SCC File Number: 40166

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

B E T W E E N:

JOHN AQUINO, 2304288 ONTARIO INC., MARCO CARUSO, GIUSEPPE ANASTASIO and LUCIA COCCIA-CANDERLE

Applicants
(Appellants)

and

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited and KSV RESTRUCTURING 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 KSV RESTRUCTURING INC., IN ITS CAPACITY AS TRUSTEE-IN-BANKRUPTCY OF 1033803 ONTARIO INC. AND 1087507 ONTARIO LIMITED

(Rule 42 of the *Rules of Supreme Court of Canada*)

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OVERVIEW

1. This appeal raises a single issue: does the common law of corporate attribution, *Canadian Dredge*, allow a fraudulent directing mind and his accomplices to avoid liability *because* they defrauded the company they ran? No. The common law has sufficient common sense to avoid this absurdity.

2. John Aquino ran a false invoicing scheme to steal assets from the companies he operated. During the five years before the companies' bankruptcy, he—along with his appellant accomplices—invented fictitious suppliers, created fake invoices from these "suppliers" and signed cheques paying the "invoices." This fraud allowed the appellants to secretly take more than $30 million from the now-insolvent corporations. It was a classic asset stripping scheme.

3. The fraud in this case is not contested. John Aquino, the company's president and directing mind, conceded that the company received no value in the transactions. The other appellants made the same concession. There was no innocent explanation for the false invoicing scheme. All courts below found the appellants liable.

4. KSV Restructuring Inc. responds to this appeal in its capacity as trustee-in-bankruptcy of 1033803 Ontario Inc., which carried on a construction business known as Forma-Con Construction and was victim to the false invoicing scheme. Upon discovering the scheme, the Trustee applied to recover the funds by way of the transfer-at-undervalue provisions in section 96 of the *Bankruptcy and Insolvency Act*. The transfer-at-undervalue provisions were designed precisely to capture scenarios, like here, where the bankrupt paid out millions of dollars for no consideration.

5. Only one of the section 96 requirements is at issue in this appeal: the requirement that the debtors had the intent to defraud, defeat or delay their creditors. The appellants say that the debtors did not have such intent. They argue that, under *Canadian Dredge*, the intent of John Aquino to defeat and defraud the debtors' creditors cannot be attributed to the debtors *because* Aquino acted fraudulently. Under their interpretation of the law, Aquino (and his accomplices)

can use their own wrongdoing to immunize themselves from liability for the false invoicing scheme they perpetrated.

6. This is a novel argument; it has never been raised in the forty years since *Canadian Dredge* was decided. Because it was a matter of first impression, the courts below used quintessential common law reasoning to consider the application of the law in a new context. They rightly concluded that the corporate attribution doctrine from *Canadian Dredge*—and, more particularly, the defences articulated in *Canadian Dredge*—could not be raised here.

7. This appeal offers an opportunity for this Court to elaborate on why the defences in *Canadian Dredge* do not apply to this case. The Trustee proposes two principled, incremental changes to the corporate attribution doctrine to explain why the defences do not apply here. Accepting either of these changes would dismiss the appellants' appeal:

(a) The "fraud" and "no benefit" defences, as described in *Canadian Dredge*, cannot be raised by the directing mind in a dispute between the corporation and the directing mind; and

(b) The defences cannot be raised by a respondent in a claim for a transfer at undervalue or its analogues.

8. The other respondent in this appeal, the Monitor of Bondfield Construction Company Limited, also commenced a transfer-at-undervalue application in response to a similar false invoicing scheme perpetuated by John Aquino and his accomplices against that company. The respondents have agreed to divide their argument. The Monitor will focus on: (i) the statutory scheme of s. 96 and (ii) the relevance of the alleged financial health of the corporate debtors. The Trustee's arguments focus on the common law of corporate attribution. The Trustee endorses the Monitor's submissions.

FACTS

9. On April 3, 2019, Bondfield Construction Company Limited ("**BCCL**") and several related entities (collectively "**Bondfield**") obtained protection under the *Companies' Creditors' Arrangement Act* (*CCAA*). Ernst & Young was appointed as the Monitor of Bondfield.[1]

10. 1033803 Ontario Inc. is an affiliate of BCCL and is known as Forma-Con Construction. Forma-Con provided concrete and forming work on Bondfield and other projects.[2]

11. On November 19, 2018, KSV Restructuring Inc.[3] was appointed as receiver and manager of all the assets, undertakings and property of Forma-Con. On December 19, 2019, KSV, as receiver, filed an assignment in bankruptcy on behalf of Forma-Con and was appointed as trustee in bankruptcy of Forma-Con under the *Bankruptcy and Insolvency Act* ("***BIA***").[4] At the time of Forma-Con's bankruptcy it had $215 million in outstanding liabilities,[5] including approximately: $142 million owing to BCCL, $8 million owing to Canada Revenue Agency, $2 million owing to the Receiver General of Canada and $2 million owed to the Workplace Safety & Insurance Board, as well as amounts owing to trade and other creditors.[6]

A. The statutory framework of transfers-at-undervalue under the *BIA*

12. The Trustee commenced this application under the transfer at undervalue (or "**TUV**") provisions in s. 96 of the *BIA*. In section 96, Parliament has provided the Trustee, for the benefit of creditors, with a powerful tool to recover assets illegitimately taken from the debtor.

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[1] *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202, para. 8, Record of the Appellants, Part I, Tab F [*Aquino ONCA*].
[2] *Aquino ONCA*, para. 6.
[3] Previously known as KSV Kofman Inc.
[4] *Aquino ONCA*, para. 8.
[5] Excluding secured guarantee claims.
[6] *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, para. 28, Record of the Appellants, Part I, Tab C [*Aquino ONSC*].

13. A TUV is a disposition of property or provision of a service where the debtor either receives (i) no consideration or (ii) conspicuously less than fair market value.[7] The Trustee may seek to unwind or claim reimbursement of a TUV under section 96.

14. In this case, the Trustee's application proceeded under section 96(1)(b)(ii)(B) of the *BIA*, under which the Trustee must show:

(a) the impugned transactions are a TUV;

(b) the impugned transactions occurred in the five-year period preceding Forma-Con's initial bankruptcy event;

(c) the recipients of the transfer were not dealing at arm's length with a debtor; and

(d) the debtor intended to defraud, defeat, or delay a creditor.[8]

15. Under section 96(1)(b)(ii)(B), there is no requirement that the debtor was insolvent at the time of the transactions or rendered insolvent by it. The sole issue on appeal is the final prong of the test: whether the debtor intended to defraud, defeat or delay a creditor.

B. The false invoicing scheme: the appellants defrauded Forma-Con of $11.4 million

16. From 2011 to 2018, the appellants orchestrated a false invoicing scheme. The statutory transfer-at-undervalue provisions limit the review period to five years. In this review period, the appellants defrauded Forma-Con and BCCL of more than $33 million: $21.8 million from BCCL and $11.4 million from Forma-Con.[9] Even more was stripped from the companies outside the review period.

17. The scheme was simple: fake invoices were generated by fake suppliers, approved by an insider and paid by the victim companies:

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[7] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 2, "transfer at undervalue".
[8] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 96(1)(b)(ii)(B).
[9] *Aquino ONCA*, paras. 10, 16.

(a) The scheme typically began with Michael Solano—cousin to John Aquino and BCCL's former head of Information technology—emailing Giuseppe Anastasio or Marco Caruso.

(b) The email told Anastasio or Caruso to prepare an invoice for a given amount and provided a description for the fake services to be billed.

(c) One of six purported supplier companies (the "**Suppliers**") would then issue an invoice (often with a 10 percent mark-up).

