COURT OF APPEAL FOR ONTARIO

CITATION: Ernst & Young Inc. v. Aquino, 2022 ONCA 202
DATE: 20220310
DOCKET: C69263, C69264, C69278, C69305, C69306, C69318 & C69321

Lauwers, Coroza and Sossin JJ.A.

DOCKET: C69263

BETWEEN

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

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellants)

DOCKET: C69264

AND BETWEEN

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellants)

DOCKET: C69278

AND BETWEEN

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellant)

DOCKET: C69305

AND BETWEEN

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

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellant)

DOCKET: C69306

AND BETWEEN

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

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellants)

DOCKET: C69318

AND BETWEEN

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellants)

DOCKET: C69321

AND BETWEEN

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

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellant)

Michael Citak and Chris Junior, for the appellants John Aquino and 2304288 Ontario Inc.

George Corsianos, for the appellant Marco Caruso

Terry Corsianos, for the appellants Giuseppe Anastasio and Lucia Coccia-Canderle

Brian Belmont, for the appellant 2104664 Ontario Inc.

Alan Merskey, Evan Cobb and Stephen Taylor, for the respondent Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Jeremy Opolsky and Craig Gilchrist, for the respondent KSV Restructuring Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Heard: September 1 & 2, 2021 by video conference

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated September 15, 2020 (C69306 & C69318) and the judgments of Justice Dietrich, dated March 19, 2021, with reasons reported at 2021 ONSC 527, 88 C.B.R. (6th) 60 (C69263, C69264, C69278, C69305, C69306, C69318 & C69321).

Lauwers J.A.:

A. OVERVIEW

[1] John Aquino was the directing mind of Bondfield Construction Company Limited and its affiliate Forma-Con Construction. He and his associates carried out a false invoicing scheme over a number of years by which they siphoned off tens of millions of dollars from both companies.

[2] The monitor and the trustee challenged the false invoicing scheme and sought to recover some of the money under s. 96 of the *BIA*[1] and s. 36.1 of the *CCAA*.[2] They asserted that the false invoicing schemes were implemented by

[1] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

means of "transfers at undervalue"[3] by which John Aquino "intended to defraud, defeat or delay a creditor".

[3] John Aquino and most of the other participants, as the application judge noted, "have conceded that no value was provided" to Bondfield and Forma-Con for the fraudulent transfers. However, they boldly assert that at the time they took the money, both companies were financially strong and healthy enough to sustain the frauds. They say this establishes that they did not intend to defeat any actual creditors. They also argue that John Aquino's intent cannot be imputed to either Bondfield or Forma-Con so that s. 96(1)(b)(ii)(B) of the *BIA* cannot be used to require them to repay what they took.

[4] The application judge required John Aquino and the other participants to repay the money they took through the false invoicing scheme and held them jointly and severally liable.[4]

[5] I would dismiss the appeals for the reasons that follow. I begin with the basic facts, next set out the issues, and then carry out the analysis.

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[3] Defined in 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."

[4] The application judge also found that transactions relating to an alleged fund cycling scheme were not captured under s. 96, but that scheme is not at issue in this appeal.

B. THE FACTS

[6] Bondfield was a construction company that operated in the Greater Toronto Area and elsewhere. Its affiliate, 1033803 Ontario Inc., commonly known as Forma-Con, was in the concrete forming business. Bondfield and Forma-Con were part of the Bondfield Group,[5] a full-service group of construction companies that carried on business in the Greater Toronto Area and Southern Ontario starting in the mid-1980s.

[7] Before its insolvency, the Bondfield Group was run by the Aquino family. Ralph Aquino founded the enterprise. He was joined by his son, John Aquino, in 1994 and by his son, Steven Aquino, in 2000.

[8] By 2018, the Bondfield Group was in financial trouble. Bondfield's bonding company, Zurich Insurance Company Ltd., engaged Ernst & Young Inc. to review the financial situation of the Bondfield Group. This eventually led Bondfield to start proceedings under the *CCAA* on April 3, 2019. The court appointed Ernst & Young Inc. as the monitor of Bondfield and some of its affiliates. On December 19, 2019, the court appointed KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con.

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[5] I use "Bondfield" to denote Bondfield Construction Company Limited, as distinct from the Bondfield Group. The application judge referred to Bondfield Construction Company Limited as "BCCL".

[9] The monitor and the trustee discovered that Bondfield and Forma-Con had illegitimately paid out tens of millions of dollars to John Aquino and several of the other appellants under a false invoicing scheme, which is described in detail by the application judge. Both the monitor and the trustee brought applications for various forms of declaratory relief, the monitor under a combination of s. 36.1 of the *CCAA* and s. 96 of the *BIA* and the trustee under the latter only.

(1) The Bondfield Application

[10] The monitor learned that between April 3, 2014 and April 3, 2019, which was the five-year statutory review period under the *BIA*, John Aquino and his associates took $21,807,693 from Bondfield by means of a false invoicing scheme.[6]

[11] In cross-examination, Mario Caruso, Giuseppe Anastasio, and Lucia Coccia-Canderle – individuals who were involved in operating the Bondfield supplier parties – conceded that the suppliers who falsely invoiced Bondfield provided no value for the transfers. John Aquino made the same admissions. However, these participants denied an intent to defraud, defeat, or delay Bondfield's actual creditors because the company was not then insolvent or in danger of insolvency. The Solano Estate insisted that it had no knowledge of the

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[6] The suppliers involved in this scheme were 2483251 Ontario Corp. a.k.a. Clearway Haulage ("Clearway"), 2420595 Ontario Ltd. a.k.a. Strada Haulage ("Strada"), 2466601 Ontario Inc. a.k.a. MMC Contracting ("MMC"), 2420570 Ontario Ltd. a.k.a. MTEC Construction ("MTEC"), Time Passion, Inc. ("Time Passion"), and RCO General Contracting Inc. ("RCO").

impugned Bondfield transactions, while Anthony Siracusa and Time Passion did not respond.

[12] The application judge granted the declarations the monitor sought concerning the Bondfield false invoicing scheme and required the Bondfield parties to repay $21,807,693 on a joint and several liability basis (other than Coccia-Canderle, whose liability was limited to $88,008).

(2) The Forma-Con Application

[13] The trustee discovered that between 2011 and 2017, Forma-Con had paid more than $34 million to certain suppliers under the false invoicing scheme. Between December 19, 2014 and December 19, 2019, which was the five-year review period under the *BIA*, Forma-Con paid over $11 million to certain purported suppliers.[7]

[14] As in the Bondfield application, under cross-examination, John Aquino, Caruso, Anastasio, and Coccia-Canderle conceded that suppliers that falsely invoiced Forma-Con provided no value for the transfers (not including 230[8]), but maintained that they had no intent to defraud, defeat, or delay Forma-Con's actual creditors.

