

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

DELOITTE LLP

Appellant

- and -

LIVENT INC., THROUGH ITS SPECIAL RECEIVER
AND MANAGER ROMAN DORONIUK

Respondent

-and-

CANADIAN COALITION FOR GOOD GOVERNANCE
AND CHARTERED PROFESSIONAL ACCOUNTANTS OF CANADA

Interveners

FACTUM OF THE INTERVENER,
CANADIAN COALITION FOR GOOD GOVERNANCE
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

McMILLAN LLP
Brookfield Place
4400 - 181 Bay Street
Toronto, ON M5J 2T3

McMILLAN LLP
World Exchange Plaza
2000 - 45 O'Connor Street
Ottawa, ON K1P 1A4

Markus Koehnen
markus.koehnen@mcmillan.ca
Tel: (416) 865-7218 | Fax: (647) 722-6721

David Debenham
david.debenham@mcmillan.ca
Tel: (613) 691-6109 | Fax: (613) 231-3191

David Kent
david.kent@mcmillan.ca
Tel: (416) 865-7143 | Fax: (416) 865-7048

Counsel for the Intervener,
Canadian Coalition for Good Governance

Ottawa Agent for the Intervener,
Canadian Coalition for Good Governance

ORIGINAL TO:

The Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa ON KIA 031

COPY TO:

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

2600 - 130 Adelaide Street West
Toronto, ON M5H 3P5

Peter Griffin

pgriffin@litigate.com

Tel: (416) 865-2921 | Fax: (416) 865-3558

DENTONS CANADA LLP

400 - 77 King Street West
Toronto, ON M5K 0A1

Matthew Fleming

matthew.fleming@dentons.com

Tel: (416) 863-4634 | Fax: (416) 863-4592

Counsel for the Appellant

STIKEMAN ELLIOTT LLP

5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Peter Howard

poward@stikeman.com

Tel: (416) 869-5613 | Fax: (416) 861-0445

Patrick O'Kelly

pokelly@stikeman.com

Tel: (416) 869-5633 | Fax: (416) 861-0445

Counsel for the Respondent

DENTONS CANADA LLP

1420 - 99 Bank Street
Ottawa, ON K1P 1H4

K. Scott McLean

scott.mclean@dentons.com

Tel: (613) 783-9600 | Fax: (613) 783-9690

Ottawa Agent for the Appellant

STIKEMAN ELLIOTT LLP

1600 - 50 O'Connor Street
Ottawa, ON K1P 6L2

Nicholas McHaffie

nmchaffie@stikeman.com

Tel: (613) 566-0546 | Fax: (613) 230-8877

Ottawa Agent for the Respondent

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3

Guy J. Pratte / Duncan Ault
gpratte@blgcanada.com / dault@blgcanada.com
Tel: (416) 367-6000 | Fax: (416) 367-6749

Counsel for the Intervener,
Chartered Professional Accountants of Canada

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
neffendi@blg.com
Tel: (613) 237-5160 | Fax: (613) 230-8842

Ottawa Agent for the Intervener,
Chartered Professional Accountants of Canada

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PART I - OVERVIEW

1. This appeal raises policy questions about auditors' independence, professional skepticism and liability. It arises in the context of widespread concern about the lack of professional skepticism and independence among auditors; concerns that permeate the lower court decisions.

2. In *Hercules v. Ernst & Young*,¹ this Court balanced auditor and stakeholder interests. This appeal requires the Court either to affirm that balance, by upholding the lower court decisions, or to tilt the balance in favour of auditors by reversing the lower court judgments. Reversal would discourage auditor independence and rob public company audits of all practical utility.

3. The Canadian Coalition for Good Governance ("CCGG") submits that, as a matter of policy, this court should incentivize auditor independence by upholding the lower court decisions.

4. Upholding the decisions below sends a message that auditors should not be pushed around. It will provide auditors with a powerful tool to resist pressure from management of the companies they audit. It will not lead auditors to "kill" their clients as the appellant claims, but will finally force management to follow auditors' advice.

PART II - QUESTION IN ISSUE

5. The fundamental policy question on appeal is how to encourage auditors to assert their independence rather than to comply with improper management demands.

PART III - STATEMENT OF ARGUMENT

A. Auditor Independence v. Management Pressure

6. Auditors must be independent of the companies they audit.² Management has strong incentives to present financial statements in a way that serves their interests.³ The auditor's role is to audit the company's annual financial statements in order to opine whether they comply with generally

¹ *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165 [*Hercules*], **Appellant's Book of Authorities [ABOA], Vol I, Tab 1.**

² *Business Corporation Act*, RSO 1990, c B 16 [*OBCA*], s 152, the corporate statute governing the respondent, Livent Inc.

³ David Kershaw, "Waiting for Enron: the Unstable Equilibrium of Auditor Independence Regulation" (2006) 33:3 *JL & Soc'y* 388 [*Kershaw*] **Intervener's Book of Authorities ["IBOA"], Tab 6** at pp 389, 400-401.

accepted accounting principles (“GAAP”). In doing so they act as a check on management⁴ and serve to bridge potential credibility gaps between senior management and shareholders.⁵ The value of the audit rests on the independence of the auditor.⁶

7. Independence is marked by objectivity and strength of character.⁷ The measure of an auditor’s objectivity lies in its ability to take a strong position with management when necessary, especially when the possible consequence of disagreeing with management is losing the account.⁸

8. Legislation throughout Canada underscores the importance of auditors’ objectivity. Ontario’s *Business Corporations Act*⁹ (“OBCA”) provides that: shareholders appoint auditors at each annual meeting; shareholders may remove auditors; auditors have the right to make written submissions to shareholders if auditors resign or are removed by the corporation; auditors are entitled to attend shareholder meetings; and auditors prepare annual reports addressed to shareholders.¹⁰ The intention of the legislation is to make auditors answerable to shareholders and independent of management.¹¹

9. Securities legislation was to similar effect at the relevant time and remains so. In order to help protect investors from unfair, improper or fraudulent practices and to maintain confidence in the public markets, securities legislation imposes many requirements on public companies, including that they file audited financial statements.¹² Audits help ensure the credibility of and confidence in Canada’s capital markets. Audits of public companies, like Livent, are even more important than those of private companies because shareholders of public companies generally have less access to

⁴ F W Wegenast, *The Law of Canadian Companies* (Toronto: Carswell, 1979) [Wegenast], **IBOA, Tab 7** at p 807.