(d) Forma-Con would issue a cheque, often within a day, signed by Aquino or Solano.[10] While Forma-Con typically paid its legitimate invoices within 30-90 days of receipt, the cheques payable to the Suppliers were paid, on average, within 1.3 days.[11]

(e) Unlike typical invoices, the invoices issued by the Suppliers were not accompanied by timesheets, contracts or other supporting documentation. The invoices were not approved by the relevant project manager.[12]

18. The Trustee's investigation implicated several individuals. These included the personal appellants here: John Aquino, who was BCCL's and Forma-Con's President and directing mind at all relevant times, as well as Giuseppe Anastasio, Marco Caruso and Lucia Coccia a.k.a. Lucia Canderle.[13] Only one of the Suppliers, 2304288 Ontario Inc. ("**230**"), is an appellant here. 230 is John Aquino's personal holding company.[14]

19. On cross-examination the individual appellants conceded the false invoicing scheme. Aquino conceded that the Suppliers who falsely invoiced—and were paid by—Bondfield had

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[10] *Aquino ONSC*, para. 84.
[11] *Aquino ONSC*, paras. 71, 84.
[12] *Aquino ONSC*, para. 85.
[13] *Aquino ONSC*, para. 31.
[14] *Aquino ONSC*, para. 37.

provided no value for the transfers. The next day Caruso, Anastasio and Coccia-Canderle made the same admissions.[15]

20. In view of these admissions that the services underlying the invoices were never performed, the false invoice scheme was never actively contested in these proceedings. It is not contested here.

C. The courts below unanimously held the appellants liable for the false invoicing scheme

21. By the time this case reached the Court of Appeal, there was no serious dispute that:[16]

(a) The impugned transactions were non-arm's length;

(b) The transfers at issue were at undervalue;

(c) The appellants had an "active intent to defraud the debtors"; and

(d) The transactions "bristled" with "badges of fraud", including the value of the transactions being nil, the non-arm's length status of the participants and the secrecy and the unusual haste with which the transactions were completed.

22. The appellants' sole ground of appeal is that the debtors did not intend to defraud, defeat or delay creditors. They advance two arguments to support this ground of appeal: (i) John Aquino's intent to defraud, defeat or delay creditors cannot be imputed to the debtors; and (ii) the debtors were financially healthy at the time of the impugned transactions such that there could not have been any intent to defraud, defeat or delay any creditors. The application judge and a unanimous Court of Appeal rejected both arguments.

23. With respect to corporate attribution, both courts recognized that this was a case of first impression.[17] In response, they both held that the traditional framework for corporate attribution from *Canadian Dredge* could not apply to the particular context of this case. The application

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[15] *Aquino ONSC,* para. 119; *Aquino ONCA,* para. 11.
[16] *Aquino ONCA,* para. 28.
[17] *Aquino ONSC,* para. 210; *Aquino ONCA*, para. 70.

judge concluded that "given the *BIA* is concerned with providing proper redress to creditors the 'intention of the debtor' in s. 96 should be interpreted liberally to include the individuals in control of the corporation" and therefore "the corporate attribution doctrine as set out in *Canadian Dredge* ought not to apply in these applications."[18]

24. Buoyed by the common law's "robust circumstantial adaptability", the Court of Appeal similarly concluded that the context of this case was "quite different" from the "circumstances in which corporate attribution has traditionally been applied."[19] Both courts agreed that, given the unique and novel circumstances of the case, the intention of the individual "in control of the corporation"—here, John Aquino—could be attributed to the debtors.[20]

25. On the issue of the debtors' financial health, the Court of Appeal found no reviewable error in the application judge's conclusion that "it would have been entirely unreasonable for John Aquino to believe that … the interests of the companies' creditors would not be endangered by the fraudulent scheme" and that John Aquino was, at the very least, "reckless as to whether the scheme would defraud, defeat or delay creditors."[21]

26. The application judge awarded the Trustee damages of $11,366,890 plus interest. The Court of Appeal upheld the award.[22]

PART II - QUESTIONS IN ISSUE AND RESPONDENT'S POSITIONS WITH RESPECT TO THE APPELLANT'S QUESTIONS

27. The central issue in this appeal is whether the courts below erred by attributing John Aquino's intent to defraud, defeat or delay creditors to the debtors because they held that the fraud and no benefit defences could not be raised by the appellants. The courts below did not err.

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[18] *Aquino ONSC*, paras. 229-230.
[19] *Aquino ONCA*, para. 74-75.
[20] *Aquino ONSC*, para. 230; *Aquino ONCA*, para. 79.
[21] *Aquino ONCA*, paras. 45, 48.
[22] *Aquino ONCA*, para. 105; *Aquino ONSC*, paras. 281-282. The application judge made all of the respondents liable on a joint several basis, with the exception of Coccia and 2104664 Ontario Inc., who were both only liable to the extent of their involvement or benefit in the false invoicing scheme.

For the reasons outlined below—and those advanced by the Monitor—the defences cannot be raised here.

28. A subsidiary issue is whether the courts below erred in concluding that there was an intent to defraud, defeat or delay creditors given the evidence offered about the debtors' financial health. For the reasons outlined by the Monitor, there was no error.

PART III - STATEMENT OF ARGUMENT

29. The Trustee's argument focuses on the common law doctrine of corporate attribution. Its argument is broken down into the following sections:

(a) ***The corporate attribution doctrine*** **(Section A)**: This section provides history and background on the corporate attribution doctrine in Canada.

(b) ***Incremental change to corporate attribution principles*** **(Section B)**: This section explores how the courts below employed ordinary and well-accepted principles of common law reasoning. This use of common law reasoning is particularly appropriate in the corporate attribution context.

(c) ***The "fraud" and "no benefit" defences do not apply to this case*** **(Sections C, D and E)**. The Trustee proposed two incremental changes to the common law of corporate attribution:

(i) The directing mind cannot raise the *Canadian Dredge* defences in a dispute between the corporation and the directing mind; and/or

(ii) The defences cannot be raised by a respondent in a claim for a transfer at undervalue or its analogues.

(d) ***Application of the corporate attribution doctrine to the facts of this case*** **(Section F)**. The application of the Trustee's proposed framework to the facts of this case demonstrates why incremental changes proposed to the corporate attribution doctrine are necessary, why they are aligned with the bankruptcy and

insolvency regime and why they will not result in any unfairness or adverse consequences.

30. The Trustee endorses and relies on the Monitor's submissions on the proper statutory interpretation of section 96 of the *BIA*; and the Monitor's submissions responding to the appellants' argument respecting the financial health of the debtor. To avoid duplication, the Trustee does not repeat these arguments in its factum.

A. The corporate attribution doctrine

31. A corporation is an abstract entity with no mind or will of its own making it difficult to determine its knowledge or intent. The corporate attribution doctrine addresses this problem.[23] The doctrine attributes the knowledge or intent of a human actor—a so-called directing mind—to the corporation to determine the corporation's knowledge or intent.

32. There are three foundational corporate attribution decisions in Canada: *Canadian Dredge*, *Livent* and *DeJong*. These cases establish the doctrine's origins, principles and contours. This appeal provides this Court with the opportunity to further develop and refine the contours of the doctrine. As the Trustee will explain throughout its factum, the novel issues raised by this appeal fall outside the rationale for the doctrine. To understand why—and to better contextualize the Trustee's proposed changes to the corporate attribution doctrine—this factum begins by canvassing the first principles outlined in *Canadian Dredge*, *Livent* and *DeJong*.

(i) Canadian Dredge

33. In *Canadian Dredge*, the Supreme Court considered attributing intention to a corporation for criminal liability. The question was whether the actions of directors or officers could be attributed to the corporation for the purpose of a corporation's criminal liability for bid rigging.

