File No. 40166

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

B E T W E E N :

JOHN AQUINO, 2304288 ONTARIO INC., MARCO CARUSO,
GIUSEPPE ANASTASIO a.k.a. Joe Ana AND LUCIA COCCIA a.k.a. Lucia Canderle

Appellants (Appellants)

- and -

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor
of Bondfield Construction Company Limited, and KSV KOFMAN INC., in its capacity as
Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Respondents (Respondents)

- and -

THE ATTORNEY GENERAL FOR ONTARIO and
INSOLVENCY INSTITUTE OF CANADA

Interveners

FACTUM OF THE RESPONDENT
ERNST & YOUNG INC., IN ITS CAPACITY AS COURT APPOINTED MONITOR OF BONDFIELD CONSTRUCTION COMPANY LIMITED ON APPEAL
(Rule 42 of the *Rules of Supreme Court of Canada*)

CASSELS BROCK & BLACKWELL LLP
Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON   M5H 3C2

Alan Merskey
Tel: 416.860.2948
amerskey@cassels.com

NORTON ROSE FULBRIGHT CANADA LLP
Barristers and Solicitors
222 Bay Street, Suite 3000
Toronto ON M5K 1E7

Evan Cobb
Tel: 416.216.1929
evan.cobb@nortonrosefulbright.com

Stephen Taylor
Tel: 416.216.2436
stephen.taylor@nortonrosefulbright.com

Counsel for the Respondent, Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

LAW OFFICE OF TERRY CORSIANOS
1595 16th Avenue, Suite 301
Richmond Hill, ON L4B 3N9

Terry Corsianos
Tel: 905.709.7463
tcorsianos@corsianoslaw.com

CORSIANOS LEE
Barristers & Solicitors
3800 Steeles Avenue east, Suite 203W
Vaughan, ON L4L 4G9

George Corsianos
Tel: 905.370.1095
gcorsianos@cl-law.ca

Counsel for the Appellants

SUPREME LAW GROUP
1800 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: 613.691.1224
mdillon@supremelawgroup.ca

Agent for Counsel for the Appellants

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2

Jeremy Opolsky
Tel: 416.865.8117
jopolsky@torys.com

Craig Gilchrist
Tel: 416.865.7629
cgilchrist@torys.com

Alex Bogach
Tel: 416.865.7379
abogach@torys.com

Lawyers for the Respondent, KSV Restructuring Inc., in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

Jean-Simon Schoenholz
Tel: 613.780.1537
jean-simon.schoenholz@nortonrosefulbright.com

Agent for Counsel for the Respondent, KSV Restructuring Inc., in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Dona Salmon
Tel: 647.213.0021

Email: dona.salmon@ontario.ca

Jennifer Boyczuk
Tel: 416.909.6673
Email: jennifer.boyczuk2@ontario.ca

Counsel for the Intervener,
The Attorney General for Ontario

JURISTES POWER LAW
50 O'Connor Street, Suite 1313
Ottawa, ON K1P 6L2

Maxine Vincelette
Tel: 613.702.5573
Email: mvincelette@juristespower.ca

Agent for Counsel for the Intervener,
The Attorney General for Ontario

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Natasha MacParland
Tel: 416.863.5567
nmacparland@dwpv.com
Chanakya A. Sethi
Tel: 416.863.5516
csethi@dwpv.com
Rui Gao
Tel: 416.367.7613
rgao@dwpv.com

Counsel for the Intervener,
Insolvency Institute of Canada

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: 613.282.1712
msobkin@sympatico.ca

Agent for Counsel for the Intervener,
Insolvency Institute of Canada

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PART I - STATEMENT OF POSITION AND FACTS

A. Statement of Position

1. Tens of millions of dollars were siphoned out of Bondfield Construction Company Ltd. (**BCCL**) through a false invoice scheme perpetrated by its president and directing mind, John Aquino, and the other appellants. Justice Dietrich, of the Ontario Superior Court, in a decision upheld by the Ontario Court of Appeal, found that the transfers were "transfers at undervalue" made by BCCL with the intent to "defraud, defeat or delay a creditor" within the meaning of s. 96 of the *Bankruptcy and Insolvency Act* (***BIA***).[1]

2. The appellants challenge this decision, arguing that the standard for corporate attribution from *Canadian Dredge*, a "legal fiction invented for pragmatic reasons" to ensure that corporate liability for the acts of its directing minds is established in a purposive manner,[2] should be extended to the statutory remedy of s. 96, notwithstanding its fundamentally different purpose. Section 96 does not address or impose corporate liability. Rather, s. 96 helps to achieve a core purpose of the *BIA* – to ensure the fair treatment of creditors and maintain the integrity of the insolvency regime – by allowing the trustee (or Monitor in the *CCAA* context)[3] to recover value stripped from a debtor for no or insufficient consideration and return it to the corporation and its creditors.

3. It is axiomatic that statutes must be interpreted purposively. However, the extension of the *Canadian Dredge* standard of corporate attribution to s. 96 fails to serve any purpose whatsoever. It does not serve the rationale described in *Canadian Dredge* given the absence of corporate

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[1] RSC 1985, c B-3, s 96 [***BIA***].

[2] *Canadian Dredge & Dock Co. v The Queen*, 1985 CanLII 32 (SCC), [1985] 1 SCR 662 at paras 13, 48, 52, 56 [*Canadian Dredge*]; *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63 (CanLII) at paras 102-103 [*Livent*].

[3] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 36.1 [*CCAA*].

liability under s. 96. Moreover, it actively undermines the statutory purpose of s. 96 by limiting its application to asset stripping that somehow benefits the corporation, thereby creating a broad exception to the statute for an archetypal example of corporate asset stripping – a corporate principal removing assets from the corporation for his own benefit and to the detriment of creditors.

4. The appellants' approach to corporate attribution under s. 96 was rejected by the application judge and a unanimous panel of the Court of Appeal as contrary to the purpose of s. 96 and "perverse". Instead, the courts below held that under s. 96, the intent of a directing mind should be attributed to the corporation, even in the absence of any intended benefit to the corporation. This approach should be adopted by this Court.

5. The appellants also challenge the application judge's detailed analysis of BCCL's financial condition at the time of the impugned transactions and factual findings of BCCL's intent to defraud creditors. As noted by the Court of Appeal, this issue is rooted in findings of fact that are owed significant deference on appeal, and the appellants have failed to indicate any palpable and overriding error in the application judge's determination.

6. The respondents on appeal are the Monitor of BCCL and the Trustee in bankruptcy of Forma-Con, which was faced with a substantively identical scheme. The respondents have agreed to divide the arguments amongst themselves, with the Monitor focused on the statutory scheme of s. 96 and the factual issues pertaining to the financial health of the corporate debtors, and the Trustee focused on the common law doctrine of corporate attribution. The Monitor endorses the Trustee's submissions.

B. Respondent's Statement of Facts

7. The appellants' statement of facts is incomplete and describes only in a cursory nature BCCL, the fraudulent scheme, and the facts surrounding BCCL's financial condition. The Monitor supplements these points below.

i. The false invoice scheme

8. Between April 3, 2014 and April 3, 2019 – the statutory five year period prior to BCCL's *CCAA* filing – John Aquino, acting with the other appellants, transferred $21,807,693 out of BCCL for no value (the **Impugned Transactions**). These transactions were carried out through a false invoicing scheme as follows:

(a) from 2011 to 2018, entities that purported to be suppliers of BCCL (the **BCCL Supplier Respondents**) delivered invoices to BCCL seeking payment for services or materials that were never provided;[4]

(b) the BCCL Supplier Respondents received $21,807,693 during the review period due to their participation in the scheme. An additional $20,451,749 in false invoices fell outside the review period;[5]

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[4] Reasons for Decision of Justice Dietrich dated March 19, 2021, 2021 ONSC 527 (**Application Decision**) at para 61, Record of the Appellants (**Record**), Part I, Tab C, p 17; Seventh Supplement to the Phase II Investigation Report of the Monitor dated August 18, 2020 (**Seventh Supplement**) at paras 15-16, Record, Part IV, Vol. 5, Tab 12, p 1664; Phase II Investigation Report of the Monitor dated October 30, 2019 (**Phase II Report**) at paras 24-35, 55-57, Record, Part IV, Vol. I, Tab 3, pp 235-239, 245-247.

[5] Application Decision at para 65, Record, Part I, Tab C, p 17; Seventh Supplement at para 30, Record, Part IV, Vol. 5, Tab 12, p 1668. The amounts outside the review period are subject to a separate proceeding.