⁵ Poonam Puri, “Converging Numbers: Harmonization of Accounting Standards in the Context of the Role of the Auditor in Corporate Governance” in *Responding to Globalization: Papers Presented at the 8th Queen’s Annual Business Law Symposium 2001* (Kingston, Ont: 2002) [Puri], **IBOA, Tab 8** at p 136; John Coffee Jr, “What Caused Enron? A Capsule Social and Economic History of the 1990s” (2004) 89 *Cornell L Rev* 269 [Coffee], **IBOA, Tab 9** at p 279.

⁶ J Gregory Jenkins and D Jordan Lowe, “Auditors as Advocates for their Clients: Perceptions of the Auditor-Client Relationship” (1999) 15:2 *J App Bus Research* 73 [Jenkins], **IBOA, Tab 10** at p 73.

⁷ J W Adams, Chairman, “Report on the Special Committee to Examine the Role of the Auditor”, *CA Magazine* (April 1978) 35 [Adams Report], **IBOA, Tab 11** at para G1.

⁸ Adams Report at para G2, **IBOA, Tab 11**; W Morley Lemon et al, *Auditing An Integrated Approach*, 4th ed (Scarborough: Prentice-Hall, 1987) [Lemon], **IBOA, Tab 12** at p 131.

⁹ R.S.O. 1990, c. B16, as amended

¹⁰ *OBCA*, ss 149(2), 149(4), 149(6), 151(1), 153(1), 154(1)(c) & 154(2).

¹¹ Wegenast, **IBOA, Tab 7** at pp 808-809.

¹² Appellate Reasons of Justice Blair dated January 8, 2016 [Appellate Reasons] at paras 186-187, 192-195, **Appellant’s Record [“AR”], Vol II, Tab 5** at p 65, 67-68; *Securities Act*, RSO 1990, c S 5, s 1.1; 21.10(4), 78; R.R.O. 1990, Reg 1015 ss. 1(3), 2(2); National Policy Statement No. 5, Part 5. Although some of these regulations and policy statements have since been revoked, they have been replaced with substantively similar provisions.

information and less access to the directors and management of the company than do shareholders of private companies.

10. Although legislation underscores the importance of auditor independence, audit texts recognize that much litigation has arisen because auditors were too willing to accept management representations or pressures.¹³ A wide body of literature demonstrates that auditors often surrender objectivity to management demands.¹⁴

11. A variety of financial and psychological pressures lead auditors to suppress professional skepticism in favour of management demands. Fear of losing the account creates financial pressure.¹⁵ Performance based compensation schemes within audit firms exacerbate that pressure.¹⁶ Literature in North America and Europe suggests that the potential loss of a client influences decisions about how far to press a disagreement with management or how deep to dig in an audit.¹⁷ Human psychological biases also encourage auditors to comply with management demands: familiarity with management makes one less likely to disagree; and people are generally more likely to agree with someone else's questionable conclusion than they are to reach that conclusion themselves.¹⁸

12. There is a well-known and unhealthy dynamic between auditor and management. When an auditor raises concerns about financial statements, management often does not reverse course to address the auditor's concern. Instead, management adopts an escalating set of measures to have the auditor reverse course. Management negotiates with the auditor about applicable accounting principles;¹⁹ shops for other opinions;²⁰ pressures the audit firm to replace the intransigent audit team;²¹ threatens to terminate the audit relationship;²² if terminating the audit relationship is

¹³ Lemon, **IBOA, Tab 12** at p 131.

¹⁴ See authorities in footnotes 15 to 30 below.

¹⁵ Kershaw, **IBOA, Tab 6** at p 394; Max Bazerman, George Loewenstein & Don Morre, "Why Good Accountants Do Bad Audits" *Harvard Business Review* (November 2002) [Bazerman], **IBOA, Tab 13** at p 5-6.

¹⁶ Kershaw, **IBOA, Tab 6** at p 396.

¹⁷ Jenkins, **IBOA, Tab 10** at p 75; Kershaw, **IBOA, Tab 6** at p 390; William Shafer et al, "Auditor's Willingness to Advocate Client-Preferred Accounting Principles" (2004) 52 *J Bus Ethics* 213 [Schafer], **IBOA, Tab 14** at p 216 (referring to studies from 7 European countries).

¹⁸ Bazerman, **IBOA, Tab 13** at pp 6-8, 10.

¹⁹ Bazerman, **IBOA, Tab 13** at p 6.

²⁰ Bazerman, **IBOA, Tab 13** at p 7.

