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SUPREME COURT OF CANADA

CITATION: Aquino *v.* Bondfield Construction Co., 2024 SCC 31

APPEAL HEARD: December 5, 2023
JUDGMENT RENDERED: October 11, 2024
DOCKET: 40166

BETWEEN:

John Aquino, 2304288 Ontario Inc., Marco Caruso, Giuseppe Anastasio, also known as Joe Ana and Lucia Coccia, also known as Lucia Canderle
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

- and -

Attorney General of Ontario and Insolvency Institute of Canada
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 100)	Jamal J. (Wagner C.J. and Karakatsanis, Côté, Rowe, Martin and O'Bonsawin JJ. concurring)

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John Aquino,
2304288 Ontario Inc.,
Marco Caruso,
Giuseppe Anastasio, also known as Joe Ana and
Lucia Coccia, also known as Lucia Canderle *Appellants*

v.

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*

and

Attorney General of Ontario and
Insolvency Institute of Canada *Interveners*

Indexed as: Aquino *v.* Bondfield Construction Co.

2024 SCC 31

File No.: 40166.

2023: December 5; 2024: October 11.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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Bankruptcy and insolvency — Transfers at undervalue — Intent to defraud, defeat, or delay creditor — Corporate attribution doctrine — Fraud exception — Directing mind of debtor companies engaged in false invoicing scheme — Monitor and trustee in bankruptcy of debtor companies applying under federal bankruptcy and insolvency legislation to recover monies paid to individuals involved in scheme on basis that transactions were transfers at undervalue and that debtors intended to defraud, defeat or delay creditors — Applications allowed and repayment of monies ordered — Whether trustee and monitor established directing mind's intent to defraud, defeat, or delay creditors — Whether intent of directing mind to defraud, defeat, or delay creditors can be attributed to debtor companies — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 96(1)(b)(ii)(B).

A was the president and directing mind of two family-owned construction companies that worked on large-sale construction projects. When the companies began experiencing serious financial difficulties, restructuring and bankruptcy proceedings were commenced. The monitor and trustee in bankruptcy's investigations revealed that for years A and several others had been fraudulently taking tens of millions of dollars from the debtor companies through a false invoicing scheme. The monitor and trustee in bankruptcy challenged the transactions and sought to recover the monies on the basis of s. 96(1)(b)(ii)(B) of the *Bankruptcy and Insolvency Act* ("*BIA*"). This provision provides that a trustee in bankruptcy or, through s. 36.1 of the *Companies' Creditors Arrangement Act*, a monitor, may apply to a court to impugn and recover from a non-arm's length party to a transaction some or all of the amount of the transfer at

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undervalue (defined in s. 2 of the *BIA* as a transaction in which a debtor transfers property or provides services to another person for no consideration or conspicuously less than fair market value), if the trustee can show, among other things, that the debtor intended to "defraud, defeat or delay a creditor".

The application judge held that the false invoice payments were transfers at undervalue and could be recovered by the monitor and trustee in bankruptcy under s. 96(1)(b)(ii)(B) of the *BIA*. First, the debtor companies had paid the monies to certain suppliers who provided nothing in return. Second, the debtor companies made the payments with the intent to defraud, defeat, or delay a creditor, as revealed by several badges of fraud. She rejected the argument that the debtor companies could not have had this intent because the payments were made at a time when the companies were not insolvent or at risk of insolvency. She attributed A's fraudulent intent to the debtor companies and ordered A and the others to pay the monitor and trustee in bankruptcy the monies they received under the false invoicing scheme. The Court of Appeal affirmed the application judge's ruling.

Held: The appeal should be dismissed.

The application judge did not misapply the badges of fraud approach to inferring fraudulent intent. A court may find that a debtor intended to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) of the *BIA* even if the debtor was not insolvent at the time of the transfer at undervalue. There is therefore no basis to interfere with the application judge's conclusion that A intended to defraud, defeat or delay a

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creditor under the false invoicing scheme. Furthermore, A's fraudulent intent should be attributed to the debtor companies because he was their directing mind and acted in the sector of corporate responsibility assigned to him. The corporate attribution doctrine must be applied purposively, contextually, and pragmatically to give effect to the policy goals of the law under which a party seeks to attribute to a corporation the actions, knowledge, state of mind, or intent of its directing mind. In the context of a claim under s. 96 of the *BIA*, the "fraud" and "no benefit" exceptions to corporate attribution should not apply because these exceptions would undermine the purpose of this provision; accordingly, the test for corporate attribution under s. 96 is simply whether the person was the directing mind and whether their actions were performed within the sector or corporate responsibility assigned to them.

Section 96(1)(b)(ii)(B) of the *BIA* requires the party seeking to reverse a transfer at undervalue to prove, among other things, the debtor's intent to defraud, defeat, or delay a creditor. This is a question of fact to be decided based on all the circumstances that existed at the time of the transfer. Because it is often difficult to adduce evidence of a debtor's subjective intent, the intent requirement is often proved through the evidentiary shortcut of badges of fraud, which are suspicious circumstances from which a court may infer the debtor's intent to defraud, defeat, or delay a creditor. Badges of fraud might include: (a) the debtor had few remaining assets after the transfer; (b) the transfer was made to a non-arm's length party; (c) the debtor was facing actual or potential liabilities, was insolvent, or was about to enter a risky undertaking; (d) the consideration for the transaction was grossly inadequate; (e) the

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debtor remained in possession of the property for their own use after the transfer; (f) the deed or transfer had a self-serving and unusual provision; (g) the transfer was secret; (h) the transfer was made with unusual haste; and (i) the transaction was made despite an outstanding judgment against the debtor. The presence of a particular badge of fraud does not require a court to infer an intent to defraud, defeat, or delay a creditor, nor does the absence of a particular badge of fraud require the court to refrain from inferring that intent.

The *BIA* is clear that insolvency is not a prerequisite to finding a debtor intended to defraud, defeat, or delay a creditor. Section 96(1)(b)(ii) is disjunctive: the debtor must either be insolvent at the time of the transfer (s. 96(1)(b)(ii)(A)) or intend to defraud, defeat, or delay a creditor (s. 96(1)(b)(ii)(B)). It is therefore no answer to an application under s. 96(1)(b)(ii)(B) of the *BIA* to say that a corporate debtor was not insolvent and was paying its creditors in full and on time at the time of the transfers. Although the debtor's financial condition at the time of the transfer is one badge of fraud that may be relevant in inferring an intent to defraud, defeat, or delay a creditor, whether that intent exists must be determined based on all the circumstances.

In the instant case, A intended to defraud, defeat, or delay a creditor under the false invoicing scheme. The transfers were made between non-arm's length parties; the debtor companies received no value; the truth about the transfers was hidden behind false invoices describing services that were never provided; the transfers were made with unusual haste; and at the time of the transfers the companies had significant

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long-term and off-balance sheet liabilities and potential liabilities as guarantors for other companies. However, to satisfy s. 96(1)(b)(ii)(B), the monitor and trustee in bankruptcy must show that the debtor companies intended to defraud, defeat, or delay a creditor. This requires showing why it is appropriate to attribute A's fraudulent intent to the debtor companies.

The common law doctrine of corporate attribution provides guiding principles for when the actions, knowledge, state of mind, or intent of the directing mind of a corporation may be attributed or imputed to the corporation. Although a corporation is a separate legal person, it has no mind or will of its own. A directing mind must be identified because a corporation can only act through a human agent. The guiding principles for the common law doctrine of corporate attribution provide that as a general rule, a person's fraudulent acts may be attributed to a corporation if two conditions are met: the wrongdoer was the directing mind of the corporation at the relevant times; and the wrongful actions of the directing mind were performed within the sector of corporate responsibility assigned to them. Attribution will generally be inappropriate when the directing mind acted totally in fraud of the corporation or the directing mind's actions were not by design or result partly for the benefit of the corporation — known as the "fraud" or "no benefit" exceptions. In addition to these exceptions, courts have discretion to refrain from attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation when this would be in the public interest, in the sense that it would promote the purpose of the law under which attribution is sought. In all cases, courts must apply the common law corporate

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attribution doctrine purposively, contextually, and pragmatically. The corporate attribution doctrine is not a standalone principle; there is no one-size-fits-all approach. The court must always determine whether the actions, knowledge, state of mind, or intent of a person should be treated as those of the corporation for the purpose of the law under which attribution is sought. This may require the court to tailor the general rule of attribution or its exceptions to the particular legal context. Attribution may be appropriate for one purpose in one context but inappropriate for another purpose in another context.