(c) the BCCL Supplier Respondents did not appear to have any business activity and many shared addresses, phone numbers, or bank accounts;[6]

(d) John Aquino, the president and a directing mind of BCCL,[7] operated the scheme from inside BCCL and received, approved and made payment on the false invoices. In turn, John Aquino benefitted personally from the scheme. His personal corporation received at least $5,829,939 from the BCCL Supplier Respondents during the review period, $5,184,346 of which was transferred to John Aquino directly;[8] and

(e) Outside of BCCL, the Respondents Caruso, Anastasio, Coccia and Siracusa acted on behalf of BCCL Supplier Respondents, being certain of the shell companies that supplied the invoices.[9]

9. The appellants initially denied the nature of the false invoicing scheme.[10] Among other things, they specifically took issue with the Monitor's contention that no value was received by BCCL for the transfers or that the consideration received by the debtors was "conspicuously less than the fair market value of the consideration given by the debtor" per the statutory definition of

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[6] Application Decision at para 62, Record, Part I, Tab C, p 17; Phase II Report at paras 28, 30, 37, Record, Part IV, Vol. I, Tab 3, pp 236, 240.

[7] Application Decision at para 196, Record, Part I, Tab C, pp 41-42.

[8] Application Decision at paras 66-72, Record, Part I, Tab C, pp 17-18.

[9] Application Decision at para 66, Record, Part I, Tab C, p 17.

[10] Application Decision at para 24, Record, Part I, Tab C, p 11.

a “transfer at undervalue”. John Aquino specifically alleged that the payments by BCCL were “for valuable consideration”.[11]

10. However, under cross-examination shortly before the hearing of the application, the appellants each admitted that “they did not dispute the Monitor’s contention that no value was provided by any of the suppliers identified by the Monitor for any of the transfers underlying these false invoices”.[12]

ii. The appellants’ position on fraud

11. The appellants did not admit that the transactions were a fraud on BCCL or its shareholders orchestrated by John Aquino. To the contrary, John Aquino and the other respondents asserted that the Impugned Transactions were carried out with the knowledge and approval of all the directors of BCCL.[13]

12. BCCL was a closely-held corporation owned by the Aquino family. At the relevant times, the family patriarch, Ralph Aquino, was the controlling shareholder of BCCL. Steven Aquino, the son, was also a shareholder and vice president. John Aquino, the other son, was BCCL’s president, a shareholder and was the “principal with primary responsibility and control over BCCL’s finances”.[14]

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[11] Affidavit of John Aquino sworn July 27, 2020 at para 46, Record, Part IV, Vol. 10, Tab 21, p 3612.

[12] Application Decision at para 24, Record, Part I, Tab C, p 11; Cross-examination of John Aquino held September 3, 2020 (**John Aquino Cross**), q 223, Record, Part IV, Vol. 19, Tab 36, p 7068.

[13] Application Decision at paras 49-51, 195-196, Record, Part I, Tab C, pp 14-15, 41-42.

[14] Application Decision at paras 12-13, Record, Part I, Tab C, p 10.

13. John Aquino took the position that "all major decisions in the Bondfield Group were made by Ralph, Steven and him and that at the highest level it was a three-man operation".[15] John Aquino specifically alleged that "Ralph and Steven were fully aware of the alleged impugned transactions".[16] The other appellants took the same position.[17]

14. The application judge ultimately determined that John Aquino's intent was relevant for assessing the intent of BCCL in carrying out the Impugned Transactions:

> As a directing mind and a shareholder of BCCL and Forma-Con, John Aquino exercised total control over the false invoicing schemes, in respect of which he tacitly acknowledged his wrongdoing. […] This degree of control by John Aquino, in and of itself, militates in favour of imputing his intent to defeat creditors to BCCL and Forma-Con.[18]

15. The application judge further held that the acts John Aquino undertook fell within his "area of responsibility […] engaging with suppliers and overseeing the provision of services and materials",[19] and that "for the purposes of … the false invoicing schemes, John Aquino controlled … BCCL and Forma-Con".[20]

16. With respect to Ralph and Steven Aquino, the application judge noted the absence of any evidence of their participation in the false invoice scheme, but determined that the appellants' position on their involvement "support the Monitor's and the Trustee's position that the BCCL

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[15] Application Decision at para 51, Record, Part I, Tab C, p 15.

[16] Application Decision at para 51, Record, Part I, Tab C, p 15.

[17] Affidavit of Giuseppe Anastasio sworn June 19, 2020 at para 10, Record, Part IV, Vol. 7, Tab 18, p 2463; Affidavit of Marco Caruso sworn January 9, 2020 at paras 6-7, Exhibit 7 to the Affidavit of John Aquino sworn June 14, 2020, Record, Part IV, Vol. 8, Tab 19, pp 2637-2638.

[18] Application Decision at para 231, Record, Part I, Tab C, pp 48-49.

[19] Application Decision at para 215-216, Record, Part I, Tab C, p 45.

[20] Application Decision at para 139, Record, Part I, Tab C, p 31.

impugned transactions and the Forma-Con impugned transactions were entered into with an intent to defraud, defeat or delay creditors."[21]

iii. Badges of fraud

17. Having determined that John Aquino's intent should be ascribed to BCCL, the application judge relied primarily upon the well-established "badges of fraud" analysis to examine the circumstances surrounding the Impugned Transactions and to draw appropriate inferences surrounding the intent of the transfers.

18. The application judge found that the totality of the evidence provided a firm basis for finding that BCCL had an intent to defraud, defeat or delay creditors. The transfers were made in secret, in haste, to non-arm's length persons, for no consideration, at a time when BCCL had significant long-term creditors and was expanding without the support of its primary lender. Concurrently, "John Aquino and Ralph were temporarily transferring funds to BCCL for the sole purpose of misleading BCCL's stakeholders, including its lenders, into believing that BCCL was in a stronger financial position than it was".[22]

iv. The appellants' evidence on BCCL's financial condition

19. The application judge also considered the appellants' evidence that there was no intent to defraud, defeat or delay BCCL's creditors in light of BCCL's alleged financial condition at the time of the transfers.

20. Justice Dietrich held that the financial circumstances of the debtors was a relevant but not determinative consideration and that it must be considered in light of the circumstances as a

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[21] Application Decision at para 196, Record, Part I, Tab C, pp 41-42.

[22] Application Decision at paras 156-161, Record, Part I, Tab C, pp 34-35.

whole.[23] Her Honour specifically noted the Monitor's concerns about the trustworthiness of BCCL's financial statements, its assertion that BCCL was not financially healthy, and the findings of its investigations, including:[24]

(a) BCCL's financial records, prepared under the supervision of John Aquino, "vastly overstated the revenues and profitability of its projects in the relevant period, causing BCCL to have to book significant adjusting journal entries under the supervision of the Monitor";

(b) Zurich, BCCL's bonding company, had "encountered stated losses of over $300,000,000 to date in paying sub-trades and completing BCCL projects, which losses arose from projects and project activities started many years before the CCAA filing";

(c) "BCCL's loan was placed in 'special loans' by its prior lender, The National Bank, no later than the start of 2017";

(d) BCCL faced "persistent liquidity challenges as evidenced in part by John Aquino's steps to inject cash into BCCL temporarily at the beginning of 2014 through 2017 in order to improve the appearance of BCCL's liquidity for the purposes of its bonding and lending arrangements";

(e) incorrect supplier invoice dates were entered into the accounting system and cheques were held back to conceal the stretching of accounts payable. In June 2018, $23,214,486.95 of cheques written to suppliers but not yet released were discovered

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[23] Application Decision at paras 164, 186-188, Record, Part I, Tab C, pp 36, 40.

[24] Application Decision at paras 168-174, Record, Part I, Tab C, pp 36-37; Seventh Supplement at paras 44-68, Record, Part IV, Vol. 5, Tab 12, pp 1671-1678.

at BCCL's office. BCCL's accounting records showed these amounts as paid at the time the cheques were written;

(f) BCCL's accounts receivables had been overstated "in a problematic fashion" and the collectability of those receivables was in continual decline;

(g) not long after the *CCAA* filing, BCCL began to "recognize large reversals of previously recognized revenue and profits because it had been previously recognizing revenue and earnings aggressively and without taking into account known cost overruns and project delays". This resulted in BCCL restating its accounting records, with the assistance of the Monitor, leading to an increase in adjusted deferred revenue from $37,000,000 as of March 31, 2018, to roughly $170,000,000 as of September 30, 2019;

(h) BCCL had overstated the level of completion of its projects during the review period and recognized revenue early as a result;

(i) BCCL reported net losses of $382,000,000 from 2018 to 2020. A significant portion of those losses actually arose much earlier but had not been accurately recorded in the prior year's financial statements; and

(j) BCCL took "write-offs for accounts receivable amounts of $53,000,000 relating to the Bondfield review period in the fourth quarter of 2018".

21. Justice Dietrich found that John Aquino was directly implicated in the inaccuracies and unreliability of BCCL's financial statements, noting that he had knowledge of the state of BCCL's projects and finances, but allowed the financial statements to be prepared in reliance on inaccurate

information.[25] Her Honour concluded that the "true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court", but that the financial information available could not support John Aquino's assertions of financial health or rebut the other clear indications of an intent to defraud creditors, particularly in light of the "number of unusual accounting practices" described by the Monitor.[26]

22. Justice Dietrich ultimately determined that, based on the totality of the evidence, the Monitor had established that BCCL had the requisite intent to defraud, defeat or delay BCCL's creditors.[27] The Court of Appeal held that such findings were entitled to significant deference and upheld these findings on appeal.[28]

PART II - QUESTIONS IN ISSUE

23. The Monitor submits that the statement of issues as framed by the appellants is overly narrow and argumentative. The issues on appeal should be framed as follows:

(a) Whether the courts below erred in law in their application of the standards of corporate attribution for the purposes of determining that BCCL "intended to defraud, defeat, or delay a creditor" under s. 96 of the *BIA*; and

(b) Whether the Court of Appeal erred in upholding Justice Dietrich's factual findings of BCCL's intent in light of the evidence of BCCL's financial condition.