²¹ Coffee, **IBOA, Tab 9** at p 292.

inconvenient because it requires public disclosure, management threatens to terminate non-audit services which do not require disclosure.²³ These pressures often lead auditors to adapt their interpretations of accounting standards to comply with management demands.²⁴

13. Concerns about these pressures resonate throughout the decisions below. Livent management used each of these tactics successfully against Deloitte and took things a step further by threatening to have Dundee Bancorp, another Deloitte client, terminate its relationship as well.²⁵

14. Regulators have expressed similar concerns about a lack of professional skepticism and a willingness to comply with management demands. A review conducted by Staff of the Ontario Securities Commission notes: “The level of professional skepticism exhibited by auditors...was generally lacking.”²⁶ Canada’s audit regulator, The Canadian Public Accountability Board, publishes an annual report of its findings about audit quality based on inspections it conducts. The lack of professional skepticism and auditor submission to management pressure are regular features of its reports.²⁷ Regulators around the world have raised similar concerns.²⁸

15. Commentators have noted that the current interplay among the law, auditors and management encourages auditors to submit to management demands and does not reward professional skepticism.²⁹ Noted American law professor John Coffee observes that, as the law in the United

²² Kershaw, **IBOA, Tab 6** at p 398; William R. Kinney, “Auditor Independence: A Burdensome Constraint or Core Value?” (1999) 13: Accounting Horizons 69 [Kinney], **IBOA, Tab 15** at p 73.

²³ Kershaw, **IBOA, Tab 6** at p 398; Puri, **IBOA, Tab 8** at p 137; Kinney, **IBOA, Tab 15** at p 73.

²⁴ Shafer, **IBOA, Tab 14** at p 216-217; Bazerman, **IBOA, Tab 13** at p 5.

²⁵ Reasons of Justice Gans dated April 4, 2014 [Trial Reasons] at paras 168, 169, 186, 189, 194-195, 208, **AR, Vol I, Tab 2** at pp 59, 66, 67-68, 71.

²⁶ Ontario Securities Commission, Staff Notice 51-719, “Emerging Markets Issuer Review” (March, 20, 2012), **IBOA, Tab 16** at p 13.

²⁷ For example, CPAB, *Report on the 2010 Inspections of the Quality of Audits* (2011), **IBOA, Tab 17** at p 11-22; *Audit Quality Symposium Summary* (2011), **IBOA, Tab 18** at p 2; *Meeting the Challenge “A Call to Action”* (2012), **IBOA, Tab 19** at pp 9, 18, 21; *Effective Regulation* (2012), **IBOA, Tab 20** at pp 5, 10, 20; CPAB, *2013 Public Report, 2014 Public Report, 2015 Annual Inspections Report* **IBOA, Tabs 21-23** at pp 22-23, 13, 8.

²⁸ Shafer, **IBOA, Tab 14** at p 215, citing the Securities Exchange Commission; Public Company Accounting Oversight Board, *Concept Release on Auditor Independence and Audit Firm Rotation*, Release No 2011-006 (Washington: 16 August 2011), **IBOA, Tab 24** at pp 5-8 citing regulators in the US, UK, Netherlands and Australia.

²⁹ Kathy Hurtt et al, “Research on Auditor Professional Skepticism: Literature Synthesis and Opportunities for Further Research” (2013) 32:1 *Audit J of Prac & Theory* 45 [Hurtt], **IBOA, Tab 25** at p 55; Kershaw, **IBOA, Tab 6** at pp 388-389; Ilanit Gavious, “Alternative Perspectives to Deal with Auditors’ Agency Problem” (2007) 18 *Critical Perspectives on Accounting* 451 [Gavious], **IBOA, Tab 26** at p 458.

States evolved to make cases against auditors more difficult, auditor acquiescence to management demands increased.³⁰

16. Given the pervasive risks to independence, CCGG submits that one purpose of the law of auditor liability should be to ensure that the negative consequences of acquiescing to improper management demands outweigh the benefits of doing so.³¹

17. The appellant paints a nightmare scenario about the consequences of upholding the decisions below, claiming that auditors will be forced to “kill” their clients’ businesses by resigning prematurely. These concerns are unfounded. On the contrary, upholding the lower court decisions gives auditors a powerful tool with which to resist management pressure. If courts hold auditors to account for complying with improper management demands, auditors will be more likely to hold firm. Management will be deprived of the power to negotiate, opinion shop or threaten and will be more likely to comply with auditor demands. That is as it should be.

18. If the lower court decisions are reversed, management will acquire greater power to force auditors to comply. If auditors cannot be held to account in the extraordinary circumstances of this case, it is difficult to imagine a case in which auditors would be held liable. If auditors can avoid liability here, no economically rational auditor would resist management pressure.

B. Duty of care: Resisting the dilution of *Hercules*

19. The appellant argues that *Hercules* ought to have sheltered it from responsibility for its negligence because: (i) stakeholders may benefit from a damages award to Livent; and (ii) the appellant was exposed to “indeterminate” liability.³² Neither argument is tenable from a policy perspective.

i) Stakeholder Benefit Does Not Preclude Liability

20. All public companies have stakeholders, typically including shareholders and lenders. Equity value and the ability to recover debt depend on the company’s assets and solvency.

³⁰ Coffee, **IBOA, Tab 9** at p 290.

³¹ Kershaw, **IBOA, Tab 6** at pp 389, 390, 420; Coffee, **IBOA, Tab 9** at pp 304, 309.

³² Deloitte Factum at paras 4-8, 76-80.

