambazzi's argument that he should be absolved

from liability for having allegedly relied on the audited financial statements to inform his decision and concluded:

> *[119] Bref, l'ensemble de la preuve relative à la conduite et l'attitude de l'intimé Gambazzi démontre un manque d'attention et de diligence et une participation laxiste à plusieurs transactions. Pour les motifs déjà discutés, un administrateur prudent aurait bénéficier des informations connues pour prendre l'intérêt de la compagnie. Le tribunal conclut que l'intimé Gambazzi ne l'a pas convaincu que l'ensemble des circonstances justifie d'exercer sa discrétion de ne pas rendre jugement en faveur du syndic.*
>
> **Unofficial Translation:**
>
> *[119] In short, all of the evidence relating to the conduct and attitude of the respondent Gambazzi discloses a lack of attention and diligence and lax participation in several transactions. For the reasons already discussed, a prudent director would have benefited from the information known to him to make a decision in the interests of the company. The court finds that the respondent Gambazzi did not convince it that the circumstances warrant it to exercise its discretion not to grant judgment in favor of the trustee.*

25. Pursuant to this judgment, a copy of which is attached hereto as **Exhibit "A"**, Gambazzi was ordered to pay the Castor Trustee $8,759,490, plus interest and the additional indemnity provided by the *Civil Code of Quebec*. Gambazzi has failed to pay any of this judgment debt and, as at July 8, 2015, remains indebted to the Castor Trustee in the amount of $12,393,118.35.

26. The Lemelin Judgment was substantially reproduced by Justice St-Pierre, then of the Quebec Court now of the Quebec Court of Appeal, in *Widdrington (Estate of) c. Wightman*, 2011 QCCS 1788, in paragraph 3570 of her judgment rendered on April 14, 2011 confirming, *inter alia*, CLCA's professional negligence (the **"St-Pierre Judgment"**).

27. The extensive involvement of Gambazzi in Castor's affairs was commented on in numerous paragraphs of the St-Pierre Judgment, a copy of the relevant extracts of said judgment is attached hereto as **Exhibit "B"**:

- Gambazzi was a shareholder of Castor and a director and a managing director, with signing authority, of the offshore subsidiaries of Castor (para. 103);

- Gambazzi had the ability to exercise control or significant influence, directly or indirectly, over the operating and financial decisions of Castor and its subsidiaries. Gambazzi was related to Castor and its subsidiaries (para. 553);

- Several corporate entities, both borrowers and lenders to Castor, were represented by Gambazzi (para. 557). Because of Gambazzi's role regarding those borrowers and lenders, some transactions between Castor or its subsidiaries and those borrowers and lenders should have been disclosed as related party transactions (para. 561). Gambazzi acted on Stolzenberg's behalf in related entities that Stolzenberg owned or controlled or in which he had an interest, and which had transactions with Castor and its subsidiaries [which also should have been disclosed as related party transactions] (para. 562);

- Gambazzi received $4 million in commission related to a $100 million debenture transaction [which was an artificial circle of funds and which improved Castor's audited financial statements] (para. 680);

- Gambazzi signed a pledge on behalf of Castor to the benefit of Bank Gotthard. This restricted cash was not disclosed on Castor's audited financial statements and constituted a material misstatement (paras. 1688-1690);

- In 1988, 1989 and 1990, certain fees paid to Castor were improperly diverted from Castor and paid, in part, to Gambazzi and/or his companies (para. 2113);

28. In contrast to Gambazzi, Justice St-Pierre concluded that the Test Case plaintiff, who was also a director of Castor, justifiably relied upon the consolidated financial statements of Castor audited by CLCA in approving the resolution of the board of directors authorizing the issuance of dividends by Castor.

FUNDING OF THE OUTSTANDING LITIGATION

29. In February 1998, the Test Case was selected by the Quebec Court to proceed first to trial and FFMP acted as counsel for the plaintiff.

30. In addition to the question of reliance, which would be specific to the Test Case, the Test Case was intended to resolve all of the issues that were common to all of the Castor Plaintiffs' actions, including the overriding issue of the professional negligence of CLCA.

31. Since the Test Case plaintiff was unable to fund the anticipated huge common litigation costs related to the prosecution of the Test Case, an agreement was entered into between the Castor Trustee and such plaintiff which provided that, other than with respect to matters specific to the Test Case plaintiff, the Castor Trustee would be responsible for, and pay all fees and expenses related to, all other phases of the litigation, including primarily, all issues related to the professional negligence of CLCA.

32. The Castor Trustee could only fund the prosecution of the Test Case, including the more than 50 appeals that were lodged from interlocutory and final judgments, through loans made by various Castor Plaintiffs.

33. In parallel with the trial of the Test Case, and with the funding obtained from the Participating Creditors (defined and described on Schedule F to the Plan), the Castor Trustee instituted the Bulk Sale Action and, together with the Test Case plaintiff, instituted the Insurance Action. The Insurance Action involved more than 50 Insurers and was very well advanced at the time of the commencement of the CCAA Proceedings. Numerous discoveries had been conducted, five expert reports were filed on behalf of the Castor Trustee and a six month trial before the Quebec Court was scheduled to commence in January 2015.

34. As a result of the extensive professional services paid for by the Participating Creditors and the many successful judgments obtained by FFMP against the Defendants and others, the Castor Plaintiffs, CLCA, and other stakeholders agreed to enter into mediation in mid-2014, through which very significant progress was made towards resolving all of the Outstanding Litigation. Although the mediation was ultimately unsuccessful, these negotiations paved the way for further discussions, the development of the Term Sheet and the initiation of the CCAA Proceedings.

PARTICIPATING CREDITORS' LOANS

35. The total amount loaned by various Castor Plaintiffs to the Castor Trustee to fund, *inter alia*, the common expenses of the Outstanding Litigation (the "**Castor Litigation Loans**") over a twenty-two year period was **$102,165,776.78**.

36. The Gambazzi Group contributed **$0** to the Castor Litigation Loans and refused to contribute to same.

37. The Participating Creditors made **$95,691,922.05** of the Castor Litigation Loans.

38. The rest of the Castor Litigation Loans (i.e., the amount of $6,473,854.73) were made by Castor Plaintiffs who settled with CLCA and discontinued their actions (the "**Withdrawn Creditors**"). The Withdrawn Creditors all ceased making contributions to the Castor Litigation Loans between 10 and 17 years ago.

39. I have been advised by Mark E. Meland of FFMP that it is his understanding that CLCA and/or the Insurers were subrogated in the rights of most of the Withdrawn Creditors as against the Castor Trustee to the extent of settlement amounts received by them from CLCA. Under the Plan, it is stipulated that any Claim based upon subrogation rights of the Applicant, CLCA, Opco and/or an Insurer, shall not give rise to any entitlement to a distribution.

40. As a result of the withdrawal of the Withdrawn Creditors from the funding arrangements with the Castor Trustee, the financial burden and corresponding risk that had to be assumed by each of the remaining Castor Plaintiffs (i.e., the Participating Creditors) increased on a percentage basis.

41. In 2006, the trial judge overseeing the Test Case became ill, and, in 2008, the Test Case had to recommence before a new judge. By the end of 2007, the Participating Creditors had already made Castor Litigation Loans in excess of $48 million.

42. The requirement after nearly eight years to abort the first trial and commence a new trial imposed a huge financial burden on the Participating Creditors and unprecedented risk. Nevertheless, the Participating Creditors assumed that financial risk and made further Castor Litigation Loans to the Castor Trustee. More precisely:

- In 2008, $10,554,982.94;
- In 2009, $ 8,452,338.94;
- In 2010, $10,085,020.51;
- In 2011, $ 3,798,080.89;
- In 2012, $ 4,446,617.35;
- In 2013, $ 4,215,963.45;
- In 2014, $ 5,286,307.58; and
- In 2015, $ 807,840.00.

43. At the time that the Term Sheet was negotiated between CLCA and the Castor Plaintiffs represented by FFMP, it was agreed that the Participating Creditors (without whose loans no judgments would have been obtained against the Defendants, no actions would have been instituted against the Insurers, PwC and individual partners, and no settlement or Plan would have been possible) should be entitled to be repaid the Castor Litigation Loans that they had made over the past 22 years. Notwithstanding the terms of the Plan and the Term Sheet, based on professional advice obtained by the Castor Trustee, it was decided to restrict the Participating Creditors' Distributions to the outstanding principal amount of the Castor Litigation Loans and to eliminate any interest payments in connection therewith, the whole increasing the distributions to be made from the General Distribution Pool by $10 million.

44. The Participating Creditors' Distributions shall be paid to the Participating Creditors, at the direction of the Castor Trustee, in accordance with the Participating Creditors' Allocations set forth in Schedule F to the Plan.

45. The difference between the amount of $95,691,922.95 referred to in paragraph 37 hereof and the repayment of principal to be repaid to the Participating Creditors by way of the Castor Trustee relates to the invoicing by the Castor Estate to the Participating

Creditors for litigation services in the amount of $691,922.95 and the Castor Estate setting off such amount from the sums due by it to the Participating Creditors. After taking into account such invoicing and set-off, the remaining amount of $95,000,000 constitutes the principal amount of the Participating Loans to be paid to the Participating Creditors.

COST AWARD FUNDS (AWARDED IN THE WIDDRINGTON ACTION)

46. Pursuant to the Plan, the Cost Award Funds, representing the court costs and special fee taxed and awarded in the Test Case, have been paid to FFMP, as attorneys for the Test Case plaintiff.

47. A substantial portion of the court costs was already deposited by CLCA as security at the office of the Quebec Court of Appeal well prior to the commencement of the CCAA Proceedings.

48. I am advised by Mark E. Meland of FFMP that in accordance with article 479 of the Quebec *Code of Civil Procedure*, court costs are distracted in favour of the attorney of the party (i.e. the attorney of the Test Case plaintiff) to whom they are awarded.

49. I am further advised by Mark E. Meland of FFMP that, although such attorneys of the Test Case plaintiff may deal with the awarded court costs as they see fit, FFMP has decided to pay the Cost Award Funds to the Participating Creditors in recognition of the extraordinary financial burden assumed by such parties in supporting the prosecution of the Test Case. In contrast, the Gambazzi Group did not contribute at all to the prosecution and funding of the Test Case.

THE FAIRNESS OF THE PLAN

50. After payment of the Participating Creditors' Distributions and the Cost Award Funds, the Plan still foresees a distribution to all Claimants from the General Distribution Pool, in the amount of more than $100 million.

51. This distribution would not have been available or possible without the funding of the Outstanding Litigation by the Participating Creditors.

52. Although the Gambazzi Group is now contesting the "fairness" of the Plan, it appears that their true grievance is not with the Plan itself, but with the disallowance of their Proofs of Claim thereunder.

53. The ultimate decision with respect to the allowance or disallowance of their claims will be determined in due course pursuant to the Claims Procedure Order issued by this Court on March 10, 2015, a copy of which is attached hereto as **Exhibit "C"**. Sufficient proceeds from the Net Contributed Funds will be retained by the Monitor in trust pending an adjudication of the validity of such claims.

54. As well as being a representative of the Claimant Castor Trustee, I am a member of the Creditors' Committee pursuant to the Initial Order of this Court dated December 8, 2014 (para. 21).

55. It is my obligation to act in the best interests of the Castor estate and its creditors, including in respect of the vote held to approve the Plan. On July 7, 2015, I attended the Creditors' Meeting and voted in favour of the Plan, since I considered that said Plan is both fair and commercially reasonable.

AND I HAVE SIGNED

PHILIP MANEL

Solemnly declared before me at Montreal
this 13th day of July, 2015

Commissioner of Oaths for the Province of Quebec

Commissaire à l'Assermentation
WENDY LANDRIGAN
144,491
Pour tous les Districts judiciaires du Québec

Exhibit “A”

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-001584-925

DATE : 30 juillet 2008

SOUS LA PRÉSIDENCE DE : L'HONORABLE LOUISE LEMELIN, J.C.S.

DANS L'AFFAIRE DE LA FAILLITE DE
CASTOR HOLDINGS LTD.

RSM RICHTER INC.
Requérante
c.
MARCO GAMBAZZI
WOLFGANG STOLZENBERG
WOLFGANG LESER
PETER OCHSNER
WALTHER STROMEYER
Intimés

JUGEMENT SUR LA REQUÊTE EN REMBOURSEMENT DE DIVIDENDES (#49)

---

[1] La requérante, RSM Richter inc., syndic à la faillite de Castor Holdings Ltd., poursuit solidairement les administrateurs en remboursement d'un dividende de 15 522 942 $ qui aurait été autorisé et payé dans les douze mois précédant la faillite de Castor Holdings Ltd. (Castor). Elle réclame dans sa requête de décembre 1992, le paiement des intérêts et l'indemnité spéciale.

[2] Il est admis que la requérante a conclu des ententes de règlement hors cour avec quatre intimés initialement poursuivis, soit avec MM. Luerssen (3 650 000 $), Raborn Jr. (200 000 $), Widdrington (750 000 $) et Dennis (1 250 000 $) pour une somme de 5 850 000 $. En début d'audience, la requérante réduit en conséquence sa réclamation à 9 672 942 $ contre les autres intimés.

[3] L'intimé Marco Gambazzi conteste le bien-fondé de cette demande. Les quatre autres intimés, Wolfgang Stolzenberg, Wolfgang Leser, Peter Ochsner et Walther Stromeyer, n'ont produit aucune contestation et ne sont pas représentés lors de l'audience.

Les faits

[4] Castor est une société de droit canadien, incorporée en décembre 1977 en vertu de la *Loi sur les corporations commerciales*[1].

[5] Le siège social de la société est à Montréal, mais elle dessert sa clientèle par plusieurs bureaux de représentation ouverts au Canada, aux États-Unis et en Europe. Elle fait affaire par ses filiales incorporées en Suisse, aux Pays-Bas, aux Antilles néerlandaises, à Chypre et en Irlande.

[6] Castor se spécialise en investissements immobiliers. Elle se décrit en 1990 dans sa brochure[2], comme une « banque d'affaires » (Investment Bank) possédant des actifs propres qui excèdent 205 millions de dollars, détenant des dépôts substantiels de ses actionnaires. Elle cible une clientèle à la recherche d'octroi de crédits à court et à moyen terme sur le marché hypothécaire dans l'attente d'un financement plus permanent de l'entrepreneur ou du promoteur et offre aux investisseurs des possibilités de placements avantageux.

[7] Retenons qu'il y avait manifestement beaucoup de mouvements de fonds entre Castor, ses filiales et diverses compagnies créées ou utilisées uniquement pour recevoir et sortir des fonds. Castor a connu un essor important au début sous la présidence de Karsten von Wersebe et l'implication active de M. Stolzenberg. Ce dernier lui succède éventuellement à la présidence de Castor.

[8] Pour la période contemporaine aux fins du litige, tous les intimés initialement poursuivis sont les administrateurs de Castor, lors de la déclaration du dividende le 21 mars 1991 et lors de la date alléguée du paiement de septembre 1991. M. Gambazzi admet qu'il est administrateur le 21 mars 1991 et les procès-verbaux des assemblées des administrateurs[3] confirment ce fait et le statut d'administrateurs de tous les autres intimés.

[9] Castor présente ses administrateurs et cadres supérieurs[4] en 1990 comme ayant :

> « Une formation de banquiers ou de financiers ayant acquis une expérience considérable dans les institutions européennes et nord-américaines de premier plan. Ils assurent par leurs connaissances et leur compétence le déroulement des

---

1 L.N.-B. 1981, c. B-9.1.
2 Pièce D-7 : Corporate brochure of Castor Holdings Ltd., April 1990.
3 Pièce P-2, Minutes of a meeting of the Board of Directors of Castor Holdings Ltd., of March 21, 1991; et Pièce P-26, Minutes of the Annual Meeting of Shareholders of May 8th, 1990.
4 Supra note 2 à la p. 2.

> opérations de placement et de crédit. Les membres du Conseil d'administration jouissent d'une grande expertise et de précieux contacts dans le domaine de l'investissement immobilier. »

[10] M. Gambazzi avait une expérience de cette nature et il reconnaît aux autres administrateurs une vaste compétence en ce domaine tout en précisant qu'ils n'assumaient pas la responsabilité quotidienne des opérations. À son souvenir, les administrateurs reçoivent des émoluments annuels de 35 000 $, et une commission de 1 % est payée pour les sommes investies par eux ou leurs clients référés[5] à Castor.

[11] M. Gambazzi obtient sa licence en droit à Lausanne en 1963, puis son diplôme d'avocat en 1965. Il pratique le droit au sein de diverses études en Suisse, avant d'ouvrir son propre bureau à Lugano en 1984 pour s'associer ensuite à M[e] Berra en 1985, trois autres avocats travaillent dans leur étude dans les années 1990. M. Ronaldo Conti est comptable et gérant du bureau de 1984 à 1993; il a des contacts personnels avec M. Stolzenberg.