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[25] Application Decision at para 171, Record, Part I, Tab C, p 37.

[26] Application Decision at paras 190-193, Record, Part I, Tab C, pp 40-41.

[27] Application Decision at paras 160-197, Record, Part I, Tab C, pp 35-42.

[28] Appeal Decision at para 46, Record, Part I, Tab F, pp 100-101.

24. It is the Monitor's position that:

(a) The courts below did not err in their treatment of corporate attribution. Both the statutory scheme and common law required John Aquino's intent to be attributed to BCCL; and

(b) The application judge's determination that BCCL in fact intended to defraud, defeat or delay its creditors was well-supported by the evidence, is entitled to significant deference and was properly maintained by the Court of Appeal.

PART III - STATEMENT OF ARGUMENT

A. Corporate Attribution

25. The Monitor submits that, applying the ordinary canons of statutory interpretation to s. 96 of the *BIA*, the intent of a corporation's directing mind should be attributed to the corporation for the purposes of determining intent under that provision, even when the actions of the directing mind have no intended benefit to the corporation.

1. Section 96 of the *BIA* must be interpreted purposively

26. Section 96 is a statutory remedy. The specific statutory provision at issue is section 96(1)b(ii)(B), which provides in relevant part:

> **96 (1)** On application by the trustee, a court may declare that a transfer at undervalue [being a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor] is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if […]
>
> **(b)** the party was not dealing at arm's length with the debtor and

> **(ii)** the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and […]
>
> **(B)** the debtor intended to defraud, defeat or delay a creditor.

27. The relevant phrase for the purposes of this appeal is "the debtor intended to defraud, defeat or delay a creditor". The process of interpreting that phrase is one of statutory interpretation that must be conducted in accordance with ordinary and fundamental rules of statutory interpretation, namely:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[29]

28. The courts should have "regard to the text, context and purpose" of the statute in resolving questions about its meaning,[30] with particular focus on statutory purpose:

> the best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction.[31]

29. A purposive approach is also mandated by section 12 of the *Interpretation Act*, which provides, "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[32]

30. A purposive, large and liberal approach has been specifically adopted by the Supreme Court under substantively similar provincial fraudulent conveyance statutes that provide for

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[29] *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC) at para 21.

[30] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 (CanLII) at para 118.

[31] *R v Z (DA),* [1992] 2 SCR 1025, 1992 CanLII 28 (SCC) at p 1042.

[32] *Interpretation Act,* RSC 1985, c I-21, s 12.

similar remedies outside of the insolvency context.[33] This approach can be traced back to the seminal decision of *Twyne's Case*, interpreting the *Statute of Elizabeth* – the predecessor to fraudulent conveyance legislation and s. 96 of the *BIA*: "it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally construed and beneficially expounded to supress the fraud."[34] This principle achieved its broadest expression in the *dicta* of Lord Mansfield that the statute "cannot receive too liberal a construction, or be too much extended in suppression of fraud."[35]

i. Purposive analysis

31. The appropriate starting point for considering corporate attribution under s. 96 is the purpose of Canada's insolvency regime, as well as the specific purpose of s. 96. The Court should then consider the meaning of the phrase "the debtor intended to defraud, defeat or delay a creditor" in light of that purpose to consider whose intent should be ascribed to a corporate debtor in order to best achieve the ends of the legislation.

(1) The purpose of insolvency legislation

32. Section 96 of the *BIA*, which is incorporated into the *CCAA* by s. 36.1 thereof, should be understood within the context of the general principles of Canada's insolvency regime, which include (i) fair and equitable treatment of creditors; and (ii) the financial rehabilitation of insolvent

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[33] *Royal Bank of Canada v North American Life Assurance Co*., 1996 CanLII 219 (SCC) at para 59.

[34] *Twyne's Case*, 3 Co. Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601) at p 815-816, BOA, Vol 1, Tab 14.

[35] *Cadogan v Kennett*, (1776), 2 Cowp. 432 (K.B.) at p 434, BOA, Vol 1, Tab 1. See similarly Charles RB Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed (Toronto: Carswell, 1995) at 598, BOA, Vol 2, Tab 18; *Optical Recording Laboratories Inc. v Digital Recording Corp.*, [1990] OJ No 2311, 1 OR (3d) 131 (ON CA) at pp 12-13, BOA, Vol 1, Tab 9; *Salna v Hie*, 2007 CanLII 50285 (ON SC) at para 24.

debtors.[36] These purposes were commented on by the Standing Senate Committee on Banking, Trade and Commerce in the Kroft Report, which preceded amendments to the *BIA* and *CCAA*, including the introduction of s. 96,[37] and explained that fairness for debtors and creditors lies at the core of Canada's insolvency laws:

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[36] *Husky Oil Operations Ltd. v Minister of National Revenue*, 1995 CanLII 69 (SCC) at para 7. See also Appeal Decision at para 64, Record, Part I, Tab F, p 109; Frank Bennett, *Bennett on Creditors and Debtors Rights and* Remedies, 5th ed (Toronto: Carswell, 2006) at 408, BOA, Vol 2, Tab 17; Lloyd W. Houlden, "Bankruptcy in Canada" (Special Lectures of the Law Society of Upper Canada, Toronto, 1956) at 1-3, BOA, Vol 2, Tab 21; Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009) at 4-5, BOA, Vol 2, Tab 26.

The history and purpose of insolvency law, and its overarching concern with not only fairness but also the avoidance of fraud on creditors is discussed in length in the Tassé Report, which was a detailed study of insolvency regimes in Canada and internationally in order to recommend potential changes to the statutory scheme. See Consumer and Corporate Affairs Canada, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (June 1970) (Chair: Robert Tassé) [**Tassé Report**] at 2.1.02 ("Bankruptcy legislation is an attempt, on the one hand, to identify and relieve the insolvent debtor who cannot meet his obligations, and, on the other hand, to ensure that his creditors will be treated fairly and equitably"), and 3.0.02-3.0.04 ("It is important, therefore, that above all else, the bankruptcy system should be fair and equitable in the demands it makes and the settlements it imposes. … In achieving this, equity must be done among and for all and their debtor. Creditors must be protected from over-reaching and creditors grasping creditors as well as from fraudulent debtors. Assets that a debtor has given away or in any other way disposed of, with the effect of giving some creditors an unjustifiable preference over the others or, in any way, defeating the creditors generally, must be pursued and recovered.")

[37] Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Richard H. Kroft) [**Kroft Report**].

The Kroft Report recommended revisions to Canada's insolvency laws, including the rules for challenging transfers at undervalue. Bill C-55 was the predecessor of Bill C-12 (which gave rise to section 96 of the *BIA* to its current form) and was aimed at realizing the recommendations in

> Canada's insolvency system must be – and must be perceived to be – fair. Fairness is an essential consideration not only for Canadians, but also for residents of other countries. It must be fair for debtors, who should be provided with tools to avoid bankruptcy if that is the best option or with a true "fresh start" when they are discharged from their bankruptcy, and for creditors, who extend credit with the expectation of full repayment on a timely basis or, when this circumstance does not occur, are provided with a predictable, fair and orderly means by which loss is both shared appropriately and minimized to the extent possible.[38]

(2) Purpose and scope of section 96

33. Section 96 forms part of the reviewable transaction powers of a bankruptcy trustee, which allow a trustee to void or set aside transfers, or otherwise recover assets that have been unfairly removed from the pool of assets available to creditors. These powers promote the goals of Canada's insolvency regime by promoting fairness and equality of treatment for all creditors, while

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the Kroft Report. However, Bill C-55 ultimately never came into force. (Stephanie Ben-Ishai & Anthony Duggan, *Canadian Bankruptcy and Insolvency Law - Bill C-55, Statute c.47 and Beyond* (Canada: LexisNexis Canada, 2007) at 5-6, BOA, Vol 2, Tab 16; see also *Debates of the Senate*, 38-1, vol 142 (November 25, 2005) at 1030 (Jerry Grafstein)). Instead, the Act was repealed and replaced by Bill C-12 in 2007. The version of s. 96 that came into force with Bill C-12 was substantively similar to the version enacted in Bill C-55, with the central differences being that (i) Bill C-55 formulated intent as the intent "to defeat the interests of creditors", which was subsequently modified to the current language; and (ii) the definition of "transfer at undervalue" was broadened to expressly include a transaction for "no consideration" (see Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess, 38th Parl, 2005, cl 5, 73 (assented to November 25, 2005), SC 2005, c 47, s 5, 73 [***Bill C-55***]); Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2nd Sess, 39th Parl, 2005, cl 3, 43 (assented to December 14, 2007), SC 2007, c 36, s 3, 43 [***Bill C-12***].)