34. The Court started its analysis by considering two absolute rules. On one hand, the Court could impose "a total vicarious liability for the conduct of any of its agents." On the other end of

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[23] *El Ajou v. Dollar Land Holdings plc*, [1994] 2 All ER 685 (Eng. C.A.) at 695-696, Respondent's Book of Authorities ["RBOA"], Tab 1.

the spectrum, the Court could hold the corporation criminally liable only when the criminal acts were committed at the request of the board of directors.[24] The Court rejected both extremes.

35. On vicarious liability, the Court was concerned that corporations could be punished when there is "neither moral turpitude nor negligence." There was unfairness in "punishing shareholders where the corporate governing body has been guilty of no unlawful act." In short, "the net [of liability] is flung too widely."[25]

36. On the other hand, if attribution required the board of directors to provide instructions to commit the crime, the criminal law would be ineffective. A corporation could "absolve itself from criminal consequence by simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law."[26]

37. After rejecting both extreme rules, the Court followed English law, which had crafted a "pragmatic", "modified and limited vicarious liability" called the "identification doctrine."[27] The identification doctrine attributes the intent or knowledge of the "directing mind" of the corporation—the human actor who represents the "core, mind and spirit of the corporation."[28]

38. The criminal defendants proposed defences to liability. The Court accepted two such defences: the corporation would not be liable when the directing mind of the corporation is, at the material time: (i) acting in fraud of the corporation; or (ii) acting wholly or partly for his or her own benefit.[29] These defences are referred to as the "fraud" and "no benefit" defences.

39. In accepting the "fraud" and "no benefit" defences, the Court recognized that when a directing mind's wrongdoing is attributed to the company, the company will "suffer an economic

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[24] *R. v. Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662 at 675.
[25] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 691.
[26] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 699.
[27] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 692 (internal quotations removed).
[28] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 691; *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, [1915] A.C. 705 (HL (Eng)) at 713-714, RBOA, Tab 2. *See also* *Canadian Dredge* at 682.
[29] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 670.

penalty."[30] Without those defences, the corporation, including its stakeholders, would suffer this economic penalty in circumstances where it was the victim of a rogue and fraudulent actor.[31] In the Court's view, "[p]unishment of the corporation for such acts of its employee would not advantage society by advancing law and order."[32] In those cases, the manager "is acting not in any real sense as its directing mind but rather as its arch enemy."[33]

(ii) Livent

40. This Court officially extended *Canadian Dredge* into the civil context in *Livent*.[34] In *Livent*, the receiver of an insolvent entertainment company (Livent) brought a claim against its auditors (Deloitte) for failing to detect fraud perpetuated by Livent's directors. Deloitte sought to attribute the directors' wrongdoing to the plaintiff receiver for the purpose of an illegality (*ex turpi causa*) defence.

41. *Livent* distinguished *Canadian Dredge* because *Canadian Dredge* was decided in the criminal law context. The public policy factors that favoured imputing a corporation with the actions of its directing minds in criminal prosecutions did not necessarily apply when attributing the actions of a directing mind in a civil context, including in *Livent*, the context of an auditor's negligence claim.[35]

42. Therefore, *Livent* modified the principles from *Canadian Dredge*. Given that corporate attribution was a doctrine rooted in public policy, courts would "retain the discretion to refrain from applying it where, in the circumstances of the case, it would not be in the public interest to do so."[36]

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[30] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 694.
[31] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 707.
[32] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 707-708.
[33] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 719.
[34] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, paras. 100-104.
[35] *Livent*, 2017 SCC 63, paras. 102-103.
[36] *Livent*, 2017 SCC 63, para. 104.

(iii) DeJong

43. *DeJong* involved a complex multi-million-dollar commercial real estate fraud with two sets of victims of the fraud. The applicant victim companies, the "Schedule B companies", sued the responding victim companies, the "Schedule C companies", claiming that the Schedule C companies knowingly assisted the fraudsters in perpetuating the fraud. The Schedule B companies sought to do this by attributing the intent of the fraudster to the Schedule C companies.

44. This Court declined to attribute the wrongdoing of the fraudster to the Schedule C companies. It explained that the policy discretion in *Livent* worked one-way: it only permits courts to refrain from applying the attribution doctrine on public policy grounds.[37]

B. Incremental change to corporate attribution principles

45. The appellants allege that the courts below impermissibly re-wrote the common law of corporate attribution. No—the appellants have misunderstood how the common law evolves. Far from introducing any "radical" change to the common law, as the appellants suggest,[38] the decisions below employed ordinary common law reasoning in response to a novel context.

46. Despite *Canadian Dredge* being almost forty years old, the corporate attribution doctrine has never been invoked in a TUV case.[39] Instead, TUV cases have relied on the established "badges of fraud" to assess whether a transaction was intended to delay, defeat or defraud creditors.[40]

47. By seeking to inject the corporate attribution doctrine into the TUV context, the appellants raise a question of first impression: can a directing mind, by virtue of existing

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[37] *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, para. 2.
[38] Appellants' Factum, paras. 1-2.
[39] See, *e.g.*, *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, para. 259, var'd on other grounds, 2016 ONCA 407; *Re: National Telecommunications Inc., a bankrupt*, 2017 ONSC 1475, para. 57; *National Telecommunications v. Stalt*, 2018 ONSC 1101, para. 57; Roderick J. Wood, "Ernst & Young Inc. v. Aquino: Attributing Fraudulent Intent to a Defrauded Corporation", (2022) 66 CBLJ 251 at 251.
[40] *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, paras. 72-73.

attribution principles, leverage their own wrongdoing to shield themselves from TUV liability? Relying on the common law's "robust circumstantial adaptability",[41] the courts below said 'no' and rejected the appellants' demand to blindly transplant existing common law principles into a new context.

48. This approach accords with basic common law methodology. At its foundation, the common law is made up of incremental changes. The common law is not an exhaustive code; it cannot "provide a comprehensive over-arching theory of liability that is capable of deciding every case or dealing with every possibility or contingency."[42] Therefore, when courts face a new factual landscape they must return to first principles and determine whether, in these new circumstances, the underlying rationale of the common law rule applies.[43] When necessary, courts may resort to the "mechanism of extending an existing principle to new circumstances" to "meet the exigencies of a new case."[44] When "the facts of the case are novel and do not fall within the reach of established precedent" courts are empowered to "move the law"; indeed, as Justice Sharpe writes, "[t]he common law tradition depends on this highly fact-sensitive process."[45] Common law methodology does not simply enable this incremental change; it demands it. "It is the duty of the courts to review common law rules."[46]

49. The corporate attribution doctrine's "pragmatic origins" make it particularly suited to this common law adaptation.[47]

50. *Canadian Dredge*'s pragmatism is unapologetic. In arriving at its conclusions, it rejected two extreme rules. On one hand, vicarious liability would fling the net of corporate liability too

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[41] *Aquino ONCA*, para. 74.
[42] *Liebig v. Guelph General Hospital*, 2010 ONCA 450, para. 19.
[43] Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 168, RBOA, Tab 4.
[44] *Watkins v. Olafson*, [1989] 2 S.C.R 750 at 760-761.
[45] Sharpe, *Good Judgment*, RBOA, Tab 4 at 94-95.
[46] *R v. Starr*, 2000 SCC 40, para. 45 [emphasis added].
[47] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 718-719; *Livent*, 2017 SCC 63, para. 103; *Jetivia SA and another (Appellants) v Bilta (UK) Limited (in liquidation) and others (Respondents)*, [2015] UKSC 23 (UK Supreme Court), para. 44 (per Lord Mance); *Meridian Global Funds Management Asia Limited v. The Securities Commission*, [1995] UKPC 5 (UK Privy Council), paras. 7, 12.

far. But imposing liability only where there was express instruction to do so would enable corporations to evade liability too easily.[48] In a pragmatic exercise of judgment, the Court in *Canadian Dredge* opted instead for a "median rule"—a "pragmatic, acceptable middle ground"—that would place a corporation "under the umbrella of the criminal law" but "would not saddle the corporation with the criminal wrongs of all of its employees and agents."[49]