[12] Les avocats se spécialisent dans le domaine du droit des sociétés et M. Gambazzi développe une expertise en fiscalité internationale. Son équipe offre divers services juridiques à sa clientèle, en plus de s'occuper des investissements et de l'organisation de leur fortune.

[13] Devenu administrateur de Castor dans les années 1980, à l'invitation de M. Stolzenberg, il apporte des fonds à Castor en investissant son argent, celui de ses compagnies et les contributions de ses clients. M. Gambazzi témoigne d'ailleurs que c'est son principal rôle dans cette compagnie.

[14] M. Gambazzi témoigne qu'il est administrateur de quelques centaines de petites sociétés qui ont des comptes bancaires. À titre d'exemple, son bureau possède FITAM Établissement qui rend des services fiduciaires pour des opérations temporaires. Elle est parfois utilisée comme prête-nom pour préserver l'anonymat du client qui de fait opère et fait réellement la transaction.

[15] Le syndic allègue que cette compagnie a notamment participé à des transactions qui ont permis de transférer 50 millions de dollars dont, ultimement, la conséquence est d'améliorer la présentation de la situation financière de Castor. L'étude de M. Gambazzi crée plusieurs compagnies pour répondre aux besoins du groupe Castor à la demande de MM. Stolzenberg et Baenziger, un cadre de Castor. L'intimé explique dans son témoignage, comment on utilise aussi, si nécessaire, des entités corporatives non actives constituées pour ses clients.

[16] Cet intimé a siégé à plusieurs conseils d'administration pour des sociétés importantes et son travail le conduit dans plusieurs pays. M. Gambazzi dépose un

---

5 Pièce P-8, Interrogatoire de Marco Gambazzi du 29 janvier 1995, Vol. 1, art. 163, p. 144 et ss.

curriculum vitae[6] de 2005 énumérant ses postes les plus prestigieux dont la présidence de la Soginvest Banca Lugano, les vices-présidences des compagnies, Lloyd Adriatic S.P.A. Insurance Co. et Finarte S.P.A. à Milano. Il a été invité à agir comme conseiller (Administrator Advisor) pour la Banque de Lugano, et Vaudoise Assurances.

[17] M. Gambazzi a une expérience significative. L'ensemble de la preuve permet d'inférer qu'il avait la confiance de M. Stolzenberg qui le visite à son bureau à une certaine époque, environ une fois par mois, et lui apporte de nombreux documents à signer dont il garde un souvenir bien imprécis. La preuve permet de constater les multiples transactions où il est signataire pour l'une des parties. M. Gambazzi pouvait signer pour sa compagnie FITAM, mais aussi pour C.H. International Finance (CHIF), Curacao, Mireta, Overnome, Coeval. La preuve démontre qu'il a aussi incorporé, est administrateur et personne autorisée à signer également pour les compagnies Trade Retreiver, Charbocean et Runaldri.

[18] Pour éviter les redites, le tribunal retient pour l'instant que M. Gambazzi est un homme d'expérience qui a été exposé à plusieurs informations et il aurait pu être au fait de certaines transactions. Nous verrons dans le cadre de la discussion, le rôle joué par certaines compagnies auxquelles était associé l'avocat Gambazzi.

[19] Les autres administrateurs de Castor en 1991 ont une notoriété et ils oeuvrent dans divers domaines d'activités; M. Gambazzi nous en parle lors de l'audience. Le dynamique et brillant Stolzenberg pour lequel il a, après coup, des propos moins louangeurs; son cousin Leser, un entrepreneur; l'avocat canadien Dennis; Stromeyer, membre aisé d'une famille allemande qui a construit des navires, comme Luerssen dont l'entreprise familiale, construit des navires pour l'armée et les particuliers. L'avocat zurichois Ochsner représente une riche famille suisse qui s'est impliquée dans divers domaines d'activités, dont les banques. Font également partie de cette brochette, Raborn Jr., expert canadien de l'industrie du pétrole et le président de la compagnie Labatt, M. Widdrington. Bref des gens susceptibles d'apporter de la crédibilité et de l'argent qui, selon l'intimé Gambazzi, s'estiment privilégiés de participer.

[20] Le tribunal retient que le 21 mars 1991, tous les intimés sont présents à l'assemblée des administrateurs, tenue au siège social de Castor à Montréal. Ils ont reçu un cartable contenant l'ordre du jour et divers documents[7] d'intérêt pour la réunion.

[21] Sont entre autres communiqués les états financiers vérifiés pour l'année se terminant le 31 décembre 1990, et annonçant un bénéfice net de 31,2 millions de dollars pour cet exercice. Les vérificateurs de la compagnie, la firme Coopers & Lybrand attestent que ces états[8] *« present fairly, in all material respects, the financial position of the company [...] and the results of its operations and the changes in its net invested assets for the years then ended in accordance with generally accepted accounting principles. »*

---

6 Pièce D-11 : Non-official translation - Curriculum vitae Me Marco Gambazzi, June 3, 2005.
7 Pièce D-5, Book of Directors Meeting, March 21, 1991.
8 Ibid., onglet 4, p. 10.

[22] Coopers & Lybrand ont évalué la juste valeur marchande des actions ordinaires à approximativement 580 $ l'action. Cette opinion est incluse au cartable. Des avocats ont également donné une opinion (Legal-for-Life)[9] dans l'objectif de faire reconnaître que la société offre des investissements sécuritaires accessibles par exemple aux compagnies d'assurance et aux fonds de retraite.

[23] La possibilité de déclarer un dividende aux actionnaires selon un calcul proposé est à l'ordre du jour.

[24] Les administrateurs ont approuvé à l'unanimité les états financiers vérifiés et ont déclaré un dividende totalisant 15 522 942 $. M. Gambazzi témoigne qu'à l'époque, la décision lui paraît appropriée et il ignore que Castor est insolvable, prétention que conteste énergiquement la requérante.

[25] Il est utile de réciter des admissions faites par la requérante et l'intimé Gambazzi, pour situer le contexte factuel :

> The audited consolidated financial statements of Castor Holdings Ltd. as at December 31, 1990 and the Auditor's report thereon dated February 15, 1991 (collectively filed as Exhibit D-1), both of which were provided to the Directors of Castor Holdings Ltd. at or in the days prior to the Meeting of Directors held on March 21, 1991, did not indicate:
>
> a) That Castor Holdings Ltd. was insolvent at that time; and/or,
>
> b) That the declaration and payment of a dividend by Castor Holdings Ltd. in the amount of $15,522,942.00 would render Castor Holdings Ltd. insolvent.
>
> While Respondent Gambazzi reserves his right to make proof and/or argue that he did not know of the insolvency of Castor Holdings Ltd. in September 1991, Respondent Gambazzi admits that Castor Holdings Ltd. was in fact insolvent in September 1991.

[26] La requérante soumet que les paiements des dividendes sont faits en septembre 1991, selon les données recueillies aux livres de Castor et appuyées par des correspondances et documents[10] transmis aux actionnaires.

[27] L'équipe du syndic a préparé un sommaire[11] détaillant pour chaque actionnaire, le dividende brut moins les retenues lorsqu'applicables pour fins fiscales, le dividende net payable et le mode de paiement. Les paiements sont identifiés sous différentes rubriques :

7 890 508,40 $ Cash Payments

---

9 Ibid., onglet 11, Opinion de McCarthy Tétrault, 22 mars 1991.

10 Pièce P-28, Documents provided to each of the 33 shareholders regarding the payment of the dividend that was declared on March 21, 1991.

11 Ibid.

3 658 785,60 $	Increase of Shareholders Loans
265 542,00 $	Inter-Company Transfer to CHIF
2 794 654,00 $	Decrease of Loans Receivable
913 452,00 $	Canadian Withholding Tax

[28] À tout le moins, pour les paiements au comptant de 7 890 508,40 $, la date de paiement et le quantum ne sont pas contestés. Nous verrons plus tard que M. Gambazzi argue que le syndic n'a pas prouvé le paiement de tout le reste du dividende.

[29] Castor se prévaut de la protection prévue à la *Loi sur les arrangements avec les créanciers des compagnies*[12], puis elle fait faillite le 9 juillet 1992, l'ordonnance de séquestre[13] est rétroactive à la date du dépôt de la requête, soit le 26 mars 1992.

[30] Les inspecteurs à la faillite autorisent le syndic à poursuivre tous les administrateurs par résolution adoptée[14] le 19 novembre 1992.

[31] Le comptable Bernard Gourdeau, syndic, prend le pôle de direction dès le début du dossier. Il sera assisté par plusieurs collègues à l'emploi de la requérante. Il supervise l'équipe de travail, sécurise et collige les informations. Il bénéficie du témoignage, entre autres, de M. Gambazzi qui a été interrogé en vertu de l'article 163(1) de la *Loi sur la faillite et l'insolvabilité*[15], et celui qui signe le rapport du syndic.

[32] Ce comptable d'expérience œuvre dans divers secteurs d'activités et contribue à de nombreux projets comme on peut le lire dans son curriculum vitae[16]. Il se spécialise en l'analyse financière complexe et en vérification judiciaire. Son travail le confronte à l'analyse des transactions révisables en matière de faillite et il a témoigné à plusieurs occasions devant les tribunaux. Il souligne avoir investi de trois à cinq ans à temps complet dans le dossier de Castor et qu'il gère ce dossier depuis environ quinze ans. Il supervise la préparation des données requises pour les instances judiciaires pendantes.

[33] Le syndic, après enquête, analyse de multiples documents, témoignages, livres de la faillie et de ses filiales, conclut dans le rapport[17] du 27 juillet 2006 à l'insolvabilité de Castor lors du paiement du dividende en septembre 1991; il qualifie même la situation de « *hopelessly insolvent on December 31, 1990* ».

[34] Il est intéressant de noter que le syndic ne sélectionne que quelques projets pour établir l'insolvabilité de la compagnie pour la période pertinente. M. Gourdeau constate que plusieurs corrections comptables doivent être apportées aux états financiers pour

---

12 L.R.C. 1985, c. C-36.
13 Pièce P-5, Ordonnance de la registraire adjointe, Claudette Lacaille.
14 Pièce P-4, Extract of the Minutes of the 5e Meeting of Inspectors of Castor Holdings Ltd., held on November 19, 1992.
15 L.R.C. 1985, c. B-3.
16 Pièce D-8, Profil de Bernard Gourdeau.
17 Pièce P-7, Report prepared by RSM Richter regarding the insolvency of Castor Holdings Ltd., July 27, 2006, p. 3.

refléter la valeur réelle des actifs et des obligations de la compagnie.

[35] M. Gourdeau illustre sa prétention par de nombreux exemples dans le rapport et lors de son témoignage. Il explique comment diverses transactions apparentes entre Castor et ses filiales et leur présentation comptable, contribuent à une véritable distorsion de la situation financière de Castor.

[36] Selon les constatations de la requérante au 31 décembre 1990[18], *« Castor's minimum obligations (i.e. direct liabilities and guarantees given to creditors of subsidiaries) exceeded the fair value of its assets by at least $ 222,129,106.00 making it clearly insolvent on that date. »* Les états financiers révisés par le syndic sont inclus au rapport au soutien de cette prétention.

[37] Un extrait des conclusions de ce rapport[19] résume le résultat de son analyse :

> [...] This review indicates that the book value of most of Castor's assets and most of those of its subsidiaries as reported in its financial statements had been grossly inflated for years. The fair value of these assets was significantly lower.
>
> Further, the present report does not include **all** of the adjustments required to reflect the fair value of Castor's and its subsidiaries assets in relations to projects.
>
> **Only a number of such projects have been chosen for this report because an analysis of only those projects is sufficient to establish beyond doubt the insolvency of Castor in September 1991.**
>
> **As previously stated, in addition to the deficit between the value of Castor's assets and liabilities shown in this report additional write-down in the value of Castor's assets and additional obligations should also have been recorded in this books and records in an amount of at least $110,000,000, which would further increase such deficit. For the purposes of the report, the Trustee feels it unnecessary to deal with and detail such additional write-downs and additional obligations, since the deficit between the value of Castor's assets and its liabilities shown in this report is more than sufficient to clearly demonstrate Castor's insolvency on September 1991.**

[38] L'intimé Gambazzi n'apporte aucune preuve d'expert questionnant la méthodologie ou cette conclusion du rapport du syndic. De fait, deux seuls témoins sont entendus lors de l'audience, le syndic Gourdeau et l'intimé Gambazzi.

[39] Le syndic et les liquidateurs estiment qu'en 2006, quatorze ans après la faillite, Castor pourrait devoir plus d'un billion de dollars[20]. Cette faillite a donné lieu à plusieurs recours.

---

18 Ibid., p.5.
19 Ibid., pp. 23-24.
20 Ibid., p. 4.

[40] Des investisseurs ont poursuivi la société Coopers & Lybrand ainsi que 300 de ses comptables, dont Elliot C. Wightman, qui ont agi comme vérificateurs de Castor de nombreuses années. La société avait notamment pour mandat de produire les états financiers et émettre des opinions sur la juste valeur marchande des actions pour une certaine période précédant la faillite. Une vingtaine de ces dossiers sont pendants devant la Cour supérieure.

[41] La Cour d'appel dans l'arrêt *Wightman c. Widdrington*[21] résume les reproches des investisseurs; ils allèguent la responsabilité professionnelle des défendeurs qui n'auraient pas respecté les principes comptables reconnus dans la préparation des états financiers et n'auraient pas dressé un portrait fidèle de Castor dans les états financiers.

[42] Depuis 1998, le juge Carrière a présidé l'audition dans le dossier *Widdrington*, choisi comme action principale. Le juge Carrière n'ayant pu poursuivre l'audience pour cause de maladie, la juge St-Pierre réentend actuellement la cause sur ordonnance[22] du juge en chef.

[43] Ce dossier origine de la même faillite, mais ne porte pas sur les mêmes questions. Le présent jugement n'a pas à décider de la responsabilité des comptables-vérificateurs. D'ailleurs, la requérante et Gambazzi ont signé des admissions pour dissiper tout doute et bien circonscrire le cadre du litige. Il est utile de les reproduire :

> 1. Both Petitioner and Respondent contend and believe that Coopers & Lybrand ("Coopers") was at fault in respect of Castor's financial statements, in general, and Castor's consolidated December 31, 1990 financial statements, in particular, as set forth in separate legal proceedings initiated by each of Petitioner and Respondent before the Quebec Superior Court (the "Coopers Proceedings"); and
>
> 2. Whether Coopers was or was at fault in respect of Castor's financial statements as set forth in paragraph 1 hereof and as alleged by each of Petitioner and Respondent in their respective Coopers Proceedings, is not an issue and is not to be decided in the Petition.

Prétentions des parties

[44] La requérante plaide que les intimés sont responsables solidairement du remboursement du dividende payé aux actionnaires dans l'année précédant la faillite de Castor. L'insolvabilité de Castor n'étant plus contestable et le syndic ayant prouvé le paiement, seuls les administrateurs qui ont protesté contre le paiement du dividende sont disculpés par la loi, ce que n'ont pas fait les intimés.

---

21 Wightman c. Widdrington (Succession de), CA Montréal, 500-09-018100-073 (5 décembre 2007), 2007 QCCA 1687.

22 Widdrington (Succession de) c. Wightman et al., CS Montréal, 500-05-001686-946, ordonnance du 7 septembre 2007.

[45] La requérante argue que l'article 101 de la *Loi sur la faillite*[23] ne prévoit aucune autre défense en 1991–1992. Les amendements législatifs de 1997 n'ont pas d'effet rétroactif.

[46] À titre subsidiaire, la requérante affirme que même si les intimés pouvaient invoquer d'autres défenses, ils ne sont pas acquittés de leur fardeau de preuve. Particulièrement, M. Gambazzi ne peut prétendre avoir agi avec une diligence raisonnable.

[47] L'intimé Gambazzi conteste que le syndic a fait la preuve du paiement de tout le dividende. Sans reconnaître en être débiteur, M. Gambazzi admet qu'une preuve du paiement au comptant de 7 890 508,40 $ a été faite.

[48] Quant aux autres modalités de paiement alléguées, Increase of Shareholders Loans, Inter-Company Transfer to CHIF et Decrease of Loans Receivable, elles sont des entrées comptables sans sortie réelle d'argent de Castor qui ne sont pas couvertes par l'article 101. Nous préciserons les détails de cet argument dans le cadre de la discussion.

[49] L'intimé plaide également qu'en l'absence de preuve de la remise à Revenu Canada des taxes retenues; pour les non-résidents canadiens, cette portion de la réclamation est irrecevable.

[50] L'intimé demande au tribunal d'exercer la discrétion que lui reconnaît l'article 100 et de ne pas le condamner. Ici, il plaide sa bonne foi et le caractère raisonnable de la décision prise de ne pas s'opposer, en tenant compte des informations disponibles et de l'ensemble des circonstances.