The fraud and no benefit exceptions to corporate attribution do not apply in the context of a transfer at undervalue under s. 96 of the *BIA*. These exceptions would undermine rather than promote the purpose of this statutory provision. The purpose of s. 96 is to protect creditors from harmful actions by a debtor that would diminish the assets available for recovery. That purpose is served by attributing the actions, knowledge, state of mind, or intent of the corporation's directing mind to the corporation, so long as those actions were performed within the sector of corporate responsibility assigned to them. This is so even if the directing mind acted in fraud of the corporation, and even if the corporation did not benefit from the actions of the directing mind. By contrast, applying the fraud and no benefit exceptions would render the transfer at undervalue remedy meaningless and would deny third-party creditors a statutory remedy that Parliament intended would be available to protect them.

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In the instant case, the fraud and no benefit exceptions are inappropriate and inapplicable and as a result A's intent should be attributed or imputed to the debtor companies. Attributing A's fraudulent intent to the debtor companies would advance the public policy underlying s. 96 of the *BIA* as attribution would allow creditors to recover fraudulently transferred assets that unlawfully reduced the value of the estate available for distribution to creditors.

Cases Cited

Applied: *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855; *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, [2019] 2 S.C.R. 530; **considered:** *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 A.C. 500; **referred to:** *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23; *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461; *Estate of Gavin v. Gavin*, 2023 PECA 8, 10 C.B.R. (7th) 30; *Pitblado LLP v. Houde*, 2015 MBQB 85, 318 Man. R. (2d) 39; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 36 C.B.R. (6th)

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169, aff'g 2013 ONSC 6635, 8 C.B.R. (6th) 200; *Twyne's Case* (1601), 3 Co. Rep. 80b, 76 E.R. 809; *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705; *Bilta (UK) Ltd. v. Nazir*, [2015] UKSC 23, [2016] A.C. 1; *Singularis Holdings Ltd. v. Daiwa Capital Markets Ltd.*, [2019] UKSC 50, [2020] A.C. 1189; *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 78 B.L.R. (5th) 183.

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Business Corporations Act, R.S.P.E.I. 1988, c. B-6.01, s. 22(1).

Business Corporations Act, R.S.Y. 2002, c. 20, s. 18(1).

Business Corporations Act, S.B.C. 2002, c. 57, s. 30.

Business Corporations Act, S.N.B. 1981, c. B-9.1, s. 13(1).

Business Corporations Act, S.N.W.T. 1996, c. 19, s. 15(1)).

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 15.

Companies Act, R.S.N.S. 1989, c. 81, s. 26(8).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36.1.

Corporations Act, R.S.N.L. 1990, c. C-36, s. 27(1).

The Business Corporations Act, 2021, S.S. 2021, c. 6, s. 3-1(1).

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Coroza and Sossin JJ.A.), 2022 ONCA 202, 160 O.R. (3d) 284, 100 C.B.R. (6th) 18, 473 D.L.R. (4th) 571, [2022] O.J. No. 1181 (Lexis), 2022 CarswellOnt 3170 (WL), affirming a decision of Dietrich J., 2021 ONSC 527, 88 C.B.R. (6th) 60, [2021] O.J. No. 1595 (Lexis), 2021 CarswellOnt 4221 (WL). Appeal dismissed.

Terry Corsianos, *George Corsianos* and *Jacob Lee*, for the appellants.

Alan Merskey and *Stephen Taylor*, for the respondent Ernst & Young Inc., in its capacity as court-appointed monitor of Bondfield Construction Company Limited.

Jeremy Opolsky and *Alex Bogach*, for the respondent KSV Kofman Inc., in its capacity as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited.

Dona Salmon and *Jennifer Boyczuk*, for the intervener the Attorney General of Ontario.

Natasha MacParland, *Chanakya A. Sethi*, *Rui Gao* and *J. Henry Machum*, for the intervener the Insolvency Institute of Canada.

The judgment of the Court was delivered by

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JAMAL J. —

I. Introduction

[1] The common law doctrine of corporate attribution provides guiding principles for when the actions, knowledge, state of mind, or intent of the directing mind of a corporation may be attributed or imputed to the corporation. This Court applied the corporate attribution doctrine in the criminal context in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, and in the civil context in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, and *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, [2019] 2 S.C.R. 530. This appeal requires the Court to apply the corporate attribution doctrine in the bankruptcy and insolvency contexts.

[2] The appellants stole tens of millions of dollars from two construction companies through a false invoicing scheme. One of the appellants, John Aquino, was the companies' directing mind. The respondents, in their capacities as trustee in bankruptcy and monitor of the companies, applied to the Ontario Superior Court of Justice to recover some of this money on the basis that the false invoice transactions were "transfers at undervalue" under s. 96(1)(b)(ii)(B) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[3] A "transfer at undervalue" is a transaction in which a debtor transfers property or provides services to another person for no consideration or conspicuously

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less than fair market value (*BIA*, s. 2). Section 96(1)(b)(ii)(B) of the *BIA* provides that a trustee in bankruptcy may apply to a court to impugn and recover from a non-arm's length party to a transaction some or all of the amount of the transfer at undervalue, if the trustee can show that the debtor intended to "defraud, defeat or delay a creditor". Section 96 of the *BIA* applies in a corporate restructuring through s. 36.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[4] The application judge and Court of Appeal for Ontario accepted that the false invoice payments were transfers at undervalue. They applied the doctrine of corporate attribution to attribute Mr. Aquino's fraudulent intent to the debtor companies and ordered the appellants to pay the trustee and monitor the monies they received under the false invoicing scheme.

[5] The appellants now revive before this Court two arguments that were rejected by the courts below. First, the appellants argue that the application judge had no basis to conclude that the debtor companies, through the actions of Mr. Aquino, intended to defraud, defeat, or delay a creditor. They say that the companies were paying their creditors in full and on time when the false invoicing scheme was underway and that the companies' financial condition at those times could not be determined on the record before the court. I do not accept this submission. A court may find that a debtor intended to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) even if the debtor was not insolvent at the time of the transfers at undervalue. I also see no basis to interfere with the findings of the application judge, affirmed by the Court

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of Appeal, that the record contains many *indicia* or badges of fraud showing that Mr. Aquino misled stakeholders as to the companies' true financial condition, reduced the funds available to pay long-term creditors, and increased the companies' debts.

[6] Second, the appellants argue that Mr. Aquino's fraudulent state of mind cannot be attributed to the debtor companies under the corporate attribution doctrine. They invoke the so-called "fraud" and "no benefit" exceptions to corporate attribution previously recognized by this Court (*Canadian Dredge*, at pp. 681-82 and 712-13; *Livent*, at para. 100). They claim that there can be no attribution in this case because Mr. Aquino acted in fraud of the debtor companies and his actions did not benefit the companies. I do not accept this submission either. As the trustee notes, this position amounts to saying that the common law doctrine of corporate attribution allows "a fraudulent directing mind and his accomplices to avoid liability *because* they defrauded the company they ran" (R.F., at para. 1 (emphasis in original)). The corporate attribution doctrine does not countenance — much less require — such a perverse result.

[7] This Court has established that the corporate attribution doctrine is not a "standalone" principle (*Livent*, at para. 97); there is no one-size-fits-all approach. The corporate attribution doctrine must be applied purposively, contextually, and pragmatically to give effect to the policy goals of the law under which a party seeks to attribute to a corporation the actions, knowledge, state of mind, or intent of its directing mind. Rules of attribution that may be appropriate in one context for one purpose may

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be inappropriate in another context for another purpose. When the rules of attribution undermine the purpose of the law under which attribution is sought, the court should adapt the attribution rules to promote the purpose of the relevant law.