[38] Kroft Report, *supra* note 37 at 5.

ensuring that a debtor is dealing fairly with its creditors such that the opportunity for financial rehabilitation available to debtors is not abused.

34. In *Merit Management Group, LP v FTI Consulting, Inc*, the U.S. Supreme Court explained that powers that allow bankruptcy trustees to set aside transfers and recover their value to the estate "help implement the core principles of bankruptcy":

> Chapter 5 of the Bankruptcy Code affords bankruptcy trustees the authority to "se[t] aside certain types of transfers ... and ... recaptur[e] the value of those avoided transfers for the benefit of the estate." These avoiding powers "help implement the core principles of bankruptcy." For example, some "deter the race of diligence of creditors to dismember the debtor before bankruptcy" and promote "equality of distribution." Others set aside transfers that "unfairly or improperly deplete ... assets or ... dilute the claims against those assets."[39] [citations omitted]

35. Canadian courts have also addressed the specific purposes of the predecessor provisions to s. 96. The Supreme Court of Canada and Ontario Court of Appeal have explained that the primary intent of the provision "is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person", and that the provision should be interpreted broadly to give effect to that purpose.[40]

36. Section 96 achieves this end by providing that designated transfers are void as against a trustee in bankruptcy and allowing for liability against parties or privies to the transfer. The statute

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[39] *Merit Management Group LP v FTI Consulting Inc.*, 138 S Ct. 883 (2018) at p 2. See also Appeal Decision at paras 23-24, Record, Part I, Tab F, pp 89-90.

[40] *People's Department Stores Inc. (Trustee of) v Wise,* 2004 SCC 68 (CanLII) at para 91 [***Peoples***]. See also *Bank of Montreal v EL04 Inc. (Just Between Us and Pink Elephant*), 2012 ONCA 80 (CanLII) at paras 22-25 [***EL04***]; *Urbancorp Toronto Management Inc. (Re),* 2019 ONCA 757 (CanLII) at para 48 [***Urbancorp***]; *David Jonas in Trust et al v McConnell et al*, 2014 ONSC 6169 (CanLII) at para 11 [***David Jonas***], citing Prof. Dunlop in *Creditor-Debtor Law in Canada*, 2nd ed at 598. See also Denis L McDonnell & John G Monroe*, Kerr on the Law of Fraud and Mistake* (London: Sweet & Maxwell, 1952) at 302-303, BOA, Vol 2, Tab 23.

thereby allows funds that were improperly stripped from the corporation to be returned to the corporation for the benefit of its creditors.

37. The strictest standards for reversing transactions are provided by paragraph 96(1)(a), which address circumstances in which the party is dealing at arm's length with a debtor. Such transfers may only be reversed within one year of the insolvency event in circumstances in which the debtor was insolvent (or rendered insolvent by the transfer) and intended to defraud, defeat or delay a creditor.

38. Paragraph 96(1)(b) addresses transfers to parties not dealing at arm's length with the debtor. The regime contemplates the right to reverse any transfer that occurred within one year of the initial bankruptcy event. A further right to reverse transfers within five years of the bankruptcy event arises if the debtor was insolvent at the time of the transfer or rendered insolvent by it, or if the debtor intended to defraud, defeat or delay a creditor.[41]

39. The required intent is ordinarily established through the proof of "badges of fraud" given the difficulty of ascertaining the state of mind of the debtor: "courts have been ready to rely on the surrounding circumstances as establishing *prima facie* the intent to defraud or delay… the so-called badges of fraud being nothing more than typical and suspicious fact situations which may be enough to enable the court to make a finding."[42] This approach has its genesis in the *Statute of Monopolies* and related fraudulent conveyance legislation, where badges of fraud can be traced to *Twyne's Case*.[43]

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[41] See *Montor Business Corporation v Goldfinger*, 2016 ONCA 406 (CanLII) at paras 51-77 [***Montor***].

[42] *David Jonas*, *supra* note 40 at para 11.

[43] *Twyne's Case*, *supra* note 34 at p 811, BOA, Vol 1, Tab 14.

40. Importantly, contrary to the circumstances considered in *Canadian Dredge* or *Dejong* where attribution would have led to liability for the corporation,[44] the provision does not give rise to liability for the debtor corporation. Section 96 provides a remedy to the "trustee" – who at law is the legal representative of both the bankrupt and all of its general creditors[45] – to avoid transfers at undervalue and to obtain an order that parties or privies to the transfer "pay to the estate" the difference in value. When used in the context of the *CCAA*, the remedy is given to the Monitor, who, in the context of such a claim, acts on behalf of the corporation itself.[46]

(3) Purposive approach to corporate attribution

41. The appellants argue that the conditions for corporate attribution set out in *Canadian Dredge* must be applied to s. 96, namely, that "an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation".[47] However, the extension of this rule to s. 96 is inconsistent with the statute's purpose.

42. Corporate asset stripping that is intended to defraud creditors is generally not intended to benefit the debtor corporation. Statutory rules allowing the reversal of asset stripping are intended to address the risk that principals of a corporation may deprive the corporation of property while retaining access to that property themselves – thereby defrauding or defeating the corporation's

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[44] *DBDC Spadina Ltd. v Walton*, 2018 ONCA 60 (CanLII) at paras 232-237, adopted on appeal *Christine DeJong Medicine Professional Corp. v DBDC Spadina Ltd.*, 2019 SCC 30 (CanLII) [***Christine DeJong***].

[45] Lloyd Houlden, Geoffrey Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell, 2009) (loose-leaf updated April 2023, release 4) (**Houlden, Morawetz & Sarra**), ch 2 at 36 and ch 5 at 460, BOA, Vol 2, Tab 22; *Mercure v Marquette & Fils Inc.*, 1975 CanLII 195 (SCC) at p 553.

[46] *CCAA*, s 36.1.

[47] *Livent*, *supra* note 2 at para 100.

creditors. Parliament raised its concern with exactly such transfers, commenting (in respect of the predecessor to s. 96) that the legislation was meant to address circumstances in which "in contemplation of bankruptcy the corporation would pay exorbitant salaries or expense allowances to officers of the company, or the debtor would sell at an unreasonably low price some of his assets to persons or corporations who in some way control the debtor."[48] Thus, the archetypal example of corporate asset stripping involves the transfer of assets to a non-arm's length party for insufficient or no consideration and effectively in fraud on the corporation.[49]

43. If the *Canadian Dredge* standard were to be applied, such transfers would fall outside of the scope of s. 96. Indeed, Justice Estey explained that corporate attribution should not arise in the criminal context where "the design of the dishonest employee was aimed squarely at reducing the financial stature of the employer".[50] However, providing tools to reverse the actions of a dishonest director who has taken steps to reduce the financial stature of a corporation is part of the core purpose of s. 96.

44. Application of the *Canadian Dredge* standard would fundamentally hamper achievement of the core purposes of the provision – promoting the fair treatment of creditors through the avoidance of transactions that removed assets from the pool of an insolvent corporation's available assets. Providing a broad exception by which corporate insiders can strip assets from a corporation without recourse for creditors would also undermine the *quid pro quo* underlying the insolvency

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[48] *House of Commons Debates*, 27-1, vol 6 (June 3, 1966) at 6488 (Pierre Cardin, Minister of Justice) [Pierre Cardin, Minister of Justice]. See also *Senate Committees*, Standing Committee on Banking, Trade and Commerce, *Evidence*, 27-1, vol 1 (March 23, 1966) at 38 [Standing Committee on Banking, Trade and Commerce, *Evidence*].

[49] See, for example, *Thomas Flynn & Sons Construction (Toronto) Ltd. v Laporte*, 1990 Carswell Ont 170, [1990] CLD 377 (ON SC) at p 7, BOA, Vol 1, Tab 13; *In Re Vaniman Intern., Inc.,* 22 BR 166 (Bankr EDNY 1982) at p 181, BOA, Vol 1, Tab 4.

[50] *Canadian Dredge, supra* note 2 at para 57.

regime – allowing the debtor a fresh start, but ensuring it is done in a manner that is *bona fide* and equitable for creditors.

45. The extent to which the rule proposed by the appellants strips s. 96 of meaning and stymies the purpose of the statutory scheme is illustrated by the example they provide in which s. 96 would apply to a corporate debtor under their proposed interpretation. The appellants posit a convoluted hypothetical in which a directing mind is stripping assets from a corporation, but does so in a manner that generates some charitable goodwill that the directing mind somehow intends to benefit the corporation.[51] No statutory purpose is achieved by restricting s. 96 to improbable niche cases. The appellants also fail to justify why the statute would seek to impose liability only in cases where the directing minds' motivations were at least in part *bona fide*, while excluding the most egregious forms of asset stripping, particularly in light of the creditor-protection purpose of the statute.

46. Although the appellants point to jurisprudence addressing when a corporation may be held liable for the acts of its directing mind in other contexts, their analysis is not purposive in nature. The appellants' approach to the statute would establish a broad and unprincipled exception to its scope that serves to promote, rather than prevent, the very sort of asset stripping that s. 96 is intended to address.

