File Number: 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 -

ATTORNEY GENERAL OF ONTARIO and INSOLVENCY INSTITUTE OF CANADA

Interveners

FACTUM OF THE INTERVENER, INSOLVENCY INSTITUTE OF CANADA

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

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PART I – OVERVIEW

1. This case affords the Court an opportunity to clarify the scope of the corporate attribution doctrine, including the reach of *Canadian Dredge & Dock Co. v. The Queen*[1] outside the criminal law context in which the doctrine arose. Despite earlier attempts to address uncertainty in the lower courts, the criticism that the case law has been "marked by inconsistency and confusing judicial analysis" unfortunately still rings true.[2] Because ambiguity concerning foundational issues in the treatment of corporations impedes the sound administration of Canada's insolvency laws, the Insolvency Institute of Canada ("**IIC**") intervenes to urge two clarifications.

2. *First*, the Court should make clear that *Dredge* did not purport to provide an all-encompassing test for corporate attribution. Rather, Justice Estey's path-marking opinion for the Court is best read as embracing (i) a general common law rule for imputing to a corporation the knowledge and intent of its directing mind (the "identification" doctrine) and (ii) a policy-based exception to that rule in the context of a *mens rea*-based criminal offence.

3. As explained in *Dredge*, imputing to the corporation the *mens rea* of a directing mind who acted "totally in fraud" of the corporation and "exclusively" for their own benefit "would not advantage society by advancing law and order".[3] Thus, *Dredge* recognized a policy-driven defence to *mens rea*-based criminal offences—effectively, an exception to the general rule that "the natural[] and legal person [are treated as] having merged into one identity".[4] But Estey J. cautioned that corporate attribution raises "manifold and complex" questions that were not likely to be answered "in a permanent or universal sense" in *Dredge*.[5]

4. Under this straightforward reading of *Dredge*, at common law, a corporation will *usually* be fixed with the knowledge and intent of its directing mind, but the specific legal context in which

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1 [1985] 1 S.C.R. 662 [*Dredge*].

2 Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization", (2007) 45:1 Alta. L. Rev. 171 at p. 201; see also Roderick J. Wood, "*Ernst & Young Inc. v. Aquino*: Attributing Fraudulent Intent to a Defrauded Corporation" (2022), 66 Can. Bus. L. J. 251 at pp. 258-261 (critiquing a "misdirect[ed]" focus of analysis that "does not quite connect") [Wood, "*Aquino*"] [IIC BoA, Tab 7].

3 *Dredge* at pp. 707-708 & 713.

4 *Dredge* at p. 683.

5 *Dredge* at p. 676.

the attribution question arises may call for a different answer. This approach harmonizes "a legal system ... that prizes consistent and predictable rulings" with the common law's promise of fairness in individual circumstances.[6] That balance is imperative in the insolvency context because, as this Court has said, "fairness, predictability and efficiency" are fundamental principles that have guided the development of Canada's insolvency regime.[7]

5. *Second*, this Court should affirm the availability of principled exceptions to the identification doctrine. When determining whether an exception is warranted, courts should consider the context and purpose of the specific legal rule at issue. That analysis will, of course, benefit from scrutiny of the broader policy objectives reflected in any relevant legislative scheme. But courts must be careful not to allow reliance on broad legislative purposes to supplant specific legal rules. That admonition is especially important in the context of a complex legislative scheme like Canada's insolvency regime, which does not pursue any single purpose at all costs, but seeks to carefully balance a multitude of competing interests.

6. The IIC takes no position on the facts or outcome of this appeal or its companion case.[8]

PART II – STATEMENT ON QUESTION AT ISSUE

7. The IIC intervenes solely with respect to the first question concerning the scope of the corporate attribution doctrine. In the IIC's view, the Court of Appeal correctly declined to treat *Dredge* as a straightjacket that constrained it from engaging in a contextual and purposive interpretation of section 96 of the *Bankruptcy and Insolvency Act* ("***BIA***") to determine whether application of the corporate identification doctrine was appropriate in the circumstances.[9]

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6 *Nova Chem. Corp. v. Dow Chem. Co.*, 2020 FCA 141 at para. 9, *aff'd* 2022 SCC 43.

7 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 90 [*Callidus*] (quotation omitted).

8 The IIC has also sought leave to intervene in *Lorne Scott v. Doyle Salewski Inc.* (Case No. 40399) [*Golden Oaks*]. The IIC's motion is limited to submissions concerning the law of set-off under section 97(3) of the *BIA*, an issue that is not raised here. By contrast, the IIC's submissions in this appeal may be helpful to the Court in *Golden Oaks* as they concern the same corporate attribution issue that arises in both cases.