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[8] In my view, the fraud and no benefit exceptions to corporate attribution do not apply in the context of a transfer at undervalue under s. 96 of the *BIA*. These exceptions would undermine rather than promote the purpose of this statutory provision. The purpose of s. 96 is to protect creditors from harmful actions by a debtor that would diminish the assets available for recovery. That purpose is served by attributing the actions, knowledge, state of mind, or intent of the corporation's directing mind to the corporation, even if the directing mind acted in fraud of the corporation, and even if the corporation did not benefit from the actions of the directing mind. By contrast, applying the fraud and no benefit exceptions would deny third-party creditors a statutory remedy that Parliament intended would be available to protect them.

[9] Applying these principles to this appeal, Mr. Aquino's fraudulent intent should be attributed to the debtor companies because he was their directing mind and acted in the sector of corporate responsibility assigned to him. I would dismiss the appeal.

II. Background

[10] Bondfield Construction Company Limited ("Bondfield") and its affiliate, 1033803 Ontario Inc., known as Forma-Con Construction ("Forma-Con"), were

family-owned construction companies that worked on large-scale construction projects in Ontario. At all relevant times, Mr. Aquino was the president and directing mind of Bondfield and Forma-Con.

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[11] By 2018, Bondfield and Forma-Con were experiencing serious financial difficulties. The respondent Ernst & Young Inc. was retained to review their financial situation, which led to the commencement of restructuring proceedings regarding Bondfield in April 2019 and bankruptcy proceedings regarding Forma-Con in December 2019. The court appointed Ernst & Young Inc. as the monitor of Bondfield, and the respondent KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con.

[12] The monitor and trustee's investigations revealed that, for years, Mr. Aquino and several other appellants had been fraudulently taking tens of millions of dollars from Bondfield and Forma-Con through a false invoicing scheme. The scheme was simple. Mr. Aquino and his accomplices made up false invoices from certain suppliers — including Mr. Aquino's holding company — for services that were never provided. Bondfield and Forma-Con then paid the false invoices promptly, often within a few days, at the direction of Mr. Aquino or other appellants. Bondfield paid more than $21.8 million and Forma-Con paid more than $11.3 million towards false invoices in the five years before the commencement of insolvency proceedings, the period within which alleged transfers at undervalue to non-arm's length parties are reviewable.

[13] The trustee and monitor each commenced proceedings before the Ontario Superior Court to challenge the false invoice transactions as transfers at undervalue.

Section 96 of the *BIA* provides a trustee and, through s. 36.1 of the *CCAA*, a monitor, with a remedy to unwind or claim reimbursement of some or all the value of the assets transferred from a debtor in circumstances that qualify as a transfer at undervalue.

[14] In this case, the applications of the trustee and monitor were brought under s. 96(1)(b)(ii)(B) of the *BIA*, which required them to show that: (a) the false invoice transactions were transfers at undervalue; (b) the transfers occurred in the five-year period preceding the initial bankruptcy event; (c) the recipients of the transfers were not dealing at arm's length with the debtor companies; and (d) the debtor companies intended to defraud, defeat, or delay a creditor.

III. Judicial History

A. *Ontario Superior Court of Justice, 2021 ONSC 527, 88 C.B.R. (6th) 60 (Dietrich J.)*

[15] The application judge held that the false invoice payments made by Bondfield and Forma-Con were transfers at undervalue under s. 96(1)(b)(ii)(B) of the *BIA* and could be recovered by the monitor and trustee. The transfers were at undervalue because Bondfield and Forma-Con had paid tens of millions of dollars to certain suppliers who provided nothing in return. In a separate costs endorsement, the application judge found the payments involved "serious corporate malfeasance and corporate looting" and "reprehensible and scandalous behaviour" (2021 ONSC 7514, at paras. 29 and 33, reproduced in A.R., at pp. 66-67). She also found the appellants

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were not dealing at arm's length with Bondfield or Forma-Con because they collaborated with them in orchestrating the false invoicing scheme.

[16] The application judge ruled that Bondfield and Forma-Con made these payments with the intent to defraud, defeat, or delay a creditor. She rejected the appellants' argument that Bondfield and Forma-Con could not have had this intent because the payments were made at a time when they were not insolvent or at risk of insolvency. When evaluating a corporate debtor's intent to defraud, defeat, or delay a creditor, the corporate debtor's financial health at the time of the transfer is a relevant but not determinative consideration.

[17] In the application judge's view, the record revealed several badges of fraud establishing that Mr. Aquino, as the directing mind of Bondfield and Forma-Con, had a fraudulent intent at the time of the false invoice payments. Bondfield and Forma-Con made the payments secretly, in haste, to non-arm's length persons, for no consideration, based on "phony invoices" for "services that were never delivered" (para. 157). Bondfield and Forma-Con also had several actual or potential long-term and off-balance sheet liabilities and were expanding their activities, even though they knew their lender was not willing to lend them more. In addition, Mr. Aquino was injecting capital into Bondfield to disguise its true financial condition from stakeholders, and unusual accounting practices made it impossible to determine the companies' financial condition. Based on all the circumstances, the application judge found that the false

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invoice payments reduced the funds available to pay the companies' long-term creditors.

[18] Finally, the application judge held that Mr. Aquino's fraudulent intent could be attributed to Bondfield and Forma-Con. The application judge ruled that, as a matter of statutory interpretation and public policy, the corporate attribution doctrine set out in *Canadian Dredge* does not apply under s. 96 of the *BIA*. In her view, because a purpose of the *BIA* is to provide proper redress to creditors, the "intention of the debtor" in s. 96 "should be interpreted liberally to include the intention of individuals in control of the corporation, regardless of whether those individuals had an intent to defraud the corporation itself" (para. 229).

[19] The application judge determined that when Mr. Aquino authorized the false invoice payments, he was acting within his area of responsibility of engaging with suppliers and overseeing the provision of services and materials. The appellants, either as bogus suppliers or facilitators of the false invoicing scheme, were all parties or privies to the transfers at undervalue. They were therefore jointly and severally liable to repay the amounts transferred from Bondfield and Forma-Con.

B. *Court of Appeal for Ontario, 2022 ONCA 202, 160 O.R. (3d) 284 (Lauwers J.A., Coroza and Sossin JJ.A. concurring)*

[20] The Court of Appeal affirmed the application judge's ruling that Mr. Aquino intended to defraud, defeat, or delay Bondfield and Forma-Con's creditors, and

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attributed Mr. Aquino’s fraudulent intent to Bondfield and Forma-Con under s. 96(1)(b)(ii)(B) of the *BIA*. Accordingly, the court dismissed the appeal.

[21] The court rejected the appellants’ attempt to relitigate their position that Mr. Aquino did not intend to defraud, defeat, or delay Bondfield and Forma-Con’s creditors because the fraudulent payments were made at times when the companies were financially stable. The court noted that the application judge “mustered a phalanx of facts in support of her conclusions” and “took a pragmatic view on the totality of the evidence” (paras. 38 and 46). The Court of Appeal affirmed that “the interests of creditors were imperilled by the transfers because Bondfield and Forma-Con were already experiencing mounting financial difficulties”, and concluded that it would have been “entirely unreasonable” for Mr. Aquino “to believe that, during that time, the interests of the companies’ creditors would not be endangered by this fraudulent scheme” (para. 45). The Court of Appeal deferred to the application judge’s findings that Mr. Aquino intended to defeat the companies’ creditors. At a minimum, Mr. Aquino was reckless as to whether the scheme would have this effect, which also established his fraudulent intent under s. 96.

[22] The court attributed Mr. Aquino’s fraudulent intent to Bondfield and Forma-Con under the common law corporate attribution doctrine. It distilled three principles from *Canadian Dredge*, *Livent*, and *DeJong*: (1) courts must be sensitive to the legal context in which a directing mind’s intent is sought to be imputed to a corporation; (2) corporate attribution is an exercise grounded in public policy, and

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policy factors that favour imputing a directing mind's wrongdoing to a corporation are based on the social purpose of holding the corporation responsible; and (3) courts have discretion to refrain from attributing the directing mind's intent to the corporation when this would be in the public interest.