47. The fundamental difference in purpose is also illustrated by the use of the attribution standard in each case. In *Canadian Dredge*, the standard for corporate attribution was motivated by the Court's desire to shield from liability a corporation that itself was the victim of wrongdoing, particularly in light of a corporation's various stakeholders.[52] In this case, the wrongdoers

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[51] Appellants' Factum at para 30.

[52] *Canadian Dredge, supra* note 2 at paras 33, 57, 64.

themselves assert that those who are involved in or who benefitted from corporate asset stripping should be entitled to rely upon the same standards of attribution to shield themselves from liability and prevent the return the funds to the corporation for the benefit of the corporation and its other stakeholders.

48. In contrast to the appellants' approach, the rule applied by the Court of Appeal allows the statute to achieve its purpose. Professor Wood,[53] commenting on the decision below, explained the inconsistency between the appellants' approach to corporate attribution and the statute's purpose, and concluded that the Court of Appeal's interpretation "ensured that the policy of creditor protection in the BIA is not undermined":

> The reason why the corporate attribution principle is inappropriate in connection with both the transfer at undervalue provisions of the BIA and fraudulent conveyances law has to do with the highly distinctive nature of the rights at stake. The underlying goal is not to punish or deter the debtor or to award damages against the debtor, but rather to protect the interests of creditors. If successful, the action will result in the avoidance of the transaction or the granting of a judgment against the transferee.
>
> Although the creditors or their insolvency representatives must show that the debtor had the intention to defraud, defeat or delay creditors, it is the transferee rather than the debtor that suffers a loss if the transaction is impeached. It is for this reason that the corporate attribution principle must be modified when applying it to the reviewable transactions remedies. The social purpose of the legislation is to protect creditors from actions of the debtor that diminish the assets that are available for recovery of the creditor's claims, and this social purpose is served whether or not the directing mind is acting in fraud of the corporation.
>
> It will still be necessary to prove that the person who entered the transaction was the directing mind of the corporation and that this person intended to defraud, defeat or delay a creditor. However, it will be irrelevant whether the act was totally in fraud of the debtor corporation or if the debtor corporation received any benefit from it. These factors will be relevant if the debtor corporation is charged criminally or if fraud actions are brought against it. But the reviewable transactions remedies are aimed against the transferee rather than the debtor corporation, and the defences and protections afforded to transferees are to be found in the legislation itself and

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[53] Q.C. Professor of Business Law, Faculty of Law, University of Alberta and author of, among other things, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015).

> not from the application of the corporate attribution principle. The issue of attribution in this context is simply whether the person acting on behalf of the company was in fact in a position to exercise control with respect to the transaction in question.[54]

49. Interpreting s. 96 purposively requires rejection of the appellants' approach to corporate attribution. On the one hand, the legislative purpose of protecting creditors through the reversal of transactions that were intended to defraud their claims is hampered by the appellants' restrictive interpretation of corporate attribution. On the other hand, no purpose is served by excluding corporate intent in the absence of benefit to the corporation under a statutory scheme that returns the value of the transaction to the corporation for the benefit of its creditors rather than establishing corporate liability.

(4) The CCAA context

50. The appellants suggest that the *CCAA* context is somehow sufficiently different from the *BIA* context to require a different purposive analysis. The appellants have not fully articulated their theory of how the *CCAA* is substantively different from the *BIA* for the purpose of interpreting s. 96. This theory is not consistent with the jurisprudence: the Supreme Court has noted the fundamental need for ensuring consistency between the *BIA* and *CCAA* to allow those statutes to achieve their purposes:

> If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.[55]

[54] Roderick J. Wood, "Ernst & Young Inc v Aquino: Attributing Fraudulent Intent to a Defrauded Corporation" (2022) 66 CBLJ 251 at 260-261 (**Wood**), BOA, Vol 2, Tab 26.

[55] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 (CanLII) at para 47 [***Century Services***].

51. Moreover, s. 96 of the *BIA* is expressly incorporated by reference into the *CCAA* by virtue of s. 36.1 "with any modifications that the circumstances require". To suggest that the *CCAA* context or framework militates a different approach or differing policy considerations than the *BIA* flies in the face of the statutory scheme.

ii. Textual analysis

52. A textual analysis of s. 96 supports the purposive analysis above. Indeed, the appellants' proposed interpretation of s. 96 is inconsistent with its express terms.

53. A "transfer at undervalue" is defined as follows:

> a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.[56] [emphasis added]

54. The criteria for the exclusion of corporate attribution under *Canadian Dredge* expressly includes where "no benefit" is received by the corporation. The very circumstances that bring a corporate debtor within the scope of the statute – "no consideration is received by the debtor" – are posited by the appellants as the basis for the exclusion of the corporate debtor from the very same statutory scheme – no benefit to the corporation. The express language necessarily indicates that Parliament did not intend the *Canadian Dredge* regime of corporate attribution to apply: a lack of benefit to a corporation cannot both qualify and disqualify the application of the statute to a corporate debtor. Such statutory inconsistency is to be avoided. Indeed, basic principles of

[56] *BIA*, s 2, "transfer at undervalue". As described in footnote 37, Parliament specifically revised the language of the Act prior to it coming into force to expressly include "no consideration" within the definition of a "transfer at undervalue".

statutory interpretation establish that the use of language inconsistent with a common law concept rebuts any presumption in favour of that common law meaning.[57]

55. Similar considerations arise out of the express inclusion and separate treatment of parties "not dealing at arm's length" under the legislation. As noted above, the purpose of the inclusion of a regime to address non-arm's length transactions in the predecessor legislation arose out of the skewed incentives that can arise for corporate insiders of a financially troubled corporation.[58] The nature of the skewed incentives is that such insiders may prefer their own interests over that of the corporation and its creditors in undertaking non-arm's length transfers. To interpret corporate intent as not applying when those very same skewed incentives arise fails to give effect to the express inclusion of the non-arm's length provisions of the *BIA*.

iii. Presumption of statutory consistency with the common law

56. The appellants fail to engage in any purposive analysis of the statute, and instead rely solely on the argument that s. 96 must be interpreted consistently with what they allege is the common law of corporate attribution. The appellants' approach is in error:

(a) The jurisprudence establishes the primacy of statutory purpose and language over consistency with the common law; and

(b) The statutory scheme was developed independently and prior to the standard of corporate attribution urged by the appellants.

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[57] See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed (June 2022) at ch 17.2.1, online: (QL) LexisNexis Canada (**Sullivan on Construction**), BOA, Vol 2, Tab 24, citing *Prebushewski v Dodge City Auto (1984) Ltd*., 2005 SCC 28 [***Dodge City Auto***]. See especially *Dodge City Auto*, paras 25-31, 37; see also *EL04, supra* note 40 at para 23; *Ontario (Attorney General) v Norwood Estate,* 2021 ONCA 493 (CanLII) at paras 98-100.

[58] Pierre Cardin, Minister of Justice, *supra* note 48 at 6488. See also Standing Committee on Banking, Trade and Commerce, *Evidence*, *supra* note 48 at 38.

(1) Primacy of statutory purpose and language

57. The principles of statutory consistency with the common law relied upon by the appellants make clear the primacy of statutory purpose and language. Resort to the common law "is impermissible if it would interfere with the policies embodied in legislation or defeat its purpose".[59] Put otherwise:

> Arguably the most important factor in determining the relationship between legislation and the common law is the court's sense of what is needed to ensure a coherent and effective operation of the law.[60]

58. This Court has also emphasized that when common law doctrines are woven into bankruptcy and insolvency legislation, the common law is tasked with picking "the means that best gives effect to the statutory scheme adopted by Parliament"; it cannot "substitute a competing goal that would give rise to a different result."[61]

59. The rule of attribution developed in *Canadian Dredge* is a "legal fiction invented for pragmatic reasons", the purpose of which is to ensure that the basis by which liability attaches to the corporation for the acts of its directing mind is rational, fair and serves a public purpose.[62] To apply this purpose to s. 96, which does not address corporate liability and fulfills a creditor protection purpose, is to substitute the purpose of the statute with a different goal arising in a different context, contrary to the express guidance of this Court.

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[59] Sullivan on Construction*, supra* note 57 at ch 17.02, BOA, Vol 2, Tab 24.

[60] *Jackson v Canadian National Railway*, 2013 ABCA 440 (CanLII) at para 38, citing Ruth Sullivan's *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008). See also Appeal Decision at paras 53-54, Record, Part I, Tab F, pp 104-105; *EL04, supra* note 40 at para 23.

[61] *Chandos Construction Ltd. v Deloitte Restructuring Inc.,* 2020 SCC 25 (CanLII) at para 33.

[62] *Canadian Dredge, supra* note 2 at paras 13, 32, 52, 56, and 73.