[51] Bref, le litige s'articule autour des questions suivantes :

- La compagnie est-elle insolvable lors du paiement du dividende?
- Quels sont les moyens de défense disponibles aux administrateurs en l'espèce?
- Même si le dividende est payé dans les 12 mois précédant la faillite et que la compagnie était insolvable, le tribunal a-t-il discrétion de ne pas rendre jugement en faveur de la requérante?
- Quel est le montant de dividende remboursable?
- Qu'en est-il de l'indemnité spéciale réclamée depuis 1992?

---

[23] S.R.C. 1970, c. B-3.

Discussion

[52] La requérante lorsqu'elle intente son recours en 1992, appuie sa réclamation sur l'article 101 de la *Loi sur la faillite*[24], tel qu'il était alors :

> **101. (1) Enquête au sujet des dividendes et des rachats d'actions**
>
> Lorsqu'une personne morale qui a fait faillite a, dans les douze mois qui précédent la faillite, payé un dividende, autre qu'un dividende en actions, ou racheté ou acheté pour annulation des actions de son capital social, le tribunal peut, à la demande du syndic, enquêter pour déterminer si le dividende a été payé ou si les actions ont été rachetées ou achetées pour annulation à un moment où cette personne morale était insolvable ou si le paiement du dividende ou le rachat ou l'achat pour annulation de ses actions l'a rendue insolvable.
>
> **(2) Jugement contre les administrateurs et les actionnaires**
>
> Lorsque le tribunal, dans des instances en vertu du présent article, constate que le paiement du dividende ou le rachat ou l'achat des actions, décrit au paragraphe (1), a été fait à un moment où la personne morale était insolvable ou l'a rendue insolvable, il peut accorder un jugement au syndic :
>
> a) contre les administrateurs de la personne morale, solidairement, pour le montant du dividende ou du prix de rachat ou d'achat, avec les intérêts y afférents, qui n'a pas été remboursé à la personne morale;
>
> b) contre un actionnaire qui est lié à un ou plusieurs administrateurs ou à la personne morale, ou qui est un administrateur décrit au paragraphe (3), pour le montant du dividende ou du prix de rachat ou d'achat, avec les intérêts y afférents, qui a été reçu par l'actionnaire et n'a pas été remboursé à la personne morale;
>
> **(3) Administrateurs disculpés par la loi**
>
> Un jugement rendu aux termes du paragraphe (2)a) ne peut être enregistré contre un administrateur, ni lier un administrateur qui avait, en conformité avec n'importe quelle loi applicable régissant le fonctionnement de la personne morale, protesté contre le paiement du dividende ou contre le rachat ou l'achat pour annulation des actions du capital social de la personne morale et qui, de ce fait, s'était en vertu de cette loi libéré de toute responsabilité à cet égard.
>
> **(4) Droit de recouvrement des administrateurs**
>
> (...)
>
> **(5) Fardeau de la preuve**
>
> Aux fins d'une enquête conformément au présent article, il incombe aux administrateurs et aux actionnaires de la personne morale de prouver que celle-ci n'était pas insolvable lors du paiement d'un dividende ou du rachat ou de l'achat pour annulation d'actions ou que le paiement d'un dividende ou un rachat d'actions ne l'a pas rendue insolvable.

[53] Cet article reprend essentiellement l'article 79 de la précédente *Loi sur la faillite*[25]

---

[24] Ibid.

[25] S.R.C. 1970, c.14 et table de concordance.

qui ne prévoit de façon explicite qu'une seule défense, soit la protestation de l'administrateur contre le paiement.

[54] En l'espèce, le tribunal conclut que la requérante a établi que les administrateurs de Castor ont approuvé à l'unanimité un dividende payé en septembre 1991, soit dans les douze mois précédant la faillite de la compagnie. La preuve démontre l'insolvabilité de Castor au 30 septembre 1991.

[55] À cette étape de la discussion, malgré les prétentions de M. Gambazzi qu'une partie du dividende approuvé n'a pas été payée, cet argument ne pourrait que réduire le quantum de la réclamation, aspect étudié subséquemment. Il demeure qu'au minimum, vu le paiement au comptant de 7 890 508,40 $, preuve non contredite, la responsabilité des administrateurs pourrait être engagée puisqu'ils n'ont pas protesté contre ce paiement.

[56] Existe-t-il à l'époque pertinente une autre défense pour les intimés? La question ne se pose pas pour les intimés Stolzenberg, Leser, Ochsner et Stromeyer puisqu'ils n'ont pas contesté la requête ni proposé aucun moyen de défense, mais qu'en est-il pour Gambazzi?

[57] En 1996, la *Loi sur la faillite et l'insolvabilité*[26] a modifié entre autres l'article 101 en introduisant une nouvelle condition pour engager la responsabilité des administrateurs s'ils *« n'avaient pas de motifs raisonnables de croire que la transaction était faite à un moment où [la compagnie] n'était pas insolvable ou ne la rendrait pas insolvable.* »

[58] Les administrateurs possèdent donc une autre défense pour se disculper en établissant leur diligence raisonnable. L'article 101(2.1) énonce les critères qui doivent guider le tribunal pour apprécier si les administrateurs ont des motifs raisonnables :

> [...] le tribunal détermine ce qu'une personne prudente et diligente aurait fait dans les circonstances de l'espèce et s'ils ont, de bonne foi, tenu compte :
>
> *a*) des états financiers ou autres de la personne morale ou des rapports de vérification donnés par les dirigeants de celle-ci ou le vérificateur comme représentant justement sa situation financière;
>
> *b*) des rapports sur les affaires de la personne morale établis, à la suite d'un contrat avec celle-ci, par un avocat, un notaire, un comptable, un ingénieur, un évaluateur ou toute autre personne dont la profession assure la crédibilité des mentions qui y sont faites.

[59] L'intimé Gambazzi rappelle à bon droit que l'amendement à un texte ne crée pas une présomption de droit nouveau. L'alinéa 2 de l'article 45 de la *Loi d'interprétation*[27] stipule que la modification *« ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement,*

---

[26] L.R.C. 1985, c. B-3, art. 101(2).
[27] L.R.C., 1985, c. I-21, art. 45.

ou toute autre autorité qui l'a édicté, les considérait comme telles. »

[60] Les auteurs opinent que l'amendement qui nous intéresse est de droit nouveau. Me Dolan[28] souligne qu'avant un seul moyen disculpatoire était possible pour les administrateurs (art. 101(3)). Il ajoute :

> Until recently, the BIA, unlike most comparable corporate legislation dealing with the declaration of dividends [...] did not contain a "due diligence" defence for believing that the corporation was not insolvent at the time in question.

[61] L'auteur Bennett[29] y voit aussi une limitation de responsabilité des administrateurs, disposition législative nouvelle qu'il qualifie ainsi :

> To mitigate the potential liability of directors, Parliament amended section 101 of the Act to provide that the directors are not liable if they have reasonable grounds to believe that the transactions was occurring at the time the Corporation was solvent. In addition to the defence that the directors protested, the directors can argue that they exercised due diligence, acted in good faith [...].
>
> [notre soulignement]

[62] Selon les auteurs Martel[30], la modification de l'article 101 est venue corriger une injustice pour les administrateurs qui ne pouvaient bénéficier de la défense d'une croyance raisonnablement fondée sur des états financiers ou des rapports d'experts comme en matière corporative. Si on exclut la protestation, en fait les administrateurs avaient l'obligation de faire la preuve du fait objectif de la solvabilité de la compagnie.

[63] Les interprétations de la doctrine confirment également l'argument de texte qui manifestement accrédite l'ajout d'une condition pour tenir responsables les administrateurs lorsque le dividende est payé alors que la compagnie est insolvable et ouvre en contrepartie un nouveau moyen de défense à l'administrateur.

[64] Le tribunal note de plus que le législateur dans ses mesures transitoires[31] prévoit que les modifications à l'article 101 « s'appliquent aux faillites et aux procédures visées par des procédures intentées après l'entrée en vigueur de 1997 ».

[65] En bref, les administrateurs de Castor au moment de la faillite pouvaient se disculper en prouvant leur protestation au paiement ou qu'au 31 septembre 1991, Castor était solvable, il n'existait alors aucune autre défense disponible.

[66] L'intimé Gambazzi demande au tribunal s'il conclut que le syndic a fait la preuve,

---

28 Terence DOLAN, «Bankruptcy and Insolvency Issues» in Directors and Officers' Duties and Liabilities in Canada», Toronto, Butterworths, 1997, à la p. 242.

29 Frank BENNETT, «Bennett on Bankruptcy», 9th ed., Toronto, CCH Ltd., 2007, p. 308.

30 Maurice MARTEL et Paul MARTEL, «*La compagnie au Québec : les aspects juridiques*», éd. spéciale, Wilson & Lafleur, 2004, pp. 24-38.

31 Dispositions transitoires, L.C. 1997, c.12, art. 82.

en tout ou en partie, du paiement d'un dividende, d'exercer la discrétion que lui confèrerait le législateur.

[67] L'intimé argue que la terminologie de l'article 101(2) de la *Loi sur la faillite* est un indice formel du caractère facultatif, permissif de cette disposition, le juge « peut accorder un jugement au syndic. »

[68] Cette prétention prend assise sur la distinction apportée par l'article 11 de la *Loi d'interprétation*[32] :

> L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

[69] Les articles 100(1) et 100(2) donnent le pouvoir au tribunal, à la demande du syndic, de réviser certaines transactions faites dans les douze mois précédant la faillite. La rédaction de ces articles est semblable à celle de l'article 101 et la jurisprudence reconnaît que le tribunal jouit d'un pouvoir discrétionnaire résiduaire l'habilitant à ne pas rendre jugement en faveur du syndic, même s'il constate que la transaction serait révisable. La Cour suprême citant avec approbation l'arrêt *Re Standard Trustee*[33] de la Cour d'appel d'Ontario confirme l'interprétation dans l'arrêt *Magasins à Rayons Peoples*[34] et explique que les principes d'équité encadrent l'exercice de ce pouvoir discrétionnaire. On pourrait donc prendre en compte la bonne foi et l'intention des parties dans le contexte précis de l'opération litigieuse.

[70] Une telle discrétion a aussi été reconnue pour l'exercice du pouvoir donné au tribunal à l'article 79 (l'ancêtre de l'art. 101) de la *Loi sur la faillite* pour apprécier si un paiement était un dividende et là encore, la bonne foi et l'intention des administrateurs pouvaient être appréciés.[35]

[71] Le tribunal conclut que même si la défense de croyance raisonnable n'existait pas lorsque le dividende a été payé en 1991, il peut exercer judiciairement sa discrétion et ne pas rendre jugement en défaveur de M. Gambazzi. Ce dernier a le fardeau d'arguer pour quels motifs et d'en faire la preuve. Il faut ici distinguer. Le tribunal ne statue pas sur le moyen de défense accordé par le nouvel article 101, mais apprécie s'il doit exercer sa discrétion en se guidant des principes d'équité.

[72] L'appréciation de la conduite et de l'intention des parties doit être contemporaine et non pas sous l'éclairage d'informations accumulées depuis. M. Gambazzi doit

---

32 Supra note 27, art. 11.
33 Standard Trustee Ltd. (Trustee of) c. Standard Trust Co., [1995] 26 O.R. (3d) 1, [1995] O.J. no. 3151.
34 Magasins à rayons Peoples c. Wise, [2004] 3 R.C.S. 461, à la p. 498.
35 ReTelsten Services Ltd., [1981] 39 C.B.R. (N.S.) 68.

convaincre qu'il s'est comporté comme un administrateur raisonnable.

[73] La *Loi sur les corporations commerciales* en vertu de laquelle est incorporée Castor définit en ces termes[36] l'ampleur des obligations des administrateurs :

> 79(1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir
>
> a) avec intégrité et de bonne foi, et
>
> b) avec soin, diligence et compétence, comme le ferait en pareilles circonstances une personne raisonnablement prudente au mieux des intérêts de la corporation.

[74] Obligations que la Cour suprême identifie comme étant une obligation de loyauté et une obligation de diligence, dans l'arrêt *Magasins à Rayons Peoples*[37]. L'article 323 C.c.Q. reprend le droit antérieur exigeant une conduite prudente et diligente de l'administrateur puis ajoute ce fardeau plus exigeant de l'obligation d'honnêteté et de loyauté dans l'intérêt de la personne morale.

[75] M. Gambazzi soutient dans un premier temps avoir été de bonne foi ne croyant pas agir contre l'intérêt de Castor. Il témoigne avoir lui-même investi personnellement ou par ses clients des sommes importantes qui n'ont pas été récupérées. La société Finapar Financiera SA n'a pas reçu paiement en argent liquide du dividende.

[76] L'intimé énumère un faisceau d'éléments qui le confortent à voter en faveur de la déclaration du dividende; plusieurs faits sont déjà énoncés précédemment. Retenons les plus importants.

[77] L'intimé témoigne de sa confiance en cette compagnie qui a connu une croissance fulgurante à laquelle les grandes banques consentent des prêts significatifs et dont les états financiers sont vérifiés par une firme réputée, Coopers & Lybrand.

[78] M. Gambazzi dit se fier alors aux documents communiqués pour l'assemblée du 21 mars, soit : les états financiers vérifiés par Coopers & Lybrand, leur opinion sur la valeur de l'action ordinaire de la compagnie et l'opinion de McCarthy Tétrault (Legal-for-Life). Dans ce contexte, et avec des profits nets de 31 millions de dollars pour l'exercice se terminant le 31 décembre 1990, il ne lui semble pas déraisonnable de payer un dividende de 15 millions de dollars.

[79] Il est admis que Coopers & Lybrand n'a pas informé les administrateurs de problèmes dans les états financiers consolidés de Castor.

[80] L'intimé traite avec une certaine légèreté le rôle de l'administrateur et du conseil d'administration. Sans vouloir être réducteur, le tribunal retient de ce témoignage le

---

36 Supra note 1.
37 Supra note 34, p. 476.

caractère social de l'assemblée des administrateurs, l'absence de discussion et de vérification.

[81] Lors de son interrogatoire hors cour, M. Gambazzi explique qu'en sus de la réception à laquelle Castor conviait des représentants des grandes banques, le Conseil se réunissait quelques heures. Les membres recevaient la veille un cartable comprenant, entre autres, l'ordre du jour, les états financiers et un sommaire des décisions prises par le Comité du conseil, composé de MM. Dennis et Stolzenberg. Un exemplaire du cartable préparé pour l'assemblée du 21 mars 1991 est déposé[38].

[82] À titre d'exemple, M. Gambazzi nous apprend que le comité « a fait et décidé » du contrat de prêt par la Deutsch Bank de 5 millions de deutsche marks. Cette question n'est pas discutée, le Conseil est là pour ratifier. Il le dit en ces termes[39] :

> Non. Non, c'était quelque chose d'automatique. Enfin, c'était la ratification de décisions qui avaient déjà eu lieu et qui demandaient l'approbation formelle du Conseil, mais qui en réalité ne concernaient pas. C'était Stolzenberg qui décidait ces emprunts, et c'était formellement le Conseil qui devait signer.
>
> [...]
>
> J'avais fait plus que ça et je dois vous dire que je me rends compte aujourd'hui que peut-être il aurait fallu rentrer dans le détail, mais on a pas fait. La vérité, c'est que chaque Conseil s'est limité à prendre acte des chiffres donnés par M. Stolzenberg, et de se féliciter de ça, et de faire un joli lunch et de repartir à trois heures (3:00) ou à cinq heures (5:00) du soir pour l'Europe.
>
> [Notre soulignement]

[83] Le Conseil se limite à regarder les chiffres sans questionner, contrôler ou vérifier[40]. On n'exige pas des administrateurs de superviser toute la conduite et les décisions des officiers et dirigeants de la compagnie; toutefois, la prudence élémentaire impose à l'administrateur de se renseigner suffisamment avant de prendre une décision, comme celle prise par le vote autorisant un dividende.

[84] L'intimé reconnaît avoir manqué de diligence en regard de certaines transactions ce que confirment l'ensemble de la preuve et l'attitude de M. Gambazzi. Il précise son approche[41] :

> Oui, je pense, on évalue plus la confiance ou bien on donne plus de poids à la confiance dans les personnes qui s'occupent que non aux chiffres présentés sur un bout de papier. Ça suffit donc de donner confiance en quelqu'un pour dire, voilà il peut faire et non ne contrôle pas.

---

38 Supra note 7.
39 Supra note 5, Vol. 1, pp. 99-100.
40 Ibid., aux pp. 102, 104-105.
41 Ibid., Vol. 3, p. 546.

Il ajoute sans vouloir s'excuser :

> Je suis d'accord qu'il aurait fallu là avoir une attention qu'on n'a pas eue et une diligence qu'on n'a pas eue.