[23] The court observed that the criminal and civil contexts in which the corporate attribution doctrine has traditionally been applied differ from the bankruptcy context. In the criminal and civil contexts, attributing the directing mind's intent to the corporation might be justified if the corporation benefits from the improper activities of the directing mind, but would be unjustified if the corporation does not benefit. In the bankruptcy context, the court noted, "the policy currents flow rather differently. . . . [A]ttributing the intent of a company's directing mind to the company itself can hardly be said to unjustly prejudice the company . . ., when the company is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors" (para. 77). The court found that it would make little sense to adopt an approach that would favour fraudsters over legitimate creditors.

[24] Based on these considerations, the Court of Appeal reframed the test for corporate attribution in the bankruptcy context as turning on the following question: "[W]ho should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority — the fraudsters or the creditors?" (para. 78). The court held that it would be perverse and counter to the purpose of s. 96 of the *BIA* to allow the appellants to benefit at the expense of Bondfield and Forma-

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Con's creditors. It therefore found that Mr. Aquino's fraudulent intent must be imputed to Bondfield and Forma-Con, even though both companies were also victims of Mr. Aquino's fraud.

IV. Relevant Statutory Provisions

[25] Section 2 of the *BIA* defines a "transfer at undervalue":

> ***transfer at undervalue*** means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

[26] Section 96 of the *BIA* governs transfers at undervalue:

> **96 (1)** On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> **(a)** the party was dealing at arm's length with the debtor and
>
> **(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> **(ii)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> **(iii)** the debtor intended to defraud, defeat or delay a creditor; or
>
> **(b)** the party was not dealing at arm's length with the debtor and

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(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

[27] Section 36.1 of the *CCAA* applies the *BIA*'s provisions on transfers at undervalue to the *CCAA* "with any modifications that the circumstances require":

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

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(c) to “bankrupt”, “insolvent person” or “debtor” is to be read as a reference to “debtor company”.

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V. Issues

[28] This appeal raises two issues:

(1) Is a debtor’s financial condition relevant or determinative in establishing the debtor’s intent to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) of the *BIA*?

(2) When can the intent of the directing mind of a corporation to defraud, defeat, or delay a creditor be attributed to the corporate debtor under s. 96(1)(b)(ii)(B) of the *BIA*?

VI. Analysis

[29] The key question in this appeal is whether the trustee and monitor established Bondfield and Forma-Con’s intent to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B). When the debtor is a corporation, the court must determine whether the corporate debtor’s directing mind intended to defraud, defeat, or delay a creditor having regard to the transactions completed by the corporation, and then consider whether the directing mind’s intent can be attributed to the corporation. Thus, the Court must first determine whether the evidence established Mr. Aquino’s intent to

defraud, defeat, or delay a creditor, and then determine whether his intent should have been attributed to Bondfield and Forma-Con. The appellants claim that the courts below erred on both points.

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A. *Is a Debtor's Financial Condition Relevant or Determinative in Establishing the Debtor's Intent to Defraud, Defeat, or Delay a Creditor Under Section 96(1)(b)(ii)(B) of the BIA?*

[30] The appellants assert that the application judge made an extricable error of law by concluding that Bondfield and Forma-Con intended to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) of the *BIA* because the companies were paying their creditors in full and on time and because the court found that it could not determine the companies' financial condition at the time of the transfers at undervalue. The appellants say that the application judge could not make an order under s. 96(1)(b)(ii)(B) of the *BIA* without first determining the companies' financial condition at the time of the impugned transactions.

[31] I do not accept this submission. I will first review the legal framework for transfers at undervalue under s. 96 of the *BIA* and address how a debtor's intent to defraud, defeat, or delay a creditor can be proved through the evidentiary shortcut of "badges of fraud". I will then explain why I see no reviewable error in the application judge's conclusion that the requisite intent under s. 96(1)(b)(ii)(B) was established.

(1) Transfers at Undervalue Under the *BIA*

(a) *General Principles*

[32] A “transfer at undervalue” is defined under s. 2 of the *BIA* as “a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor”. Transfers at undervalue reduce the value of the debtor’s estate and diminish the value of the creditors’ realizable claims (A. Duggan and T. G. W. Telfer, “Gifts and Transfers at Undervalue”, in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 175, at p. 191).

[33] Section 96 has been described as “a tool to address ‘asset stripping’ by a debtor” (*Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 40; see also *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, at para. 91, on the predecessor provision, s. 100 of the *BIA*). Section 96 of the *BIA* provides a remedy to reverse transfers at undervalue that occurred within a specified period of time before the date of bankruptcy (*Urbancorp*, at para. 48; *Estate of Gavin v. Gavin*, 2023 PECA 8, 10 C.B.R. (7th) 30, at paras. 14 and 142; *Pitblado LLP v. Houde*, 2015 MBQB 85, 318 Man. R. (2d) 39, at para. 35).

[34] Section 96 of the *BIA* allows a trustee in bankruptcy to ask a court to review a suspected transfer at undervalue. When the conditions of s. 96 are met, the court may declare the transfer void as against the trustee or grant judgment against the parties or privies to the transfer for the amount of the difference between the consideration given

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by the debtor and the consideration received. Section 36.1 of the *CCAA* incorporates s. 96 of the *BIA* by reference and allows a monitor to impugn a transfer at undervalue in a corporate restructuring.

[35] Because the purpose of s. 96 is to protect creditors rather than to punish debtors, the remedy is directed against the person who received the transfer of property from the debtor and others who were privy to the transfer (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 191). A "person who is privy" to the transfer is defined under the *BIA* as "a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person" (s. 96(3)).

(b) *Transfers at Undervalue Undermine the Integrity of the Bankruptcy Process*

[36] The two main purposes of the *BIA* are the "equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, quoting *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 32, citing *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7; see also *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28, at para. 1). A bankrupt's financial rehabilitation involves allowing "honest but unfortunate debtors to obtain a discharge of their debts and have a 'fresh start', free of debt" (F. Bennett, *Bennett on Bankruptcy*

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(26th ed. 2024), at p. 37). Other objectives of the bankruptcy system include preserving and maximizing the value of a debtor's assets and protecting the public interest (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 40).

[37] Transfers at undervalue frustrate the purposes of the *BIA*. They prejudice creditors by diminishing the value of a debtor's estate and reducing the funds available for distribution. They can also involve fraudulent debtors abusing the bankruptcy process by seeking a fresh start after trying to place assets beyond the reach of creditors, thereby undermining the integrity of the bankruptcy process (see, generally, Wood (2015), at pp. 188 and 190-91; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 2, at p. 5-959; J. D. Honsberger and V. W. DaRe, *Honsberger's Bankruptcy in Canada* (5th ed. 2017), at pp. 8-9).

(c) *Section 96 of the BIA Establishes Three Classes of Impeachable Transactions*

[38] Section 96 of the *BIA* establishes three classes of impeachable transactions (R. J. Wood, "Transfers at Undervalue: New Wine in Old Wineskins?", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 1, at p. 4).

[39] The first class of impeachable transaction involves arm's length dealing between the debtor and a party or privy to the transfer (s. 96(1)(a)). This class of

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transaction has the most stringent requirements to reverse a transfer. The trustee must show that the transfer at undervalue occurred within one year of the bankruptcy, the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and the debtor intended to defraud, defeat, or delay a creditor.

[40] The second class of impeachable transaction involves a transfer at undervalue to a party who was not dealing at arm's length with the debtor and which occurred within one year of the bankruptcy (s. 96(1)(b)(i)). In this context, "the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee" (Houlden, Morawetz and Sarra, at p. 5-966; see also Wood (2015), at p. 204; *BIA*, s. 4). The trustee need not show that the debtor was insolvent at the time of the transfer or that the debtor intended to defraud, defeat, or delay a creditor.

[41] The third class of impeachable transaction involves a transfer at undervalue to a party who was not dealing at arm's length with the debtor, which occurred more than one year but less than five years before the bankruptcy (s. 96(1)(b)(ii)). In this class, the trustee may obtain a remedy by proving that the debtor was insolvent at the time of the transfer or was rendered insolvent by it (s. 96(1)(b)(ii)(A)), or by proving that the debtor intended to defraud, defeat, or delay a creditor (s. 96(1)(b)(ii)(B)).

[42] This appeal involves the third class of transaction, under s. 96(1)(b)(ii)(B) of the *BIA*.