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[7] The Forma-Con suppliers were Clearway, MMC, MTEC, Strada, 2304288 Ontario Inc. ("230"), which was John Aquino's personal holding company, and 2104664 Ontario Inc. ("664 Ontario").
[8] Despite the individual Forma-Con parties' exclusion of 230 from their concessions, the application judge found that 230 was involved in the false invoicing scheme: *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, 88 C.B.R. (6th) 60 ("Decision Below"), at paras. 120, 242.

[15] 664 Ontario contended that it had provided value in the form of consulting services to Forma-Con regarding a hospital project in Hawkesbury. The Solano Estate asserted that it had no knowledge of the impugned Forma-Con transactions.

[16] The application judge granted the declarations the trustee sought concerning the Forma-Con false invoicing scheme, and required the Forma-Con parties to repay $11,366,890 on a joint and several liability basis (other than 664 Ontario, whose liability was limited to $90,400, and Coccia-Canderle, whose liability was limited to the value of the cheques paid to her by the Forma-Con suppliers).

C. THE ISSUES

[17] There are four issues, which I address in turn:

1. Did the application judge err in finding that s. 96 of the *BIA* could be used by the monitor and the trustee to recover the money John Aquino and his associates took from Bondfield and Forma-Con?

2. Are the defences of legal and equitable set-off available to John Aquino and the other appellants who claim them?

3. Did the application judge err in finding 664 Ontario to be part of the false invoicing scheme?

4. Should the application judge have converted the applications into an action, or, if not, have required a trial on the financial position of Bondfield and Forma-Con?

D. ANALYSIS

(1) Can s. 96 of the *BIA* be used by the monitor and the trustee to recover the money John Aquino and his associates took from Bondfield and Forma-Con?

[18] The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it.[9] The interpreter must attend to text, context, and purpose.[10] After discussing the text, purpose, and legislative history of s. 96, I attend to the governing principles and to their application to the facts in this case.

(a) The text and purpose of s. 96 of the *BIA*

[19] Section 96 of the *BIA* permits trustees to seek a court order voiding a transfer by the debtor to another party at "undervalue", which is an improvident transaction from the debtor's perspective. Section 96 provides, in part:

> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against… the trustee — or order that a party to the transfer or any other person who is privy to the transfer[11], 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
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> …
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> (b) the party was not dealing at arm's length with the debtor and

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[9] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 121.
[10] *Vavilov*, at paras. 117-24.
[11] Section 96(3) of the *BIA* defines a "privy" 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."

> (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
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> (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
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> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
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> (B) the debtor intended to defraud, defeat or delay a creditor. [Emphasis added.]

[20] Textually speaking, the contrast between paras. (A) and (B) makes it clear that there are circumstances in which s. 96 will apply even though the "transfer at undervalue" occurs at a time that the debtor, in this case Bondfield or Forma-Con, is not insolvent. This scenario gives rise to a problem about the meaning to be given to "creditor" in para. (B). Section 2 of the Act defines "creditor' as "mean[ing] a person having a claim provable as a claim under this Act". The reasonable interpretation is that there must be a person to whom the debtor owes money at the moment the fraudulent transaction occurs who would be a creditor with a provable claim if the debtor were immediately insolvent.[12] There is an inescapable contingency to the test. There is also a prospectivity, which comes from the

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[12] Section 121(1) of the *BIA* concerns what constitutes a provable claim: "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act".

contrast between para. (A) (“was insolvent”) and para. (B), which lacks that language and therefore implies that the debtor is not yet insolvent.

[21] Next, I would interpret the words “a creditor” in para. (B) as denoting any such creditor, not a target creditor or one necessarily known to the fraudulent debtor. It is reasonable to infer that any large enterprise in financial difficulty will have many such creditors, many of whom would not be actively known by the fraudster.

[22] I understand s. 96 to be remedial in nature.[13] The Supreme Court has said with respect to provincial legislation governing fraudulent conveyances and preferences: “All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors.”[14] This remedial purpose led the court to conclude that the legislation “should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects”.[15] In my view this approach applies equally to the interpretation of s. 96 of the *BIA*.

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[13] This court has held that, in general, the “*BIA* is remedial legislation and should be given a liberal interpretation to facilitate its objectives”: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43.
[14] *Royal Bank of Canada v. North American Life Assurance Co*., [1996] 1 S.C.R. 325, at para. 59.
[15] *Royal Bank of Canada*, at para. 59, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[23] Section 96 was included in the 2009 amendments to the *BIA*. The section "combines and simplifies the principles that were established pursuant to sections 91 and 100 in the pre-2009 amendments addressing settlements and reviewable transactions, respectively", as Robyn Gurofsky explains.[16] In her view: "Section 96, like section 95, is intended to create a framework for challenging transactions that have the effect of diminishing the value of the bankrupt's estate and limiting the ability of creditors to recover all or a portion of their debt from the estate."[17]

[24] Michael Myers explains the genesis of s. 96: "The law has long recognized the need to protect creditors from insolvent debtors who give away assets to third parties instead of using those assets to repay their debts."[18] This is an historic concern: "[L]egislation prohibiting debtors from fraudulently dissipating their assets when heavily indebted was first enacted in England during the reign of Queen Elizabeth I in the 1500s and has been embodied into the *Fraudulent Conveyances Act* of Ontario since the late 1800s."[19] Gurofsky and Myers both point out that the

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[16] Robyn Gurofsky, "Fraudulent Preferences and Transfers at Undervalue: A Review of the Legal Developments under the *Bankruptcy and Insolvency Act*", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*, 2011 (Toronto: Thomson Reuters, 2012) 567, at p. 584.
[17] Gurofsky, at p. 584 (footnote omitted).
[18] Michael S. Myers, "Transfers at Undervalue Under Section 96 of the Bankruptcy and Insolvency Act – A Primer", prepared for the Law Society of Ontario's Six-Minute Debtor-Creditor and Insolvency Lawyer Seminar (October 17, 2018), at p. 2, online: Papazian Heisey Myers, Barristers & Solicitors <www.phmlaw.com/site_files/content/pdf/published_works/michael_myers/2018_lso_seminar_6_minute_debtor-creditor_and_insolvency_law.pdf>. Myers' analysis of s. 96 has been cited in M.A. Springman *et al.*, *Frauds on Creditors: Fraudulent Conveyances and Preferences*, loose-leaf (2022-Rel. 1) (Toronto: Thomson Reuters, 2021).
[19] Myers, at pp. 2-3 (footnote omitted).

idea was to prevent the dissipation of assets, especially to related recipients. They both cite Lord Hatherley L.C.'s statement from *Freeman v. Pope* that "persons must be just before they are generous and that debts must be paid before gifts can be made."[20] The policy of the *BIA* goes beyond this modest origin.