60. The priority of statutory purpose over common law doctrines has also been addressed under the predecessor of s. 96. In *EL04*, the appellant submitted that liability for a "privy" under the predecessor to s. 96 must be interpreted consistently with the common law principles of corporate personality, such that directors or officers of corporate parties are not liable in the absence of grounds at common law for piercing the corporate veil. The Ontario Court of Appeal rejected this argument, relying upon Justice Deschamps' judgment in *Peoples* and explanation of the need to give a broad meaning to the term "privy" in order to achieve "the provision's remedial purpose":

> The primary purpose of s. 100 of the BIA is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when those who benefit are the controlling minds behind the transaction.[63] [emphasis added]

The Court of Appeal found that this purposive interpretation as applied by the Supreme Court of Canada "has effectively created an exception to the well established principles of separate corporate personality".[64]

61. Similarly, the UK Courts have also specifically considered the interplay of statutory purpose and the principles of corporate attribution, and have squarely decided that rules of corporate attribution must be tailored to the statutory purpose, rejecting the one-size-fits-all approach urged by the appellants. All parties rely on the UK Supreme Court's decision of *Bilta*,[65]

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[63] *Peoples*, *supra* note 40, at para 91.

[64] *EL04*, *supra* note 40 at para 23.

[65] *Jetivia SA v Bilta (UK) Ltd.*, [2015] UKSC 23 [***Bilta***].

in which that Court unanimously decided that corporate attribution must be determined purposively.[66] Lord Mance described the applicable principles as follows:

> it is not always appropriate to apply general rules of agency to answer questions of attribution, and this is particularly true in a statutory context.
>
> "[…] The rules of imputation do not exist in a state of nature, such that some reason has to be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed."[67]

62. This was echoed by Lords Toulson and Hodge, who similarly noted as follows:

> It is clear from those cases that a finding that a person is for a specific purpose the "directing mind and will" of a company, when it is not merely descriptive, is the product of a process of attribution in which the court seeks to identify the purpose of the statutory or common law rule or contractual provision which might require such attribution in order to give effect to that purpose.[68]

63. In so doing, their Lordships relied upon the determination of Lord Hoffman in *Meridian Global Funds*, who laid out a similar rule of corporate attribution and specifically noted that the usual canons of statutory interpretation apply:

> This is always a matter of interpretation: given that it is intended to apply to a company, how is it intended to apply? Whose act (or knowledge or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[69]

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[66] Although there are four judgments in *Bilta*, the Court was unanimous that rules of attribution are context specific. Illustrative quotes from Lords Mance and Toulson and Hodge are set out below. The analysis of Lords Toulson and Hodge was adopted by Lords Neuberger, Clarke and Carnwath (*Ibid*, paras 9, 18-19). Lord Sumption similarly held that attribution is context dependent (*Ibid*, para 92).

[67] *Bilta*, *supra* note 65 at paras 40, 44.

[68] *Ibid* at para 202.

[69] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5, [1995] 3 All ER 918 at para 12. See also *Bank of India v Morris* [2005] EWCA Civ 693, [2005] BCC 739 at paras 93-96, 111-112, 116, 120, 129-131.

64. The same analytical approach was followed by the UK Supreme Court in *Singularis Holdings Ltd. v Daiwa Capital Markets Europe Ltd.*, in which the Court followed *Bilta* and summarized its principle reasoning as follows:

> the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant.[70]

65. This UK jurisprudence not only highlights the primacy of statutory purpose in addressing corporate attribution but also the lack of any single "common law" rule of corporate attribution. Thus, the argument that the language of "intent" in s. 96 incorporates the standard of *Canadian Dredge* is based upon a false premise – that there is a "common law" single rule of corporate attribution applicable to all circumstances that Parliament must have intended to incorporate into its statutory scheme.

66. Finally, it should not be forgotten that *Canadian Dredge* was a case of statutory interpretation in which Justice Estey conducted a purposive analysis of criminal law to determine the meaning of "intent" in that context, and rejected corporate attribution in cases of fraud or no benefit on the basis that "no social purpose is served by convicting a corporation in such a circumstance."[71] A purposive and textual interpretation of s. 96 leads to a different result here due to the specific language of s. 96, which is inconsistent with the *Canadian Dredge* standard, and the fundamental differences between a context that seeks to impose liability on a corporation and one that seeks to protect creditors from asset stripping. However, an interpretive approach that sets the rules for attribution pragmatically, textually and purposively is consistent with the principles applied by Justice Estey and reflected in fundamental rules of statutory interpretation.

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[70] [2019] UKSC 50 at para 34.

[71] *Canadian Dredge*, *supra* note 2 at paras 52, 73.

67. The Court of Appeal and application judge therefore appropriately determined that the rules of corporate attribution must be guided by the purpose of s. 96 rather than a rote application of the *Canadian Dredge* rule. Applying this approach, the corporate intent of the directing mind who exercised effective control of the corporation in undertaking the transfers at issue should be ascribed to the corporation.

(2) No statutory incorporation of *Canadian Dredge*

68. The argument that Parliament intended to incorporate the rule from *Canadian Dredge* is not only inconsistent with the text and purpose of the statute, it is also fundamentally ahistorical and fails to consider the provenance of the language of s. 96. The appellants cite the proposition that "when the legislature uses a term that has an established legal meaning, it is presumed to have given the term that meaning in the statute in question".[72] However, the appellants have failed to consider that the phrase "intent to defraud, defeat, or delay creditors" has a pedigree that pre-dates *Canadian Dredge* and even pre-dates fundamental principles of corporate separateness.[73]

69. The issue for the Court is therefore to consider how the statutory provision, which was developed initially to address personal debtors, should be extended to corporations. This emphasizes the need for an interpretative approach based on the purpose of the provision, as

[72] *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*., 2020 SCC 29 (CanLII) at para 39 [***Owners, Strata Plan LMS 3905***].

[73] Laurence CB Gower, *The Principles of Modern Company Law*, 2nd ed (London: Stevens & Sons Limited, 1957) at p 21-23, 25-26, 34-35, and 47-48, BOA, Vol 2, Tab 20; *Salomon v A Salomon & Co Ltd*, [1896] UKHL 1, [1897] AC 22.

discussed above, rather than the rote application of subsequently developed rules of attribution that arose in a different context and for a different purpose.[74]

70. The history of the provision and its language demonstrates that it developed independently and prior to the attribution rules from *Canadian Dredge*. The formulation that "the debtor intended to defraud, defeat or delay a creditor" is traceable to the *Fraudulent Conveyances Act*, 1571,[75] which formed part of the law of Canada at Confederation, and has subsequently been codified by the provinces in fraudulent conveyance statutes.[76] As explained by Houlden and Morawetz in Bankruptcy and Insolvency Law of Canada, "Although the language of the statute has been modernized, the basic intent of the legislation is still the same as in the original Act."[77]

71. The language was present in Canada's first insolvency statutes of 1869 and 1875. Those statutes included a substantively similar provision to s. 96 that served to nullify transfers made by a debtor "with intent fraudulently to impede, obstruct or delay his creditors in their remedies

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[74] See *Smith v Morse*, 2 Cal 524 (1852) at p 540, BOA, Vol 1, Tab 12. This Supreme Court of California decision is one of the earliest cases to grapple with the issue of corporate attribution in this context. The Court declined to apply the standards of attribution in the criminal law, which held that a corporation could not have fraudulent intent, and found liability under a fraudulent conveyance statute: "If, however, there be any doubt on this subject, it is true that doubt should be removed, and all metaphysical refinements, and fine-drawn distinctions of astute logicians, must yield to plain principles of sound morality and justice. A corporation without soul, will, capacity to do wrong, or legal responsibility, is a legal monstrosity, whose existence no court ought to foster or protect; and common justice requires that the rights of the creditor should be protected from every species of fraud, proceeding from whatever source it may."

[75] 13 Eliz. 1. c 5, preamble [the ***Statute of Elizabeth***], BOA, Vol 2, Tab 33.

[76] *Bank of Montreal v Ngo*, 1985 CanLII 585 (BC SC) at paras 14-15; See also Houlden, Morawetz & Sarra, *supra* note 45, ch 5 at 460, BOA, Vol 2, Tab 22.

[77] Houlden, Morawetz & Sarra, *supra* note 45, ch 5 at 460, BOA, Vol 2, Tab 22.

against him, or with intent to defraud his creditors, or any of them", which was based upon the *Statute of Elizabeth*.[78] This legislation was repealed in 1880.[79] Following their repeal, the predecessor to the *Winding-up and Restructuring Act* was enacted with a provision containing this same language[80] that persists to this day.[81]

72. A forty year period followed in which Canada had no bankruptcy legislation. The precursor to the current *BIA* was then enacted in 1919. That Act was replaced in 1949.[82] Both the 1919 and 1949 acts stipulated that an act of bankruptcy included the disposal or assignment of goods by a debtor "with intent to defraud, defeat or delay his creditors or any of them".[83] The provision has persisted to this day and is represented in s. 42(1)(g) of the current version of the *BIA*, which resulted from amendments to the 1949 Act.

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[78] *An Act respecting Insolvency,* 1869, 32-33 Vict Cap XVI, ss 13 (a)-(c) and s 88, BOA, Vol 2, Tab 29; *An Act respecting Insolvency*, SC 1875, 38 Vict, c 16, s 3(b)-(d) and s 132, BOA, Vol 2, Tab 30; "The Insolvent Act of 1875 and amending acts" Microform: *Annotated by Samuel R. Clarke* (Toronto: Carswell, 1877) at 33, online: *Canadiana*.