9 R.S.C. 1985, c. B-3 [*BIA*].

PART III – STATEMENT OF ARGUMENT

A. *Dredge* Recognized that a Directing Mind's Knowledge and Intent Will Usually Be Attributed to the Corporation Under the 'Identification Doctrine'

8. This Court's decision in *Dredge* "remains the authoritative test for the application of the corporate identification doctrine".[10] It is thus helpful to recall how *Dredge* approached the issue.

9. Justice Estey's reasons began by distinguishing corporate attribution on the basis of vicarious liability and primary liability.[11] The corporation's state of mind could be relevant only in the latter.[12] As Estey J. noted, common law courts "from the earliest times found vicarious liability in the corporation on the principles of agency", such as in the law of torts.[13] But courts had been far more circumspect in attributing an individual's actions to the corporation in situations that implicated the corporation's own state of mind.[14]

10. That dam broke with the House of Lord's landmark decision in *Lennards' Carrying Co. v. Asiatic Petroleum Co.*[15] Viscount Haldane's judgment is remembered for embracing the rule that a corporation is properly fixed with the knowledge and intent of "the person of somebody who for some purposes may be called an agent, *but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation*."[16] As Viscount Haldane reasoned, "if Mr. Lennard was the directing mind of the company, *then his action must ... have been an action which was the action of the company itself ...*".[17]

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10 *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 104 [*Livent*].

11 See *Dredge* at pp. 673-675.

12 Vicarious liability "is also known as 'strict' or 'no-fault' liability, because it is imposed in the absence of fault of the [corporation]": see *Bazley v. Curry*, [1999] 2 SCR 534 at para. 1; see also Kevin McGuinness, *Canadian Business Corporations Law*, 3rd ed. (Lexis, 2017) at §8.14 [IIC BoA, Tab 5].

13 *Dredge* at p. 677.

14 *Dredge* at p. 676.

15 *Lennards' Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.) [*Lennards'*] [IIC BoA, Tab 2].

16 *Dredge* at p. 679 (emphasis added), quoting *Lennards'* at pp. 713-714.

17 *Dredge* at p. 679 (emphasis added), quoting *Lennards'* at pp. 713-714. *Lennards'* was a civil case, but was later applied by British courts in civil and criminal cases "with no divergence of

11. *Dredge* endorsed *Lennards'* as stating a general rule. A corporation would properly be attributed (or "identified") with the state of mind of an individual, according to Estey J., "so long as the employee or agent in question is of such a position in the organization and activity of the corporation that he or she represents its *de facto* directing mind, will, centre, brain area or ego ...".[18] Or, as more simply stated by a leading modern treatise, "[t]he corporation will be primarily liable where the act complained of can be attributed to its directing mind—to a person who acts not on behalf of the corporation, but rather as the corporation."[19]

12. Such a straightforward default rule promotes the predictable and consistent legal outcomes that are necessary in a world where corporations are ubiquitous. That is especially so in the insolvency context because Parliament has sought to "provide[] a structured system and ensure[] a fairly predictable and consistent outcome".[20] This Court has likewise underscored the importance of "fairness, predictability and efficiency" to Canada's insolvency regime.[21]

B. Exceptions to the Identification Doctrine Should Consider the Context and Purpose of Legal Rules at Issue, as Illustrated by Both *Dredge* and *Livent*

13. Even as *Dredge* recognized the general rule of the identification doctrine, it also recognized an exception to that rule, or what Estey J. described as "defences".[22]

14. The Court's analysis was grounded in a pragmatic assessment of the context and purpose of criminal law. In Justice Estey's view, "no social purpose is served by convicting a corporation whose directing mind has acted throughout in fraud of that corporation" and "without any benefit to the corporate employer".[23] Criminal liability in such circumstances "would not provide protection of any interest in the community" and "would not advantage society by advancing law

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approach": see *El-Ajou v. Dollar Land Holdings Plc (No. 1)*, [1994] 2 All E.R. 685 at p. 695, *per* Nourse L.J. [IIC BoA, Tab 1]. In Canada, this Court has likewise imported *Dredge* into the civil context: see *Livent* at paras. 100 & 104.

18 *Dredge* at p. 675.

19 McGuinness at § 8.14.

20 Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Thomson Reuters, 2009, loose-leaf) at A4, § A4:1 [IIC BoA, Tab 4].