(b) The governing principles and their application

[25] In *Urbancorp Toronto Management Inc. (Re)*, van Rensburg J.A. noted that "s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met."[21] She added: "The interpretation of the section must be considered in relation to the remedy that is sought." This echoed her earlier comments that even though s. 96 is a "tool to address 'asset stripping' by a debtor", a "bankruptcy trustee or *CCAA* monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the… specific words used" in the section.[22]

[26] In order to require John Aquino and the other beneficiaries of the false invoicing scheme to repay the money they took under s. 96(1)(b)(ii)(B) of the *BIA*, the monitor and the trustee had to prove two elements: first, John Aquino and the other participants were not dealing with Bondfield and Forma-Con at arm's length; and second, at the time they took the money (during the statutory review period),

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[20] *Freeman v. Pope* (1870), L.R. 5 Ch. App 538, at p. 540.
[21] *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 48.
[22] *Urbancorp*, at para. 40.

they “intended to defraud, defeat or delay a creditor” of Bondfield or Forma-Con. The first element is amply established by the evidence. This case turns on the second element.

[27] The obvious gap in the second element concerns the reach of the fraudsters’ intention. No doubt John Aquino and the other participants intended to defraud Bondfield and Forma-Con, but this does not immediately lead to the conclusion that they also intended at that time to defraud the creditors of Bondfield and Forma-Con. The application judge bridged the gap by imputing John Aquino’s fraudulent intention to the debtors, Bondfield and Forma-Con, and on that basis found that it could be said that “the debtor intended to defraud, defeat or delay a creditor.”

[28] Several aspects of the legal analysis are no longer in active dispute. John Aquino and his associates in the false invoicing scheme do not seriously contest their non-arm’s length status, that the transfers at issue were at undervalue, or their active intent to defraud the debtors, Bondfield and Forma-Con. Nor is there any doubt, as the application judge noted, that the transactions bristled with “badges of fraud”, including the value of the transactions being nil, the non-arm’s length status of the participants, the secrecy, and the unusual haste with which the transactions were completed.[23]

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[23] Decision Below, at paras. 156-60.

[29] John Aquino and his associates nonetheless dispute liability under s. 96 on two grounds. The first is that their fraudulent acts were not carried out at a time when Bondfield and Forma-Con were financially precarious. The second is that the fraudulent intentions of John Aquino cannot be imputed to Bondfield and Forma-Con. These are the two deep issues to be addressed in this appeal.

(i) The timing of the fraudulent transfers

[30] Recall the bold assertion made by John Aquino and his associates that at the time they took the money, both Bondfield and Forma-Con were sufficiently financially healthy to sustain the losses, which establishes that they did not intend to "defraud, defeat or delay" any actual creditors. The focus is on the fraudster's intent to defraud a creditor of these companies.

[31] The court must not indulge the temptation to engage in hindsight bias. In *Montor Business Corp. (Trustee of) v. Goldfinger*, Brown J. (as he then was) stated the principle on which the appellants rely:

> When inquiring into the intention of a debtor for the purposes of *BIA* s. 96(1)(a)(iii) – and the provincial preferences statutes for that matter – a court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time. A court must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time. The focus must remain on the belief and intention of the

> debtor at the time, as well as the reasonableness of that belief in light of the circumstances then existing.[24]

[32] Brown J. added a caution about the parties' beliefs as to the value of certain properties in that case: "In hindsight one might question the reasonableness of [their] belief, but the evidence given… about the parties' thinking at the time indicated a genuine belief in the value of the properties."[25] This he found to be evidence on which he placed "significant weight".

(a) The application judge's reasons on the timing of the transfers

[33] The application judge instructed herself correctly on the applicable legal principles by reference to the appropriate cases whose reach was also argued before us. She heard and recited the arguments made by John Aquino and his associates, who said that when they took the money, Bondfield and Forma-Con were financially strong.[26] This strength, they claim, was evidenced by the Deloitte audited financial statements[27] and by the report of Ross Hamilton of Cohen Hamilton Steger & Co. Inc., the forensic and investigative accounting experts retained by John Aquino (the "CHS report").[28] John Aquino argued that the amounts they took were relatively small, so that inferentially the thefts did not

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[24] *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, 8 C.B.R. (6th) 200, at para. 272 (emphasis added), aff'd 2016 ONCA 406, 351 O.A.C. 241, leave to appeal refused, and [2016] S.C.C.A. No. 361 and rev'd in part on other grounds, 2016 ONCA 407, 398 D.L.R. (4th) 266, leave to appeal refused, [2016] S.C.C.A. No. 360.
[25] *Montor*, at para. 274.
[26] Decision Below, at paras. 48, 144 and 163.
[27] Decision Below, at paras. 98, 165, and 167.
[28] Decision Below, at paras. 102-3, 165-66.

impact the companies' financial condition.[29] He cast the blame for the companies' collapse on the actions of Zurich as well as on the National Bank's having denied Bondfield Group an increase in its credit facility.[30]

[34] The application judge did not accept the CHS report as a reliable indicator of the companies' financial health because it was based on unreliable information received from the companies.[31] She took a similarly skeptical view of the reliability of Deloitte's financial statements, which are now the subject of litigation.[32]

[35] In the application judge's opinion, a debtor's financial health is relevant but not determinative regarding the debtor's intent to defraud, defeat or delay creditors, particularly where, as here, there is evidence of a number of badges of fraud. These "provide a strong evidentiary basis on which to find that each of BCCL and Forma-Con, through the actions of its president John Aquino, intended to defraud, defeat or delay its creditors."[33]

[36] The application judge concluded that the presence of badges of fraud "creates a rebuttable presumption of the intention to defraud, defeat or delay creditors" that has the effect of shifting the evidentiary burden "to those defending

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[29] Decision Below, at para. 181.
[30] Decision Below, at paras. 96-97.
[31] Decision Below, at paras. 169, 176-77 and 193.
[32] Decision Below, at paras. 99, 165 and 193.
[33] Decision Below, at para. 145.

the fraud to adduce evidence to show the absence of fraudulent intent".[34] She found that John Aquino and his associates had "not rebutted the presumption of fraudulent intent".[35]

[37] The application judge noted that there is "a divergence of opinion between the parties on the financial condition of the Bondfield Group during the Bondfield review period and the Forma-Con review period."[36] She concluded her lengthy analysis: "The true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court."[37] The appellants referenced this statement in argument to attempt to undermine the certainty of the application judge's factual findings and her conclusions. However, doing so mischaracterizes the meaning of her observation.