[85] Le tribunal considère un peu surprenant cet argument disculpatoire invoqué par l'intimé : M. Stolzenberg lui soumet des centaines de documents, donne certaines explications et M. Gambazzi signe sans vraiment connaître le contexte et les implications. Cela expliquerait-il pourquoi il a des souvenirs imprécis des documents même ceux signifiants dans les mouvements de fonds appréciables entre Castor et ses filiales par exemple?

[86] Possible qu'on lui ait caché bien des choses, mais comme l'écrivent les auteurs Martel[42] :

> Le devoir de diligence et de soin de l'administrateur lui impose de se renseigner avant de signer le document : il ne peut s'exonérer en alléguant qu'il se fiait à ses collègues ou aux dirigeants au point de ne pas prêter attention aux affaires de la compagnie. »

[87] M. Gambazzi est un juriste de formation, un homme familier avec le monde des affaires, qui a de plus l'expérience des conseils d'administration et des véhicules corporatifs. Sa signature complaisante témoigne d'imprudence et d'un manque de diligence qui doivent aussi être pris en compte.

[88] Cette participation de Gambazzi à diverses transactions nous amène à vérifier s'il peut avec succès soutenir que ses décisions étaient tributaires des états financiers et opinions accessibles lors de l'assemblée du 21 mars. Le tribunal ne croit pas que M. Gambazzi était dans la complète ignorance de la situation financière de Castor, un survol de certaines transactions éclaire.

[89] Avant de vérifier l'ampleur des informations auxquelles a eu accès M. Gambazzi, il faut répondre aux oppositions de l'intimé à la production de documents au motif que, n'étant pas des originaux, ils ne satisfont pas à la règle de meilleure preuve. La majorité des objections sont retirées en fin d'audience. Il ne reste que celles visant les pièces P-21(a) (b), P-22(a) (b) et P-23(a) (b).

[90] L'article 2260, alinéa 2, du C.c.Q. permet la preuve par tout moyen lorsque la partie ne peut malgré sa bonne foi et sa diligence produire l'original ou la copie qui légalement en tient lieu.

[91] Le syndic Gourdeau qui a constitué le dossier explique rigoureusement la provenance de toutes les pièces. Pour celles qui sont objet d'opposition, il n'a pas trouvé les originaux. Il n'a que des photocopies des ententes ou billets promissoires entre

---

[42] Supra note 30, p. 23-14.

Castor et la compagnie panaméenne, Trade Retriever; la situation est identique pour les billets de Charbocean Trading Corporation.

[92] Le tribunal estime que le syndic a démontré l'impossibilité d'agir à laquelle réfère l'alinéa 2 de l'article 2860. Il est admis que l'impossibilité peut résulter de la perte, de la destruction, du refus de la partie ou d'un tiers de produire le document en leur possession. Ici, aucune preuve de collusion, il est possible que les originaux soient en possession de tiers.

[93] M. Gambazzi ne nie pas sa signature mais il prétend qu'il n'y avait qu'une créance contre Trade Retriever, la deuxième est fausse. Avec égards, l'intimé a pourtant été incapable de se rappeler de transactions plus significatives et l'ensemble de la preuve rend plausible les transactions que ces documents attestent.

[94] Ce qui est pertinent dans le cadre de notre discussion, ce n'est pas d'identifier les dettes et obligations réelles de Castor mais d'apprécier si la conduite de M. Gambazzi lui permet de bénéficier de la discrétion accordée par l'article 101(2).

[95] Revenons sur le prêt de Castor à Trade Retriever. M. Gambazzi admet sans réserve qu'il signe pour un renouvellement de prêt de 2 millions de dollars à cette compagnie qu'il a incorporée dont il est administrateur et personne autorisée à signer. M. Gambazzi voit qu'il n'y a pas eu de remboursement, n'a pas vu de bilan, celui-ci n'étant pas requis au Panama selon l'intimé; il signe pour faire plaisir à Stolzenberg : « c'est seulement 2 millions de dollars ».

[96] La preuve établit que Castor a prêté 5 millions de dollars à Trade Retriever (2,28 M$[43] et 2,2 M$[44]), au moins 4 millions de dollars à Charbocean[45] et environ 2 millions de dollars à Runaldri[46].

[97] Ces prêts sont inscrits aux états financiers de la faillie comme « Receivable », comptes à recevoir, ce qu'ils ne sont pas selon la preuve. Il s'agit au mieux de prêts à long terme desquels on ne peut espérer un apport de liquidité dans un court délai. Les prêts ont été consentis au début des années 1980, renouvelés d'année en année, ce que ne peut ignorer M. Gambazzi qui signe depuis un certain nombre d'années pour lesdites compagnies.

[98] M. Gambazzi n'a pas informé Coopers & Lybrand ou le Conseil d'administration de ces prêts consentis à des compagnies dont il est administrateur. L'intimé ne peut toujours pas, lors de son témoignage en Cour, confirmer l'identité des véritables propriétaires de ces compagnies et, ce qui est plus important, de leur situation financière

---

43 Pièce P-21a) et b), En liasse, billets promissoires des 19 mars 1990 et 19 mars 1991.

44 Pièce P-22a), b) et c), En liasse, billets promissoires des 19 mars 1990 et 19 mars 1991 et Entente entre Trade Retriever et Castor du 19 mars 1990.

45 Pièce P-23a) et b), En liasse, billets promissoires des 19 mars 1990 et 19 mars 1991.

46 Pièce P-24, billets promissoires du 15 avril 1991.

respective. Il ne sait pas non plus si les intérêts prévus ont été payés. Le syndic, pour sa part, dit que les créances à l'endroit de ces compagnies n'ont pu être exécutées.

[99] Le tribunal n'a pas à se prononcer sur le rôle qu'auraient pu jouer les vérificateurs Coopers & Lybrand; comme nous l'avons vu, leur responsabilité est recherchée entre autres par la requérante et l'intimé Gambazzi dans d'autres dossiers de Cour. L'étude de ces prêts n'est faite que pour illustrer que l'intimé savait que certaines entrées comptables n'étaient pas rigoureusement exactes et pouvaient avantager la présentation de la situation de Castor, comme ce fut le cas pour les transactions de FITAM.

[100] FITAM, une compagnie appartenant à l'étude de l'intimé emprunte le 24 décembre 1990, 50 millions US$ de Banco de Gottardo à Lugano. Le même jour, FITAM transfère ce montant à CHIF, nous l'avons déjà vu, « un bras de Castor ». CHIF dépose à son tour ce montant à Banco de Gottardo à Nassau dans un dépôt à terme de 30 jours. Ce dépôt à terme est donné en garantie pour la dette de FITAM envers la Banco de Gottardo à Lugano.[47]

[101] Toujours le 24 décembre, M. Stolzenberg confirme à la Banco del Gottardo à Lugano que M. Gambazzi a le pouvoir de signer à la fois pour C.H. International Finance N.V. et aussi pour Castor Holdings Ltd.[48] Ces documents nous confirment que l'intimé Gambazzi est autorisé à signer pour CHIF, il reconnaît être un administrateur de cette compagnie et porter le titre de « managing director » qui ne correspondrait pas à la réalité. Trente jours plus tard, le montant de 50 millions de dollars fera le chemin inverse. Cette transaction sans risque, du moins pour les banques, a injecté sur papier environ 58 millions de dollars à l'époque qui furent inscrits aux états financiers comme étant des liquidités.

[102] Or, ce n'est pas le cas, l'argent n'était pas libre, il était nanti pour garantir le prêt. Même si les chiffres ne sont pas faux, ils s'insèrent dans un montage ayant pour seul but de bonifier sur papier la liquidité pour la période cruciale de la fin de l'exercice financier. L'intimé tente de convaincre qu'il n'a pas mesuré l'impact de ces transferts et il conserve des souvenirs imprécis des détails.

[103] Le syndic ne retrouve aucune mention aux procès-verbaux que M. Gambazzi ait dénoncé au Conseil ces mouvements de fonds. Coopers & Lybrand n'aurait probablement pas été informée. L'intimé n'offre aucune preuve pour contredire ces prétentions.

[104] Le tribunal retient que l'intimé Gambazzi était informé que, de façon générale, Castor et/ou M. Stolzenberg se livrait à un exercice de « window dressing » que l'intimé définit en ces termes[49] :

---

47 Pièce P-12.
48 Pièce P-13.
49 Supra note 5, Vol. 3, p. 558.

> C'est une façon d'améliorer l'aspect financier du bilan en montrant aux banques, comme Castor se présente aux banques et elle peut démontrer d'avoir dans la caisse ou plutôt dans l'aspect dans les comptes actifs chez les banques, de la liquidité.

[105] M. Gambazzi affirme que M. Stoltzenberg lui avait parlé de ce window dressing lors d'une demande de remboursement dont nous parlerons plus loin. Mais ce discours n'est pas nouveau. Toujours lors du long interrogatoire hors cour tenu à Lugano en 1995, l'intimé dit[50] :

> [...] il [M. Stolzenberg] a fait ce discours de « window dressing » qu'il faisait d'ailleurs toutes les années, il demandait, on peut pas. Il y avait des années où en effet, les banques qui ont anticipé quelque chose, même des sociétés sur ma demande, lui ont anticipé de l'argent entre le 15 décembre, le 5 janvier de façon à avoir un beau bilan à la fin de l'année.

[106] La preuve retrace une participation de M. Gambazzi dans le flot de transactions circulaires entourant l'émission de 100 millions d'obligations par Castor. Les états financiers constatent en 1989 et 1990 ce passif à long terme. La note 6 des états financiers[51] explique qu'il s'agit de deux groupes d'obligations de 50 millions, échéant respectivement les 30 juin 1997 et 2002 avec possibilité pour Castor de rembourser à compter de 1992 et 1994.

[107] Le syndic Gourdeau souligne que ce montant n'est pas banal; en 1987 le capital de Castor est moindre que la somme des obligations[52]. Ces obligations ont aussi été prises en compte dans la lettre de Coopers & Lybrand pour la valeur des actions ordinaires de Castor[53].

[108] M. Gourdeau explique que cette dette à long terme est favorable pour une compagnie car elle donne une plus grande flexibilité de développement susceptible de générer des profits supérieurs aux intérêts à payer. Une dette due dans 10 à 15 ans envoie le message que la compagnie est reconnue comme solvable. Bref, cette dette est une donnée positive dans les états financiers de Castor.

[109] La réalité est autre. En gros, CHIF sort de l'argent qu'elle prête à des compagnies qui, à leur tour, retournent l'argent à Castor sous forme d'obligations. L'argent de CHIF, en d'autres termes, revient à Castor par l'intermédiaire de diverses compagnies prête-noms.

[110] M. Gambazzi témoigne avoir appris *post facto* « ce tourniquet porte avant, porte

---

50 Ibid., p. 557.

51 Pièce D-1, Consolidated financial statements of Castor Holdings Ltd. for the year ended December 31, 1990, p. 8, note #6.

52 Pièce D-3, Opinion of McCarthy Tétrault dated March 22, 1991, re: Consolidated financial statements for the five years ended December 31, 1990.

53 Supra note 7, onglet 10.

arrièrre. » Pourtant parmi ces compagnies « intermédiaires », on retrouve Morocco Holding, Licaon, Coeval, Mireta, Overnome qui ont été incorporées ou utilisées par son bureau pour entrer et sortir des fonds lorsque requis.[54]

[111] On peut aussi voir la signature de l'intimé Gambazzi sur les documents P-18, P-19 et P-20[55]. Il a de plus reconnu expressément les dettes de Morocco Holding en relation avec ces obligations et de Licaon envers CHIF[56]. À l'audience, il reconnaît d'ailleurs qu'il a pu être informé de cette opération « debentures » en 1990.

[112] Même si on tenait pour avérée la prétention de M. Gambazzi que M. Stolzenberg ne lui aurait pas tout dit, comment expliquer qu'il ne l'interroge pas sur la multiplicité des transactions? À tout le moins, le tribunal conclut qu'il avait assez d'informations à compter de 1990-1991, bien avant la faillite, pour susciter son attention et plus de vigilance. L'intimé Gambazzi n'aurait pas alerté le Conseil de toutes ces transactions pour lesquelles il est signataire.

[113] Il y a plus, après le vote du Conseil autorisant le paiement du dividende aux actionnaires, il apprend en avril 1991 de M. Stolzenberg que Castor a besoin de « liquidités ».

[114] Castor est sur le point de dépasser la marge de crédit de 100 millions de dollars, qui lui accorde la Banque Crédit Suisse de Zurich. M. Stolzenberg demande un nouveau service à M. Gambazzi, soit de leur prêter 10 millions de dollars pour une courte période.

[115] L'intimé prête cette somme pour trois mois. Lors de l'échéance en juillet 1991, il demande le remboursement. Les intérêts ont peut-être été payés mais à la demande de M. Stolzenberg, le prêt est renouvelé pour trois mois[57]. En octobre 1991, M. Stolzenberg, demande de leur laisser les fonds pour améliorer la situation de Castor à son bilan, le « window dressing » dont nous avons déjà parlé.

[116] De façon contemporaine, avant le paiement du dividende de 15 M$ aux actionnaires, l'intimé sait que Castor a des problèmes de liquidités, il prête 10 M$ pour colmater la brèche et pourtant il n'avise pas les membres du Conseil d'administration et Coopers & Lybrand. Il semble bien que M. Stolzenberg n'avait pas personnellement diffusé ce problème.

[117] Avec égards, ce silence sied mal avec son obligation de loyauté envers les intérêts de la compagnie.

---

54 Supra note 5, Vol. 3, pp. 593, 594 et 595.

55 P-18, En liasse, debentures series 10007-11007;
P-19, En liasse, debentures series 10008-10009, 11008-11009;
P-20, En liasse, debentures series 11006.

56 P-15, Statement of Account;
P-16, Document Morocco Holding Corp.;
P-17, Confirmation Morocco Holding Corp.

57 Supra note 5, Vol. 3, p. 557.

[118] La requérante lui reproche aussi son silence, son manque de transparence quant aux importantes commissions touchées du groupe Castor pour les argents investis par les clients qu'il a référés. Il est vrai que les politiques de la compagnie limitent ces « finder's fees » aux circonstances exceptionnelles et que ces frais doivent être dénoncés et autorisés par le Conseil.[58] Il n'y a aucune preuve de ces autorisations.

[119] Bref, l'ensemble de la preuve relative à la conduite et l'attitude de l'intimé Gambazzi démontre un manque d'attention et de diligence et une participation laxiste à plusieurs transactions. Pour les motifs déjà discutés, un administrateur prudent aurait bénéficier des informations connues pour prendre l'intérêt de la compagnie. Le tribunal conclut que l'intimé Gambazzi ne l'a pas convaincu que l'ensemble des circonstances justifie d'exercer sa discrétion de ne pas rendre jugement en faveur du syndic.

[120] Nul ne conteste que le fardeau de la preuve du paiement du dividende repose sur la requérante. L'intimé argue que le syndic n'a prouvé que la portion du dividende payée comptant et qu'il n'a pas été en mesure de supporter les paiements allégués selon d'autres modes.

[121] Le seul témoin entendu sur ce volet est le comptable et syndic Gourdeau qui explique avoir colligé et revu plusieurs informations et documents. Il conclut que, selon les entrées comptables qu'il qualifie d'« appropriées » aux livres de Castor[59], le dividende de 15 522 942 $ a été entièrement payé en septembre 1991. Les chiffres correspondent à l'évaluation faite par Coopers & Lybrand et soumise aux administrateurs lors du vote du dividende en mars 1991.

[122] Le syndic produit un cartable comprenant une copie de la correspondance transmise aux 39 actionnaires de Castor confirmant pour chacun le dividende dû moins la retenue fiscale, s'il y a lieu, et les modes de paiement respectifs[60].

[123] Il faut noter que ces envois de la compagnie confirment les instructions données par chaque client pour sa préférence du mode de paiement. On peut constater dans plusieurs que le client identifie la banque où le paiement doit être effectué ou la confirmation d'un crédit à son compte auprès de Castor ou le transfert à CHIF.

[124] Le syndic a colligé pour chacun les entrées comptables et documents émanant de Castor qui confirment comment le dividende a été acquitté et selon les instructions des actionnaires[61]. Aucune preuve n'a contredit toutes ces données ou contesté les documents. Il appert qu'une somme de 14 609 490 $ (dividende moins retenue fiscale) a été déboursée de cinq façons.

---

58 Pièce P-27, Minutes of meeting of the Board of Directors held on April 9, 1979.
59 Pièce P-32, Consolidated financial statements ended September 30, 1991.
60 Pièce P-28, Documents provided to each of the shareholders regarding payment of dividend declared on March 21, 1991.
61 Pièce P-32, Consolidated financial statements ended September 30, 1991.