51. Grounded in policy, *Canadian Dredge* searched for a common law rule that balanced the interests of society in ensuring that corporations are held responsible against the need to avoid imposing undue and unfair burdens on corporations and their stakeholders. As the reasoning in *Canadian Dredge* reveals, the corporate attribution doctrine does not exist in a "state of nature"; it is a set of judge-made rules designed to resolve practical legal problems.[50] An indiscriminate application of its principles would risk misalignment between the rule's rationale and its end results.[51]

52. Indeed, *Canadian Dredge* expressly invites common law incrementalism, acknowledging that matters of corporate attribution "are not likely to be answered in a permanent or universal sense" and adding that common law courts can adapt the doctrine to meet "the changing realities of the community."[52]

53. In support of common law stasis, the appellants point to American case law to suggest a kind of inter-jurisdictional harmony. They point to a principle purportedly akin to the "fraud" and "no benefit" defences, called the "adverse interest exception".[53] But these cases—*Re CBI Holdings Company* and *Kirschner v. KPMG LLP*[54]—are merely adaptions of the common law to

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[48] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 691, 699.
[49] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 701.
[50] *Bilta*, [2015] UKSC 23, paras. 44, 191, citing Peter Watts & FMB Reynolds, *Bowstead & Reynolds on Agency*, 19th ed, (London: Tomson Reuters, 2010), RBOA, Tab 5, para. 8-213.
[51] Sharpe, *Good Judgment*, RBOA, Tab 4 at 168.
[52] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 676, 719.
[53] Appellants' Factum, paras. 56-62.
[54] *Re: CBI Holding Company*, 529 F. 3d 432 (2008) (US Court of Appeals, 2d Cir); *Kirschner v. KPMG LLP*, 15 NY 3d 446 (2010) (Court of Appeals of New York).

situations of auditor's negligence.[55] This Court dealt with this question in *Livent*. As the courts below noted, this case is different.

54. Consistent with rigorous common law methodology—and the pragmatic origins of the corporate attribution doctrine—the courts below crafted modest, incremental exceptions to adapt that doctrine to a new factual and legal landscape. They were right to do so.

C. The "fraud" and "no benefit" defences do not apply to this case

55. Consistent with rigorous common law reasoning, the courts below correctly concluded that the "fraud" and "no benefit" defences cannot be raised by the appellants in this case. There are two distinguishing factors that make those two defences inapplicable in this case:

(a) ***In a dispute between the corporation and its directing mind, the directing mind cannot raise or rely on the "fraud" or "no benefit" defences***. Allowing directing minds to raise these defences enables them to use their own wrongdoing to shield themselves from the very corporation they have wronged.

(b) ***The "fraud" and "no benefit" defences do not apply in the TUV context or in the context of other analogous remedies***. This appeal is about the liability of John Aquino and his accomplices, not the debtors. Inserting *Canadian Dredge*—a case about assessing the corporation's liability—into section 96 would be both illogical and defeat key bankruptcy principles and policies.

56. These two distinguishing factors present two alternative, independent routes for this Court to affirm the lower courts' conclusion and dismiss this appeal. Each is explored below.

D. Directing minds cannot rely on "fraud" and "no benefit" defences in disputes between the corporation and a directing mind

57. This appeal is a dispute between the corporation versus its directing mind and his accomplices. There is no third party seeking to attribute the knowledge or intent of a human

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[55] *Kirschner*, 15 NY 3d 446 (2010) at 459; *CBI Holdings*, 529 F. 3d 432 (2008) at 441-443.

actor to the corporation. The dispute can be characterized as an internal one: the corporation is seeking redress against its directing mind and his accomplices.

58. In these corporation versus directing mind disputes, when the directing mind or their accomplices invoke the "fraud" and "no benefit" defences, they are necessarily using their own wrongdoing to shield themselves. As the Court of Appeal recognized below, using the corporate attribution doctrine in this way would be "perverse."[56] The appellants' attempt to wield the corporate attribution doctrine in this perverse manner is, as this section will discuss, at odds with: (i) *Canadian Dredge*; (ii) other established Canadian legal principles; and (iii) international corporate attribution principles.

(i) Canadian Dredge sought to protect the corporation from rogue and fraudulent actors

59. The "fraud" and "no benefit" criteria were designed to protect the corporation from rogue managers or directors, individuals that *Canadian Dredge* calls the corporation's "arch enemy" who seek "the destruction of the undertaking of the corporation."[57] The Court repeatedly refers to the "fraud" and "no benefit" criteria as "defences" that the corporation can use to protect itself against these enemies.[58]

60. The appellants' approach flips *Canadian Dredge* on its head: defences designed to shield the corporation from the deceptive acts of its "arch enemy" are being deployed by that same "arch enemy" to defeat the corporation and its stakeholders.

61. The "fraud" and "no benefit" defences were created because this Court sought to save corporations from the harshest excesses of vicarious liability; it would be unfair to saddle the corporation and its stakeholders with the wrongs of a rogue directing mind acting against the corporation's interest. Yet, here, the appellants seek to formalistically use *Canadian Dredge* to do just this: the appellants use the "fraud" and "no benefit" defences to prevent corporations (and their stakeholders) from recovering from the directing minds who wronged them.

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[56] *Aquino ONCA*, para. 79.
[57] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 713-714, 717-718.
[58] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 670, 672-673, 694, 704, 706, 713-718.

62. *Canadian Dredge* and its progeny provide no principled basis to allow John Aquino and his accomplices—who deceptively funneled funds out of the debtors—to immunize themselves, *by virtue of their fraudulent acts*, from the corporations and stakeholders they wronged.

(ii) Canadian law does not permit a directing mind to use their own fraud as a defence

63. The appellants seek shelter under the "fraud" and "no benefit" defences; defences that are only triggered by their own wrongdoing. The appellants have cited no case law in support of the proposition that a natural person can rely on their own fraud to shield them from liability to the corporation they defrauded. Such a holding would be completely discordant with the public policy underlying *Canadian Dredge*, *Livent* and *DeJong*.

64. In *Caja Paraguaya*, the Ontario Court of Appeal recently rejected an effort by insiders' accomplices to use the fraud perpetrated by corporate insiders as a defence. In that case, the accomplices sought to attribute the insiders' fraud to the corporation for the purpose of an illegality (*ex turpi causa*) defence.[59] The Court rejected the accomplices' argument: it would "deprive a company, vulnerable to fraud because of the neglect and corruption of board members and officers, of any civil remedy, to the detriment of its shareholders and legitimate creditors" while allowing "fraudsters to pocket their gains with civil impunity."[60] The accomplices could not root a defence against a claim for fraud in the very fraudulent scheme at issue.

65. The appellants' position would also conflict with the broader law of fraud and illegality that one cannot use their own wrongdoing to support a claim or a defence. The doctrine of illegality (*ex turpi causa*) developed to prevent plaintiffs from asserting claims which would allow them to benefit from their own wrongdoing.[61] The core rationale of the doctrine is to avoid "intolerable" situations where the courts "punish conduct with the one hand while rewarding it with the other."[62]

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[59] *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Garcia*, 2020 ONCA 124.
[60] *Caja Paraguaya*, 2020 ONCA 124, paras. 14, 17.
[61] *Hall v. Hebert*, [1993] S.C.R. 159 at 172-173.
[62] *Hebert*, [1993] S.C.R. 159 at 176.