[38] The application judge mustered a phalanx of facts in support of her conclusions:

> The transferors, being the corporate debtors, also had actual and potential liabilities, or were about to enter risky undertakings. According to the reports of the Monitor and the Trustee, both BCCL and Forma-Con had significant long-term and off-balance sheet liabilities during the relevant review periods and were guarantors on BCCL's credit facility in respect of which there were contingent obligations in the tens of millions of dollars at the end of fiscal years 2014, 2015 and 2016. Ralph, Steven and

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[34] Decision Below, at para. 161, citing *Purcaru v. Seliverstova*, 2015 ONSC 6679, 69 R.F.L. (7th) 388, aff'd 2016 ONCA 610, 80 R.F.L. (7th) 28.
[35] Decision Below, at para. 164.
[36] Decision Below, at para. 165.
[37] Decision Below, at para. 193.

> John Aquino's sister Maria Bot, were all creditors of BCCL with substantial shareholder loan accounts. The Bondfield Group was facing actual and potential liabilities, and by John Aquino's own admission was embarking on a significant expansion in its construction activities at a time when its lender, National Bank, was not prepared to increase its lending. During the relevant period, John Aquino and Ralph were temporarily transferring funds to BCCL for the sole purpose of misleading BCCL's stakeholders, including its lenders, into believing that BCCL was in a stronger financial position than it was.[38]

[39] The application judge noted there were a number of unusual accounting practices at Bondfield and Forma-Con:

> According to the Monitor's reports, just as accounts payable were understated in BCCL's records, accounts receivable were overstated in a problematic fashion. While BCCL's contract revenues were going up, the collectability of those revenues was going down. Throughout the Bondfield review period, BCCL's accounts receivable collection was in continual decline.
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> …
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> These [unusual accounting practices] include John Aquino's admission that, during the Bondfield review period, he and Ralph routinely injected capital into BCCL to mislead BCCL's stakeholders into thinking that the Bondfield Group was financially stronger than it was; the fact that suppliers' cheques were withheld to give BCCL an opportunity to extend the time it could use the funds owing to suppliers; the fact that BCCL was entering a date later than the date shown on the supplier invoice into its accounting system, which allowed its payables to remain outstanding longer; the fact that significant

[38] Decision Below, at para. 158.

> adjusting journal entries had to be made regarding BCCL's revenue and profit once the Monitor was appointed; and the fact that a claim has been brought against Deloitte with respect to its audit of Bondfield Group financial statements (which it is defending). In light of these concerns, it is reasonable to infer that the financial records provided to Deloitte and to Mr. Hamilton were likely not reliable.[39]

[40] Even though getting an absolutely accurate picture of the financial condition of Bondfield and Forma-Con was not possible, such precision was unnecessary. The application judge accepted the description of the state of affairs discovered in the monitor's investigation. She listed the findings:

> a) BCCL's financial records, prepared under the supervision of John Aquino, vastly overstated the revenues and profitability of its projects in the relevant period, causing BCCL to have to book significant adjusting journal entries under the supervision of the Monitor; b) Zurich had encountered stated losses of over $300,000,000 to date in paying sub-trades and completing BCCL projects, which losses arose from projects and project activities started many years before the *CCAA* filing; c) BCCL's loan was placed in "special loans" by its prior lender, The National Bank, no later than the start of 2017; d) BCCL faced persistent liquidity challenges as evidenced in part by John Aquino's steps to inject cash into BCCL temporarily at the beginning of 2014 through 2017 in order to improve the appearance of BCCL's liquidity for the purposes of its bonding and lending arrangements; and e) the Bondfield Group's auditors, Deloitte, are the subject of litigation by both BCCL and Zurich with respect to the accuracy of the

[39] Decision Below, at paras. 170, 193.

> financial statements that the defending Bondfield Respondents and Forma-Con Respondents rely upon.[40]

[41] The application judge added context, emphasizing that John Aquino "signed a number of the cheques associated with the impugned transactions [and that in] cross-examination he stated that he would have been familiar with 100 percent of the suppliers and subtrades."[41] Meanwhile, "[a]t the same time as he was authorizing payments on false invoices, [John Aquino] was injecting capital into BCCL from time to time in an attempt to disguise the true financial condition of BCCL."[42] In her view: "It is reasonable to infer that John Aquino took these actions to avoid BCCL's and Forma-Con's obligations and defeat their creditors."[43] She added that he had not "given evidence of an alternative explanation."

[42] The application judge also addressed the question of the relatively small value of the amounts paid out on the false invoices as compared to Bondfield's gross revenue or net profit. She was not persuaded that this ratio "absolves John Aquino of an intent to defeat creditors."[44] She put the transfers in context, adding: "The amounts, whatever the quantum, were paid out at a time when John Aquino was taking deliberate steps to mislead the stakeholders of BCCL with respect to its financial position and these payments bore a number of badges of fraud", and

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[40] Decision Below, at para. 168.
[41] Decision Below, at para. 190.
[42] Decision Below, at para. 191.
[43] Decision Below, at para. 192.
[44] Decision Below, at para. 182.

"[e]ach of these payments reduced the funds available to pay long-term creditors and increased bank indebtedness".[45]

[43] The evidence led the application judge to conclude: "The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con."[46] This conclusion built on her earlier finding:

> The totality of the evidence, in my view, provides a firm basis for finding that John Aquino, as principal and directing mind of BCCL and Forma-Con, had fraudulent intent – an intent to defraud, defeat or delay creditors. It was in no way reasonable for him to believe that, throughout the period of the impugned transactions, BCCL and Forma-Con did not have long-term creditors, like lenders, including Ralph, who would not be defeated or delayed by the draining of tens of millions of dollars from BCCL and Forma-Con through the false invoicing schemes.[47]

[44] The requirement noted in *Montor* is that the "court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time."[48] In particular, a court must not rely on hindsight by injecting into the circumstances surrounding the impugned transactions knowledge about how

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[45] Decision Below, at para. 182.
[46] Decision Below, at para. 197.
[47] Decision Below, at para. 160.
[48] *Montor*, at para. 272.

events unfolded after that time. Contrary to the appellants' submissions, this is not what the application judge did.