21 *Callidus* at para. 90 (quotation omitted); see also *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25 at para. 39 (urging "certainty and coherence").

22 *Dredge* at p. 714.

23 *Dredge* at p. 704.

and order."[24] Thus, in such circumstances, the directing mind's knowledge and intent should *not* be attributed to the corporation.[25]

15. But Estey J. was careful to add that he was not purporting to resolve all issues about corporate attribution "in a permanent or universal sense in this appeal".[26] To the contrary, courts would continue to "adapt[] the common law rules of law to the changing realities of the community."[27] That guidance has proved apt.

16. Indeed, this Court took precisely such a step in *Deloitte & Touche v. Livent Inc.* There, an auditor who was sued for negligence in the performance of its statutory audit invoked the defence of illegality. The auditor alleged that the illegal conduct of certain directors and managers was the conduct of the corporation. The attribution question was thus squarely presented.[28]

17. The Court recognized that the relevant individuals were properly characterized as directing minds.[29] Yet it declined to attribute their conduct to the corporation. In so concluding, *Livent* drew heavily on the context and purpose of the audit required by the relevant corporate statute.[30] The "very purpose" of the audit was "to provide a means by which fraud and wrongdoing may be discovered".[31] To allow an auditor to escape liability "on the basis that an individual within the corporation has engaged in the very action that the auditor was enlisted to protect against would render the statutory audit meaningless".[32] Thus, the context and purpose of the audit regime militated *against* the default attribution rule.

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24 *Dredge* at pp. 707-708. Notably, Parliament has since overridden *Dredge* in a way that "makes it both easier and more difficult successfully to prosecute a corporation criminally": see MacPherson at p. 193; see also *Criminal Code*, R.S.C. 1985, c. C-46, s. 22.1 (negligence-based offences) & s. 22.2 (all others).

25 *Dredge* at p. 708.

26 *Dredge* at p. 676.

27 *Dredge* at p. 719.

28 *Livent* at paras. 98-99.

29 *Livent* at para. 101.

30 *Livent* at paras. 61 & 103-104.

31 *Livent* at para. 103.

32 *Livent* at para. 103.

18. Taken together, *Dredge* and *Livent* show that the corporate attribution doctrine cannot be divorced from the context in which and the purpose for which the attribution question arises. As explained in *Livent*, "[t]he corporate identification doctrine ... is a means by which acts may be attributed to a corporation *for the particular purpose or defence at issue*."[33]

19. If understood this way, the Court's precedent aligns with the approach in British common law jurisprudence. *Meridian Global Funds Management Asia Ltd. v. Securities Commission*[34]—recognized as "[t]he leading modern case" by the UK Supreme Court—similarly emphasizes that "the key to any question of attribution is ultimately always to be found in considerations of context and purpose."[35] The critical question is always "[w]hose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?"[36]

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33 *Livent* at para. 97 (emphasis added). To the extent this Court's decision in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30 [*DeJong*] reads the *Dredge* defence as being applicable in *all* contexts, that approach is inconsistent with *Dredge* itself. *DeJong* should thus be limited to knowing assistance claims "in the time-honoured tradition of interpreting the scope of a previous decision": see *R. v. Kirkpatrick*, 2022 SCC 33 at para. 97. That is all the more so because *DeJong*'s fleeting discussion of *Dredge* was not dispositive. This Court adopted "as [its] own" the reasons of van Rensburg J.A. below. See *DeJong* at para. 1. Those reasons make clear that van Rensburg J.A. concluded that the claim should fail based on the participation issue "alone". See *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60 at paras. 160 & 231-232. In any event, Justice van Rensburg's opinion offers ample reason for making an exception to the general attribution rule in the case of knowing assistance claims, meaning that *DeJong* is readily synthesized with the approach urged here. See *ibid* at para. 237.

34 [1995] All E.R. 918 (P.C.) [*Meridian*] [IIC BoA, Tab 3].

35 *Jetivia SA and another v. Bilta (UK) Limited (in liquidation) and others*, [2015] UKSC 23 at para. 41, *per* Mance L.J. & para. 67, *per* Sumption L.J. [*Bilta*]; see also *Meridian* at pp. 923-924.