66. But the doctrine is broad and applies to prevent a defendant from relying on their own wrongdoing to ground a defence. For example, a defendant vendor could not rely on its own failure to meet a statutory prerequisite for the sale to render the contract illegal and back out of the sale. For the Ontario Court of Appeal, the defendant's position was "a disingenuous attempt" to leverage its own misdeeds.[63]

67. Courts have similarly rejected a defendant's ability to root a defence in an illegal scheme. A defendant cannot, for example, resist repayment of a loan on the basis that the loan was a gift merely disguised as a loan to avoid adverse tax consequences. Allowing the defendant to succeed would permit the defendant to turn an illegal, deceptive arrangement into a defence against the repayment of the loan.[64]

68. This is no different from what the appellants seek to do here: transform their false invoicing scheme into the basis for a defence from liability. Such attempts are "intolerable" to the common law.

(iii) International corporate attribution cases have unanimously rejected similar attempts by directing minds to use their own wrongdoing as a defence

69. ***International jurisprudence does not allow directing minds to use their own fraud as a defence.*** While there is limited Canadian jurisprudence directly addressing a director leveraging their own wrongdoing for a corporate attribution argument, it has been litigated—and dismissed—in corporate attribution cases in other jurisdictions. After broadly canvassing the history of attempts to raise this type of defence, the Hong Kong Court of Final Appeal explained in *Moulin* that "[t]he injustice and absurdity of such a defence is obvious, and for more than a century judges have had no hesitation in rejecting it."[65]

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[63] *Doherty v. Southgate (Township)*, 2006 CanLII 24231, para. 43 (ONCA). See also *Kainz v. Bleiler Estate*, 1993 CanLII 761 at 17-18 (BCSC); *Jonasson v. Dubinak* (1928), 37 Man R 430 at 432 (MBCA).

[64] *Jackson v. Jackson* (1960), 34 WWR (ns) 431 at 432 (BCSC). *See also*: *Kappler v. Beaudoin*, [2000] OJ No 3439, para. 25 (ONSC), RBOA, Tab 3.

[65] *Moulin Global Eyecare Trading Ltd (in liquidation) v Commissioner of Inland Revenue*, 2014 HKCFA 22, para. 80 (Hong Kong Court of Final Appeal).

70. A seminal case on the issue is *Bilta*, where the UK Supreme Court considered corporate attribution in a contest between corporation and its directing minds.[66] Following a fraudulent scheme orchestrated by Bilta's directors and their accomplices, Bilta's liquidators brought a claim against the directors and accomplices. The directors responded by attempting to attribute their own fraudulent intent to the corporation for the purpose of an illegality defence.[67]

71. While *Bilta* involved four judgments, the Court was unanimous in rejecting the directors' attempts to use their own wrongdoing as a defence against the corporation they had wronged.[68] *Bilta* stands for the proposition that "a director sued by a company for loss caused by a breach of fiduciary duty cannot rely on the principles of attribution to defeat the claim."[69]

72. In reaching this conclusion, the UK Supreme Court recognized that the corporate attribution doctrine is not one-size-fits-all. Instead, the doctrine could lead to different results in cases: (i) between a third party and the corporation; and (ii) those between the corporation and its directing minds (and their accomplices).[70] A corporation can "rely on attribution for one purpose, but disclaim attribution for another."[71]

73. ***The appellants wrongly rely on the "fraud exception" in Bilta.*** The appellants point to the English "fraud" or "breach of duty" exception as analogous to the *Canadian Dredge* "fraud" and "no benefit" defences in Canada. They argue that the English exception prevented corporate attribution of the directors' intention in *Bilta* and so too should the *Canadian Dredge* defences in this case; otherwise, they claim, Canadian law will diverge from the English.[72]

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[66] *Bilta*, [2015] UKSC 23.
[67] *Bilta*, [2015] UKSC 23, paras. 5-6 (per Lord Neuberger).
[68] *Bilta*, [2015] UKSC 23, paras. 7-9 (per Lord Neuberger), paras. 42-44 (per Lord Mance), para. 89 (per Lord Sumption), paras. 181, 208 (per Lords Toulson and Hodge).
[69] *Crown Prosecution Service v. Aquila Advisory Ltd.*, 2021 UKSC 49, para. 59 (UK Supreme Court)
[70] *Bilta*, [2015] UKSC 23, para. 208 (per Lords Toulson and Hodge). See also: *Bilta*, [2015] UKSC 23, para. 8 (per Lord Neuberger), para. 43 (per Lord Mance); *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*, 2019 UKSC 50, para. 30 (UK Supreme Court).
[71] *Bilta*, [2015] UKSC 23, para. 43 (per Lord Mance).
[72] Appellants' Factum, para. 68.

74. The appellants' arguments misread the English fraud exception. Read properly, it supports the Trustee's position. The *Canadian Dredge* "fraud" and "no benefit" defences are different from the English fraud exception and have "not been adopted in England."[73] The English fraud exception is a rule of public policy designed to avoid "the injustice and absurdity of directors or employees relying on their own awareness of their own wrongdoing as a defence to a claim against them by their own corporate employer."[74]

75. Lord Sumption relied on the fraud exception in *Bilta*. He explained that it would be a "remarkable paradox" if a breach of a directors' duties to the company would immunize it from a claim brought by the company. He concluded that "the dishonest directors" could not "rely[] on their own dishonesty to found a defence."[75] Thus, the English fraud exception supports barring directing minds from relying on the *Canadian Dredge* defences.

E. Context is critical: common law of corporate attribution in the context of TUVs should not include "fraud" and "no benefit" defences

76. Causes of action for fraudulent conveyances have existed for over 400 years. Although now called transfers at undervalue, such actions have been statutorily codified in Canadian bankruptcy statutes for at least 150 years.[76] But, in the almost 40 years since *Canadian Dredge*, there are no reported decisions that consider the application of the *Canadian Dredge* standard in the context of transfers at undervalue or their analogues.

77. This lacuna in case law raises a fundamental question: what is the common law of corporate attribution for transfers at undervalue? As the Court of Appeal held, this is a question of first impression:

> Thus far, the corporate attribution doctrine has been applied in the fields of criminal and civil liability. Courts have yet to consider the doctrine in the

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[73] *Moulin*, 2014 HKCFA 22, para. 91.
[74] *Bilta*, [2015] UKSC 23, para. 85 (per Lord Sumption), citing *Moulin*, 2014 HKCFA 22, para. 106(4). See also: *Bilta*, [2015] UKSC 23, para. 9 (per Lord Neuberger) and para. 181 (per Lords Toulson and Hodge).
[75] *Bilta*, [2015] UKSC 23, para. 89.
[76] See Monitor's Factum, paras. 70-77.

bankruptcy and insolvency context under s. 96 of the *BIA*, making this a case of first impression.[77]

78. This section first explains why context is key in determining the development of the common law. Because it originated as a tool of public policy, corporate attribution is particularly sensitive to context. This section then turns to the particular context here—a transfer at undervalue claim—to determine the contours of the corporate attribution doctrine in this case.

79. Two aspects of this context render the "no benefit" and "fraud" defences from *Canadian Dredge* inapplicable to transfers at undervalue: (i) while corporate attribution is usually about the determination of the corporation's liability, the insolvency remedies are, in contrast, about the liability of *others* to the corporation; and (ii) the appellants' position would conflict with core legislative policy objectives embedded in Canada's bankruptcy and insolvency legislation

(i) Context is key: Different contexts cause the common law to develop differently

80. ***Common law doctrines respond to their surrounding legal contexts.*** Common law concepts and terms can often take their shape from the surrounding legal context. A common law concept in one legal context may have a different meaning when it is transported to a different context.

81. For example, despite its lengthy history in the common law, the definition of employee varies depending on the surrounding legal and legislative context. An employee in the employment standards context may not be an employee in human rights or tax contexts.[78] The question "must always be assessed in the context of the particular scheme being scrutinized."[79] Other examples include exemplary damages[80] and the definition of sale,[81] in which different

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[77] *Aquino ONCA*, para. 70.
[78] *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, para. 25; *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147, paras. 30-35. See also: *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3, paras. 13-18.
[79] *McCormick*, 2014 SCC 39, para. 25.
[80] *Prebushewski v. Dodge City Auto (1984) Ltd.*, 2005 SCC 28, para. 37.
[81] *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, paras. 10, 24-25.

contexts have driven different meanings, including departing from the traditional common law definition.