[79] *An Act to repeal the Acts respecting Insolvency now in force in Canada*, SC 1880, c 1, s 1, BOA, Vol 2, Tab 32.

[80] *An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations*, 45 Vic, Can S 1882, c 23, s 73, BOA, Vol 2, Tab 31.

[81], RSC 1985, c W-11, s 99.

[82] Lloyd W. Houlden, "Bankruptcy in Canada" (Special Lectures of the Law Society of Upper Canada, Toronto, 1956) at 3-4, BOA, Vol 2, Tab 21; Industry Canada, *Fresh Start: A Review of Canada's Insolvency Laws*, prepared by the Hon. James Moore (Ottawa: Innovation, Science and Economic Development Canada, 2014) at 5; Canada, Law and Government Division, *Bankruptcy Law Update*, prepared by Margaret Smith, 88-16E (Ottawa: Current Issue Review, 1999) at "Chronology"; Tassé Report, *supra* note 36, also contains a detailed history of Canadian insolvency legislation up to 1970 in Chapter 2.

[83] *An Act Respecting Bankruptcy,* SC 1919, c 36, s 3(g) [***1919 Bankruptcy Act***], BOA, Vol 2, Tab 27; *An Act Respecting Bankruptcy*, SC 1949 (2 Sess), c 7, s 20(1)(g) [***1949 Bankruptcy Act***], BOA, Vol 2, Tab 28.

73. Although this language continued to define what constitutes an act of bankruptcy, prior to the enactment of s. 96 in 2009, the bankruptcy statutes since 1919 did not have an intent based provision addressing transfers at undervalue. Rather, such transfers were addressed through "settlement"[84] and "reviewable transaction"[85] provisions that looked to issues such as the amount of consideration and the timing and effect of the transfers.

74. In 2009, the current form of s. 96 came into force. The provision had its genesis in the Kroft Report, which explained the history of such provisions and that the transactions "are addressed by the law because they have the effect of reducing the moneys or assets available for distribution to other creditors". The Committee recommended as follows:[86]

> The Committee believes that there should be a uniform system nationwide for the examination of fraudulent and reviewable transactions in situations of insolvency. At present, there is a lack of fairness, uniformity and predictability by virtue of both federal and provincial/territorial legislation addressing fraudulent and reviewable transactions. We feel that a national standard is needed for reviewable transactions that diminish the value of the insolvent debtor's estate and thereby reduce the value of creditors' realizable claims. Provincial/territorial legislation would continue to exist for transactions not occurring in the context of insolvency. A national system for review of such transactions would provide the fairness and predictability that we want in our insolvency system.

75. Following the Kroft Report, the provisions relating to settlements and reviewable transactions were condensed into a single provision that adopted language consistent with

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[84] *1919 Bankruptcy Act*, *supra* note 83, s 29, BOA, Vol 2, Tab 27; *1949 Bankruptcy Act*, *supra* note 83, ss 60, 62, 65, BOA, Vol 2, Tab 28; *BIA*, *supra* note 1, s 91 as it appeared on and before September 17, 2009.

[85] *BIA, supra* note 1, s 100 as it appeared on and before September 17, 2009.

[86] Kroft Report, *supra* note 37 at 121-123.

provincial fraudulent conveyance legislation and mirrored the pre-existing language of the *BIA*, all of which had their provenance in the *Statute of Elizabeth*.[87]

76. In light of this history, there can be no serious suggestion that the principles of *Canadian Dredge* formed "part of the context in which a legislature enact[ed]" the statute, which is the very basis for application of the principle of consistency with the common law.[88] This Court has specifically held that the relevant consideration for incorporation of the common law is "the state of the common law when Parliament acted: in other words, the debate is about whether the term used had a clearly understood legal meaning when it was incorporated into the statute."[89] The statutory language of s. 96 can be traced to the 16th century and has formed part of Canada's insolvency legislation since Confederation. Therefore, the "established legal meaning"[90] of the language of s. 96 of the *BIA* should not be examined through the framework of *Canadian Dredge*, but rather through the long-standing jurisprudence on the *Statute of Elizabeth* and its progeny and in light of the purpose of those statutes.

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[87] Bill C-12. The language of the original s. 96 used the standard that "the debtor intended to defeat the interests of creditors", see Bill C-55, s 73. Bill C-55 was then repealed and replaced in 2007, which gave effect to the current version of s. 96, including the specific language that "the debtor intended to defraud, defeat or delay a creditor", mirroring pre-existing language used in the *BIA*. Contemporaneously, the definition of "transfer at undervalue" was also broadened to expressly a transaction for "no consideration" (compare Bill C-55, s 5).

[88] *Owners, Strata Plan LMS 3905*, *supra* note 73 at para 39.

[89] *R v DLW*, 2016 SCC 22 (CanLII) at para 22.

[90] *Owners, Strata Plan LMS 3905*, *supra* note 73 at para 39.

77. That jurisprudence examines intent through the use of "badges of fraud" and legal presumptions of intent.[91] These principles have been consistently applied to attribute the intent of the corporation to the directing mind that carried out the transactions at issue, including in cases of no benefit and no consideration.[92] As commented by Professor Wood, "Ordinarily, the state of mind of a person who is the directing mind of the corporation and who acts within his or her scope of authority is attributed to the corporation itself."[93] This approach, which has arisen organically in Canada and in the absence of any consideration of subsequently developed rules of corporate attribution, appropriately gives effect to the purpose of the statutory scheme.

iv. International jurisprudence

78. The appellants rely on jurisprudence from New York and the UK; however, the relevant international jurisprudence supports the position of the respondents.

79. The New York jurisprudence cited by the appellants are ordinary common claims brought by a bankruptcy trustee (for example, auditor's negligence).[94] The appellants attack a strawman.

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[91] Eric Gertner et al, *Debtor and Creditor: Cases and Commentary*, 3rd ed (Toronto: Carswell, 1987) at 548, BOA, Vol 2, Tab 19.

[92] *1007374 Alberta Ltd. v Ruggieri*, 2014 ABQB 641 (CanLII) at para 56, aff'd 2015 ABCA 205 (CanLII); *Abakhan & Associates Inc. v Braydon Investments Ltd.,* 2009 BCCA 521 (CanLII) at paras 4-8, 89-90; *Abalon Holdings Ltd. v Bank of Nova Scotia*, 2001 MBQB 136 (CanLII) at paras 11-12, 16-17, aff'd 2002 MBCA 76; *Builders' Floor Centre Ltd. v Thiessen*, 2012 ABQB 86 (CanLII) at paras 4, 16-22; *Dapper Apper Holdings Ltd. v 895453 Ontario Ltd.*, 1996 CanLII 8253 (ON SC) at paras 55-62; *Mian v Kalezic*, 2002 CarswellOnt 208, [2002] OJ No 264 at paras 39-40, BOA, Vol 1, Tab 7, aff'd in 2003 CanLII 23559 (ON CA); *Nuove Ceramiche Ricchetti S.p.A. v Mastrogiovanni,* 1988 CarswellOnt 184, [1988] OJ No 2569 at paras 24 and 32, BOA, Vol 1, Tab 8; *Pan-Atlas Financial Group, Ltd. (Re)*, 2008 BCSC 1198 (CanLII) at paras 32-45; *Re Dougmor Realty Holdings Ltd. Fisher v Wilgorn Investments Ltd.,* 1966 CarswellOnt 31, [1967] 1 OR 66 at paras 93-100, BOA, Vol 1, Tab 10, overt'd on other grounds, 1967 CarswellOnt 56, [1968] 1 OR 61 (ON CA), BOA, Vol 1, Tab 11.

[93] Wood, *supra* note 54 at 251-252, BOA, Vol 2, Tab 26.

[94] *In Re: CBI Holding Company*, 529 F. 3d 432.

Neither the Court of Appeal nor the respondents suggest that the standard of corporate attribution for common law auditor negligence claims should be changed merely because the action is brought by a bankruptcy trustee. Rather, the respondents argued and the Court of Appeal accepted that the specific statutory remedy of s. 96 must be interpreted and understood purposively.

80. Contrary to the submissions of the appellants, the US bankruptcy regime in fact allows for the attribution of the intent of fraudulently acting directors to corporations under the applicable statutory regime. Section 548 of Title 11 of the United States Code addresses fraudulent transfers. The US regime has a two year lookback period and divides claims based upon "actual intent" (Section 548(A)) and "constructive intent" (Section 548(B)), the latter of which is applied to the broad equivalent of transfers at undervalue. The "actual intent" provisions allow for the reversal of transactions made "with actual intent to hinder, delay, or defraud any entity to which the debtor was […] indebted".