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(d) *The Debtor’s Intent to Defraud, Defeat, or Delay a Creditor Can Be Proved Through Badges of Fraud*

[43] Section 96(1)(b)(ii)(B) of the *BIA* requires the party seeking to reverse a transfer at undervalue to prove the debtor’s intent to defraud, defeat, or delay a creditor. This is a question of fact to be decided based on all the circumstances that existed at the time of the transfer (*Urbancorp*, at para. 53; *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 36 C.B.R. (6th) 169 (“*Montor CA*”), at para. 72).

[44] Because it is often difficult to adduce evidence of a debtor’s subjective intent, the intent requirement is often proved through the evidentiary shortcut of badges of fraud. Badges of fraud are suspicious circumstances from which a court may infer the debtor’s intent to defraud, defeat, or delay a creditor (*Urbancorp*, at para. 52; *Montor CA*, at para. 72; Wood (2018), at p. 24). The badges of fraud approach to inferring a debtor’s intent to defraud creditors is of ancient vintage, dating back to *Twyne’s Case* in 1601 (Wood (2018), at p. 24; *Twyne’s Case* (1601), 3 Co. Rep. 80b, 76 E.R. 809).

[45] Case law has recognized the following non-exhaustive examples of badges of fraud: (a) the debtor had few remaining assets after the transfer; (b) the transfer was made to a non-arm’s length party; (c) the debtor was facing actual or potential liabilities, was insolvent, or was about to enter a risky undertaking; (d) the consideration for the transaction was grossly inadequate; (e) the debtor remained in possession of the property for their own use after the transfer; (f) the deed of transfer

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had a self-serving and unusual provision; (g) the transfer was secret; (h) the transfer was made with unusual haste; and (i) the transaction was made despite an outstanding judgment against the debtor (*Montor CA*, at para. 73; see also Wood (2018), at p. 24; Wood (2015), at pp. 223-25 (in the fraudulent conveyance context)).

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[46] A badge of fraud must be considered in the context of the surrounding circumstances and in relation to the question of the debtor's intention at the time of the transfer (*Urbancorp*, at para. 65). A court must avoid analyzing the debtor's actions with the benefit of hindsight; it "must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time" (*Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, 8 C.B.R. (6th) 200, at para. 272, aff'd 2016 ONCA 406, 36 C.B.R. (6th) 169). The presence of one or more badges of fraud does not require the court to infer an intent to defraud, defeat, or delay a creditor, nor does the absence of a particular badge of fraud prevent the court from inferring this intent (*Urbancorp*, at paras. 53 and 55; *Montor CA*, at para. 72; see also Wood (2018), at pp. 24-25).

(2) Application to This Case

[47] The application judge found that Bondfield and Forma-Con's payments under the false invoicing scheme involved several badges of fraud: the transfers were made between non-arm's length parties; Bondfield and Forma-Con received no value; the truth about the transfers was hidden behind phony invoices describing services that were never provided; the transfers were made with unusual haste when compared to

Bondfield and Forma-Con's usual billing cycle; and at the time of the transfers the companies had significant long-term and off-balance sheet liabilities and potential liabilities as guarantors for other companies (paras. 157-58).

[48] Based on these badges of fraud, the application judge found that the evidence as a whole provided "a firm basis for finding that John Aquino, as principal and directing mind of [Bondfield] and Forma-Con, had fraudulent intent — an intent to defraud, defeat or delay creditors" (para. 160). She found that "[i]t was in no way reasonable for him to believe that, throughout the period of the impugned transactions, [Bondfield] and Forma-Con did not have long-term creditors, like lenders, . . . who would not be defeated or delayed by the draining of tens of millions of dollars from [Bondfield] and Forma-Con through the false invoicing schemes" (para. 160).

[49] Faced with these findings, the appellants contend that the application judge made an extricable error of law by concluding that Mr. Aquino intended to defraud, defeat, or delay Bondfield and Forma-Con's creditors when the record before the court did not allow it to determine the companies' true financial condition at the time of the transfers. They argue that a corporation's financial condition can be determinative on the question of intent, even in the presence of other badges of fraud, if there were enough assets remaining to pay creditors after the transfers at undervalue. The appellants note that Bondfield and Forma-Con "were paying their creditors in full and on time for most of the applicable review periods" (A.F., at para. 77). They ask this

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Court to remit the case to the application judge with instructions to determine the companies' financial condition at the time of the transfers.

[50] I would not give effect to this submission. The application judge did not misapply the badges of fraud approach to inferring fraudulent intent. It is no answer to an application under s. 96(1)(b)(ii)(B) of the *BIA* to say that the debtor was not insolvent and was paying its creditors in full and on time at the time of the transfers. The *BIA* is clear that insolvency is not a prerequisite to finding a debtor intended to defraud, defeat, or delay a creditor. Section 96(1)(b)(ii) is disjunctive: the debtor must *either* be insolvent at the time of the transfer (s. 96(1)(b)(ii)(A)) *or* intend to defraud, defeat, or delay a creditor (s. 96(1)(b)(ii)(B)). The appellants' argument would effectively introduce an insolvency requirement into the latter provision, contrary to Parliament's decision not to do so.

[51] The appellants' argument would also give a potentially determinative role to one factor, namely, the debtor's financial condition at the time of the transfer. Although the debtor's financial condition at the time of the transfer is one badge of fraud that may be relevant in inferring an intent to defraud, defeat, or delay a creditor (*Urbancorp*, at para. 64), whether that intent exists must be determined based on all the circumstances. Again, the presence of a particular badge of fraud does not require a court to infer an intent to defraud, defeat, or delay a creditor, nor does the absence of a particular badge of fraud require the court to refrain from inferring that intent (*Urbancorp*, at paras. 53 and 55; *Montor CA*, at para. 72). A court may find that a

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debtor intended to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) even if the debtor was not insolvent at the time of the transfer at undervalue.

[52] The application judge considered the financial condition of the debtor companies and rejected the appellants' argument that Mr. Aquino did not intend to defraud, defeat, or delay a creditor just because the transfers were made when Bondfield and Forma-Con could meet their liabilities as they became due. She found that Bondfield was already in a precarious financial position at the time of the transfers and noted Mr. Aquino's admission that he and another stakeholder routinely injected capital into Bondfield to mislead stakeholders about the company's financial condition (paras. 191-93). The application judge could not determine the companies' true financial condition because the companies' financial records contained deceptive accounting and were unreliable (para. 193). Ultimately, after considering the companies' financial condition and numerous other badges of fraud, the application judge saw "no innocent explanation for a false invoicing scheme" (para. 162). In these circumstances, the appellants cannot now reproach the court for being unable to draw precise conclusions about the companies' financial condition.

[53] I therefore see no basis to interfere with the application judge's conclusion that Mr. Aquino intended to defraud, defeat, or delay a creditor under the false invoicing scheme.

[54] Here, however, the debtors are Bondfield and Forma-Con, not Mr. Aquino. To satisfy s. 96(1)(b)(ii)(B), the trustee and monitor must show that Bondfield and

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Forma-Con intended to defraud, defeat, or delay a creditor. This requires showing that it is appropriate to attribute Mr. Aquino's fraudulent intent to Bondfield and Forma-Con. I address that issue next.

B. *When Can the Intent of the Directing Mind of a Corporation to Defraud, Defeat, or Delay a Creditor Be Attributed to the Corporate Debtor Under Section 96 of the BIA?*

[55] The appellants contend that even if Mr. Aquino intended to defraud, defeat, or delay a creditor, his intent cannot be attributed to Bondfield and Forma-Con under the corporate attribution doctrine. They invoke the fraud and no benefit exceptions to corporate attribution recognized in this Court's decisions in *Canadian Dredge*, *Livent*, and *DeJong*, and they note that the application judge found that Mr. Aquino intended to defraud both companies and the companies did not benefit from his fraud. The appellants say that this Court's jurisprudence imposes minimal criteria for corporate attribution that must be met in every case, regardless of the context, and that the courts below erred by reframing the corporate attribution doctrine to allow for attribution in this case.

[56] I do not accept this submission. As I will explain, the corporate attribution doctrine does not prescribe rigid rules to be applied regardless of the legal context. Instead, this Court has directed that the doctrine must be applied purposively, contextually, and pragmatically to promote the purpose of the law under which attribution is sought. The fraud and no benefit exceptions to corporate attribution should not apply to a transfer at undervalue claim under s. 96 of the *BIA* because these

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exceptions would undermine the purpose of this provision. Consequently, Mr. Aquino's fraudulent intent should be attributed to Bondfield and Forma-Con.