21. In *Hercules*, this Court conducted an *Anns/Kamloops* analysis and held, at the first stage, that auditors had a *prima facie* duty of care to shareholders of companies they audit. However, insofar as those shareholders rely on audit reports to manage their own affairs, the use of those reports is inconsistent with their purpose and the duty to *shareholders* is negated as a matter of policy at the second *Anns/Kamloops* stage.³³

22. The Court noted, however, that one purpose of audit reports is to permit shareholders to oversee the operations of the corporation in what the Court described as a “managerial” role. Reliance on negligently prepared audit reports by shareholders in *this* capacity *is* consistent with their purpose. But any harm arising from such collective “managerial” reliance would be harm to the company, not the shareholders as such, and thus would not be recoverable by the shareholders by direct action. The *Hercules* shareholders’ proper recourse was to have brought a derivative action in the company’s name.³⁴

But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company’s affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders. [emphasis added by this Court]

23. The balanced policy choices made in *Hercules* are a complete answer to the appellant’s attempts to eliminate its duty of care by referring to “The Stakeholders Behind this Claim” and to investor claims being “dressed up in the guise of corporate losses”.³⁵ While there may not generally be a duty of care to *shareholders*, an auditor will necessarily have a duty to its *audit client*. So long as the losses in question are those suffered by the company,³⁶ rather than the shareholders, the company’s claim must be entertained. The fact that stakeholders may benefit from any award in favour of the *company* is irrelevant to the duty analysis, and cannot represent a policy based reason to negate a *prima facie* duty of care. Indeed, as noted above, the *Hercules* and *Caparo* courts anticipated that stakeholders would benefit in this way.

³³ *Hercules* at paras 51-57, **ABOA, Vol I, Tab 1** at p 207-211.

³⁴ *Hercules* at paras 58-64, **IBOA, Tab 1** at pp 212-215; *Caparo Industries plc v. Dickman*, [1990] 1 All ER 568 (HL), **ABOA, Vol I, Tab 12**.

³⁵ Deloitte Factum at paras 7 and 12.

³⁶ This intervener takes no position as to issues relating to the identification and calculation of Livent’s losses.

24. *Hercules* effectively confines an auditor's duty of care to its audit client. It does not, and should not be read to, further limit that duty to audit company clients whose stakeholders will not benefit from an award of damages. Put differently, and as clearly articulated in *Hercules*, the fact that a shareholder cannot claim for her losses *qua* shareholder has no bearing on whether or to what extent the *company* can claim for the *company's* losses. This Court should resist any revisionist approach that ignores, and thus confounds, the careful distinction drawn between the two by the *Hercules* Court.

25. It is important in this context to note, in response to Deloitte's comment,³⁷ that *Hercules* is not simply a "standing case"; *Hercules* focuses not on who can claim but rather on whose losses can be asserted. The answer – the company's losses – must not now be undermined by excluding such losses where a recovery will benefit the company's stakeholders. Such an exclusion would reduce auditors' duty of care to next to nothing.

ii) Large Consequences Do Not Negate Duty Of Care

26. The appellant's discussion of the "limits of the audit relationship" refers constantly to an auditor's relationship with the company's stakeholders, rather than with the company itself.³⁸ But as *Hercules* makes clear, an auditor's duty to a company it audits and to the company's stakeholders are critically different things. Below, CCGG addresses only an auditor's duty to the company it audits.

27. Deloitte contends that its duty to Livent ought to have been negated because of the risk of indeterminate liability.³⁹ In considering such an argument, however, it is important to work within the framework already established in *Hercules* for determining whether, as a policy matter, there are concerns so serious that a *prima facie* duty should be upset. There, the Court said repeatedly that *no* concern about indeterminate liability would arise, and thus *no* duty would be negated, where the known user of the negligently prepared material uses it for the purpose for which the material was prepared.⁴⁰

³⁷ Deloitte Factum at para 7 - "It is doubtful that the Court in *Hercules* thought that it was deciding a standing case."

³⁸ See, for example, Deloitte Factum at para 73

³⁹ Deloitte Factum at paras 78 and 82 *et seq.*

⁴⁰ *Hercules* at paras 37-39, 46-47, **IBOA, Tab 1** at pp 197-199, 203.

28. No “user” could be more “known” to an auditor than its client. The *Hercules* Court adopted from *Caparo* the following description of the purpose of an audit report from the perspective of the corporation (as opposed to its shareholders):⁴¹

It is the auditors’ function to ensure, so far as possible, that the financial information as to the company’s affairs prepared by the directors accurately reflects the company’s position in order first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing....[emphasis added by this Court]

29. Accordingly, absent a finding that a company relied on its auditor’s negligence for a purpose for which the negligent conduct was not intended, the *Hercules* test for identifying policy concerns about indeterminate liability is simply not met. The Court should resist the appellant’s effort to dilute *Hercules* and negate a duty of care simply because of the *style* of loss and the size of the damage award.⁴² Such issues go to the assessment of damages, not to the duty of care.

30. The appellant’s true concern is revealed by its assertion that “[a] \$130 million judgment...is such an ‘extreme’ consequence” of failing to resign that its *prima facie* duty to its client should have been negated on the basis of indeterminate liability. This suggests that a duty of care is subject to a cap on damages. There is no principled basis for negating a duty of care – to a plaintiff which has relied on a defendant’s negligent conduct in the manner intended – merely because the consequent harm exceeds some arbitrary limit. To do so would be to create the very sort of “pocket” of negligence cases that the *Hercules* Court warned against.⁴³ Reports by accounting commissions have recommended that any such limits should, if needed, be established by statute.⁴⁴

C. Corporate Identification and *Ex Turpi Causa*

31. An analysis of corporate identification and *ex turpi causa* should begin by recognizing that they are *not* immutable legal rules, to be applied regardless of the circumstances. Corporate identification was developed as a pragmatic policy to promote and implement other legal rules.⁴⁵ This Court has

⁴¹ *Hercules* at para 48, **ABOA, Vol 1, Tab 1** at p 204.

⁴² Deloitte Factum at para 76.

⁴³ *Hercules* at para 21, **IBOA, Tab 1** at p 186.

⁴⁴ Adams Report, **IBOA, Tab 11** at p 3.