[45] At the time of the fraudulent transactions under the false invoicing scheme, the interests of creditors were imperilled by the transfers because Bondfield and Forma-Con were already experiencing mounting financial difficulties. As noted above, the application judge determined that it would have been entirely unreasonable for John Aquino to believe that, during that time, the interests of the companies' creditors would not be endangered by this fraudulent scheme.[49] He and his associates continued on nonetheless. The application judge found that because the companies had outstanding debts at the time of the transfers, including a substantial loan from its primary lender, "there was a creditor or creditors toward whom BCCL's and Forma-Con's intent to defraud, defeat or delay could be directed", even though the companies were then "paying off current liabilities".[50] In other words, the fact that current liabilities were being paid did not mean that "the fraudulent transfers were never intended to defeat then-current creditors."

[46] In short, the application judge took a pragmatic view on the totality of the evidence. She found that during the review periods both Bondfield and Forma-Con

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[49] Decision Below, at para. 160.
[50] Decision Below, at para. 204.

were experiencing increasing financial difficulties, to the knowledge of John Aquino, who carried on with the false invoicing scheme. She inferred that he did this with the intent to defeat the companies' creditors. This court owes deference to the application judge's findings of fact and findings of mixed fact and law. The appellants have not established any palpable and overriding errors nor legal errors with these findings.

[47] The application judge also accepted that the false invoicing scheme might not have been solely motivated by an intention to defeat creditors. However, she noted that the monitor and trustee only had to demonstrate that one of the motives or intentions was to defraud, defeat, or delay a creditor.[51] As Wilton-Siegel J. explained:

> [T]he relevant wording in s. 96 is to the effect that "the debtor intended to defraud, defeat or delay a creditor." Of significance, it is not that "the intention of the debtor was to defraud, defeat or delay a creditor." If it were the latter, I think an applicant would be required to establish that the principal intention of the debtor was to defeat his or her creditors. However, the wording of s. 96 does not require such a determination. Instead, I think it requires only that an applicant establish that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor.[52]

[48] Finally, as discussed, John Aquino was aware that the interests of the companies' creditors were potentially imperilled by the false invoicing scheme.

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[51] Decision Below, at para. 189.
[52] *Juhasz Estate v. Cordiero*, 2015 ONSC 1781, 24 C.B.R. (6th) 69, at para. 54 (emphasis added).

Although the application judge did not make findings with respect to recklessness, it is clear that at a minimum, John Aquino was reckless as to whether the scheme would defraud, defeat, or delay creditors. In the criminal context, the Supreme Court has held that fraud can be established on the basis of recklessness as to the consequences of a fraudulent act. As McLachlin J. put it:

> I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.[53]

[49] I see no reason why John Aquino's recklessness as to the consequences of the fraudulent transfers with respect to the interests of the companies' creditors would not be similarly sufficient for establishing the requisite intent under s. 96 of the *BIA*.[54]

(ii) The imputation of John Aquino's fraudulent intent to Bondfield and Forma-Con

[50] For the purpose of construing the words, "the debtor intended to defraud, defeat or delay a creditor" in s. 96(1)(b)(ii)(B), the debtors are Bondfield and

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[53] *R. v. Théroux*, [1993] 2 S.C.R. 5, [1993] S.C.J. No. 42, at para. 26.
[54] Recklessness is also generally sufficient in cognate areas such as knowing assistance or fraudulent misrepresentation.

Forma-Con. The application judge imputed the fraudulent intention of John Aquino in the false invoicing scheme to Bondfield and Forma-Con, and found that the trustee and the monitor could pursue the repayment of the funds taken from the fraudsters under the *BIA*.

[51] The appellants argue that the application judge erred legally because John Aquino's fraudulent intent cannot be imputed to Bondfield or Forma-Con as a matter of law, even though he was one of their directing minds. They assert that the binding principles of the common law doctrine of corporate attribution set out in *Canadian Dredge & Dock Co. v. The Queen*,[55] do not permit the imputation of his intention to either defrauded company. Accordingly, s. 96(1)(b)(ii)(B) of the *BIA* cannot be used to require John Aquino, or his associates as "privies" to the impugned transactions, to repay the money they took.

[52] This argument raises a thorny question about the interplay between the provisions of the *BIA* and common law doctrine. When can common law doctrine be engaged by the court in construing and applying the *BIA*? I begin by setting out the application judge's reasons. I next address this legal question and then turn to its implications for the application of the corporate attribution doctrine in this appeal.

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[55] *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662.

(a) The application judge's reasons on corporate attribution

[53] The application judge reviewed and considered the law concerning corporate attribution. She agreed that "the actions of John Aquino were not intended to benefit BCCL and Forma-Con and they did not do so."[56] In her view, if the *Canadian Dredge* test "were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations."[57]

[54] However, the application judge took a different tack and concluded: "[T]he corporate attribution doctrine as set out in *Canadian Dredge* ought not to apply in these applications made pursuant to s. 96 of the *BIA*, and John Aquino's intent to defeat creditors ought to be attributed" to Bondfield and Forma-Con.[58] She founded this result on several interrelated considerations:

- The incompatibility of the *Canadian Dredge* formulation "with the very purpose of s. 96 of the *BIA*, which is aimed at restoring value for the benefit of the debtor's creditors;[59]

- The policy factors in *Canadian Dredge*, particularly the "social purpose" of holding a corporation responsible for the acts of its employees and the view that the doctrine's application should only be by "judicial necessity" where it would "advantage society by advancing law and order";[60]

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[56] Decision Below, at para. 217.
[57] Decision Below, at para. 217.
[58] Decision Below, at para. 230.
[59] Decision Below, at para. 218.
[60] Decision Below, at para. 219.

- The remedial purpose of s. 96, which is "directed towards recovering funds for creditors";[61] and

- The principles of statutory interpretation, particularly the purposive approach, "[g]iven that the *BIA* is concerned with providing proper redress to creditors".[62]

[55] In *DBDC Spadina Ltd. v. Walton*, van Rensburg J.A. took a strict approach to the application of the *Canadian Dredge* test, which the Supreme Court expressly approved on appeal.[63] However, based on the reasoning set out above, the application judge expressed "hesitancy about whether [van Rensburg J.A.'s reasoning in *Walton*] ought to apply in the context of s. 96."[64]

[56] As I will explain, the application judge did not err in her approach and in her judgment. I review several points of intersection between common law doctrine and the *BIA* before turning to the specific application of the corporate attribution doctrine.

(b) Intersections between common law doctrine and the *BIA*

[57] There are several examples of situations in which common law doctrines have been used to interpret, apply, or supplement the *BIA*, apart from the corporate

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[61] Decision Below, at para. 224.
[62] Decision Below, at paras. 226-29.
[63] *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409 ("*Walton*"), *per* van Rensburg J.A., in a dissenting opinion adopted by the Supreme Court as its reasons on appeal in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, [2019] 2 S.C.R. 530 ("*Dejong*").
[64] Decision Below, at para. 224.

attribution doctrine.[65] I pick out four but could extend the list: the common law principles around the priority of secured claims; the doctrine of good faith; the anti-deprivation rule; and unjust enrichment.