81. Under the "actual intent" provisions, the Courts have generally recognized and applied an "intent attribution" doctrine to ascribe the intent of a transferee to the debtor corporation in circumstances similar to the facts of this case: "Most courts recognize that when a transferee is in a position to dominate or control the debtor's disposition of the property, the transferee's intent to hinder, delay, or defraud will be imputed to the debtor/transferor."[95] Thus, the intent of a person

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[95] *Maxus Liquidating Trust v YPF S.A., et al (In re Maxus Energy Corp.), 641 BR 467 (Bankr D Del 2022)* at pp 47-48; *Jackson v Mishkin (In re Adler, Coleman Clearing Corp.),* 263 BR 406 (SDNY 2001) at pp 442-444, 447-448, BOA, Vol 1, Tab 5; *In re Tribune Company Fraudulent Conveyance Litigation*, 10 F.4th 147 (2d Cir. 2021) at pp 18-24, BOA, Vol 1, Tab 3, cert. denied, *Markland v Asset Acceptance LLC*, 142 S. Ct. 1128, 212 L. Ed. 2d 18 (2022), BOA, Vol 1, Tab 6. See also Bankruptcy Service, Lawyers Ed, "Nature and showing of intent – Relevance of particular party's intent – Control or domination of debtor" (April 2023) online: (WL) Thomson Reuters at § 34:158, BOA, Vol 1, Tab 15.

acting in fraud on a corporation may be imputed to the corporation for the purpose of these remedies.

82. It is notable that the application judge found as a fact that "for the purposes of […] the false invoicing schemes, John Aquino controlled 230, BCCL and Forma-Con."[96] Given the differences between the Canadian and US regimes, it may not be appropriate to directly adopt US law on this issue, but it is telling that, contrary to the appellants' submissions, US bankruptcy law in fact permits corporate attribution on similar facts.

83. The appellants' reliance on UK law is equally misguided. As noted above, *Bilta*, which was a case decided under the *Insolvency Act*, 1986, explains that the rules regarding attribution must be developed purposively. The appellants' argument that this decision requires the rejection of corporate attribution under s. 96 is clearly wrong.

84. Further, jurisprudence on s 423 of the UK *Insolvency Act*,[97] which addresses "transactions entered into at an undervalue" establishes that the decisions and actions of a directing mind who carried out the transactions at issue should be attributed to the corporation, even in cases where the company is a "victim" of the transaction.[98]

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[96] Application Decision at para 139, Record, Part I, Tab C, p 31.

[97] 1986 c 45. The structure and language of this act is not identical to s. 96 of the *BIA*, but an element of the claim is proof that the transaction "was entered into by [the debtor] for the purpose (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make." (s 423(3)).

[98] *Dickinson v NAL Realisations (Staffordshire) Ltd and others*, [2018] 1 BCLC 623 (Ch) at paras 94-97, BOA, Vol 1, Tab 2, aff'd on appeal (on other grounds) [2019] EWCA Civ 2146 (CA). See also *Integral Petroleum S.A. v Petrogat Fze*, [2023] EWHC 44 (Comm) at paras 13-19, 64-65.

v. Wrong cause of action

85. Finally, the appellants suggest that other civil remedies exist that may allow a corporation to recover against persons involved in asset stripping and that the Monitor has simply proceeded with the wrong cause of action.

86. In making such submissions, the appellants seek to blow both hot and cold. The appellants have admitted to facts, including that the Impugned Transfers were made with the knowledge and approval of not only John Aquino but also Ralph and Steven Aquino, seemingly for the purpose of insulating themselves from the other causes of action that they say the Monitor ought to have pursued, including that they had defrauded Ralph and Steven Aquino and the corporation more generally. They now seem to rely upon their previously denied fraud as a defence to attribution. In any event, other civil claims have both substantive and procedural shortcomings or differences that are addressed through the inclusion of s. 96 in Canada's insolvency regime. Among other things:

(a) Fraudulent conveyance legislation broadens the scope of the persons entitled to seek redress for asset stripping beyond just the corporation itself. For example, the Monitor has an express right to commence a s. 96 proceeding. Although the Courts have granted leave for Monitors to commence other adversarial proceedings, they have commented that "it will be a rare occasion" that a monitor is so empowered.[99] Creditors also have rights to advance proceedings under substantively similar provincial legislation;

(b) Section 96 provides a remedy against "a person who is privy" to the transfer, which allows for a remedy against individuals involved in asset stripping in the absence of

[99] *Ernst & Young Inc. v Essar Global Fund Limited*, 2017 ONCA 1014 (CanLII) at para 123.

obstacles presented by common law claims, such as piercing the corporate veil,[100] or proving the fraudulent knowledge of the transferees;[101]

(c) Procedurally, s. 96 issues are presumptively addressed by way of application, creating an efficient and effective regime for recovering assets to a bankrupt and ensuring that the administration of an estate is not delayed for a lengthy and complex fraud action, which occurs within the "single proceeding model [which] avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt".[102]

B. Financial Condition of the Debtor

87. The appellants also challenge the application judge's factual findings of fraudulent intent in light of BCCL's financial condition. This is an issue of mixed fact and law that should be upheld absent a palpable and overriding error.[103] Further, because this issue addresses "concurrent findings of fact at the lower courts" – determinations of mixed fact and law that were agreed upon in the courts below – this Court should not interfere unless it is "clearly satisfied" that the Court of Appeal's decision was erroneous.[104] There was no such error in the findings of the courts below. Justice Dietrich found that the Monitor had established that numerous badges of fraud were present

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[100] *EL04, supra* note 40 at para 23.

[101] *Christine DeJong*, *supra* note 44 at para 1, adopting the decision of Van Rensburg J. in 2018 ONCA 60 at para 211.

[102] *Century Services, supra* note 55 *at* para 22. Note that although this proceeding was commenced as a separate application, that application was commenced with leave sought and obtained through the single proceeding model and were case managed by the supervising *CCAA* judge, Justice Hainey.

[103] *Montor*, *supra* note 41 at paras 136-137; *Housen v Nikolaisen*, 2002 SCC 33 (CanLII) at paras 10, 19, 26-37.

[104] *St-Jean v Mercier*, 2002 SCC 15 (CanLII) at paras 45-46.

in respect of the Impugned Transactions, as further described above in the Monitor's recitation of facts, and that the Monitor had established BCCL's intent to defraud creditors.[105]

88. The appellants attack these findings by focusing solely on ambiguous evidence of BCCL's financial position. However, the jurisprudence sets out that this is only one relevant factor: "there is no special rule that makes evidence of a debtor's insolvency determinative as opposed to one factor that may be considered … Instead, the crucial question remains whether the applicant has proved the fraudulent intent of the debtor."[106]

89. The argument that a debtor must have been insolvent also fails to give effect to the disjunctive nature of the s. 96 test, which requires proof of either insolvency at the time of the transfer under 96(1)(b)(ii)(A) or the intent to defraud, defeat or delay creditors under 96(1)(b)(ii)(B). This is further reflected in the fact that the statute expressly contemplates recovery of improper transfers made with an intent to defraud, defeat or delay creditors up to five years prior to an insolvency event.[107] It is no answer to assert that during this five year period, the debtor may not yet have been insolvent.

90. The application judge reasonably concluded that BCCL intended to defeat, defraud or delay creditors based upon the evidence as a whole.[108] To quote the Court of Appeal:

> In short, the application judge took a pragmatic view on the totality of the evidence. She found that during the review periods both Bondfield and Forma-Con were experiencing increasing financial difficulties, to the knowledge of John Aquino, who carried on with the false invoicing scheme. She inferred that he did this with

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[105] Application Decision at paras 157-158, Record, Part I, Tab C, pp 34-35.

[106] *Urbancorp*, *supra* note 40 at para 64; *Montor, supra* note 41 at paras 72-73; *Indcondo v Sloan,* 2014 ONSC 4018 (CanLII) at paras 51-56, aff'd 2015 ONCA 752 (CanLII).

[107] *BIA,* s 96(1)(b)(ii).

[108] Application Decision at paras 145, 151-160, 186, and 188, Record, Part I, Tab C, pp 32-35, 40.

> the intent to defeat the companies' creditors. This court owes deference to the application judge's findings of fact and findings of mixed fact and law. The appellants have not established any palpable and overriding errors nor legal errors with these findings.[109]

91. The appellants provide no basis for this Court to interfere with those findings.

PART IV - SUBMISSIONS ON COSTS

92. The Monitor seeks costs of the appeal per the tariff. Given the moral turpitude of the appellants, who have admitted to stripping BCCL of tens of millions of dollars, in the event the appellants are successful on appeal, they should nevertheless be denied costs.

PART V - ORDER SOUGHT

93. The Monitor seeks an order dismissing the appeal, with costs.

PART VI - IMPACT OF SEALING OR CONFIDENTIALITY ORDER

94. Although there is a sealing order over portions of the record, those portions are not relevant to the issues on appeal. No sealing order in the proceeding should have any impact on the Court's reasons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of July, 2023.

NORTON ROSE FULBRIGHT CANADA LLP

[109] Appeal Decision at para 46, Record, Part I, Tab F, pp 100-101.

PART VII - AUTHORITIES RELIED ON

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Jurisprudence	Paragraph
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Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Richard H. Kroft), p 5.	**32**

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