36 *Meridian* at p. 924 (emphasis added). A different approach is not called for in the context of a so-called "one person" corporation, unless the context and purpose of a given legal rule itself depends on the number of directing minds at a corporation. To the extent the UK Supreme Court previously endorsed a contrary position (see *Stone & Rolls Ltd. (in liquidation) v. Moore*

C. The Context and Purpose of the Specific Legal Rule at Issue Should Guide the Analysis and Should Not Be Supplanted by Broader Policy Objectives

20. In applying the above approach, two related points are especially salient in the insolvency context. *First*, courts should emphasize the context and purpose of the specific legal rule at issue. *Second*, even though broad policy objectives will help place a specific legislative provision in context, they should not supplant Parliament's purpose in enacting that specific rule.

21. *Aquino* illustrates the first point.[37] The Court of Appeal correctly observed that "s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate".[38] The provision, with its "wide[] potential application", is part of the powerful reviewable transactions framework that provides the trustee (or monitor, when acting under the *Companies' Creditors Arrangement Act*[39]) with enhanced powers to challenge transactions that diminish the value of an insolvent company's estate.[40] In this sense, the provision furthers the *BIA*'s broader goal to ensure "the equitable distribution of the bankrupt's assets among his or her creditors".[41]

22. There are multiple paths for a trustee to make out a claim under section 96, depending on the identity of the transferee and when the transfer happened. In some cases, the trustee will have to show that the corporation "intended to defraud, defeat or delay a creditor".[42] In these cases, "the crucial question" is whether the trustee has shown "the fraudulent intent of the debtor."[43]

23. Courts have recognized "the obvious limitations in proving a debtor's subjective state of mind".[44] So instead of interrogating corporate knowledge or intent, courts long relied on so-called

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Stephens, [2009] UKHL 39), it has revisited its position. *Stone & Rolls* is thus best "put on one side and marked 'not to be looked at again' ". See *Bilta* at para. 30, *per* Neuberger L.J.

37 *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202 [*Aquino ONCA*].

38 *Aquino ONCA* at para. 25, quoting *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 at para. 48.

39 *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 36.1 [*CCAA*].

40 Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Irwin Law, 2015) at pp. 189-90 [Wood, *Bankruptcy and Insolvency Law*] [IIC BoA, Tab 6].

41 *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 67.

42 See *BIA*, s. 96(1)(a)(iii) (arm's length transfers) & s. 96(1)(b)(ii)(B) (non-arm's length transfers between 1-5 years prior to insolvency where debtor not insolvent or rendered insolvent).

43 *Urbancorp* at para. 64.

44 *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527 at para. 151 [*Aquino* ONSC].

"badges of fraud". The badges operate as "an evidentiary shortcut" that "may cause the court to draw an inference of fraudulent intent".[45] For example, a trustee may establish a presumption of fraudulent intent by showing that "the transferor has few remaining assets after the transfer," "the transfer was made to a non-arm's length person," or that "the transfer was secret."[46]

24. But the historical reliance on badges of fraud should not foreclose reliance on the intent of a directing mind to prove the intent of the corporation, particularly where evidence of the directing mind's fraudulent intent is available. Where, as in this case, the attribution issue arises, the question should simply be whether the normal rule of attribution would "achieve the [provision's] social purpose of providing proper redress to creditors".[47] That, as the Court of Appeal correctly recognized, is the "core aim of s. 96".[48] If the answer is "yes", then the ordinary identification rule should apply; if the answer is "no", then an exception is warranted.[49]

25. Whether the directing mind is acting "totally in fraud" of the corporation or for their own benefit is irrelevant under section 96. That is so because, as one leading scholar has observed, "[t]he 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*."[50]

26. It bears recalling that "the corporation is not prejudiced by a section 96 remedy" because "the remedy is directed against *the transferee* who receives the property and *not against the debtor corporation* who transfers it."[51] The rationale underlying the *Dredge* exception to the identification doctrine is thus wholly absent. While Estey J. was concerned that "no social purpose

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45 *Urbancorp* at para. 55; Roderick J. Wood, "Transfers at Undervalue: New Wine in Old Wineskins?" 2017 Ann. Rev. Insolv. 1 at p. 10 [IIC BoA, Tab 8].

46 *Montor Business Corp. v. Goldfinger*, 2016 ONCA 406 at para. 73.

47 *Aquino ONCA* at para. 79.

48 *Aquino ONCA* at para. 79.

49 To be sure, section 96 also implicates the "competing objective ... of preserving the finality of legitimate commercial transactions". Wood, *Bankruptcy and Insolvency Law* at p. 191. But that objective has been addressed by Parliament in the text of section 96 itself, which precisely circumscribes the circumstances where a trustee may proceed against a transferee.