[58] The Supreme Court has held that "Parliament is presumed to intend not to change the existing common law unless it does so clearly and unambiguously".[66] This frames the legal context.

[59] First, regarding the priority of secured claims, Houlden, Morawetz, and Sarra note: "If no statutory provisions are applicable, then common law and equitable principles will be applied."[67] For example, the common law rule of "first in time" will *prima facie* be followed.

[60] Second, various provisions of the *BIA* engage principles of "good faith", including the duties of receivers under s. 247, as well as the recent addition of the s. 4.2 good faith provision. These provisions engage the common law doctrine of good faith, which also exists in the civil law. But "good faith" is not a codified concept. For example, in *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, Mah J. considered the meaning of "good faith" in the *BIA* context and applied the

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[65] In this context, for terminological clarity, I treat the two somewhat distinct spheres of common law and equity as together comprising "common law".
[66] *Chandos Construction Ltd. v. Deloitte Restructuring Inc*., 2020 SCC 25, 449 D.L.R. (4th) 293, at para. 29.
[67] Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada,* 4th ed., loose-leaf, (Toronto: Thomson Reuters, 2009), at para. 6-163. See *Bulut v. Brampton (City)*, 48 O.R. (3d) 108 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 259.

principles of good faith derived from *Bhasin v. Hrynew*[68] and *C.M. Callow Inc. v. Zollinger*[69] to give content to s. 4.2, while being cognizant of the policy objectives of the *BIA*.[70]

[61] The third example is the doctrine of "fraud on the bankruptcy law" and the associated anti-deprivation rule. These are common law doctrines applicable in commercial bankruptcies, as I noted in *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*:

> Professor Wood explains that the anti-deprivation rule invalidates contractual provisions that remove assets otherwise available to creditors in the event of insolvency. He discusses the fraud on the bankruptcy law doctrine in *Bankruptcy and Insolvency Law* at p. 88:
>
> > Canadian courts have recognized that a contractual provision that is designed to remove value from the reach of an insolvent person's creditors is void on the basis that it violates the public policy of equitable and fair distribution on bankruptcy. This is referred to as the "fraud on the bankruptcy law principle." The principle can be usefully broken down into two distinct components: the anti-deprivation rule and the *pari passu* rule. The anti-deprivation rule operates by invalidating provisions that withdraw an asset that would otherwise be available to

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[68] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494.
[69] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, 452 D.L.R. (4th) 44.
[70] *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, 2021 ABQB 137, 25 Alta. L.R. (7th) 3, at paras. 41, 58. See also Houlden, Morawetz, and Sarra, at paras. 1-68 and 4-82 for further discussion on good faith in the *BIA* and Ari Y. Sorek and Charlotte Dion, "Good Faith in Insolvency and Restructuring: At the Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?" in Jill Corraini and the Honourable Blair Nixon, eds., *Annual Review of Insolvency Law*, 2020 (Toronto: Thomson Reuters, 2021) 34.

> satisfy the claims of creditors upon the insolvency of the party or the commencement of insolvency proceedings. [Internal citations omitted.]
>
> The common law anti-deprivation rule applies in commercial bankruptcies, including Greenview Power's bankruptcy.[71]

[62] The Supreme Court affirmed this understanding of the law in *Chandos*. The majority held "that the rule has existed in Canadian common law and has not been eliminated by either this Court or Parliament" and noted that "[t]he anti-deprivation rule renders void contractual provisions that would prevent property from passing to the trustee and thus frustrate s. 71 and the scheme of the *BIA*."[72] The common law anti-deprivation rule thus "maximizes the assets that are available for the trustee to pass to creditors."[73]

[63] The fourth example of the active engagement of common law doctrine in supplementing the *BIA* is in the area of unjust enrichment and restitution. Professor Wood points to situations in which a trustee can avoid a transaction in which an innocent recipient of the bankrupt's assets has paid some consideration to the debtor or added value. He notes that "[u]njust enrichment law may be relevant in respect of the recovery of these gains."[74] He continues: "These are not matters

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[71] *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*, 2020 ONCA 430, at paras. 41-42 (emphasis added; citations omitted), leave to appeal refused, [2020] S.C.C.A. No. 312.
[72] *Chandos*, at paras. 25, 30.
[73] *Chandos*, at para. 30.
[74] Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015), at p. 195.

that are governed by the statutes dealing with impeachable transactions, and therefore the issue may be properly resolved through the application of principles of unjust enrichment." The common law doctrine of unjust enrichment can be used to supplement the *BIA* in circumstances where the statute itself does not fully govern the transactions at issue.

[64] I would draw several principles from this discussion of the active engagement of common law doctrine in the application of the *BIA*. Common law doctrine can be enlisted by a court to interpret and supplement the *BIA* where necessary to better achieve its purposes, one of which is to protect the interests of the bankrupt's creditors. The common law can add content to the terms of the *BIA* not otherwise defined. In particular, the common law doctrine known as the anti-deprivation rule and its purpose of preventing a fraud on the bankruptcy is especially pertinent in this case. The use of common law doctrine must respect the policy of the *BIA*. But these principles do not license a court to do whatever it likes; the common law doctrines impose their own discipline.

[65] I turn now to the common law doctrine of corporate attribution.

(c) The common law doctrine of corporate attribution in the bankruptcy context

[66] Corporations are not natural persons. In view of separate corporate personality, it is no small thing to impute to a corporation the intention of its "directing mind". On the other hand, there is the spectre that corporations might

commit criminal acts and civil delicts with impunity because these engage mental elements relevant to intentions. The corporate attribution doctrine creates a bridge between the corporation and the natural person whose "directing mind" caused the corporation to act as it did. The doctrine attributes the intent of the corporation's directing mind to the corporation itself, whose conduct is then evaluated against the legal standard that applies to the implicated criminal or civil area of law.

[67] The Supreme Court's current substantive teaching on the doctrine of corporate attribution is found in *Deloitte & Touche v. Livent Inc. (Receiver of*),[75] which contextualizes *Canadian Dredge*. In *Livent*, the court restated the *Canadian Dredge* test:

> 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.[76]

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[75] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at paras. 100-4.
[76] *Livent*, at para. 100 (citations omitted).

[68] In the result, the court did not allow the doctrine to be used by the auditor Deloitte to defend against Livent's claim for negligence based on the fraudulent activities of its directing minds.