[125] Le tribunal est satisfait « des chiffres » que le syndic a révisés et qu'il classe sous chaque mode de paiement qu'il est utile de rappeler :

Cash Payments	7 890 508,40 $
Decrease of Loans Receivable	2 794 654,00 $
Increase of Shareholders Loans	3 658 785,60 $
Inter-Company Transfer to CHIF	265 542,00 $
Canadian Withholding Tax	913 452,00 $

[126] Selon M. Gourdeau, comme comptable, il *« est clair et précis que le dividende est entièrement payé »*. L'intimé questionne l'inclusion dans le montant réclamé du dividende, touts les modes de paiement qui ne se traduisent pas par une sortie réelle de fonds.

[127] L'article 101 de la *Loi sur la faillite* vise le paiement du dividende *« autre qu'un dividende en actions ou racheté et acheté pour annulation des actions »*, il ne comporte pas la restriction que plaide l'intimé.

[128] La loi en vertu de laquelle Castor est incorporée prohibe à l'article 42 de verser un dividende lors de l'insolvabilté de la compagnie et précise comment peut être versé un dividende :

> 42(1) Sous réserve de l'article 41, une corporation peut verser un dividende, soit en argent comptant ou en biens, soit par l'émission des actions entièrement libérées de la corporation.

[129] Le paiement, selon le syndic, « c'est la décharge d'une obligation avec le consentement des parties ». Sa compréhension est conforme à la définition que donnait en 1992, l'article 1139 C.c.B.C. : *« non seulement la livraison d'une somme d'argent pour acquitter une obligation, mais l'exécution de toute chose à laquelle les parties se sont respectivement acquittées »*. L'article 1553 C.c.Q. reprend une définition au même effet.

[130] Bien entendu, les parties peuvent convenir de quelle façon sera exécutée l'obligation. Pour payer valablement, il faut avoir dans ce qui est dû un droit qui autorise à le donner en paiement (art. 1143 C.c.B.C.).

[131] Tous les modes de paiement du dividende à l'exclusion des retenues fiscales satisfont à ces conditions de paiement valable et ils ont été établis par une prépondérance de preuve. Le témoignage du syndic, sa révision de toutes les entrées et de tous les documents de corroboration mentionnés convainquent en l'espèce que le syndic apporte une preuve suffisante (art. 2831 et 2832 C.c.Q.). Les paiements en comptant de 7 890 508,40 $ ne sont pas contestés.

[132] Quant au dividende dû à Sardi International Finance inc. de 2 794 654 $, il a été imputé au remboursement du prêt consenti par Castor plus tôt en opérant compensation

ce que confirment les pages 2 et 3 de l'onglet 27[62]. La correspondance à Sardi atteste également que ce montant, sur instructions de Sardi, sera porté à son crédit chez Castor.

[133] Des actionnaires, au lieu de recevoir un chèque de Castor, ont préféré lui prêter ce montant « Increase of Shareholders Loans »; ils acquéraient en contrepartie une créance additionnelle normalement exigible d'une compagnie. M. Gourdeau précise tous les actionnaires visés par ce mode de paiement et ajoute que certains dont Finaper, Lima et Chrysler Pension Plan utilisèrent leur dividende pour acheter de nouvelles actions. Le paiement effectué de cette façon est de 3 658 785,60 $.

[134] D'autres actionnaires, informés du dividende, donnèrent instructions de transférer le montant dans CHIF, par exemple on peut lire les instructions confirmées pour l'actionnaire no 9, Golden Harvest inc. : *« This amount has been credited to your account with C.H. International Finance Inc. »*[63] L'actionnaire pouvait diriger le paiement à un tiers désigné, ici en l'occurrence à une filiale de Castor, ce que firent les actionnaires. La portion du dividende ainsi payée est de 265,542 $.

[135] Il reste un poste de la réclamation identifiée comme « Withholding Tax » pour un montant de 913,452 $. La *Loi de l'impôt sur le revenu*[64] du Canada oblige le payeur canadien de retenir à la source un pourcentage du dividende versé à un non-résident canadien.

[136] En l'espèce, Castor a complété le formulaire requis par Revenu Canada[65] pour les sommes retenues pour l'année 1991. Un dividende de 5 408 912 $ a été versé à des non-résidents canadiens pour lesquels Castor aurait retenu à la source un montant de 913,452 $.

[137] L'article 227(4) de cette loi prévoit que : *« Toute personne qui déduit ou retient un montant quelconque en vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté »*. Ces retenues ne sont plus la propriété de Castor, mais elle demeure fiduciaire de cette somme qu'elle doit remettre. D'ailleurs, l'article 227(5) stipule que, même en cas de faillite, le montant en fiducie est exclu de la masse. L'article 67 de la *Loi sur la faillite* exclue également des biens du failli ceux détenus en fidéicommis. Donc, ce montant n'appartient plus à Castor au moment de la faillite.

[138] La preuve ne permet pas de conclure que le versement a été fait à Revenu Canada. Le tribunal a bien noté la prétention de M. Gourdeau que cela fut fait, mais contrairement aux autres transactions, aucune preuve documentaire ne permet de vérifier ce paiement. En contrepartie, une note préparée par le bureau de Richter le 14 octobre 1992, indique que, selon Revenu Canada, le paiement n'avait pas été effectué. Le tribunal ne peut présumer qu'éventuellement un ajustement a été fait et il y

---

62 Supra note 60, onglet 27.
63 Supra note 60, onglet 9.
64 Loi de l'impôt sur le revenu, L.R.C. 1985, c. 1 (5e suppl.).
65 Pièce P-30, Formulaire des retenues à la source du 15 mars 1992.

aurait eu paiement. Vu l'insuffisance de preuve, ce montant de 913,452 $ doit être retranché.

[139] Pour tous ces motifs, les défendeurs doivent solidairement rembourser à la requérante la somme de 8 759 490,00 $ plus les intérêts à compter de la signification.

[140] L'intimé Gambazzi argue que l'indemnité additionnelle ne devrait pas être accordée considérant le long délai écoulé depuis l'institution des procédures. La Cour d'appel a énoncé les principes applicables en cette matière dans *Canadian Newspaper c. Snyder*[66] :

> L'indemnité supplémentaire [...] vise à compenser adéquatement le demandeur victorieux en période d'inflation lorsque le taux d'intérêt légal est très inférieur au taux du marché. [...]
>
> Cette indemnité [...] doit donc être demandée et le juge de première instance garde le pouvoir de la refuser dans certains cas. Toutefois, il est bien établi que son octroi reste la règle et qu'elle ne peut être refusée que dans des circonstances exceptionnelles. [...]
>
> La jurisprudence, à cet égard, reconnaît que l'indemnité peut être refusée dans au moins deux cas précis, soit lorsque le demandeur est responsable de délais importants ou que le montant demandé à l'origine était grossièrement exagéré.

[141] Il ne fait aucun doute que le délai est très surprenant et ce, malgré l'existence de plusieurs litiges auxquels ont référé les deux parties. La partie qui invite le tribunal à s'écarter de la règle générale de la condamnation à l'indemnité additionnelle doit établir le bien-fondé de sa demande et démontrer que les retards sont tous imputables à la requérante.

[142] Ce qui ne semble pas toujours le cas. En l'espèce, en 1995, le syndic interroge M. Gambazzi pendant quatre jours en Suisse. Il y a eu des discussions et pourparlers qui se terminent éventuellement par des règlements hors cour. L'intimé Gambazzi tarde plusieurs années à présenter une requête en irrecevabilité et qu'il avait signifiée à la requérante.

[143] Le dossier est plus actif depuis juin 2001. Un échéancier est établi, de nouveaux interrogatoires hors cour des intimés Dennis et Gambazzi sont tenus en 2002 et 2003. Après un certain temps, les défenses sont produites, un règlement intervient avec l'intimé Dennis et depuis, les parties ont rencontré à plusieurs reprises le juge en chef Deslonchamps puis le juge Mongeon. Les dernières séances de gestion imposent des devoirs aux deux parties. Cette présentation de la chronologie des procédures serait assez fidèle à l'évolution du dossier comme le reconnaît l'intimé.

---

[66] Canadian Newspaper Co. c. Snyder (C.A., 1995-03-20), J.E. 95-644, [1995] R.D.J. 392; voir au même effet, Montréal (Ville de) c. Cordia Ltd. (C.A., 2003-09-02), SOQUIJ AZ-50194228, J.E. 2003-1862, [2003] R.R.A. 1202 (rés.).

[144] Dans les circonstances, l'indemnité additionnelle n'est accordée qu'à compter du 1er juin 2001.

POUR TOUS CES MOTIFS, LE TRIBUNAL :

[145] **ACCUEILLE** la réclamation de la requérante;

[146] **CONDAMNE** solidairement les intimés à payer à la requérante la somme de 8 759 490,00 $ avec intérêts à compter de la signification et l'indemnité additionnelle à compter du 1er juin 2001.

[147] **LE TOUT,** avec dépens contre les intimés.

Louise Lemelin

LOUISE LEMELIN, J.C.S.

Me Gerald F. Kandestin
Me Stuart Kugler
Me Anastasia Flouris
KUGLER, KANDESTIN
Procureurs de la requérante RSM Richter

Me Martin Côté
Me Charles E. Flam
ROBINSON, SHEPPARD, SHAPIRO
Procureurs de l'intimé Marco Gambazzi

Dates d'audience : 3, 4, 5, 6, 7, 11 et 12 décembre 2007

Exhibit “B”

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-05-001686-946

DATE: April 14, 2011

IN THE PRESENCE OF: THE HONOURABLE MARIE ST-PIERRE

The Estate of the late Peter N. Widdrington
Plaintiff
v.
Elliott C. Wightman and AL.
Defendants

JUDGMENT

---

[1] Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

[2] Time has come to decide the plaintiff's claim, one of many claims made before our Court by lenders and investors in Castor Holding Limited ("**CHL**" or "**Castor**") further to Castor's bankruptcy in 1992 and, in so doing, to communicate answers to various common issues that will be binding in all of these other files.

[103] Gambazzi was a shareholder of Castor through companies he owned or controlled, and a Director and a Managing Director, with signing authority, of the offshore subsidiaries of Castor.

Coopers - Castor's audit teams and Coopers Partners in other jurisdictions

Castor's audit teams

[104] Coopers has acted as auditor for CHL since its inception and Wightman has always been the engagement partner in charge of the audit and of the Castor file in general.

[105] Members of Castor's audit teams, in Montreal and overseas, have come and gone over the years.

[106] Between 1986 and 1990, while Castor nearly tripled in size, the size of the teams remained about the same, as well as the time spent on audit work in the field, and the rollover of personnel was noticeable.

[107] John Grezlak was involved with the Montreal audits from 1982 to 1987, as audit manager, but he left Coopers in October 1988[68].

[108] Bruce Wilson was involved with Castor's overseas audit, as audit manager, from 1985 to 1987 inclusively, but he left Coopers in August of 1988[69].

[109] Even if he remained the partner responsible for the overseas audit until the end, Jean Guy Martin, who had personally been involved with the supervising on the site of the overseas audit work since 1982, ceased going to Europe after the 1988 audit.[70]

The 1988 audit teams

[110] In 1988, the Montreal audit team included Kenneth Mitchell (audit manager[71]), Martine Picard[72] (supervisor), Daniel Séguin[73] for a certain period of time (senior), Linda Belliveau (senior)[74], John Talbot (staff assistant) and Charles Soroka (staff assistant)[75].

---

[68] Grezlak, January 4, 1996, pages 8 to 10
[69] Wilson, October 28, 1996, pages 6 to 9
[70] Martin, December 18, 1995, pages 7 to10: Martin, January 5, 2010, pages 71, 72, 76, 81 to 94
[71] Mitchell, April 22, 1996, pages 2 to 5
[72] Seguin, December 11, 1995, page 14; Picard, December 6, 1995, pages 7, 8, 18, 23, 79 and 93
[73] Seguin, December 11, 1995, pages 8 to 15
[74] Picard, December 6, 1995, pages 7, 8, 18, 23, 79 and 93

[549] Transactions between Castor and Stolzenberg[509], or between Castor and companies in which Stolzenberg had significant control or influence, were RPTs to be disclosed[510]. Castor's audited consolidated financial statements disclosed some of those transactions as RPTs[511], but not all of them.

[550] Stolzenberg was the owner of record of 612044 Ontario[512] and through it, of 97872 Canada. Stolzenberg was the incorporator, the President and a director of the 97872[513]. 612044 had pledged its shares of 97872 to secure a loan from Castor[514].

[551] Because they were subject to common control or significant influence through Stolzenberg, Castor's transactions with 97872 Canada and 612044 Ontario should have been disclosed. [515]

[552] Stolzenberg had the ability to exercise, and did exercise significant control or influence on Trinity Capital Corporation ("**Trinity**")[516]. Because they were subject to common control or significant influence through Stolzenberg, Castor's transactions with Trinity should have been disclosed[517].

[553] Given their actual role, not because of their titles and notwithstanding the fact that Stolzenberg had generally the final decision-making authority, Gambazzi and Bänziger had the ability to exercise control or significant influence, directly or indirectly, over the operating and financial decisions of Castor and its subsidiaries. Gambazzi and Bänziger were related to Castor and its subsidiaries.

[554] Section 3840.04 (d) provides:

---

[509] Wightman, September 5, 1995, p. 121.
[510] Wightman, July 18, 1996, p. 90.
[511] Transactions with 606752, Wost Holdings and Wost Development
[512] PW-338
[513] PW-1102A-6
[514] PW-2908, vol.1. p.4-E-32 and PW-1102A-6
[515] PW-1102-A6 ; O' Connor, January 14, 2009; O'Connor, January 15, 2009; PW-167 Y, PW-292, PW-323, PW-324, PW-325, PW-340, PW-565, PW-566-18, PW-571-15A, PW-571-15B, PW-571-15C, PW-571-22, PW-571-23, PW-572-2, PW-572-4, PW-572-5, PW-572-10, PW-572-13-1, PW-572-27, PW-573-51,PW-573-53, PW-668-1a, PW-668-1c, PW-669-1e, PW-669-2a, PW-669-3a, PW-1101, PW-1102, PW-1103, PW-1159-A-1, PW-2400-88, PW-2400-104,PW-2400-112,PW-2400-118, PW-2400-119, D-94, D-97, D-115, D-1078 ; PW-326, PW-327, PW-328, PW-566-18, PW-566-25a, PW-1103, PW-1053-23-12
[516] Finn, July 25, 2000, pp. 241 to 245, 283, 284, 287 to 292; Finn, July 26, 2000, pp.400,401, 437, 439, 462, 469, 471, 494, 495, 511 and 512; Binch, October 29, 2001, pp.30, 45; Binch, October 30, 2001, pp.197, 219, 232; Binch, October 31, 2001, pp.392,393, 394, 402, 471, 480; Vance, June 4, 2008, pp.43-46, Rosen, March 31, 2009, pp 204-210 and Selman, May 7, 2009, pp. 69-70; See also exhibits D-600, D-601, D-602, D-603, D-604, D-869, D-872, D-873, D-875, D-876, D-899, D-901.
[517] PW-1419-1, 3840.03 and 3840.10 (1988); PW-1419-2, 3840.03 and 3840.10 (1989) and PW-1419-3, 3840.03 and 3840.10 (1990)

> The extent to which a relationship between two parties can be clearly perceived will vary, but the most commonly encountered and easily identifiable related parties of a reporting enterprise would include the following:
>
> (…)
>
> (d) management: any person(s) having authority and responsibility for planning, directing and controlling the activities of the reporting enterprise. Thus, in the case of a company, management would include the directors, officers and other persons fulfilling a management function;

[555] In fact, Castor, as well as C&L, considered all shareholders and directors to be parties related to Castor.

[556] Wightman testified that he considered Castor to be «*almost an investment club, so that the shareholders and the lenders were all closely connected*»[518] and «*that the directors represented the … most of the shareholders, directly or indirectly*. »[519]

[557] Several corporate entities, both borrowers and lenders to Castor, were represented by Gambazzi, a director of CHL, a director of several of its subsidiaries and the managing director of CHIF[520].

[558] Several corporate entities, both borrowers and lenders to Castor, were represented by Bänziger, a director of CHINBV[521] who «*was tremendously involved in the operations of Castor Europe*»[522], who was part of Castor's management[523] and who had the same powers regarding CHIO as Stolzenberg did[524].

[559] Castor's files contain hundreds of documents signed by either Gambazzi or Bänziger such as loan agreements, promissory notes, pledge agreements, audit confirmations, and commitment letters. In some instances, Gambazzi signs «in trust» but in many other instances there is no indication of «in trust»[525].