⁴⁵ *Canadian Dredge & Dock Co v The Queen* [1985] 1 SCR 662, **IBOA, Tab 2** at p 691, 692, 701 and 719.

defined *ex turpi causa* as a principle that *permits* courts to deny recovery where allowing recovery would undermine the integrity of the justice system.⁴⁶

32. Whether to apply these principles to deny a plaintiff recovery can be determined by asking a number of questions:⁴⁷

- a) Does application (of the principles) further or defeat the expectations on which the relationship is based?
- b) Does application defeat a legislative purpose?
- c) Does application promote legal responsibility or immunize against it?
- d) Does application advance or defeat any deterrence objectives?
- e) Does application lead a wrongdoer to benefit?
- f) Does application lead to an injustice?

33. Here, the expectation underlying the audit relationship is that auditors are independent of management and will resist management's improper demands. Applying corporate identification and *ex turpi* to relieve auditors of liability for failing to detect fraud by senior management, no matter how serious the auditor's negligence, defeats the purpose behind statutory audits. Audits of public companies are most needed to detect misfeasance by their senior management. Well governed companies already have in place layers of approval and review to detect wrongdoing by junior employees. Since there are fewer controls on senior management, audits are more critical at that level. Relieving the appellant of liability here would not promote legal responsibility but immunize against it. Doing so would defeat any deterrence objective behind auditor liability. In the case at bar, wrongdoers are specifically excluded from recovery.⁴⁸ Defendants can ensure more generally that wrongdoers are excluded from recovery by joining them as parties and claiming contribution or indemnity.

34. Finally, holding auditors accountable here creates no injustice. An auditor's task is to opine on whether management's financial statements complied with GAAP. The appellant defended itself in the courts below and before disciplinary tribunals, in part, by relying on management's

⁴⁶ *Hall v Hebert* [1993] 2 SCR 159, **ABOA, Vol II, Tab 47** at p 169 and 179-180.

⁴⁷ These policy considerations are largely reflected in an article cited by the trial judge: Darcy MacPherson, "Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Limited v Deloitte & Touche*" (2005) 41 Can Bus LJ 471; **IBOA, Tab 27** at pp 480-482.

⁴⁸ Trial Reasons at para 270, **AR, Vol I, Tab 2**; Appellate Reasons at para 151, **AR, Vol II, Tab 5**.

representations that the statements complied with GAAP. That, however, was the auditor's very job to determine. Auditors should not be able to "contract out" to management the very thing they are supposed to ascertain. The appellant's accounting regulator rejected this defence when it sanctioned the appellant's partners, as should this Court.⁴⁹

PART IV - SUBMISSIONS CONCERNING COSTS

35. CCGG is not asking for any cost order.

PART V - ORDER REQUESTED

36. CCGG requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2017.



Markus Koehnen
David W. Kent
Jeffrey Levine
McMillan LLP,
Counsel to the Intervener,
Canadian Coalition for Good Governance

⁴⁹ *Re Charges against Barrington, et al* (11 February 2007) ICAO Discipline Committee Decision at para 61-62, **IBOA, Tab 4**; *aff'd Barrington v. Institution of Chartered Accountants*, 2011 ONCA 409, **IBOA, Tab 5**.

PART VI - TABLE OF AUTHORITIES

Authority (Jurisprudence)	Paragraph Reference
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<i>Hercules Management Ltd. v. Ernst & Young</i> [1997] 2 SCR 165	1, 21, 22, 27, 28, 30
<i>Re Charges against Douglas Barrington, Peter Chant, Anthony Power and Claudio Russo</i> , (11 February 2007) ICAO Discipline Committee Decision	34
<i>Barrington v. Institution of Chartered Accountants</i> , 2011 ONCA 409	34
Authority (Secondary Sources)	
J. W. Adams, Chairman, “Report on the Special Committee to Examine the Role of the Auditor”, <i>CA Magazine</i> (April 1978) 35	7, 30
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Canadian Public Accountability Board, <i>Report on the 2010 Inspections of the Quality of Audits conducted by Canadian Public Accounting Firms</i> (Toronto: CPAB, 2011)	14
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PART VII - STATUTORY PROVISIONS

<p><i>Business Corporations Act, R.S.O. 1990, c. B.16</i></p> <p>Auditors</p> <p>149 (2) The shareholders shall at each annual meeting appoint one or more auditors to hold office until the close of the next annual meeting and, if an appointment is not so made, the auditor in office continues in office until a successor is appointed.</p> <p>Removal of auditor</p> <p>149 (4) The shareholders may, except where the auditor has been appointed by order of the court under subsection (8), by resolution passed by a majority of the votes cast at a special meeting duly called for the purpose, remove an auditor before the expiration of the auditor's term of office, and shall by a majority of the votes cast at that meeting appoint a replacement for the remainder of the auditor's term.</p> <p>Right of auditor to make representations</p> <p>149 (6) An auditor has the right to make to the corporation, three days or more before the mailing of the notice of the meeting, representations in writing, concerning,</p> <ul style="list-style-type: none"> (a) the auditor's proposed removal as auditor; (b) the appointment or election of another person to fill the office of auditor; or (c) the auditor's resignation as auditor, <p>and the corporation, at its expense, shall forward with the notice of the meeting a copy of such representations to each shareholders entitled to receive notice of the meeting.</p>	<p><i>Loi sur les sociétés par actions, L.R.O. 1990, chap. B.16</i></p> <p>Vérificateurs</p> <p>149 (2) Les actionnaires nomment, à chaque assemblée annuelle, un ou plusieurs vérificateurs dont le mandat expire à la clôture de la prochaine assemblée annuelle. À défaut de nomination, le vérificateur en fonction poursuit son mandat jusqu'à la nomination de son successeur.</p> <p>Destitution d'un vérificateur</p> <p>(4) Sauf si le vérificateur a été nommé par ordonnance du tribunal aux termes du paragraphe (8), les actionnaires peuvent le destituer par une résolution adoptée à la majorité des voix exprimées lors d'une assemblée extraordinaire régulièrement convoquée à cette fin avant l'expiration de son mandat. À cette assemblée, ils nomment à la majorité des voix son remplaçant pour la durée du mandat qui reste à courir.</p> <p>Droit du vérificateur de soumettre ses observations</p> <p>146 (6) Le vérificateur a le droit de soumettre à la société, au moins trois jours avant la mise à la poste de l'avis de convocation de l'assemblée, des observations par écrit concernant :</p> <ul style="list-style-type: none"> a) sa destitution proposée comme vérificateur; b) la nomination ou l'élection d'une autre personne pour combler son poste; c) sa démission en tant que vérificateur. <p>La société joint, à ses frais, un exemplaire de ces observations à l'avis de convocation et le fait parvenir à chaque actionnaire qui a le droit de recevoir cet avis.</p>
<p>Auditor's attendance at shareholders' meetings</p>	<p>Présence du vérificateur à l'assemblée</p>