(1) The Need for Rules of Corporate Attribution

[57] A corporation is a separate legal person distinct from its founders, shareholders, and directors. The separate legal personality of a corporation has been a "bedrock principle of law" since the House of Lords' seminal decision in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (*Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 80; see also S. Rappos, "A Reframing of the Corporate Attribution Doctrine in the Bankruptcy and Insolvency Context", in J. Corraini and D. B. Nixon, eds., *Annual Review of Insolvency Law 2022* (2023), 1, at p. 1).

[58] The separate legal personality of a corporation is recognized by business corporation statutes across Canada, which provide that a corporation has the capacity, rights, powers, and privileges of a natural person (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15; *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 15; *Business Corporations Act*, CQLR, c. S-31.1, s. 10; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 16(1); *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30; *The Business Corporations Act, 2021*, S.S. 2021, c. 6, s. 3-1(1); *The Corporations Act*, C.C.S.M., c. C225, s. 15(1); *Business Corporations Act*, S.N.B. 1981, c. B-9.1, s. 13(1); *Companies Act*, R.S.N.S. 1989, c. 81, s. 26(8); *Business Corporations Act*, R.S.P.E.I. 1988, c. B-6.01, s. 22(1); *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 27(1); *Business*

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Corporations Act, R.S.Y. 2002, c. 20, s. 18(1); *Business Corporations Act*, S.N.W.T. 1996, c. 19, s. 15(1)).

[59] Although a corporation is a separate legal person, it has no mind or will of its own. As explained by Kevin P. McGuinness and Maurice Coombs, "[e]very single act that involves a corporation, and every decision not to act, is the action or inaction of human beings and only human beings" (*Canadian Business Corporations Law* (4th ed. 2023), vol. 1, at ¶9-11). This has long been recognized by the jurisprudence. In *Canadian Dredge*, for example, this Court said that "a corporation may only act through agents" (p. 675). The Court cited Viscount Haldane L.C.'s speech in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), at pp. 713-14, which explained the need to identify a directing mind because a corporation can only act through a human agent:

> . . . a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will may consequently be sought in 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. [pp. 678-79]

[60] Professor Darcy L. MacPherson notes that "[t]he attribution of personhood to a corporation in turn necessitates a mechanism to give that person a mental state. . . . Since so many areas of our law depend on mental states, the law must therefore attribute a mental state to the corporation" ("The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007), 45 *Alta. L. Rev.* 171, at

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p. 186; see also E. Ferran, “Corporate Attribution and the Directing Mind and Will” (2011), 127 *Law Q. Rev.* 239, at p. 241).

[61] In *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 A.C. 500 (P.C.), widely considered to be the leading United Kingdom decision on corporate attribution, Lord Hoffman discussed the need for rules of attribution this way:

> Any proposition about a company necessarily involves reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called “the rules of attribution”. [p. 506]

[62] The rules of attribution, Lord Hoffman elaborated, can arise from three sources: (1) *primary rules of attribution*, contained in a corporation’s statutes or constitution, or general company law, stipulating when decisions taken by shareholders or the board of directors are to be treated as decisions of the corporation; (2) *general rules of attribution*, such as under the law of agency or vicarious liability, which also apply to natural persons; and (3) *the common law of corporate attribution*, which requires the court to fashion and apply a special rule of attribution for the particular context in which the question arises (*Meridian*, at p. 507; see also *Bilta (UK) Ltd. v. Nazir*, [2015] UKSC 23, [2016] A.C. 1, at para. 190, per Lords Toulson and Hodge; *Singularis Holdings Ltd. v. Daiwa Capital Markets Ltd.*, [2019] UKSC 50, [2020] A.C.

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1189, at para. 28, per Lady Hale). The last of these three sources, the common law of corporate attribution, is sometimes known as the identification doctrine because it supplies rules for when a corporation may be identified with the actions or intent of its directing mind (see *Canadian Dredge*, at pp. 670, 673, 682-83 and 692-93; MacPherson, at p. 172).

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(2) This Court's Corporate Attribution Jurisprudence

[63] This Court has addressed the corporate attribution doctrine in three decisions over the last 40 years: *Canadian Dredge* in 1985, in the context of corporate criminal liability for wrongdoing by directing minds; *Livent* in 2017, in the context of an auditor's civil liability to a company's creditors for failing to detect fraud by the company's directing minds; and *DeJong* in 2019, in the context of a civil claim for knowing assistance and knowing receipt in relation to a breach of fiduciary duty.

[64] This Court's jurisprudence, like the jurisprudence in the United Kingdom, highlights that there is no uniform rule of corporate attribution. Because the attribution doctrine is rooted in public policy, courts must take a purposive, contextual, and pragmatic approach to questions of attribution consistent with the purpose of the law under which attribution is sought.

(a) *Canadian Dredge (1985)*

[65] In *Canadian Dredge*, this Court applied the corporate attribution doctrine in the criminal context. Four corporations were found criminally liable for the *mens rea* offence of bid-rigging under the *Criminal Code*, R.S.C. 1985, c. C-46. Each corporation had a manager or directing mind who conducted the corporation's business. The corporations denied criminal liability because the managers had acted in fraud of the corporations, for their own benefit, and outside the scope of their employment. Justice Estey rejected these arguments. He found the corporations guilty because the directing minds had not acted wholly for their own benefit and the corporations had received some benefits. He formulated a common law rule for corporate attribution (at pp. 681-82 and 712-13), which this Court later distilled in *Livent*, at para. 100:

> To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation. [Citation omitted.]

[66] Justice Estey highlighted that the corporate attribution doctrine was developed "in order to find some pragmatic, acceptable middle ground which would see a corporation under the umbrella of the criminal law of the community but which would not saddle the corporation with the criminal wrongs of all of its employees and agents" (*Canadian Dredge*, at p. 701). He rejected a test for criminal liability based on total vicarious liability for the conduct of any corporate agents, whatever their level of

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employment and responsibility, because this would impose criminal liability when "there is neither moral turpitude nor negligence" (p. 691). This, in turn, would not serve the public policy goal of protecting the interests of the community and advancing law and order (pp. 691 and 707-8). Justice Estey also rejected a test for criminal liability that would find a corporation liable only when it commits a criminal act on the express instructions of its board of directors, because this would allow corporations to absolve themselves from criminal consequences "by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law" (p. 699).

[67] To respond to these policy concerns, Estey J. formulated the "fraud" and "no benefit" exceptions as public policy-based exceptions to the general principle that a directing mind's knowledge should be attributed to a corporation to establish corporate criminal liability. The exceptions were justified, Estey J. stated, because in both situations "no social purpose is served by convicting a corporation" (*Canadian Dredge*, at p. 704; see also pp. 707-8). Imposing criminal liability would be unjust if the corporation is totally defrauded by, or does not benefit from, the wrongdoing of its directing mind. As Estey J. explained:

> The identification theory . . . loses its basis in rationality when it is applied to condemn a corporation under the criminal law for the conduct of its manager when that manager is acting not in any real sense as its directing mind but rather as its arch enemy. . . . In my view, the very pragmatic origins of the identification rule militate against its extension to the situation which would have existed here had one or more of the directing minds acted entirely for his own benefit and directed his principal efforts to defrauding the company. Where the corporation benefited or was

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> intended to be benefited from the fraudulent and criminal activities of the directing mind, the *rationale* of the identification rule holds. Where the delegate of the corporation has turned against his principal, the *rationale* fades away. [Emphasis in original; p. 719.]

(b) *Livent (2017)*

[68] In *Livent*, this Court adapted the principles enunciated in *Canadian Dredge* to the civil context. An auditor had invoked the corporate attribution doctrine to defend against a claim brought by a corporation's receiver for the auditor's negligence in failing to uncover fraud by the corporation's directing minds. The auditor argued that the fraud of the directing minds should be attributed to the corporation to give the auditor a defence of illegality to avoid civil liability to the corporation.