[560] For disclosure purposes, when one of the parties to a transaction is acting through a person acting "in trust", it is not the relationship between the person acting "in trust" and the reporting entity that matters, but the relationship between the actual parties to the contracts – i.e. the principals. There is therefore no automatic reportable relationship between two entities when a person acting "in trust", who is director of the first entity, is acting for a second entity, even when he sits on the Board of that second

---

[518] Wightman, February 8, 2010, p. 173
[519] Wightman, October 11, 1995, p.69
[520] PW-2908, Vol. 1, pp. 4-E-33, 4-E-34.; PW-1053-22
[521] PW-2400-34.; PW-2282;
[522] Wightman, September 7, 1995, pp. 138-139 and September 8, 1995, pp. 42 and 46. See also PW-1053-63C-4, PW-2400-34 and PW-2400-42
[523] PW-1053-91-2, PW-10
[524] Zampelas, March 15, 1999, p. 12; PW-931.
[525] PW-1496-4-88-N-1C

entity and is therefore also presumed to be related to it. Both entities will be related if and only if the person acting "in trust" has the actual ability to exercise control or significant influence, directly or indirectly, over the operating and financial decisions of both entities.

[561] Because Gambazzi and Bänziger signed loan documents and audit confirmations on behalf of offshore borrowers and lenders, and because of Gambazzi and Bänzinger's respective role regarding those offshore borrowers and lenders, which allowed them to exercised control or significant influence, directly or indirectly, some transactions between Castor or its subsidiaries and those offshore borrowers and lenders should have been disclosed as RPTs.

[562] Gambazzi was a close personal friend of Stolzenberg and acted on his behalf[526] in related entities that Stolzenberg owned or controlled or in which he had an interest, and which had transactions with Castor and its subsidiaries.

[563] CHIF made loans to companies in which Bänziger was involved, such as Investamar[527]: These transactions were not disclosed as RPTs and they should have been.

> On page B46 of the CHIF 1988[528] working papers in connection with two loans to Investamar S.A., the following notation appears:
>
> "*This shortfall on the other loan is acceptable as the company is Mr. E. Bänziger*".

[564] It is highly probable that much more needed to be disclosed given the numerous and strong indicia revealed by the evidence[529] but, more than 20 years later, indicia are not enough to reach final conclusions. However, and not surprisingly, Defendants wrote in their written argument submitted on July 8, 2010:

> Defendants acknowledge that based on the partial record before the Court, there is a possibility that the disclosure in the 1988 financial statements did not meet GAAP in that some transactions that now appear to have related party indicators may have been RPTs.

Artificial improvements of liquidity and undisclosed restricted cash

[526] PW-1053-49, seq. p. 264
[527] Jean Guy Martin, August 26, 1996, p.84
[528] PW-1053-91-8, seq. p. 241. See also same kind of annotation in the 1989 AWP – PW-1053-89-6, sequential page 257).
[529] See Vance, March 12, 2008 pp. 50 and following (discussions on the YH and the DT Smith group) Vance, May 12, 2008, pp.197 and following; Vance, June 4, 2008, pp. 118 and following; see also the testimony and the written report of Levi

- Fondation Letor, Vaduz (6.5 million)
- Overnome Handels - Finanz-anstalt, Schaan (25 million)
- Mova Inc., Panama (12.5 million)
- Coeval Co. Inc., Panama (15 million)
- Mireta Ltd. Inc., Panama (10 million)

[671] Castor received $75 million from the debenture holders other than Overnome between June 25 and June 29, 1987[707].

[672] Castor Holdings Ltd. made three transfers to CFAG totalling $72.5 million as follows[708]:

- June 26, 1987: $25 million
- June 29, 1987: $27.5 million
- July 7, 1987 : $20 million

[673] The above amounts were recorded in CHL's general ledger account number 358 as a reduction of "*Advance Payable - ZUG*"[709].

[674] CFAG concurrently transferred the exact amounts it received from CHL to CHI (Cyprus) which, again concurrently, transferred the exact amounts it received to CHIFNV[710].

[675] CHIFNV made a payment to Foxfire Investments of $25 million on November 27, 1987[711]. Also on November 27, 1987, CHL received $25 million which was recorded in its books as having come from Overnome[712].

[676] On November 30, 1987, CHL transferred $18 million to CFAG and $2 million to CHI (Cyprus)[713]. The former amount was recorded in CHL's general ledger account number 358 as a reduction of "*Advance Payable - ZUG*" and the latter amount in account number 360 as a reduction of "*Advance Payable CH (Cyprus)*[714].

---

[707] PW-94 (bates #250, 251)
[708] PW-1484-9-3-87, PW-1999 and PW-2000
[709] Part of PW-78
[710] PW-1484-9-3-87, PW-1999 and PW-2000
[711] PW-791 (bates #44420, 44626 to 44633), PW-789 , PW-790
[712] PW-94 (bates #240, 241)
[713] PW-2001
[714] Part of PW-78

[677] CFAG transferred the $18 million to CHI (Cyprus) on November 30, 1987[715].

[678] CHI (Cyprus) transferred the $20 million to CHIFNV[716].

[679] CHL retained $7.5 million of the funds and CHIFNV disbursed $7.5 million more than it received, but, at the end of the day and on a consolidated basis, 100 million of current liabilities of Castor were moved to long-term debt.

[680] Gambazzi received $4 million in commission related to this transaction[717] without having done any work as no new money was raised. These fees ended up being circulated back to CHI (Cyprus) and CHIFNV and ultimately, in part, to Stolzenberg for the purchase of a Westmount home[718].

The transaction and the 1988 financial statements

[681] Under the heading "*Investments in mortgages, secured debentures and advances (notes 2, 3, 4 and 10)*" of the assets section, the balance sheet included 100 million of loans made by CHIF to Morocco and Liacon maturing within the year and therefore presented as current assets[719]. The total amount of the consolidated assets was $1,163,047 million.

[682] Under the heading "*Debentures*" of the liabilities section, the balance sheet included $100 million of long-term debt since, as written under note 6, $50 million of those debentures were maturing on June 30, 1997 and $50 million were maturing on June 30, 2002[720].

Experts' opinions

[683] Vance and Rosen opined that this was a circular transaction that had no commercial purpose and was simply a movement of Castor's own money[721]. Defendants' expert Levi opined likewise[722].

[684] Defendants' expert Selman admitted that, if the $100 million transaction was a circular transaction, the financial statements were materially misleading[723].

Conclusion

---

[715] PW-1484-9-3-87, PW-1999, PW-2000 and PW-2001
[716] PW-2001
[717] D-324-1, D-323-1, D-323-2, D-323-3, PW-791 (bates #44447)
[718] PW-1053-85 (page 35), PW-2304, D-325-1, PW-1199, PW-791, (bates #44780), PW-253, PW-253A, PW-791 (bates #44604, 44315)
[719] PW-5, tab 10
[720] PW-5, tab 10
[721] Vance, March 12, 2008, p. 166; PW-3033, Vol. 1, pp. 70–71.
[722] D-1347, pp. 60-66.
[723] Selman, May 25, 2009, pp. 28-29.

[685] The 100 million debentures transaction was a circular transaction. The financial statements were materially misleading.

Undisclosed restricted cash

[686] Castor had an unclassified balance sheet in its 1988 financial statements which included the heading "*Cash in bank and short-term deposits*".

[687] Section 3000.01 of the Handbook, an italicized recommendation, provided:

> The following should be excluded from current assets:
>
> (a) Cash subject to restrictions that prevent its use for current purposes;
>
> (b) Cash appropriated for other than current purposes unless such cash offsets a current liability.[724]

[688] Without any note disclosure, a reader of the financial statements would assume that the amount shown under the heading "*Cash in bank and short-term deposits*" was all available and usable for general purposes[725].

Positions (in a nutshell)

Plaintiff

[689] Plaintiff argues :

- Vance opined that USD $20 million were pledged to secure loans made by Credit Suisse Canada to Castor, in existence since 1985 and merely rolled forward in subsequent years[726]. Even if he could not refer to an actual pledge or other guarantee signed by Castor in favour of Credit Suisse with respect to 1988, since none could be located, Vance assumed such a pledge existed in light of the content of the written confirmations signed.

[724] PW-1419-1, section 3000 "cash"
[725] Vance, March 13, 2008, p.29.
[726] Vance, March 13, 2008, p. 46.

[1684] Selman opined that if a pledge was in force on December 31, 1990, there was a restriction on the cash on deposit at the Nassau branch of Bank Gotthard which should have been noted in the consolidated audited financial statements of Castor.[1801]

[1685] Defendants' expert Levi agreed that there were a misstatement and a disclosure failure with respect to Bank Gotthard,[1802] and concluded that the failure to disclose same resulted in the financial statements being misleading[1803].

[1686] Levi takes the position that the bank acted to conspire with Stolzenberg to inflate the cash position at year-end 1990 with the intent «*to deceive the investors as well as the auditors*» because it failed to confirm to the auditors that the funds were restricted.[1804]

[1687] As admitted by Levi, the effect of undisclosed restricted cash would be to artificially improve the liquidity position of Castor, a matter which «*would be of utmost importance to investors and creditors*».[1805]

Conclusions

[1688] The Court concludes that Gambazzi signed a pledge on behalf of Castor to the benefit of Bank Gotthard and that such pledge was in place as of December 31, 1990.

[1689] The US$50 million pledged by Castor to secure a loan by Bank Gotthard to Fitam[1806] was restricted cash and had to be disclosed as such on Castor's audited financial statements for 1990.

[1690] This transaction artificially inflated Castor's cash position as at December 31, 1990 and constituted a material misstatement.

Undisclosed Capitalised interest and inappropriate revenue recognition

[1691] In its 1990 brochure, Castor described its business in the same fashion as it had during the previous years.[1807] In reality, Castor's business was quite different.

[1692] The books and records provided to C&L, in Montreal and overseas, again disclosed the nature of Castor's loans and the fact that very little cash – if virtually no cash – was being paid by Castor's borrowers.

[1801] D-1295, p. 340, paragraph 6.12.25
[1802] Levi, January 28, 2010, pp. 38–39; February 2, 2010, p. 97.
[1803] Levi. January 28, 2010, pp. 37-38.
[1804] D-1347, pp. 181–182.
[1805] D-1347, p. 170.
[1806] PW-1053-87-23-1.
[1807] PW-1057-3

[1693] Again in 1990, a huge amount of capitalized interest was unplanned capitalized interest further to non-compliance with loan covenants which were nevertheless recognized as revenue.

[1694] The analysis developed and the conclusions enunciated on this topic in the 1988 financial statements section of this judgment apply *mutatis mutandis*.

[1695] Disclosure of capitalization of interest should have taken place and a huge amount of capitalized interest should not have been recognized as revenue.

Understatement of LLP and overstatement of carrying value of Castor's loan portfolio and equity

[1696] In 1990, Castor represented a carrying value of loans (investments in mortgages, secured debentures and advances) of $1,689, 973 in its audited financial statements: it represented that the figure of $1,689, 973 was the lower of estimated realizable value and cost.

[1697] At December 31, 1990, could the carrying value of loans, at the lower of estimated realizable value and cost, be $1.689, 973 or an amount close enough to $1,689, 973 to avoid a material misstatement?

[1698] The obvious conclusion is that it could not be, taking into account the facts as they unfolded, as they shall be viewed and analyzed in the context of the relationships that existed between Castor and YH and Castor and DT Smith.

[1699] Assessing the exact quantum of any LLP that might have been required for 1990 is neither achievable nor necessary. This litigation is not about what the precise content Castor's financial statements for 1990 should have been – it is about whether or not C&L's 1990 audited financial statements of Castor presented fairly the financial position of Castor in accordance with GAAP, as they purported to do.

Positions in a nutshell

[1700] Plaintiff and Defendants positions, summed-up in the 1988 audited financial statements section of the present judgment, apply *mutatis mutandis*.

[1701] Plaintiff argues that a minimum LLP of $331.5 million[1808] should have been taken.

[1702] Plaintiff argues that it was clear and known to Castor and to C&L that the Canadian and American economies were at least going through a slowdown, if not a

[1808] This is the lowest figure mentioned by Froese while his proposed LLP (mi-point) is in the amount of $382.7 million – see PW-2941-4

[2111] Selman was specifically asked by the Court if Ford would have seen the two pages of the Konto Kurrents ("**KK**") showing the payments coming out of the various account to both Stolzenberg and DT Smith, assuming she had performed procedure #3 set out on the working paper PW-1053-87 at sequential page 107. Selman replied: «*If she checked all the KKs in CHIF NV, yes*». [2348]

[2112] The payments to Stolzenberg were related party transactions. As payments out of CHIO's assets, they should have been disclosed as RPTs: Vance and Selman agree.[2349]

[2113] The Court agrees with the following propositions:

- A proposition of Selman: the transfer of the placement fees from CHIO to CHIF's various account was clear.[2350]

- A proposition of Froese: had «*C&L appropriately audited CHIO's fee revenue, they would have had the opportunity to detect the diverted fees.*»[2351]

- A proposition of Vance: this diversion of placement fees constituted a fraud against the company, but not against C&L, as the audit trail was not concealed.[2352]

[2348] Selman, June 8, 2009, p. 156.
[2349] PW-2908, Vol. 1, p. 6-54; D-1295, p. 350, para. 6.13.13.
[2350] D-1295, p. 345, para. 6.13.02
[2351] PW-2941, Vol. 1, p. 32.
[2352] PW-2908, Vol. 1, p. 2-12.

Exhibit “C”

Court File No.: CV-14-10791-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	**)**	TUESDAY, THE 10TH
	)	
JUSTICE NEWBOULD	**)**	DAY OF MARCH, 2015

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **4519922 CANADA INC.**

Applicant

ORDER

(Claims Procedure Order)

THIS MOTION made by the Applicant for the relief sought in the Notice of Motion herein dated February 12, 2015 (the "**Notice of Motion**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Michael F. Macey sworn on February 12, 2015, the Second Report of Ernst & Young Inc., in its capacity as Court-appointed Monitor dated February 20, 2015, and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, and all other parties listed on the Counsel Slip, no one else appearing although duly served as it appears from the Affidavit of Service of Lee Nicholson sworn on February 13, 2015.

DEFINITIONS

1. The following terms shall have the following meanings ascribed thereto:

(a) "**9:30 Appointment**" means a chambers appointment with the Judge which may be scheduled for 9:30 a.m. or at such other time as the Court may determine on any day on which the Court is sitting;

(b) "**Above Threshold Undetermined Claim**" has the meaning ascribed to it in paragraph 34 of this Order;

(c) "**Accepted Claim**" means a Claim that has been wholly or partially accepted for voting and/or distribution purposes by the Applicant and CLCA, with the consent of the Monitor, in accordance with the terms of this Order;

(d) "**Adjudication Notice**" has the meaning ascribed to it in paragraph 31 of this Order and is attached hereto at Schedule "**G**";

(e) "**Approved Plan**" means a Plan that is approved by (i) the requisite majority of Claimants having Claims for voting purposes as determined in accordance with this Order; and (ii) the Court, all in accordance with the CCAA;

(f) "**Below Threshold Undetermined Claim**" has the meaning ascribed to it in paragraph 33 of this Order;

(g) "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Toronto, Ontario;

(h) "**Capital Subscription Program**" has the meaning ascribed to it in the Affidavit of Michael F. Macey sworn on December 24, 2014;

(i) "**Case Website**" means the website located at: http://www.ey.com/ca/coopers;

(j) "**Castor**" means Castor Holdings Ltd.;

(k) "**Castor Claims**" means any right or claim of any Person that has been or may in the future be asserted or made, in whole or in part, against the Applicant, CLCA, or a current or former partner of CLCA, in each case in connection with any indebtedness, liability, or obligation of any kind whatsoever, including any action or proceeding, arising from or in respect of losses incurred in connection with the performance or work or services provided by CLCA to Castor or its subsidiaries or in respect of CLCA's engagement by Castor or its subsidiaries including losses resulting from a loan to or an investment in Castor or its subsidiaries, or a loan guaranteed by Castor or its subsidiaries, whether asserted or made, including Interest accrued thereon or costs payable in respect thereof, whether the right, claim, indebtedness, liability, or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, and whether any right, claim, indebtedness, liability, or obligation is executory or anticipatory in nature;

(l) "**CCAA**" means the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended;

(m) "**CCAA Proceedings**" means the proceedings commenced by the Applicant in the Court under Court File No. CV-14-10791-00CL;

(n) "**Claim**" means a Castor Claim, a Pre-71 Entitlement Claim or a General Claim;

(o) "**Claimant**" means any Person asserting a Claim, and includes the transferee or assignee of a Claim, transferred and recognized as a Claimant in accordance with paragraph 37 of this Order, or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

(p) "**Claims Bar Date**" means 5:00 p.m. (Eastern Standard Time) on April 10, 2015;

(q) "**Claims Officer**" means the individual or individuals appointed and approved by the Court pursuant to paragraph 35 of this Order to determine the validity, quantum and

priority of Below Threshold Undetermined Claims for voting and/or distribution purposes;

(r) "**CLCA**" means Coopers & Lybrand Chartered Accountants;

(s) "**CLCA Partnership Board Members**" means the individuals who are or were at any time subsequent to the Date of the Castor Bankruptcy members of the CLCA partnership board;