<p>151 (1) The auditor of a corporation is entitled to receive notice of every meeting of shareholders and, at the expense of the corporation, to attend and be heard thereat on matters relating to the auditor's duties.</p> <p>Disqualification as auditor</p> <p>152 (1) Subject to subsection (5), a person is disqualified from being an auditor of a corporation if the person is not independent of the corporation, all of its affiliates, or of the directors or officers of the corporation and its affiliates.</p> <p>Independence</p> <p>152 (2) For the purposes of this section,</p> <p>(a) independence is a question of fact; and</p> <p>(b) a person is deemed not to be independent if the person or the person's business partner,</p> <p>(i) is a business partner, director, officer or employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of the corporation or any of its affiliates,</p> <p>(ii) beneficially owns directly or indirectly or exercises control or direction over a material interest in the securities of the corporation or any of its affiliates, or</p> <p>(iii) has been a receiver, receiver and manager, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within two years of the person's proposed appointment as auditor of the corporation.</p>	<p>151. (1) Le vérificateur de la société a le droit de recevoir avis de toute assemblée des actionnaires et d'y assister aux frais de la société et d'y être entendu sur toute question relative à ses fonctions de vérificateur.</p> <p>Qualités comme vérificateur</p> <p>152 (1) Sous réserve du paragraphe (5), pour être vérificateur d'une société il faut être indépendant de la société, des membres du même groupe et des administrateurs ou dirigeants de la société et des membres du même groupe.</p> <p>Indépendance</p> <p>152 (2) Pour l'application du présent article :</p> <p>a) l'indépendance est une question de fait;</p> <p>b) une personne ou son associé est réputé ne pas être indépendant dans les cas suivants :</p> <p>(i) la personne ou son associé est un associé, administrateur, dirigeant ou employé de la société, ou d'un membre du même groupe, ou un associé d'un administrateur, dirigeant ou employé de la société ou d'un membre du même groupe,</p> <p>(ii) la personne ou son associé est le propriétaire bénéficiaire directement ou indirectement d'une partie importante des valeurs mobilières de la société ou d'un membre du même groupe, ou en exerce le contrôle ou la direction,</p> <p>(iii) la personne ou son associé a été le séquestre, l'administrateur-séquestre, le liquidateur ou le syndic de faillite de la société ou d'un membre du même groupe, au cours des deux ans précédant la proposition de sa nomination au poste de vérificateur.</p>
<p>Examination by auditor</p> <p>153 (1) An auditor of a corporation shall make</p>	<p>Examen par le vérificateur</p> <p>153 (1) Le vérificateur de la société procède à</p>