[69] Writing for the majority of the Court, Gascon and Brown JJ. noted that although the criteria in *Canadian Dredge* seemed "[a]t first glance" to be satisfied because the fraud was intended to benefit the corporation by giving it an "artificial extension of its life" (para. 101), they declined to attribute the directing minds' wrongdoing to the corporation. They highlighted that the *Canadian Dredge* test was "not . . . a standalone principle", but rather "a means by which acts may be attributed to a corporation <u>for the particular purpose or defence at issue</u>" (para. 97 (emphasis added)). They emphasized that "corporate identification must be analyzed independently for each defence" (para. 97). Continuing the purposive, contextual, and pragmatic approach developed in *Canadian Dredge*, Gascon and Brown JJ. noted that the "public policy and judicial necessity" principles that justify attributing the actions

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of the directing mind to the corporation in the criminal context do not apply in the context of an auditor's negligent preparation of a statutory audit:

> . . . the very purpose of a statutory audit is to provide a means by which fraud and wrongdoing may be discovered. It follows that denying 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 . . . . [I]t would be perverse to deny auditor's liability for negligently failing to detect fraud "where the harm [to the corporation] is likely to occur and likely to be most serious" . . . . [Citations omitted; para. 103.]

[70] This Court in *Livent* added an important qualification to the "authoritative test" for corporate attribution set out in *Canadian Dredge* (para. 104). The Court recognized a judicial discretion not to attribute a directing mind's actions or intent to a corporation when, in the circumstances of the case, declining attribution would be in the public interest (para. 104). The discretion reflects the rationale of the fraud and no benefit exceptions, that attribution should promote the policy of the law under which attribution is sought. Justices Gascon and Brown stated that when attribution "would render meaningless the very purpose for which a duty of care was recognized, such application [of the corporate attribution doctrine] will rarely be in the public interest" (para. 104).

(c) *DeJong (2019)*

[71] *DeJong* involved a large and complex multimillion-dollar real estate fraud involving two groups of companies that were victims of the fraud. The first group of

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companies sued the second group, claiming that the latter had knowingly assisted the fraudsters to commit the fraud and seeking to attribute the fraudsters' conduct to them. A majority of the Court of Appeal for Ontario accepted the argument for attribution, reasoning that the corporate attribution doctrine "may be approached in a less demanding fashion" in the civil context than in the criminal context of a *mens rea* offence (*DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 78 B.L.R. (5th) 183, at para. 70). In dissent, van Rensburg J.A. would have declined to relax the approach to corporate attribution, saying that she saw "no justification in the circumstances of this case to lessen the requirement for knowledge before one victim of a fraud is tagged with the conduct of a fraudster" (para. 237).

[72] Speaking for this Court, Brown J. allowed the appeal in brief oral reasons that adopted the dissenting reasons of van Rensburg J.A. Justice Brown observed that "while the presence of public interest concerns may *heighten* the burden on the party seeking to have the actions of a directing mind attributed to a corporation, *Canadian Dredge* states *minimal* criteria that must always be met" (*DeJong*, at para. 2 (emphasis in original)).

[73] The appellants interpret Brown J.'s statement that "*Canadian Dredge* states *minimal* criteria that must always be met" as effectively endorsing a mechanical rather than a purposive, contextual, and pragmatic application of the corporate attribution doctrine. They submit that a court cannot attribute the intent or acts of a

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fraudulent directing mind to a corporation when either the fraud or no benefit exception applies, regardless of the legal context.

[74] I would clarify the seemingly inflexible statement in this Court's brief oral reasons in *DeJong*. I respectfully disagree with any suggestion that the criteria in *Canadian Dredge* should be applied mechanically in every case, even if they would be inconsistent with the purpose of the law under which attribution is sought. The Court's principal concern in *DeJong* was to reject the suggestion that courts have an unfettered judicial discretion to relax the approach to corporate attribution based on the factual circumstances of a case. In my view, *DeJong* should not be read as departing from the longstanding purposive, contextual, and pragmatic approach to corporate attribution recognized in *Canadian Dredge* and *Livent*.

(3) Guidance From United Kingdom Jurisprudence

[75] In recent years, courts in the United Kingdom have similarly applied the corporate attribution doctrine in a purposive, contextual, and pragmatic manner.

[76] The modern history of the corporate attribution doctrine in the United Kingdom must begin with *Meridian*. There, Lord Hoffman explained on behalf of the Privy Council that rules of corporate attribution must be tailored for "the particular substantive rule" under which attribution is sought (p. 507). Lord Hoffman wrote:

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> This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy. [Emphasis in original; p. 507.]

[77] Lord Hoffman added that "[o]nce it is appreciated that the question is one of construction rather than metaphysics" (p. 511), questions of corporate attribution become straightforward. The courts must always apply "an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule" under which attribution is sought (p. 512).

[78] Lord Hoffman applied these principles in *Meridian* to conclude that a publicly traded corporation breached disclosure obligations under New Zealand securities legislation. He attributed to the corporation the knowledge of a lower level executive who had been responsible for obtaining a substantial interest in publicly traded securities on the corporation's behalf. "Otherwise", Lord Hoffman said, "the policy of the Act would be defeated":

> Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. [p. 511]

[79] Professor Jennifer Payne highlights two important lessons from *Meridian*. The first lesson is that the special rules of attribution under the common law doctrine

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“do not mean that a company itself has done something or had a particular state of mind” (“Corporate Attribution and the Lessons of *Meridian*”, in P. S. Davies and J. Pila, *The Jurisprudence of Lord Hoffman: A Festschrift in Honour of Lord Leonard Hoffman* (2015), 357, at p. 375). She observes that *Meridian* helpfully “moved away from the anthropomorphic ‘metaphysical’ approach to company attribution towards a more context-driven approach” (p. 363). The second and related lesson is that “the issue of attribution depends on the context. It is always necessary to ask whether an act or state of mind of a particular individual should be attributed to the company for *this particular purpose*” (p. 375 (emphasis in original)). Professor Eilís Ferran agrees that “contextualization, rather than anthropomorphic inquiry into corporate personality, is the key to answering these questions” of corporate attribution (p. 239).

[80] Recent decisions of the Supreme Court of the United Kingdom have affirmed the approach in *Meridian* by applying the corporate attribution doctrine based on the context and purpose of the relevant law under which attribution is sought (see *Bilta*, at para. 9, per Lord Neuberger, at paras. 41-42, per Lord Mance, at para. 92, per Lord Sumption, and at para. 181, per Lords Toulson and Hodge). As Lady Hale stated succinctly in *Singularis*, “the key to any question of attribution [is] always to be found in considerations of the context and the purpose for which the attribution [is] relevant” (para. 30).

[81] The Supreme Court of the United Kingdom has also highlighted that because the corporate attribution doctrine must be applied purposively and

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contextually, a company or the court "can rely on attribution for one purpose, but disclaim attribution for another" (*Bilta*, at para. 43, per Lord Mance). As a result, attribution may be inappropriate in a claim by a corporation against its directors for breach of their duties to the corporation, but may be appropriate when determining the corporation's liability to a third party or for breach of a statutory provision (see *Bilta*, at para. 7, per Lord Neuberger, at para. 43, per Lord Mance, at paras. 67 and 92, per Lord Sumption, and at paras. 208-9, per Lords Toulson and Hodge; Payne, at p. 376).

(4) Summary

[82] The guiding principles for the common law doctrine of corporate attribution under Canadian law can be summarized as follows:

(a) As a general rule, a person's fraudulent acts may be attributed to a corporation if two conditions are met: (1) the wrongdoer was the directing mind of the corporation at the relevant times; and (2) the wrongful actions of the directing mind were performed within the sector of corporate responsibility assigned to them (*Canadian Dredge*, at pp. 681-82; *Livent*, at para. 100).

(b) Attribution will generally be inappropriate when: (1) the directing mind acted totally in fraud of the corporation (the fraud exception); or (2) the directing mind's actions were not by design or result partly

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for the benefit of the corporation (the no benefit exception) (*Canadian Dredge*, at pp. 712-13; *Livent*, at para. 100).

(c) In addition to the fraud and no benefit exceptions, courts have discretion to refrain from attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation when this would be in the public interest, in the sense that it would promote the purpose of the law under which attribution is sought (*Livent*, at para. 104; *DeJong*, at para. 2).