82. The same principles apply when common law doctrines are woven into the bankruptcy and insolvency context. As this Court explained in *Chandos*, when common law terms intersect with statutory schemes, the common law must align with the "means that best gives effect to the statutory scheme adopted by Parliament."[82] For example, in *Saulnier* and *Peoples*, this Court modified age-old common law concepts—property and privity—to align with the insolvency-specific contexts raised by those appeals.[83]

83. The appellants argue that legislatures do not intend to modify common law principles unless done so expressly. They argue that section 96 lacks the requisite clarity to oust *Canadian Dredge*. The Trustee endorses the Monitor's response to this argument, expressed at paragraphs 56-77 of its factum.

84. In addition to the Monitor's arguments, the Trustee adds, that context is—and must remain—key. The appellants presume there is a homogeneity to the common law across contexts. There is not. The appellants presume that there is an established common law doctrine of corporate attribution in the bankruptcy and insolvency context, generally, or in the context of the centuries-old doctrine of fraudulent conveyances, specifically. There is not. How the common law of corporate attribution—as developed in criminal and civil law—ought to be transplanted into the context of this insolvency remedy is unresolved. Indeed, it is the very question before this Court.

85. ***The common law of corporate attribution is particularly sensitive to context.*** The need for common law principles to be sensitive to the surrounding legal context is heightened for the doctrine of corporate attribution. Rather than treating the corporate attribution doctrine as a universal and free-standing set of rules applicable across the entire legal landscape, courts, both

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[82] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25, para. 33.
[83] *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, paras. 23, 43; *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, para. 91.

in Canada and internationally, have recognized that the surrounding legal and factual context must shape the application of the doctrine.

86. As has been discussed above, the rules in *Canadian Dredge* were specially tailored for corporate criminal law. The Court acknowledged that the answers it provided would not resolve attribution issues "in a permanent or universal sense", recognizing that new contexts may require further calibration and refinement.[84] *Livent* confirms this. It held that different considerations animate the application of the doctrine in civil cases and, in particular, auditor negligence cases.[85] Rigid application of the *Canadian Dredge* doctrine in *Livent* would have rendered an auditor's obligations "meaningless."[86] Similarly, in *Caja Paraguaya*, the Ontario Court of Appeal recently recognized that the corporate identification doctrine "is not a free-standing rule" divorced from the surrounding context and purpose for its invocation.[87]

87. The English corporate attribution jurisprudence echoes this context-based approach. Under English attribution law, "[q]uestions of attribution are always sensitive to the factual situation in which they arise, and the language and legislative purpose of any relevant statutory provisions."[88] This principle is instructive on this appeal, particularly given *Canadian Dredge*'s status as a descendant of the seminal English identification doctrine jurisprudence.[89]

88. For example, in *Meridian Global Funds Management Asia Limited v. The Securities Commission*—the "leading case on the topic of attribution in company law"[90]—the Judicial Committee of the Privy Council explained that the rules of attribution must be "tailored" to the "terms and policies of the substantive rule" at issue.[91] Finding the "special rule of attribution for the particular substantive rule" is "always a matter of interpretation." Courts must ask: "Whose

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[84] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 676.
[85] *Livent*, 2017 SCC 63, para. 102.
[86] *Livent*, 2017 SCC 63, para. 103.
[87] *Caja Paraguaya*, 2020 ONCA 124, para. 13.
[88] *Moulin*, 2014 HKCFA 22, para. 106(1); *Aquila*, 2021 UKSC 49, paras. 55-56; *Singularis*, 2019 UKSC 50, para. 30.
[89] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 678-679, citing *Lennard's Carrying Co.* [1915] A.C. 705 (HL (Eng)), RBOA, Tab 2.
[90] *Moulin*, 2014 HKCFA 22, para. 77.
[91] *Meridian*, [1995] UKPC 5, paras. 12, 23.

act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?" The court finds the answer "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."[92]

89. *Meridian* considered a provision in New Zealand's securities laws requiring persons to provide notice when they become a "substantial security holder."[93] In attributing the knowledge of a more junior employee to the company, the Privy Council explained that because the purpose of the securities law was to ensure the immediate disclosure of one's status as a substantial security holder, knowledge should be attributed to the person who carried out the transaction, even if they were not the company's senior officials.[94] Were it otherwise, "the policy of the Act would be defeated."[95]

90. More recently, the UK Supreme Court has considered a trilogy of cases that asked whether the dishonest or fraudulent acts of directors (and their accomplices) could be attributed to the corporation for the purpose of an illegality (*ex turpi causa*) defence in response to a claim brought by the corporation.[96] In each case, the Court declined to attribute the directors' intentions because, following *Meridian*, it would have cut against policy objectives embedded in the underlying common law rule or statutory provision at issue.[97] The lesson is clear: the rules of attribution must match the context.

(ii) The bankruptcy context shapes the corporate attribution doctrine

91. Consistent with the above principles, the Court of Appeal below did not treat corporate attribution as a free-standing—and frozen—doctrine. Instead, the Court of Appeal remained

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[92] *Meridian*, [1995] UKPC 5, para. 12.
[93] *Meridian*, [1995] UKPC 5, para. 2.
[94] *Meridian*, [1995] UKPC 5, para. 22.
[95] *Meridian*, [1995] UKPC 5, para. 22; *Bilta*, [2015] UKSC 23, para. 41 (per Lord Mance), para. 92 (per Lord Sumption); para. 191 (per Lords Toulson and Hodge).
[96] *Bilta*, [2015] UKSC 23; *Singularis*, 2019 UKSC 50; *Aquila*, 2021 UKSC 49.
[97] *Singularis*, 2019 UKSC 50, para. 35; *Aquila*, 2021 UKSC 49, para. 75; *Bilta*, [2015] UKSC 23, paras. 103, 208 (per Lords Toulson and Hodge). See also: *Bilta*, [2015] UKSC 23, para. 20 (per Lord Neuberger) and paras. 40-43 (per Lord Mance).

"sensitive to the context established by the field of law in which an imputation of intent to a corporation is sought to be made."[98] Here, that context is insolvency and transfers at undervalue.

92. In evaluating the corporate attribution doctrine within the sphere of insolvency, the Court of Appeal correctly identified two issues that must guide the common law of corporate attribution for transfers at undervalue:

(a) While corporate attribution has historically been about the determination of the corporation's liability, these insolvency remedies are, in contrast, about the liability of *third parties* to the corporation and its stakeholders *i.e.*, the liability of the transferees of a transfer at undervalue and their privies.

(b) The appellants' position would conflict with core legislative policy objectives, as reflected in Canada's bankruptcy and insolvency legislation, including: (i) maximizing the value of the debtor's assets; and (ii) preventing fraud that risks undermining commercial confidence in the credit system.

(A) Transfers at undervalue present a different context: they are not about the corporation's liability

93. Corporate attribution cases to date have all asked a fundamental question: should the corporation (and its stakeholders) bear responsibility for the impugned actions of the corporation's directing mind?[99] The question in this case—and in the transfer at undervalue context more broadly—is different: should the corporation (and its stakeholders) be able to recover from the wrongful acts of its directing minds and their accomplices? The difference in contexts leads to different rules of corporate attribution.