(t) "**CLCG**" means Coopers & Lybrand Consulting Group;

(u) "**CLCG Partnership Board Members**" means the individuals who were at any time subsequent to the Date of the Castor Bankruptcy members of the CLCG partnership board;

(v) "**Court**" means the Ontario Superior Court of Justice (Commercial List);

(w) "**Court Ordered Response Deadline**" has the meaning ascribed to it in paragraph 27 of this Order;

(x) "**Date of the Castor Bankruptcy**" means March 26, 1992;

(y) "**Disputed Claim**" has the meaning ascribed to it in paragraph 25(d) of this Order;

(z) "**Disputed Pre-71 Claim**" has the meaning ascribed to it in paragraph 17 of this Order;

(aa) "**Face Value**" means

(i) in respect of any Castor Claim, the principal sum claimed by a Claimant in any action or proceeding against CLCA, exclusive of Interest and costs accruing thereon after the date of the institution thereof, as alleged by such Claimant in its Proof of Claim; and

(ii) in respect of any General Claim or Pre-71 Entitlement Claim means the quantum of the Claim exclusive of Interest and costs accruing thereon, as alleged by such Claimant in its Proof of Claim;

(bb) "**Filing Date**" means December 8, 2014;

(cc) "**General Claim**" means any right or claim of any Person, other than a Castor Claim or a Pre-71 Entitlement Claim, that may be asserted or made in whole or in part against the Applicant or CLCA whether asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any Interest accrued thereon or costs payable in respect thereof, whether any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, for any reason including, by reason of the commission of a tort (intentional or unintentional), by reason of any claim under contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise);

(dd) "**Initial Order**" means the Initial Order of Mr. Justice Newbould dated December 8, 2014 in the CCAA Proceedings, as extended and amended from time to time;

(ee) "**Interest**" means:

(i) in connection with any Castor Claim, contractual and/or legal interest calculated up until the date of the institution of the subject action or proceeding in respect of such Castor Claim and, thereafter, legal interest and the additional

indemnity provided for under Quebec law up to and including the Filing Date; and

(ii) in all other cases, contractual interest, if applicable, up to and including the Filing Date;

(ff) "**Instruction Letter**" means the instruction letters to Claimants, in substantially the form attached hereto as Schedule "**A**", regarding completion by Claimants of the appropriate Proof of Claim;

(gg) "**Insurers**" means the Persons listed in Schedule "**H**" attached hereto and their predecessors, successors and assigns;

(hh) "**Judge**" means the judge seized of these CCAA Proceedings or his designate;

(ii) "**Known Claimant**" means a Person listed on the List of Creditors published on the Case Website as at the date of this Order;

(jj) "**Monitor**" means Ernst & Young Inc., in its capacity as the Court-appointed Monitor of the Applicant;

(kk) "**Notice of Revision or Disallowance**" means a notice, in substantially the form attached as Schedule "**E**" hereto, advising a Claimant that the Applicant, with the consent of the Monitor, has revised or disallowed all or part of such Claimant's Claim as set out in such Claimant's Proof of Claim;

(ll) "**Notice of Unresolved Claim**" has the meaning ascribed to it in paragraph 30 of this Order and is substantially in the form attached hereto as Schedule "**F**";

(mm) "**Notice to Claimants**" means the notice to Claimants and to Persons holding Related Castor Claims to be published in substantially the form attached hereto as Schedule "**B**";

(nn) "**OpCo**" means Coopers & Lybrand;

(oo) "**OpCo Partnership Board Members**" means the individuals who are or were at any time subsequent to the Date of the Castor Bankruptcy members of the OpCo partnership board;

(pp) "**Outstanding Litigation**" has the meaning ascribed to it in the Initial Order;

(qq) "**Person**" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government authority or any agency, regulatory body, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether having legal status, and whether acting on their own or in a representative capacity;

(rr) "**Plan**" means a Plan of Compromise or Arrangement filed by the Applicant in these CCAA Proceedings;

(ss) "**Potential Releasees**" means the Applicant, CLCA, the Insurers, PwC, former and current partners of CLCA, the CLCA Partnership Board Members, former and current partners of OpCo, OpCo, the OpCo Partnership Board Members, former and current partners of CLCG, CLCG, the CLCG Partnership Board Members, and other Persons contributing to an Approved Plan through the Capital Subscription Program and "**Potential Releasee**" means any one of them;

(tt) "**Pre-71 Claimant**" has the meaning ascribed to it in paragraph 16 of this Order;

(uu) "**Pre-71 Entitlement Claim**" means any right or claim of a Person who is entitled to Pre-71 Entitlements;

(vv) "**Pre-71 Entitlements**" has the meaning ascribed to it in paragraph 27, and more particularly described in paragraph 93, of the Affidavit of Michael F. Macey sworn December 7, 2014 in support of the Initial Order;

(ww) "**Pre-71 Proof of Claim**" means the proof of claim, substantially in the form attached at Schedule "**D**", to be completed by a Pre-71 Claimant in respect of a Disputed Pre-71 Claim;

(xx) "**Proof of Claim**" means

(i) in respect of a Claim, other than a Pre-71 Entitlement Claim, the proof of claim in substantially the form attached as Schedule "**C**" hereto to be completed and filed by a Person setting forth its Claim and which shall include all supporting documentation in respect of such Claim; and

(ii) in respect of a Pre-71 Entitlement Claim means a Pre-71 Proof of Claim;

(yy) "**Proof of Claim Document Package**" means a document package that includes a copy of the Instruction Letter, a Proof of Claim, this Order and such other materials as the Monitor, in consultation with the Applicant, may consider appropriate or desirable;

(zz) "**PwC"** means PricewaterhouseCoopers LLP, an Ontario limited liability partnership, together with its affiliated and associated entities, including all current and former partners, employees, officers, successors and assigns of PricewaterhouseCoopers LLP and such affiliated and associated entities.

(aaa) "**Related Castor Claims**" means any right or claim, other than a Castor Claim, of any Person that has been or may in the future be asserted or made, in whole or in part, against the Potential Releasees, other than the Applicant and CLCA, in each case in connection with any indebtedness, liability, or obligation of any kind whatsoever, including any action or proceeding, with respect to the Outstanding Litigation or arising from events and occurrences directly or indirectly related to the Outstanding Litigation, or the facts, circumstances and allegations asserted or raised in the Outstanding Litigation whether asserted or made, including Interest accrued thereon or costs payable in respect thereof, whether the right, claim, indebtedness, liability, or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, and

whether any right, claim, indebtedness, liability, or obligation is executory or anticipatory in nature, including, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to the Outstanding Litigation or arising from events and occurrences directly or indirectly related to the Outstanding Litigation or the facts, circumstances and allegations asserted or raised in the Outstanding Litigation;

(bbb) "**Releasees**" means all Potential Releasees who are released under an Approved Plan from Claims and/or Related Castor Claims, including for greater certainty, any claims for contribution or indemnity in respect of the Outstanding Litigation or arising from events or occurrences related to the Outstanding Litigation or the facts, circumstances and allegations asserted or raised in the Outstanding Litigation that might otherwise be brought by any Person;

(ccc) "**Request for Information**" has the meaning ascribed to it in paragraph 25(a) of this Order; and

(ddd) "**Unresolved Claim**" has the meaning ascribed to it in paragraph 26(d) of this Order.

SERVICE

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record in respect of this Motion is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.

INTERPRETATION

3. **THIS COURT ORDERS** that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day, unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

6. **THIS COURT ORDERS** that all references to money amounts are to be the lawful currency of Canada, unless otherwise specified.

APPROVAL OF DOCUMENTS AND NOTICE

7. **THIS COURT ORDERS** that the form and substance of each of the Instruction Letter, Notice to Claimants, Proof of Claim, Pre-71 Proof of Claim, Notice of Revision or Disallowance, Notice of Unresolved Claim, and Adjudication Notice, attached as Schedules "**A**", "**B**", "**C**", "**D**", "**E**", "**F**", and "**G**", respectively, is approved.

8. **THIS COURT ORDERS** that the publication of the Notice to Claimants and the mailing of the Proof of Claim Document Package as set out in paragraph 15 of this Order shall constitute good and sufficient notice to Claimants and any Person holding a Related Castor Claim of the Claims Bar Date and the related deadlines and procedures set forth herein and that no other form of notice or service need be given or made on any Person, and no other document or material need be served on any Person in respect of the call for Claims and the Proofs of claim and the related deadlines and procedures set forth herein.

MONITOR'S ROLE

9. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Initial Order, is directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order or incidental thereto.

10. **THIS COURT ORDERS** that (i) in carrying out the terms of this Order, the Monitor shall have all of the protections given to it by the CCAA, the Initial Order, this Order, and as an officer of the Court, including the stay of proceedings in its favour, (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order, (iii) the Monitor shall be entitled to rely on information provided by the Applicant, CLCA and/or a Claimant, all without independent investigation, and (iv) the Monitor shall not be liable for any claims or

damages resulting from any errors or omissions in information provided by the Applicant, CLCA or by any Claimant.

11. The Monitor shall report to the Court from time to time as it sees fits on the status of the claims process established by this Order including, identifying what Claims have become Accepted Claims, Unresolved Claims, and Disputed Claims.

PROOF OF CLAIM PROCEDURE

Reservation of Rights

12. **THIS COURT ORDERS** that neither (i) the reference to a purported Claim as a "Claim" or a purported Claimant as a "Claimant" or a "Known Claimant" in this Order nor (ii) the delivery of a Proof of Claim Document Package by the Monitor to a Person shall constitute an admission or acknowledgment by the Applicant, CLCA, the Potential Releasees or the Monitor of any liability of the Applicant, CLCA or the Potential Releasees (as the case may be) to any Person, or the acceptance of such purported Claim for any purpose.

13. **THIS COURT ORDERS** that the acceptance of any Claim by the Applicant and CLCA or other determination of any Claim in accordance with this Order, in full or in part, and whether for voting and/or distribution purposes, shall not constitute an admission or any finding of any fact, thing, liability, validity, quantum or priority of any Claim by any party, save and except in the context of these CCAA Proceedings and for the sole purposes of a Plan and, in the event there is no Approved Plan, all parties, including the Claimants and Potential Releasees, shall retain all of their rights, recourses, defences and counterclaims that, outside of these CCAA Proceedings, were available prior to the Filing Date. For greater certainty, no discussions, evidence submitted, submissions made, or positions taken in connection with the procedures established under this Order shall be used or relied upon for any purpose outside of these CCAA Proceedings and are without prejudice to any positions that any party may take in any other action or proceeding including the Outstanding Litigation.

14. **THIS COURT ORDERS** that information and documents delivered to the Monitor pursuant to this Order shall be kept confidential by the Monitor, except as otherwise provided for

in this Order and subject to further Order of this Court and subject to the Monitor providing all information and documents to the Applicant and CLCA upon request.

Notice of Claims Bar Date

15. **THIS COURT ORDERS** that:

(a) the Monitor shall, no later than five (5) Business Days following the making of this Order, post a copy of the Proof of Claim Document Package on the Case Website;

(b) the Monitor shall, no later than five (5) Business Days following the making of this Order, send to each of the Known Claimants a copy of the Proof of Claim Document Package;

(c) the Monitor shall, no later than five (5) Business Days following the making of this Order, cause the Notice to Claimants to be published in the *Globe and Mail* (National Edition) on one such day; and

(d) the Monitor shall, provided such request is received by the Monitor prior to the Claims Bar Date, deliver as soon as reasonably possible following receipt of a request a copy of the Proof of Claim Document Package to any Person requesting such material.

Pre-71 Entitlement Claims

16. **THIS COURT ORDERS** that, as soon as reasonably practicable after the date of this Order, the Monitor, in consultation with the Applicant, shall send to each Claimant with a Pre-71 Entitlement Claim (a "**Pre-71 Claimant"**), as determined by the Monitor, a written notice advising such Claimant of the quantum, as determined by the Monitor, of its Pre-71 Entitlement Claim for voting and/or distribution purposes.

17. **THIS COURT ORDERS** that, if a Pre-71 Claimant disputes the Monitor's determination of the quantum of its Pre-71 Entitlement Claim (a "**Disputed Pre-71 Claim**") for voting and/or distribution purposes, such Pre-71 Claimant shall prepare and file a Pre-71 Proof of Claim on or before the Claims Bar Date in accordance with this Order.

18. **THIS COURT ORDERS** that, if a Pre-71 Claimant does not complete and file a Pre-71 Proof of Claim in accordance with this Order on or before the Claims Bar Date, in respect of a Disputed Pre-71 Claim, the Pre-71 Claimant shall be deemed to have accepted the Monitor's assessment of the quantum of its Pre-71 Entitlement Claim for voting and/or distribution purposes and shall be deemed to have filed a Pre-71 Proof of Claim in the amount shown on the Monitor's notice.

19. **THIS COURT ORDERS** that all Disputed Pre-71 Claims shall be valued for voting and/or distribution purposes in accordance with paragraphs 25 and 29 of this Order, as applicable.

Proofs of Claim and Claims Bar Date

20. **THIS COURT ORDERS** that Proofs of Claim, for all Claims must be properly completed and shall be filed, together with all supporting documentation, with the Monitor, so as to actually be received by the Monitor on or before the Claims Bar Date.

21. **THIS COURT ORDERS** that a Claimant making a Claim shall complete its Proof of Claim indicating the amount of the Claim, including the Face Value of the Claim, as of the Filing Date, without including any Interest that would otherwise accrue after the Filing Date.

22. **THIS COURT ORDERS** that any Claimant that does not file a Proof of Claim as provided for herein such that it is actually received by the Monitor on or before the Claims Bar Date:

(a) shall not be entitled to any further notice as a Claimant in these CCAA Proceedings;

(b) shall not be entitled to participate in these CCAA Proceedings; and

(c) shall not be entitled to attend or vote at any meeting or meetings of the Claimants or to receive any distribution, if applicable, in respect of a Plan.

23. **THIS COURT ORDERS** that, provided there is an Approved Plan in these CCAA Proceedings, any Claimant that does not file a Proof of Claim on or before the Claims Bar Date:

(a) shall be and is hereby forever barred, without further act or notification, from making or enforcing any Claim; and

(b) shall be deemed to have fully and finally released such Claim.

Related Castor Claims

24. **THIS COURT ORDERS** that no Person shall be required to file a Proof of Claim in respect of any Related Castor Claim and for greater certainty, all Persons holding a Related Castor Claim shall retain all of their rights, recourses, defences and counterclaims that were available prior to the Filing Date, subject to the stay of proceedings in these CCAA Proceedings, any further Order of the Court in these CCAA Proceedings, the terms of any Approved Plan and the rights of Releasees under the Approved Plan. For greater certainty, any Claim as against the Applicant or CLCA is not a Related Castor Claim.

Determination of Claims

25. **THIS COURT ORDERS** that the Applicant and CLCA, subject to the terms of this Order, shall review all Proofs of Claim filed, and at any time may:

(a) request additional information (a "**Request for Information**") from a Claimant;

(b) attempt to consensually resolve the amount of a Claim for voting and/or distribution purposes;

(c) accept (in whole or in part) any Claim for voting and/or distribution purposes and so notify the Claimant in writing, provided that the Monitor has provided written consent pursuant to paragraph 26 (an "**Accepted Claim**");

(d) by notice in writing to the Claimant, revise or disallow (in whole or in part) the validity, quantum or priority of any Claim for voting and/or distribution purposes (a "**Disputed Claim**").

26. **THIS COURT ORDERS** that the Monitor, subject to the terms of this Order, shall review all Proofs of Claim in respect of Claims or any part thereof accepted by the Applicant and CLCA (in whole or in part) for voting and/or distribution purposes, and at any time:

(a) may request additional information (a "**Monitor Request for Information**"), on notice to the Applicant, CLCA and the Claimant, from any Person who, in the Monitor's determination, possesses or has knowledge of information that the Monitor determines is relevant to its assessment of a Claim or any part thereof that is accepted by the Applicant and CLCA for voting and/or distribution purposes;

(b) may determine that the Applicant and CLCA's decision in respect of an Accepted Claim was reasonable, based upon the Monitor's review of the Proof of Claim and information provided pursuant to a Monitor Request for Information, and subsequently may provide its consent to the acceptance (in whole or in part) by the Applicant and CLCA of a Claim;

(c) may attempt to consensually resolve the amount of the Claim with the Claimant, the Applicant and CLCA; and

(d) may by notice in writing advise the Applicant and CLCA that it will not consent to the acceptance (in whole or in part) by the Applicant and CLCA of the Claim (an "**Unresolved Claim**"), providing brief reasons why the Monitor (i) has not provided its consent and (ii) intends to refer the Claimant's Claim to the adjudication procedure set out in this Order.