<p>such examination of the financial statements required by this Act to be placed before shareholders as is necessary to enable the auditor to report thereon and the auditor shall report as prescribed and in accordance with generally accepted auditing standards.</p> <p>Information to be laid before annual meeting</p> <p>154 (1) The directors shall place before each annual meeting of shareholders,</p> <p>...</p> <p>(c) the report of the auditor, if any, to the shareholders; and</p> <p>Auditor's report</p> <p>154 (2) Except as provided in subsection 104 (1), the report of the auditor to the shareholders shall be open to inspection at the annual meeting by any shareholder.</p>	<p>l'examen des états financiers que la présente loi exige de soumettre aux actionnaires dans la mesure nécessaire pour lui permettre de produire son rapport. Il présente son rapport de la manière prescrite et conformément aux normes de vérification généralement reconnues.</p> <p>Renseignements présentés à l'assemblée annuelle</p> <p>154 (1) Les administrateurs présentent à chaque assemblée annuelle des actionnaires :</p> <p>...</p> <p>c) le rapport du vérificateur aux actionnaires, le cas échéant;</p> <p>Rapport du vérificateur</p> <p>154 (2) Sous réserve du paragraphe 104 (1), tout actionnaire peut consulter le rapport du vérificateur aux actionnaires à l'assemblée annuelle.</p>
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<p>Securities Act, R.S.O. 1990, c. S.5</p> <p>Purposes of Act</p> <p>1.1 The purposes of this Act are,</p> <p>(a) to provide protection to investors from unfair, improper or fraudulent practices; and</p> <p>(b) to foster fair and efficient capital markets and confidence in capital markets.</p> <p>Delivery of financial statements</p> <p>21.10 (4) A registrant that is not subject to section 21.9 shall deliver to the Commission annual audited financial statements, prepared in accordance with generally accepted accounting principles, and other regulatory filings as prescribed by the regulations, within ninety days after the end of its financial year or as otherwise prescribed by the regulations.</p> <p>Comparative financial statements</p> <p>78. (1) Every reporting issuer that is not a mutual fund and every mutual fund in Ontario shall file annually within 140 days from the end of its last financial year comparative financial statements relating separately to,</p> <p>(a) the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer or mutual fund has completed a financial year, the last financial year, as the case may be; and</p> <p>(b) the period covered by the financial year next preceding the last financial year, if any,</p> <p>made up and certified as required by the regulations and in accordance with generally accepted accounting principles.</p> <p>Auditor's report</p> <p>78 (2) Every financial statement referred to in</p>	<p>Loi sur les valeurs mobilières, L.R.O. 1990, chap. S.5</p> <p>Objets de la Loi</p> <p>1.1 Les objets de la présente loi sont les suivants :</p> <p>a) protéger les investisseurs contre les pratiques déloyales, irrégulières ou frauduleuses;</p> <p>b) favoriser des marchés financiers justes et efficaces et la confiance en ceux-ci.</p> <p>Présentation des états financiers</p> <p>21.10 (4) La personne ou la compagnie inscrite qui n'est pas assujettie à l'article 21.9 présente à la Commission des états financiers annuels vérifiés, préparés en conformité avec les principes comptables généralement reconnus, ainsi que les autres dépôts réglementaires prescrits par les règlements, dans les quatre-vingt-dix jours qui suivent la fin de son exercice ou dans l'autre délai que prescrivent les règlements.</p> <p>États financiers comparatifs</p> <p>78. (1) Chaque émetteur assujetti qui n'est pas un fonds mutuel et chaque fonds mutuel de l'Ontario déposent chaque année, dans les 140 jours suivant la fin de leur dernier exercice, des états financiers comparatifs distincts dressés et attestés comme l'exigent les règlements et conformément aux principes comptables généralement reconnus, se rapportant aux deux périodes suivantes :</p> <p>a) la période qui a commencé à la date de sa constitution en personne morale ou de son organisation et qui s'est terminée à la fin de son premier exercice ou, si l'émetteur assujetti ou le fonds mutuel a terminé un exercice, à la fin du dernier exercice, selon le cas;</p> <p>b) la période embrassant l'exercice qui a immédiatement précédé le dernier exercice, le cas échéant.</p> <p>Rapport du vérificateur</p> <p>78 (2) Chaque état financier visé au paragraphe (1) est accompagné d'un rapport du vérificateur de l'émetteur assujetti ou du fonds mutuel, établi conformément aux</p>
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subsection (1) shall be accompanied by a report of the auditor of the reporting issuer or mutual fund prepared in accordance with the regulations.

Auditor's examination

78 (3) The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make the report required by subsection (2).

règlements.

Examen du vérificateur

78 (3) Le vérificateur d'un émetteur assujetti ou d'un fonds mutuel procède aux examens qui lui permettent de préparer le rapport exigé par le paragraphe (2).

RRO 1990, Reg 1015 (as of 1998)**Under *Securities Act*, R.S.O. 1990, c. S.5**

1(3) Subject to subsection (4), for the purposes of the Act and this Regulation, where a recommendation has been made in the Canadian Institute of Chartered Accountants which is applicable in the circumstances, the terms “generally accepted accounting principles”, “auditor’s report”, and “generally accepted auditing standards” means the principles, report, and standards, respectively, recommended in the Handbook.

2(2) Except as otherwise provided in the Rules entitled “In the Matter of Regulation 910, R.R.O. 1980, as amended and In the Matter of the Multijurisdictional Disclosure System” (1991) 14 OSCB 2863 and National Policy Statement No. 45 (1991), 14 OSCB 2889, as amended, where an auditor reports on a financial statement required by the Act or this Regulation, the report shall be prepared in accordance with generally accepted auditing standards and with any applicable provision of the Act or this Regulation. O. Reg. 80/95, s. 2(1).

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tively an "Issuer") required to file financial statements with a securities regulatory authority in any province or territory in Canada in accordance with the requirements of the statutes concerning the regulation of securities markets and trading in securities in a jurisdiction, and the regulations in respect of these statutes ("Securities Legislation"), where the financial statements are accompanied by an auditor's report containing a reservation of opinion.

Part 2: Application

This policy statement applies to all financial statements filed by an Issuer, that are required to be audited, under the requirements of the Securities Legislation of any jurisdiction, unless otherwise specified in, or exempted by, the specific provisions of the Securities Legislation of that jurisdiction. The application of this policy statement to the financial statements that are required to be audited of an Issuer incorporated or organized in a jurisdiction other than Canada or a province of Canada (a "Non-Canadian Issuer") is set out in part 6.

Part 3: Financial Statements to be Prepared in Accordance with Canadian GAAP

The Securities Legislation of certain jurisdictions requires, subject to certain exceptions, that financial statements be prepared in accordance with generally accepted accounting principles in Canada ("Canadian GAAP") and with any applicable provisions of the Securities Legislation. Where the Securities Legislation of a jurisdiction is silent on the issue of compliance with generally accepted accounting principles, the securities regulatory authorities nonetheless require that Issuers prepare their financial statements in accordance with Canadian GAAP. See National Policy Statement No. 27 for a discussion of the meaning of "Canadian GAAP" and information on the additional accounting and disclosure requirements that may be imposed by certain jurisdictions.