94. The Court of Appeal correctly noted this difference in contexts. It held that corporate attribution is generally about liability of the corporation: (i) in the criminal context "whether it would be just to visit criminal liability on a corporation" or (ii) in the civil context "whether it would be just to visit civil liability on a corporation."[100] In other cases, a defendant may seek to

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[98] *Aquino ONCA,* para. 71.
[99] *Aquino ONCA*; *Canadian Dredge,* [1985] 1 S.C.R. 662 at 701.
[100] *Aquino ONCA,* paras. 75-76.

attribute wrongdoing to the plaintiff corporation for the purpose of an illegality (*ex turpi causa*) defence[101] or knowledge of a claim to the plaintiff corporation for a limitations defence.[102] But in all these cases, the corporate attribution doctrine is about determining when a corporation should be liable for, or prejudiced by, the actions of its human operators.

95. In contrast, insolvency remedies are not focused on whether the *corporation* should bear responsibility for the directing mind's misdeeds. Instead, such remedies allow the corporate debtor (through a court officer) to make *others* liable, with the goal of enlarging its assets for the benefit of creditors.[103]

96. Under the TUV provisions the party liable is not the corporation but instead the third-party recipients of the corporation's assets and their privies. The remedies in section 96 are "directed against the transferee who receives the property and not against the debtor corporation who transfers it"; unlike other traditional corporate attribution cases, the corporate entity "is not prejudiced by a section 96 remedy."[104]

97. Because Section 96 is not concerned with the corporation's liability, the invocation of "fraud" and "no benefit" defences do nothing except disorient and confuse section 96. Those defences are designed to shield the corporation from the unfairness of vicarious liability.[105] Defences carefully tailored to calibrate the corporation's liability have no place in determining the liability of a third party.

(B) The appellants' use of the "no benefit" and "fraud" defences conflict with bankruptcy and insolvency policy

98. As the Court of Appeal observed, "policy currents flow rather differently" in the context of bankruptcy and insolvency.[106] The Monitor has detailed the history and policy objectives

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[101] *Livent*, 2017 SCC 63.
[102] *Golden Oaks Enterprises Inc. v. Scott*, 2022 ONCA 509.
[103] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42.
[104] Roderick J. Wood, "Ernst & Young Inc. v. Aquino: Attributing Fraudulent Intent to a Defrauded Corporation", (2022) 66 CBLJ 251 at 259.
[105] *Canadian Dredge*, [1985] 1 S.C.R. 662 at 707-708.
[106] *Aquino ONCA*, para. 77.

underlying section 96 and Canada's insolvency regimes; the Trustee does not repeat them here.[107]

99. These policy objectives guide the application of the common law of corporate attribution to insolvency remedies like transfers at undervalue. The Court of Appeal focused on two insolvency policy objectives:[108]

(a) "Preserving and maximizing the value of a debtor's assets"[109]; and

(b) Protecting "commercial morality by preventing fraudulent debtors from abusing the credit system" in a way that would "undermine public trust in the credit economy."[110]

The Court of Appeal correctly concluded that the adoption of the "fraud" and "no benefit" defences for insolvency remedies conflicted with these insolvency objectives.

100. ***Maximizing the value of the debtor's assets.*** One of the central goals of the insolvency regimes is to "provid[e] proper redress to creditors."[111] In *Golden Oaks*, the Court of Appeal similarly described a "fundamental tenet of insolvency law, the policy of ensuring equitable distribution of the assets between creditors."[112] This Court recently determined the application of common law principles in insolvency by referring to the objective of "maximiz[ing] the 'global recovery for all creditors'."[113]

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[107] Monitor's Factum, paras. 32-40.
[108] *Aquino ONCA*, paras. 77-79.
[109] *Callidus Capital Corp.*, 2020 SCC 10, para. 40.
[110] Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd Ed. (Toronto: Irwin Law, 2015), RBOA, Tab 6 at 41, *citing* *Shields v. Peak* (1883) 8 S.C.R. 579 at 588.
[111] *Aquino ONCA*, para. 79.
[112] *Golden Oaks*, 2022 ONCA 509, para. 57.
[113] *Chandos Construction*, 2020 SCC 25, para. 30.

101. This objective of equitable redress to creditors sits at the heart of insolvency remedies like TUVs. The goal of such provisions, as this Court has explained, is to "reverse the effects of a transaction that stripped value from the estate of a bankrupt person."[114]

102. Allowing a rogue directing mind to avail themselves of the "fraud" and "no benefit" defences would needlessly imperil equitable creditor recovery. The appellants have provided no insolvency law justification for John Aquino and his accomplices to outrank the debtors' creditors.

103. ***Preventing fraud and abuse.*** The Court of Appeal below explained that Parliament's policy objectives, as reflected in Canada's insolvency statutes, would recoil at "[a]n approach that would favour the interests of fraudsters over…creditors."[115] Put simply, "[p]ermitting the fraudsters to get a benefit at the expense of creditors would be perverse."[116] Lenders would lose confidence in the insolvency system if fraudulent actors could use their own fraud to dilute or defeat claims in the event of a bankruptcy or other insolvency.

104. ***Appellants offer no principled justification for using Canadian Dredge in the TUV context***. Incorporating the *Canadian Dredge* "fraud" and "no benefit" defences into the common law of corporate attribution in the context of TUVs is contrary to the objectives of Canada's insolvency regimes. The appellants' present two counterarguments to justify the inclusion of the *Canadian Dredge* in the TUV context. Neither is compelling.

105. First, they argue that while section 96 is a tool to address asset stripping, its strict statutory conditions must always be met.[117] This, with respect, begs the question. The question here is the common law of corporate attribution. Determining the common law in the context of

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[114] *Peoples Department Stores Inc.,* 2004 SCC 68, para. 91 (addressing the predecessor to s. 100 of the *BIA*, the now-repealed predecessor of the current transfer-at-undervalue provisions in s. 96 of the *BIA*).

[115] *Aquino ONCA,* para. 77.

[116] *Aquino ONCA,* para. 79.

[117] Appellants' Factum, para. 42; *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, para. 48.

TUVs requires the consideration of insolvency policy objectives. It will inform how the statutory conditions are applied.

106. Second, the appellants argue "en passant" that the Monitor and Trustee could have sued for other causes of action, like breach of fiduciary duty or fraud. This 'no harm no foul' defence is a red herring; it seeks to avoid the question of what the common law of corporate attribution should be in this context. More importantly, this argument contradicts a different insolvency policy objective: the "efficient" resolution of a debtor's insolvency.[118] As the Monitor has detailed at length, section 96 codifies a summary and efficient method of reversing transfers at undervalue. The appellants' approach would effectively remove this tool against fraudulent directing minds and their accomplices, miring the estate in years of litigation—at costs it may be unable to afford. There is no rationale for why Parliament would provide an efficient TUV remedy against a third party but limit its application against a corporations' own insiders.

107. The appellants have presented no policy rationales—insolvency or otherwise—for why the "fraud" and "no benefit" defences should be available to respondents in the TUV context. Their position relies on a formalistic reading of *Canadian Dredge* that, as demonstrated above, is neither consistent with the rationale of *Canadian Dredge* or Canada's insolvency regimes. The "fraud" and "no benefit" defences simply have no place in the common law of corporate attribution for TUVs.

F. Application of the corporate attribution doctrine to the facts of this case

108. This section first summarizes the Trustee's proposed incremental changes to the corporate attribution doctrine. It then applies this revised doctrine to the facts of the case.

109. This application demonstrates why such incremental changes are necessary, why they are aligned with the bankruptcy and insolvency regime and why they will not result in any unfairness or adverse consequences—contrary to the suggestions of the appellants otherwise.

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[118] *Callidus Capital Corp.*, 2020 SCC 10, para. 40.