[69] The Supreme Court in *Dejong* clarified that *Livent* invited a flexible application of the *Canadian Dredge* test, but only to make clear that courts retain discretion not to apply the test in circumstances where attributing the actions of a directing mind to a corporation would not be in the public interest. Courts must take seriously the elements of the corporate attribution test in *Canadian Dredge*.

(d) The corporate attribution doctrine and the *BIA*

[70] Thus far, the corporate attribution doctrine has been applied in the fields of criminal and civil liability. Courts have yet to consider the doctrine in the bankruptcy and insolvency context under s. 96 of the *BIA*, making this a case of first impression.

[71] I would extract three principles from *Livent* and *Canadian Dredge* to guide the application of this doctrine in this setting. First, the court is sensitive to the context established by the field of law in which an imputation of intent to a corporation is sought to be made.

[72] Second, the court recognizes that the attribution exercise is grounded in public policy.[77] I would generalize the point made by the *Livent* court about *Canadian Dredge* by paraphrasing: In the legal field of inquiry – civil, criminal, or bankruptcy – the underlying question is "who should bear the responsibility for the [impugned] actions of the corporation's directing mind?"[78] The policy factors that weigh in favour of imputing to a corporation the wrongdoing intent of its directing mind flow from the "social purpose" of holding the corporation responsible. In *Livent*, the court stated: "[A]s Estey J. himself recognized [in *Canadian Dredge*], the doctrine is only one of 'judicial necessity' and where its application 'would not provide protection of any interest in the community' or 'would not advantage society by advancing law and order', the rationale for its application 'fades away'".[79]

[73] Third, these principles "provide a *sufficient* basis to find that the actions of a directing mind be attributed to a corporation, not a *necessary* one".[80] Accordingly, "[a]s a principle that is grounded in policy, and which only serves as a means to hold a corporation criminally responsible or to deny civil liability, courts retain the discretion to refrain from applying it where, in the circumstances of the case, it would not be in the public interest to do so."[81]

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[77] *Livent*, at para. 104.
[78] *Livent*, at para. 102.
[79] *Livent*, at para. 103 (citations omitted).
[80] *Livent*, at para. 104 (emphasis in original).
[81] *Livent*, at para. 104.

[74] While this court must take the elements of the corporate attribution doctrine seriously, the genius of the common law is in its robust circumstantial adaptability.

[75] The circumstances in which the corporate attribution doctrine has traditionally been applied – the criminal and civil contexts – are quite different from the bankruptcy context. In the criminal context, the issue is whether it would be just to visit criminal liability on a corporation. As *Canadian Dredge* instructs, if the corporation benefited from the directing mind's criminal activity, imposing criminal liability might be justified. But if the criminal activities do not, by design or in result, benefit the corporation, then it is not criminally liable.

[76] The rule in the civil context seeks to determine whether it is just to visit civil liability on a corporation. Where a corporation benefits from the improper activities of the directing mind, that intent might be attributed to the corporation. But if it does not get a benefit, there is no attribution and no liability.

[77] The application of these principles is not clear in the bankruptcy arena, where the policy currents flow rather differently. In particular, attributing the intent of a company's directing mind 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. An approach that would favour the interests of fraudsters over those of creditors seems counterintuitive and should not be quickly adopted.

[78] In light of these considerations, I would reframe the test for imputing the intent of a directing mind to a corporation in the bankruptcy context this way: The 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?

[79] Permitting the fraudsters to get a benefit at the expense of creditors would be perverse. The way to avoid that perverse outcome is to attach the fraudulent intentions of John Aquino to Bondfield and Forma-Com in order to achieve the social purpose of providing proper redress to creditors, which is the core aim of s. 96 of the *BIA*. The application judge did not err in finding that the "intention of the debtor" under s. 96 can include "the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself."[82]

(2) Are the defences of legal and equitable set-off available to John Aquino and the others claiming them?

[80] I deal with the set-off claims of Anastasio and John Aquino separately.

(a) Anastasio's claim to set-off

[81] The application judge found Anastasio to be an active participant in the false invoicing scheme.[83] The companies associated with Anastasio – MMC and RCO

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[82] Decision Below, at para. 229.
[83] Decision Below, at paras. 24, 136.

– received more than $4 million through the scheme.[84] Anastasio takes the same position as John Aquino on the merits of this appeal. He concedes that the transactions were at undervalue, essentially nil.[85] He also concedes that the transactions were not at arm's length.[86]

[82] Anastasio asserts that he is owed US$3.75 million as his fee for introducing the Bondfield Group to Deutsche Bank, who considered providing the Group a credit facility of US$150 million.[87] The application judge rejected this claim. She set out the factual background to this assertion:

> Prior to Zurich's *CCAA* application, in 2016, National Bank denied the Bondfield Group an increase in its credit facility from $60,000,000 to $120,000,000. Then, the Bondfield Group entered into an $80,000,000 loan facility with Bridging for one year at an interest rate of 13.5 percent calculated daily. In late 2017, the Bondfield Group negotiated long-term financing with Deutsche Bank, but it required an insurance policy for the construction holdbacks in which it would have priority. The insurance policy was obtained. However, a disagreement between Zurich and Deutsche Bank regarding the loan facility in relation to Zurich's bonds could not be resolved and the Deutsche Bank facility did not proceed.[88]

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[84] Decision Below, at paras. 72-73.
[85] Decision Below, at paras. 35, 119 and 157.
[86] Decision Below, at para. 138.
[87] Decision Below, at para. 106.
[88] Decision Below, at para. 97.

[83] Anastasio argues that his US$3.75 million fee remains unpaid.[89] He claims a set-off for that amount against any order for repayment of the proceeds of the false invoicing scheme. However, the application judge noted that he "provided no documentary or corroborating evidence in support of his alleged claim against the Bondfield Group in this amount."[90] She added that while John Aquino agreed that Anastasio introduced Bondfield to Deutsche Bank, he made "no mention of any fee owing to Anastasio for his services." The application judge concluded that Anastasio did not establish an entitlement to any legal or equitable set-off.

[84] These are essentially factual findings to which this court owes deference. Anastasio has not pointed to any palpable and overriding error, nor error of law, with respect to these findings. I would not give effect to this ground of appeal.

(b) John Aquino's claims to set-off

[85] The statutory basis for a claim to set-off is s. 97(3) of the *BIA*, which provides:

> The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, <u>except in so far as any claim for set-off or compensation is affected by the provisions of this Act</u>

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[89] Decision Below, at para. 106.
[90] Decision Below, at para. 284.

> respecting frauds or fraudulent preferences. [Emphasis added.]