(d) In all cases, courts must apply the common law corporate attribution doctrine purposively, contextually, and pragmatically. The corporate attribution doctrine is not a "standalone principle" (*Livent*, at para. 97); there is no one-size-fits-all approach. The court must always determine whether the actions, knowledge, state of mind, or intent of a person should be treated as those of the corporation for the purpose of the law under which attribution is sought (*Livent*, at paras. 102-3). This may require the court to tailor the general rule of attribution or its exceptions to the particular legal context. Attribution may be appropriate for one purpose in one context but may be inappropriate for another purpose in another context.

[83] With these guiding principles in mind, I now consider how the corporate attribution doctrine should be applied to transfers at undervalue under s. 96 of the *BIA*.

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(5) Applying the Corporate Attribution Doctrine in the Context of Section 96 of the *BIA*

[84] The respondents urge this Court to apply the corporate attribution doctrine in the context of s. 96 of the *BIA* purposively, contextually, and pragmatically, consistent with this Court's precedents and the persuasive authority from the United Kingdom. They argue that the fraud and no benefit exceptions to corporate attribution should not apply in the context of a claim under s. 96 of the *BIA* for a transfer at undervalue because applying either exception would flout the purpose of s. 96.

[85] I agree. Recall that s. 96 of the *BIA* is a tool to remedy asset stripping by a debtor by clawing back assets that were improperly transferred to others before bankruptcy in order to protect the pool of assets available for creditors. The issue is whether and when attributing the actions or intent of the corporation's directing mind to a corporate debtor would promote the purpose of this provision.

[86] The remedial purpose of s. 96 of the *BIA* is served by attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation, even if the directing mind acted in fraud of the corporation, and even if the corporation did not benefit from the actions of the directing mind. Professor Roderick J. Wood has explained that the reason for this conclusion relates to the "highly distinctive nature of the rights at stake" ("*Ernst & Young Inc. v. Aquino*: Attributing Fraudulent Intent to a Defrauded Corporation" (2022), 66 *Can. Bus. L.J.* 250, at p. 259). As he notes, "[t]he underlying goal [of s. 96] is not to punish or deter the debtor or to award damages

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against the debtor, but rather to protect the interests of creditors" (p. 259). The "social purpose of the legislation . . . is served whether or not the directing mind is acting in fraud of the corporation" (p. 259).

[87] On the other hand, applying the fraud and no benefit exceptions under s. 96 would deny third-party creditors the benefit of a statutory remedy intended to protect them from asset stripping and would diminish the pool of assets available for their claims. This would undermine the purpose of s. 96.

[88] As in *Livent*, where this Court said that "denying 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" (para. 103), applying the fraud and no benefit exceptions mechanically under s. 96 of the *BIA* would render the transfer at undervalue remedy meaningless. The purpose of this statutory remedy is to protect creditors from the debtor transferring assets to others for little to no benefit. Applying the exceptions would undermine this purpose. It would result in denying liability on the basis that the corporation's directing mind engaged in the very action that the provision targets. Such an approach would be perverse.

[89] Consequently, the test for corporate attribution under s. 96 of the *BIA* is simply whether the person was the directing mind and whether their actions were performed within the sector of corporate responsibility assigned to them. If these criteria are met, the actions, knowledge, state of mind, or intent of the directing mind

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should be attributed to the corporation, regardless of whether the fraud and no benefit exceptions are engaged (see Wood (2022), at pp. 260-61).

[90] It follows that I do not accept the appellants' submission that the principles of statutory interpretation require courts to apply the fraud and no benefit exceptions in this context. The appellants argue that because s. 96 of the *BIA* does not clearly and unambiguously derogate from the common law of corporate attribution, the rules in *Canadian Dredge*, *Livent*, and *DeJong* must be applied without modification, including the fraud and no benefit exceptions. The appellants' submission presupposes that the common law rules of corporate attribution should be applied regardless of the context or purpose of the law under which attribution is sought, unless the legislature expressly derogates from those rules. But that is a false premise. The corporate attribution doctrine must *always* be applied having regard to the context and the purpose of the law under which attribution is sought. This approach has been integral to the Canadian common law of corporate attribution since *Canadian Dredge*.

[91] I therefore agree with the conclusion of the Court of Appeal that attributing Mr. Aquino's fraudulent intent to Bondfield and Forma-Con would advance the public policy underlying s. 96 of the *BIA*. Attribution would allow creditors to recover fraudulently transferred assets that unlawfully reduced the value of the estate available for distribution to creditors. I respectfully disagree, however, with two aspects of the Court of Appeal's reasoning on this issue.

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[92] First, the Court of Appeal stated that attributing the directing mind's knowledge or intent to the company itself "can hardly be said to unjustly prejudice the company in the bankruptcy context, when the company is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors" (para. 77). The court added that "[a]n approach that would favour the interests of fraudsters over those of creditors seems counterintuitive and should not be quickly adopted" (para. 77).

[93] With respect, however, the Court of Appeal's rationale for attribution does not apply to transfers at undervalue in the restructuring context under the *CCAA*. As the appellants correctly explain, "[i]n a *CCAA* monitorship, unlike a traditional bankruptcy, the possibility remains for the debtor company to be rehabilitated and to resume its normal operations at some future date" (A.F., at para. 47). As a result, in the restructuring context, it cannot be said that "the company is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors" (para. 47).

[94] Second, the Court of Appeal reframed the test for corporate attribution in the bankruptcy context by stating that "[t]he underlying question here is who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority — the fraudsters or the creditors?" (para. 78). Not surprisingly, the court answered this question in favour of the creditors and attributed Mr. Aquino's fraudulent intent to Bondfield and Forma-Con. The court said

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that “[p]ermitting the fraudsters to get a benefit at the expense of creditors would be perverse” (para. 79).

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[95] The Court of Appeal’s framing of the question poses a contest between fraudsters and creditors. But as Professor Wood notes, this question is “misconceived” because transfers at undervalue can involve not just fraudsters, but also innocent recipients (Wood (2022), at p. 257). As he explains, the Court of Appeal’s question “misdirects the focus of analysis” because in such cases the “contest” is between the corporation’s creditors and the recipients of the transfer, who might be just as innocent (p. 257). Professor Wood gives the helpful example of the sale of a house at undervalue to an innocent purchaser, who would be prejudiced if the sale were to be successfully challenged under s. 96 of the *BIA*:

> Consider the case where a house is sold to an innocent buyer in an arm’s length dealing for a price that is conspicuously less than its market value. If the debtor intended to defeat creditors and was insolvent at the time of the transfer, the trustee will be able to set aside the sale or require the buyer to pay the difference in value under section 96(1)(a) of the BIA. This holds true even though the buyer may have incurred considerable expense in moving into the house and may also not have the funds to pay the difference in value. Despite searching in the land registration system and finding nothing, the innocent buyer is placed in a precarious position. If fraud is involved it lies with the seller, but the buyer is the party who stands to lose to the seller’s creditors. <u>This is not a contest between fraudsters and creditors so an allocation of responsibility on the basis suggested by the [c]ourt is misconceived.</u> [Emphasis added; footnote omitted; p. 257.]

[96] As a result, I agree with the Court of Appeal’s conclusion that the fraud and no benefit exceptions to corporate attribution do not apply under s. 96 of the *BIA*, but I respectfully disagree with some of the court’s reasoning.

[97] In sum, the fraud and no benefit exceptions are inappropriate and inapplicable in the context of transfers at undervalue under s. 96 because these exceptions would undermine the creditor protection purpose of this provision.

(6) Application to This Case

[98] Mr. Aquino, as the directing mind of Bondfield and Forma-Con, intended to defraud, defeat, or delay creditors of Bondfield and Forma-Con through the false invoicing scheme. In conducting the false invoicing scheme, he acted in his assigned sector of corporate responsibility of engaging with suppliers and overseeing the provision of services and materials. His intent should therefore be attributed or imputed to Bondfield and Forma-Con under s. 96(1)(b)(ii)(B) of the *BIA*.

[99] Consequently, I would affirm the application judge's order regarding the appellants' liability for the transfers at undervalue.

VII. Disposition

[100] I would dismiss the appeal with costs.

Appeal dismissed with costs.

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