(i) The Trustee's principled and incremental development to the corporate attribution doctrine

110. The Trustee's proposal can be summarized as follows: (i) the *Canadian Dredge* "fraud" and "no benefit" defences cannot be raised or relied on by the directing mind when the attribution dispute is between the corporation and the directing minds (and their accomplices); or (ii) the defences cannot be raised by a respondent to a TUV claim. As discussed above, these rules will ensure that directing minds cannot use their own wrongdoing as a shield for liability and it will also align the corporate attribution doctrine with the context and remedial aims of bankruptcy and insolvency legislation.

111. Each of the above scenarios is independently dispositive of the appellants' corporate attribution arguments. In other words, this Court need only accept that the "fraud" and "no benefit" defences cannot be raised in one of the above scenarios to resolve this issue in favour of the respondents.

(ii) Application of the revised corporate attribution doctrine to the facts of the case

112. As discussed, most of the section 96 pre-requisites are uncontested. The impugned transactions are non-arm's length transfers at undervalue occurring within the five-year statutory review period. The sole question is whether the debtor intended to defraud, defeat or delay a creditor.

113. Where the debtor is a corporation, there must be an attribution of the intent of the directing mind. John Aquino was the debtors' directing mind.[119] The application judge found that he wielded his corporate authority to "exercis[e] total control over the false invoicing scheme."[120] The "phony invoices" were created "for the purposes of stripping funds" from Forma-Con and BCCL.[121]

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[119] *Aquino ONCA,* para. 1.
[120] *Aquino ONSC,* para. 231.
[121] *Aquino ONSC,* paras. 236-237.

114. Under the Trustee's approach, John Aquino cannot rely on the "fraud" or "no benefit" defences. Instead, his intention to asset strip should be attributed to the debtors, regardless of whether his actions were in fraud of the debtors.

115. As for the other appellants, under section 96, liability extends to both transferees and "any other person who is privy to the transfer."

116. The appellants say that the application of the Trustee's approach creates two problems: (i) it imposes liability on mere privies to a transfer at undervalue; and (ii) it unfairly elevates the interests of creditors over those privies, effectively asking this Court to pick winners and losers from the debtors' financial struggles for no principled reason. As the next two subsections will reveal, neither of these responses has any merit.

(A) Privies were co-conspirators to the fraud; they are liable for the transfers at undervalue

117. In an effort to flip the equities of the case, the appellants cast themselves as mere privies to suggest some sort of innocence or lack of culpability. This is unsupportable on both the facts and the law.

118. On the facts, the application judge found that all the appellants had "collaborative involvement" in the false invoicing scheme.[122] They were not incidentally or tangentially associated with it. They sent emails calling for the creation of phony invoices, designed those fake invoices from fake suppliers (sometimes using supplier names that were similar to the names of the debtors' legitimate suppliers) and coordinated the suspiciously instantaneous "payment" of these suppliers.[123] The appellants "do not deny their involvement", "do not deny that they personally benefitted", and "provided no explanation" for the false invoicing scheme.[124] The precise label ascribed to them is a matter of semantics: whether "privies", "accomplices" or "fraudsters", they are implicated in the wrongdoing.

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[122] *Aquino ONSC,* para. 241.
[123] *Aquino ONSC,* para. 34.
[124] *Aquino ONSC,* para. 242.

119. Notwithstanding the coordinated fraud committed against the debtors, the application judge was still alert and sensitive to any potential unfairness from imposing liability on the privies. The application judge concluded that one of the privies, 2104664 Ontario Inc. ("**664**"), "was not involved in the false invoicing scheme…to the same degree" and had "not benefitted to the same extent" as the others.[125] Similarly, the application judge found that the appellant privy Coccia played a "limited role" in the scheme. As a result, the application judge did not make 664 or Coccia jointly and severally liable. Their liability was capped at the amount of the benefit they derived from the scheme.[126] No such accommodation was made for the other privies, emphasizing the significant scope of their involvement in the scheme.

120. With respect to the law, this Court has already considered the issue: imposing liability on privies to a TUV is critical to achieve Parliament's objectives. In considering the predecessor provision to section 96, this Court said that the "primary purpose" of addressing transfers at undervalue "is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person." To advance that purpose, the Court adopted 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."[127]

(B) The Trustee's approach protects creditors; it does not pick winners and losers

121. The appellants argue that the Trustee's approach unfairly elevates the interests of creditors over the interest of privies. They assert that by deviating from the strictures of *Canadian Dredge*, the Trustee is asking this Court to simply pick winners and losers.

122. No. The Trustee's approach does no such thing. The choice of who should be held liable for transfers at undervalue was made by Parliament in section 96. That section stipulates the rules of when liability can be imposed on a transferee and those privy to the transaction. Parliament has prescribed specific guard rails to ensure that section 96 does not target legitimate

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[125] *Aquino ONSC,* para. 282.
[126] *Aquino ONSC,* paras. 243-245, 282.
[127] *Peoples Department Stores Inc.,* 2004 SCC 68, para. 91; *Bank of Montreal v. EL04 Inc. (Just Between Us and Pink Elephant)*, 2012 ONCA 80, paras. 21-23.

transfers. Moreover, section 96 is discretionary and equitable principles guide the exercise of the court's discretion in awarding remedies, which further protects against potential unfairness.[128]

123. As Professor Roderick Wood explains, "the defences and protections afforded to transferees are to be found in the legislation itself and not from the application of the corporate attribution principle."[129] Keeping the "fraud" and "no benefit" defences away from section 96 will not tilt the scales in favour of creditors nor will it allow debtors to capture genuine and legitimate business transactions with the TUV provisions. Instead, it is the appellants' legal position that would create unfair or harsh results; if accepted, it would craft an exception from the default rule that privies are liable for a TUV, an exception that would perversely apply only in cases of insider fraud.

124. The appellants rely on the New York Court of Appeal's decision in *Kirschner v. KPMG LLP* to support an argument that the Trustee's proposal leads to courts arbitrarily picking winners and losers.[130] In *Kirschner*, the Court rejected a litigation trustee's proposal to modify attribution principles because it would effectively devolve into the Court picking winners and losers between two sets of "innocent stakeholders."[131] This principle is similar to one embodied in *DeJong*, which the Court of Appeal in *Golden Oaks* described as follows: "uses of corporate attribution which encourage victims of fraud to enlarge their recovery at the expense of other victims… are to be avoided."[132]

125. This principle does not apply here. Privies are not innocent stakeholders. In the eyes of Parliament, they have, at a minimum, contributed to asset stripping to the detriment of creditors.

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[128] *Peoples Department Stores Inc.*, 2004 SCC 68, para. 81 (addressing the predecessor to s. 100 of the *BIA*, the now-repealed predecessor of the current transfer-at-undervalue provisions in s. 96 of the *BIA*)); *Mercado Capital Corporation v. Qureshi*, 2017 ONSC 5572, paras. 22-29, aff'd 2018 ONCA 711 (accepting that the s. 100 jurisprudence applies to s. 96).

[129] Roderick J. Wood, "Ernst & Young Inc. v. Aquino: Attributing Fraudulent Intent to a Defrauded Corporation", (2022) 66 CBLJ 251 at 251.

[130] *Kirschner*, 15 NY 3d 446 (2010).

[131] *Kirschner*, 15 NY 3d 446 (2010) at 475.

[132] *Golden Oaks*, 2022 ONCA 509, paras. 46, 50.

And, of course, in this appeal, the privies did much more than simply contribute to the asset stripping; they helped, designed and executed it. The only innocent stakeholders in this case are the debtors' creditors, who stand to lose from the appellants' clandestine asset-stripping.

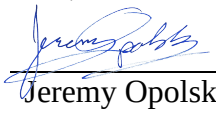
PART IV - SUBMISSIONS CONCERNING COSTS

126. The Trustee seeks its costs of the appeal in accordance with the court's tariff of fees and disbursements.

PART V - ORDER OR ORDERS SOUGHT

127. The Trustee requests that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 4th DAY OF JULY 2023



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PART VI - TABLE OF AUTHORITIES

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