Part 4: Audits to be Performed in Accordance with Canadian GAAS

Where an Issuer is required to file audited financial statements, the Securities Legislation of certain jurisdictions requires that the auditor make the necessary audit to be able to prepare an auditor's report in accordance with generally accepted auditing standards as set out in the Handbook of the Canadian Institute of Chartered Accountants ("Canadian GAAS") and with any applicable provisions of the Securities Legislation. In these jurisdictions, as well as in jurisdictions where the Securities Legislation is silent on the issue of compliance with generally accepted auditing standards, the securities regulatory authorities expect that the auditor will complete the audit, and prepare the auditor's report, in accordance with Canadian GAAS. For a full discussion of the meaning of "Canadian GAAS", see section 5100 of the Handbook of the Canadian Institute of Chartered Accountants.

Part 5: Reservations in an Auditor's Report

5.1 Acceptability of financial statements accompanied by an auditor's report containing a reservation of opinion

Where financial statements accompanied by an auditor's report containing a reservation of opinion are filed with the securities regulatory authorities, the securities regulatory authorities will generally take the position that the Issuer has not filed financial statements that are in compliance with the requirements of the Securities Legislation.

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5.2 Meaning of reservation of opinion

The expression "reservation of opinion" is used when an auditor

- (1) forms a positive opinion on the financial statements as a whole, but qualifies that opinion with respect to a departure from generally accepted accounting principles or a limitation in the scope of the audit (a "Qualified Opinion");
- (2) forms an opinion that the financial statements are not presented fairly in accordance with generally accepted accounting principles (an "Adverse Opinion"); or
- (3) is unable to form an opinion on the financial statements as a whole because of a limitation in the scope of the audit (a "Denial of Opinion").

See section 5510 of the Handbook of the Canadian Institute of Chartered Accountants for a discussion of the circumstances when the auditor is unable to express an opinion without reservation on financial statements.

5.3 Financial statements accompanied by a reservation of opinion acceptable in limited circumstances

The securities regulatory authorities recognize that, in certain limited circumstances, it may be in the public interest to accept, for the purpose for which they are filed, financial statements on which the auditor is not able to express an opinion without reservation. Subject to part 7, where the Securities Legislation gives the appropriate representative of the securities regulatory authority (the "Applicable Regulator") the discretion to accept financial statements accompanied by an auditor's report in which the auditor is not able to express an opinion without reservation, these financial statements will generally be accepted except where the reservation is:

- (1) due to a departure from Canadian GAAP; or
- (2) due to a limitation in the scope of the auditor's examination that
 - (a) results in a Denial of Opinion, or
 - (b) is imposed or could reasonably be eliminated by management, or
 - (c) could reasonably be expected to be recurring.

5.4 Example of application of section 5.3

Financial statements will generally be accepted where the reservation of opinion is due to a limitation in the scope of the auditor's examination resulting from an event that clearly limits the availability of accounting records that substantiate a specific financial statement balance to such an extent that the Issuer is unable to provide its auditor with sufficient appropriate audit evidence to afford a reasonable basis for the auditor to express an opinion without reservation on the financial statements as a whole. In such a circumstance, for the financial statements to be considered for acceptance the auditor must have performed all of the other procedures necessary and reasonable under the circumstances and as required by Canadian GAAS on the financial statements except those that cannot be performed because of the limiting event.

5.5 Action by securities regulatory authorities where financial statements accompanied by a reservation of opinion

Subject to part 7, where financial statements accompanied by an auditor's report containing a reservation of opinion are filed with the securities regulatory authorities in circumstances other

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than those acceptable to the securities regulatory authorities, the securities regulatory authorities may:

- (1) require the Issuer to revise its financial statements or provide its auditor with the necessary information, as is appropriate in the circumstances, such that the financial statements are prepared in accordance with Canadian GAAP and the audit is completed, and auditor's report is prepared, in accordance with Canadian GAAS;
- (2) issue a cease trading order, if the financial statements are filed as part of an Issuer's continuous disclosure obligations under the Securities Legislation;
- (3) suspend, cancel or restrict the registration of an Issuer, if the financial statements are filed as part of the Issuer's obligation to file financial statements under the Securities Legislation;
- (4) refuse to issue a receipt for a preliminary or final prospectus, if the financial statements form part of, or are incorporated by reference into, that prospectus, or
- (5) use the remedies available under the Securities Legislation, if the financial statements form part of, or are incorporated by reference into, an offering memorandum or a take-over bid circular.

Part 6: Financial Statements of Non-Canadian Issuers

6.1 Financial statements of Non-Canadian Issuers accompanied by an auditor's report containing a reservation of opinion

Where the financial statements of a Non-Canadian Issuer are accompanied by an auditor's report that contains a reservation of opinion due to either

- (1) a departure from the applicable non-Canadian generally accepted accounting principles ("Non-Canadian GAAP"), or
- (2) a limitation in the scope or application of the audit under the applicable non-Canadian generally accepted auditing standards ("Non-Canadian GAAS"),

the principles set out in part 5 will apply. The principles set out in part 5 will also apply where Non-Canadian GAAS does not require the expression of a reservation of opinion in situations where Canadian GAAS would require a reservation to be included.

6.2 Financial statements of Non-Canadian Issuers where reservation not required by Canadian GAAS

Where Non-Canadian GAAS requires the expression of a reservation of opinion in situations where Canadian GAAS would not require such a reservation, and in all other respects the financial statements and auditor's report comply with all of the requirements of the applicable Securities Legislation, the securities regulatory authorities will generally take the position that the Non-Canadian Issuer has filed financial statements that are acceptable for the purpose for which they were filed. This position will also be taken when the auditor's report that accompanies a Non-Canadian Issuer's financial statements includes additional emphasis paragraphs in situations that do not represent or require a reservation of opinion under Canadian GAAS.

6.3 Example of application of section 6.2

A report prepared in accordance with generally accepted auditing standards in the United States may include an additional emphasis paragraph where there is uncertainty as to an issuer's