50 Wood, "*Aquino*" at p. 260 (emphasis added).

51 Wood, "*Aquino*" at p. 259 (emphasis added).

is served by convicting a corporation whose directing mind has acted throughout in fraud of that corporation",[52] the corporation's interests have no role to play in applying section 96.

27. Turning to the second point, although the broader policy objectives of the *BIA* and related statutes provide helpful context for specific legal rules, those objectives should not supplant the purpose behind any given rule. As Cromwell J. has observed, "the broader purposes" of a complex legislative regime "are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme".[53]

28. Consider the differences between section 96, on the one hand, and sections 71 and 30(1)(d) of the *BIA*, on the other. While section 96 provides a trustee with enhanced powers to pursue recovery, sections 71 and 30(1)(d) together enable a trustee to advance claims as a successor to a debtor corporation itself.

29. Although successor claims also "help[] maximize the global recovery for all creditors",[54] this Court has repeatedly admonished that, under section 71 and similar provisions, the trustee simply stands in the shoes of the debtor corporation. That is, "the trustee has no more rights with respect to the debtor's property than did the debtor"; as Binnie J. colourfully put it, the trustee simply acquires the debtor's assets "warts and all".[55] The upshot of successor claims is that—unlike trustee-empowering provisions like section 96—the trustee's rights *in* bankruptcy are no greater than the debtor's rights would have been *outside* bankruptcy.

30. This distinction carries an important implication for the attribution analysis. While the question under section 96, as discussed above, is simply whether attribution to establish the corporation's fraudulent intent furthers creditor recovery, the question is less straightforward for successor claims. Courts must also study the context and purpose behind the claims the trustee has invoked (unjust enrichment, fraudulent conveyance, etc.). In so doing, courts should resist the

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52 *Dredge* at p. 704.

53 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 174, *per* Cromwell J concurring; see also *Callidus* at para. 40 (recognizing numerous purposes under insolvency statutes).

54 *Chandos* at para. 30 (quotation omitted).

55 *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63 at para. 37; *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 at para. 50; see also *Giffen (Re)*, [1998] 1 S.C.R. 91 at para. 50.

temptation to approve *whatever* outcome most maximizes creditor recovery, lest Canada's insolvency laws be effectively rewritten to pursue a single purpose at all costs.

31. *Livent* again is instructive. The Court there considered the purpose of the statutory audit requirement in the context of a negligent misrepresentation claim, independent of the fact that the corporation was insolvent and its receiver brought the claim.[56] Although the shoes-of-the-debtor rule was not considered, the result was nonetheless faithful to the rule, and *Livent*'s attribution analysis was not skewed by undue reliance on the broader goals of insolvency law.

32. In sum, the law of corporate attribution, particularly in the insolvency context, requires a balance between predictability, consistency, and fairness. *Dredge* is best read as striking that balance with a general rule that a directing mind's knowledge or intent will be attributed to the corporation, absent an exception driven by the "social purpose" of the particular legal rule at issue.[57] That "pragmatic" approach remains sound, and should be affirmed here.[58]

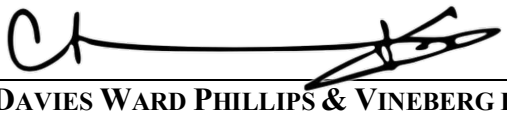
PART IV – SUBMISSIONS ON COSTS

33. The IIC seeks no costs and requests that no order for costs be made against it.

PART V – ORDERS SOUGHT

34. The IIC seeks no other orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 31ST DAY OF JULY, 2023.



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56 *Livent* at paras. 101-104. Like trustees, receivers also stand in the shoes of the debtor when advancing claims on behalf of an insolvent corporation. See *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 109.

57 *Dredge* at p. 704.

58 *Dredge* at p. 701.

PART VI – TABLE OF AUTHORITIES

	Jurisprudence	Cited in paragraphs
1.	*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10	4, 12 & 27
2.	*Bazley v. Curry*, [1999] 2 SCR 534	9
3.	*Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662	1-4, 7-11, 13-15, 18, 23, 26 & 32
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5.	*Christine DeJong Medicine. Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, *aff'g* 2018 ONCA 60	18
6.	*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63	10, 16-18 & 31
7.	*El-Ajou v. Dollar Land Holdings Plc (No.1)*, [1994] 2 All E.R. 685 [IIC BoA, Tab 1]	10
8.	*Ernst & Young Inc. v. Aquino*, 2022 ONCA 202, *aff'g* 2021 ONSC 527	21 & 23-24
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