27. **THIS COURT ORDERS** that if a Claimant does not comply in substance with a Request for Information or Monitor Request for Information under paragraphs 25(a) or 26(a), respectively, of this Order within the period(s) set out in such a Request for Information or Monitor Request for Information, provided such period(s) is or are reasonable in the circumstances, the Applicant, CLCA and/or the Monitor may appear before a Judge of the Court at a 9:30 Appointment seeking an Order imposing a deadline by which the Claimant must comply in substance with a Request for Information or Monitor Request for Information (a

"**Court Ordered Response Deadline**"). If a Claimant does not comply with a Court Ordered Response Deadline, paragraphs 22 and 23 of this Order shall apply to such Claimant's Claim as if the Claimant did not file a Proof of Claim in respect of such Claim on or before the Claims Bar Date.

28. **THIS COURT ORDERS** that Claimants may examine Proofs of Claim submitted to the Monitor in respect of a Castor Claim subject to the Monitor obtaining such undertakings or agreements as to confidentiality as the Monitor may reasonably require. A Claimant may deliver documents or other information to the Monitor and the Applicant and CLCA that the Claimant believes are relevant to the Monitor's and/or the Applicant's and CLCA's determination in respect of any Castor Claim required hereunder. The Monitor and/or the Applicant and CLCA may consider such documents and information and may consult with such stakeholders prior to or as part of making any determination required hereunder as may be deemed appropriate by the Monitor and/or the Applicant and CLCA.

Disputed Claims

29. **THIS COURT ORDERS** that with respect to all Claims determined to be Disputed Claims, the Applicant and CLCA shall advise the Claimant in writing (a "**Notice of Revision or Disallowance**"):

(a) that the Applicant and CLCA dispute the Disputed Claim, in whole or in part; and

(b) provide a summary of the grounds upon which the Applicant and CLCA dispute the Disputed Claim.

Unresolved Claims

30. **THIS COURT ORDERS** that with respect to all Claims that are Unresolved Claims, the Monitor shall advise the Claimant in writing (a "**Notice of Unresolved Claim**"):

(a) that the Monitor has not consented to the acceptance of the Claimant's Claim, in whole or in part; and

(b) provide a brief statement summarizing the reasons for which the Monitor has not provided its consent.

Adjudication of Claims

31. **THIS COURT ORDERS** that any Claimant who receives a Notice of Revision or Disallowance or a Notice of Unresolved Claim and who wishes to dispute the Notice of Revision or Disallowance or Notice of Unresolved Claim, shall deliver to the Applicant, CLCA, and the Monitor a written notice of its intention to have its Claim adjudicated in accordance with this Order (an "**Adjudication Notice**") within ten (10) Business Days following receipt by the Claimant of the Notice of Revision or Disallowance or Notice of Unresolved Claim, or such later date as the Monitor, the Applicant and CLCA may agree in writing, or this Court may otherwise order.

32. **THIS COURT ORDERS** that, if a Claimant who receives a Notice of Revision or Disallowance or a Notice of Unresolved Claim does not file an Adjudication Notice in accordance with paragraph 31 hereof, then the value of such Claimant's Claim, if any, as determined by the Applicant or CLCA and stipulated in the Notice of Revision or Disallowance or by the Monitor in the Notice of Unresolved Claim shall, for all purposes in these CCAA Proceedings, including, for greater certainty, for voting and/or distribution purposes in these CCAA Proceedings, be deemed to be final and binding on the Claimant in all respects, subject to the limitations set out in paragraphs 12 and 13 hereof.

33. **THIS COURT ORDERS** that, if the Face Value of a Disputed Claim or Unresolved Claim is equal to or less than One Hundred Million dollars ($100,000,000), for which the Claimant has filed an Adjudication Notice, in accordance with paragraph 31 hereof (a "**Below Threshold Undetermined Claim**"), such Below Threshold Undetermined Claim shall be determined by the Claims Officer in accordance with the terms of the order of the Court approving the appointment of a Claims Officer by the Applicant and CLCA.

34. **THIS COURT ORDERS** that all Disputed Claims or Unresolved Claims that are not Below Threshold Undetermined Claims, for which the Claimant has filed an Adjudication

Notice, in accordance with paragraph 31 hereof (an "**Above Threshold Undetermined Claim**"), shall be determined by the Court in accordance with paragraph 36 of this Order.

Adjudication Before a Claims Officer

35. **THIS COURT ORDERS** that the Applicant and CLCA are authorized to bring a motion to seek an order of the Court appointing a Claims Officer to determine the validity, quantum and priority of all Below Threshold Undetermined Claims for voting and/or distribution purposes.

Adjudication Before the Court

36. **THIS COURT ORDERS** that, when a determination is made by the Applicant and CLCA or the Monitor, each in accordance with the terms of this Order, that a Claim is an Above Threshold Undetermined Claim, the Applicant, CLCA and the Claimant of an Above Threshold Undetermined Claim shall appear as soon as reasonably practicable before a Judge of the Court at a 9:30 Appointment to determine the process and procedures (including the manner in which evidence shall be brought before the Court) by which the validity, quantum and priority of such Above Threshold Undetermined Claim shall be determined by the Court for voting and/or distribution purposes.

NOTICE OF TRANSFEREES

37. **THIS COURT ORDERS** that the Monitor, the Applicant and CLCA shall not be obligated to send notice to or otherwise deal with a transferee or assignee of a Claim, as the Claimant in respect thereof unless and until (i) actual written notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received by the Monitor in the Claimant's Proof of Claim or otherwise, and (ii) the Monitor shall have acknowledged in writing such transfer or assignment, and thereafter such transferee or assignee shall for all purposes hereof constitute the "Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by all notices given or steps taken in respect of such Claim, in accordance with this Order prior to the written acknowledgement by the Monitor, the Applicant and CLCA of such transfer or assignment.

38. **THIS COURT ORDERS** that, if the holder of a Claim has transferred or assigned the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfer or assignment shall not create a separate Claim, and such Claim shall continue to constitute and be dealt with as a single Claim notwithstanding such transfer or assignment, and the Monitor, the Applicant and CLCA shall in each such case not be bound to acknowledge or recognize any such transfer or assignment and shall be entitled to send notice to and to otherwise deal with such Claim only as a whole, and then only to and with the Person last holding such Claim in whole as the Claimant in respect of such Claim. Provided that a transfer or assignment of the Claim has taken place in accordance with this Order and the Monitor has acknowledged in writing such transfer or assignment, the Person last holding such Claim in whole as the Claimant in respect of such Claim may by notice in writing to the Monitor direct that subsequent dealings in respect of such Claim, but only as a whole, shall be with a specified Person and, in such event, such Claimant, transferee or assignee of the Claim, shall be bound by any notices given or steps taken in respect of such Claim by or with respect to such Person in accordance with this Order.

SERVICE AND NOTICES

39. **THIS COURT ORDERS** that any notice or other communication (including a Proof of Claim) to be given under this Order by a Claimant to the Monitor shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by courier, by personal delivery, email or facsimile transmission addressed to:

The Monitor
c/o Ernst & Young Inc., Court-appointed Monitor of 4519922 Canada Inc.
Ernst & Young Inc.
Ernst & Young Tower
222 Bay St., 32nd Floor
P.O. Box 251
Toronto, ON M5K 1J7

Attention: **Alex Morrison**
Email: alex.f.morrison@ca.ey.com
Telephone: (416) 941-7743
Fax: (416) 943-3300

cc: Davies Ward Phillips & Vineberg LLP, Counsel to the Monitor
155 Wellington St. W., Suite 4000
Toronto, ON M5V 3J7

Attention: **Jay Swartz**
Email: jswartz@dwpv.com
Telephone: (416) 863-5520
Fax: (416) 863-0871

40. **THIS COURT ORDERS** that any notice or other communication to be given under this Order by a Claimant to the Applicant and CLCA shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by courier, by personal delivery, email or facsimile transmission addressed to:

4519922 Canada Inc.
c/o Thornton Grout Finnigan LLP, Counsel to the Applicant
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, ON M5K 1K7

Attention: **Robert I. Thornton and Lee M. Nicholson**
Email: clca@tgf.ca
Telephone: (416) 304-1616
Fax: (416) 304-1313

41. **THIS COURT ORDERS** that any notice or other communication (including a Notice to Claimants, Notice of Revision or Disallowance, a Notice of Unresolved Claim, a Request for Information, or Monitor Request for Information) to be given under this Order to a Claimant by the Applicant, CLCA, or the Monitor shall be deemed to be received by the Claimant if sent to the Claimant, or to the Person designated as its duly authorized representative on the Proof of Claim, by courier or personal delivery to the address provided by the Claimant in its Proof of Claim, by email to the email address provided by the Claimant in its Proof of Claim or by facsimile transmission to the facsimile number provided by the Claimant in its Proof of Claim.

GENERAL PROVISIONS

42. **THIS COURT ORDERS** that the Applicant, CLCA and the Monitor, are authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which

forms delivered hereunder are completed and executed, and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and execution of such forms.

43. **THIS COURT ORDERS** that, if any Castor Claim arose in a currency other than Canadian dollars, the Claimant shall calculate the amount of such Castor Claim in Canadian Dollars using the conversion as stated in the Claimant's pleadings. If such conversion is not applicable as the conversion is not provided for in the Claimant's pleadings or no such action or proceeding has been instituted in respect of the Claimant's Castor Claim, the Claimant shall calculate the amount of such Castor Claim in Canadian Dollars using the closing exchange rate provided by the Bank of Canada on the Date of the Castor Bankruptcy, failing which the Applicant and CLCA shall subsequently calculate the amount of such Castor Claim in Canadian Dollars, using the Bank of Canada, on the Date of the Castor Bankruptcy. Where no currency is indicated, the Castor Claim shall be presumed to be in Canadian dollars. Notwithstanding this paragraph, the Applicant and CLCA shall retain their right to revise or dispute the conversion provided by the Claimant in its Proof of Claim.

44. **THIS COURT ORDERS** that, if any Claim, other than a Castor Claim, arose in a currency other than Canadian dollars, then the Person making the Claim shall complete its Proof of Claim indicating the amount of the Claim in such currency, and provide a conversion to Canadian dollars using the closing exchange rate on the Filing Date (as found at http://www.reuters.com/finance/currencies). Where no such conversion is provided, the Applicant and CLCA shall subsequently calculate the amount of such Claim in Canadian Dollars, using the closing exchange rate on the Filing Date (as found at http://www.reuters.com/finance/currencies).Where no currency is indicated, the Claim shall be presumed to be in Canadian dollars.

45. **THIS COURT REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, CLCA and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide

such assistance to the Applicant, CLCA and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant, CLCA and the Monitor and their respective agents in carrying out the terms of this Order.

DIRECTIONS

46. **THIS COURT ORDERS** that the Monitor, the Applicant, CLCA, the Potential Releasees, the Creditors' Committee and any Claimant may, at any time, and with such notice as the Court may require, seek directions from the Court with respect to this Order and the claims process set out herein, including the forms attached as Schedules hereto.

_____

SCHEDULE "H" – LIST OF INSURERS

1. PROFESSIONAL ASSET INDEMNITY LTD. (PAIL)
2. L&F INDEMNITY LIMITED
3. ALLIANZ SUISSE VERSICHERUNGS-GESELLCHAFT AG (FORMERLY ELVIA, SCHWEIZERISCHE VERSICHERUNGS-GESELLSCHAFT, ZURICH)
4. ALLIANZ GLOBAL CORPORATE AND SPECIALTY SE (FORMERLY COMPAGNIE D'ASSURANCES MARITIMES AÉRIENNES ET TERRESTRES S.A.)
5. AVIVA INTERNATIONAL INSURANCE LTD. (FORMERLY COMMERCIAL UNION ASSURANCE COMPANY PLC)
6. CX REINSURANCE COMPANY LTD. (FORMERLY CNA INTERNATIONAL REINSURANCE COMPANY LIMITED)
7. ALLIANZ I.A.R.D. (FORMERLY ABEILLE ASSURANCES I.A.R.D.)
8. GAN EUROCOURTAGE
9. GUARDIAN ASSURANCES LTD. (FORMERLY AEGON INSURANCE COMPANY (UK) LTD.)
10. HANNOVER RUCK SE (FORMERLY HANNOVER RUCKVERSICHERUNG AG)
11. GORDIAN RUNOFF LTD. (FORMERLY GIO INSURANCE LIMITED AND A.M.P. INSURANCE LTD.)
12. GIO AUSTRALIA HOLDINGS LIMITED (FORMERLY GOVERNMENT INSURANCE OFFICE OF NEW SOUTH WALES)
13. HDI-GERLING VERZEKERINGEN N.V. (FORMERLY HANNOVER INTERNATIONAL INSURANCE (NEDERLAND) N.V.)
14. INDEMNITY MARINE ASSURANCE COMPANY LTD.
15. MARKEL INTERNATIONAL (FORMERLY TERRA NOVA INSURANCE COMPANY LIMITED)
16. MMA IARD ASSURANCES MUTUELLES (FORMERLY LES MUTUELLES DU MANS ASSURANCES I.A.R.D.)
17. NRG FENCHURCH INSURANCE COMPANY LIMITED
18. OCEAN MARINE INSURANCE COMPANY LTD.,
19. THE OCEAN MARINE INSURANCE COMPANY LTD. (FORMERLY COMMERCIAL UNION ASSURANCE COMPANY LTD.)"
20. PALATINE INSURANCE COMPANY LTD.
21. ROYAL INSURANCE UK LTD.
22. SCOTTISH LION INSURANCE COMPANY LTD.
23. SIRIUS INTERNATIONAL INSURANCE (FORMERLY SIRIUS (UK) INSURANCE PLC)
24. SWISS RE SPECIALTY INSURANCE (UK) LIMITED (FORMERLY THE THREADNEEDLE INSURANCE COMPANY LTD.)
25. ALLIANZ I.A.R.D. (FORMERLY GAN INCENDIE ACCIDENTS)
26. TRADERS GENERAL INSURANCE COMPANY
27. CERTAIN UNDERWRITERS AT LLOYD'S
28. UNION AMERICA INSURANCE COMPANY LIMITED
29. WASA INDUSTRIAL INSURANCE CO. LTD.
30. ZURICH SPECIALTIES LONDON LIMITED (FORMERLY ZURICH RE (UK) LIMITED)

31. HANNOVER RUCKVERSICHERUNGS-AKTIENGESELLSCHAFT TYSKLAND FILIAL (FORMERLY SKANDIA INTERNATIONAL INSURANCE CORPORATION)
32. SGIO INSURANCE LIMITED (FORMERLY STATE GOVERNMENT INSURANCE OFFICE OF WESTERN AUSTRALIA)
33. BALOISE INSURANCE LTD. (FORMERLY THE BALOISE INSURANCE CO. LTD)
34. HDI-GERLING FIRMEN UND PRIVAT VERSICHERUNGS AG (FORMERLY U.A.P. INTERNATIONAL ALLGEMEINE VERSICHERUNGS AG)
35. AXA CORPORATE SOLUTIONS ASSURANCES (FORMERLY UNI EUROPE ASSURANCES)
36. AGCS SE (FORMERLY ASSURANCES GÉNÉRALES DE FRANCE IART)
37. AGCS FRANCE
38. INDIA INTERNATIONAL INSURANCE PTE LTD
39. CAVELL INSURANCE COMPANY LIMITED (FORMERLY UNI STOREBRAND INTERNATIONAL INSURANCE A/S)
40. ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
41. AXA VERSICHERUNG AG
42. GENERAL REINSURANCE AG
43. THE SOVEREIGN GENERAL INSURANCE COMPANY
44. BRITTANY INSURANCE COMPANY
45. EVANSTON INSURANCE COMPANY
46. LUMBERMENS MUTUAL CASUALTY COMPANY
47. ST-PAUL SURPLUS LINES
48. HIH CASUALTY AND GENERAL INSURANCE LIMITED
49. FAI GENERAL INSURANCE COMPANY LIMITED
50. DORINCO REINSURANCE COMPANY
51. GENERAL INSURANCE COMPANY OF AMERICA
52. NEW YORK MARINE & GENERAL INSURANCE COMPANY
53. RELIANCE INSURANCE COMPANY (IN LIQUIDATION)
54. INVESTORS INSURANCE COMPANY
55. PADUA LTD.
56. ABACUS INSURANCE LIMITED
57. ABACUS FINANCIAL AND INSURANCE LIMITED
58. ABACUS INSURANCE COMPANY LIMITED

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 4519922 CANADA INC.

Court File No. CV-14-10791-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

Proceeding commenced at Toronto

AFFIDAVIT OF PHILIP MANEL
(Sworn on July 13, 2015)

FISHMAN FLANZ MELAND PAQUIN LLP
Barristers and Solicitors
4100-1250 René-Lévesque Blvd. West
Montreal QC H3A 3H3

Avram Fishman
afishman@ffmp.ca

Mark E. Meland
mmeland@ffmp.ca
Tel: 514-932-4100

Counsel for the Creditors' Committee