[86] Houlden, Morawetz, and Sarra comment on the operation of the exception under s. 97(3): "It may be that the purpose of the concluding words of s. 97(3) is to make it clear that a creditor who has to return property to the trustee as a result of the setting aside of a fraudulent preference has no right to assert a set-off."[91] This is because the effect of according a set-off would be to give a preference to that creditor over other creditors. Houlden, Morawetz, and Sarra note that "the effect of the set-off is to prefer one creditor over the general body of creditors", which "has the effect of securing the claim of the party entitled to it."[92] Doing so would give a fraudster priority over other creditors for the amount set off, which is contrary to the *pari passu* principle of bankruptcy law.

[87] John Aquino asserts that his liability for any s. 96 repayments should be reduced by a total of $19,009,987. He claims set-offs in the amounts of: (1) $11,922,811, which is the alleged amount of his shareholder's loan to Bondfield[93]; (2) $3,270,631 on behalf of his holding company, 230, which is the difference between the inflows and outflows of cash between 230 and Bondfield during the review period ($17.3 million cash injections against repayment of

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[91] Houlden, Morawetz, and Sarra, at para. 5-547.
[92] Houlden, Morawetz, and Sarra, at para. 5-543, discussing *King Insurance Finance (Wines) Inc. v. 1557359 Ontario Inc. (Willowdale Autobody Inc.)*, 2012 ONSC 4263, 99 C.B.R. (5th) 227.
[93] Decision Below, at para. 93.

$14,029,369)[94]; and (3) $3,816,545, which is the amount he argues would account for Harmonized Sales Tax input credits on the sums found to be transfers at undervalue.

[88] Although the application judge recited the evidence about the first claim, she rejected it perfunctorily on the basis that John Aquino "has not provided evidence to establish an entitlement to legal or equitable set off in the context of these insolvency and bankruptcy proceedings."[95] An insight into her reasoning would have been helpful, but I would not hesitate to come to the same conclusion.

[89] The logic of the language of s. 97(3), particularly the underlined words quoted above, as explained by Houlden, Morawetz, and Sarra, is determinative. Giving effect to John Aquino's argument would perversely reward him for his fraud. This is sufficient to dispose of John Aquino's set-off claims. Neither legal nor equitable set-off is available to John Aquino. In support of the refusal to grant equitable set-off, I would paraphrase a hoary old equitable maxim: The one who comes to Equity must come with clean hands. John Aquino's hands are not clean.

[90] Concerning the second set-off claim on behalf of 230, the application judge noted that the monitor did not dispute that: "Within the Bondfield review period, accounting for all ins and outs, 230 is in a net positive position at the end of the

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[94] Decision Below, at para. 255.
[95] Decision Below, at para. 283.

period and appears to be owed $3,270,631."[96] The monitor took the position that the cash flows were part of an illicit "fund cycling scheme" that were also transfers at undervalue. However, the application judge found that the monitor had not proven that claim.[97]

[91] But the application judge's findings do not reinforce 230's claim to set-off. That claim suffers from the same fundamental deficiency as John Aquino's claims, and I would dismiss this ground of appeal on that basis.

[92] The third claim, that the application judge did not take into account HST credits, is correct. The HST issue was not addressed in her reasons. The reason the monitor gives is that this issue was not raised before her but is a new issue raised for the first time on appeal. I agree with the monitor that it is not an issue this court should consider.

(3) Did the application judge err in finding that 664 Ontario was part of the false invoicing scheme?

[93] The application judge noted that unlike most of the other participants in the false invoicing scheme, 664 Ontario denied involvement and asserted that it provided value for the payment by Forma-Con of an invoice in the amount of $90,400.[98]

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[96] Decision Below, at para. 255.
[97] Decision Below, at paras. 269, 278.
[98] Decision Below, at paras. 36, 108.

[94] The application judge analyzed 664 Ontario's claim in a number of paragraphs in her decision and concluded: "Because the evidence indicates that 664 Ontario was not involved in the false invoicing scheme during the Forma-Con review period to the same degree as the other Forma-Con Supplier Respondents, and it has not benefited to the same extent, its liability is limited to the benefit it derived from its involvement, which I find to be $90,400."[99]

[95] In reaching this conclusion, the application judge said: "I am left with serious doubt about the legitimacy of 664 Ontario's explanation of the payment to it. On a balance of probabilities, in light of the pattern of the false invoicing scheme, I find that 664 Ontario's invoice, like many others produced as part of the false invoicing schemes, was a transaction in which no service was given for the value received."[100]

[96] This conclusion was well-supported. Although 664 Ontario said that the work related to consulting services on the Hawkesbury hospital project: "The Trustee has not been able to find, and 664 Ontario has not produced, any internal records to corroborate the work or the agreement."[101] The application judge noted that the consulting service 664 Ontario asserts that it provided required a "high degree of structural engineering experience", which 664 Ontario did not possess as a matter

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[99] Decision Below, at para. 282.
[100] Decision Below, at para. 128.
[101] Decision Below, at para. 123.

of fact. She pointed out that 664 Ontario failed to provide relevant documents and correspondence regarding the involvement of a sub-consultant, refused to produce original documents, and refused to answer a number of questions in cross-examination.[102] The invoice at issue was solicited by Solano, who had no responsibility in the area in which 664 Ontario was operating. The method of invoicing was consistent with the other false invoices, including Solano's shady role.

[97] Finally, the application judge found that 664 Ontario was not acting at arm's length with Forma-Con, largely based on her finding that no consulting services were actually supplied.[103]

[98] However, because 664 Ontario's participation was limited, she did not make the company jointly and severally liable, but instead only made it liable for the payment actually received from Forma-Con.

[99] I would dismiss 664 Ontario's appeal on the basis that it failed to discharge its evidentiary burden of answering the case put forward by the trustee. It was open to the application judge to draw the adverse inferences she did. I do not discern any palpable and overriding error or error of law.

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[102] Decision Below, at paras. 124-25.
[103] Decision Below, at para. 140.

(4) Did the application judge err in permitting the matter to proceed as an application?

[100] John Aquino brought a motion to the application judge at the outset of the hearing to convert the combined applications of the monitor and trustee into an action, which Hainey J. had earlier refused to do. The application judge's endorsement on the motion noted that the *BIA* permitted an application as the "default procedural rule". She was aware that the *Rules of Civil Procedure*[104] gave her discretion to convert the application into an action or to order the trial of an issue. She instructed herself on the jurisprudence and declined to do so, concluding:

> I find that Mr. Aquino has not produced sufficient evidence to persuade me that there are material facts in dispute or credibility issues that cannot be resolved without the benefit of a trial. At the heart of the application is the question of whether the impugned transactions were carried out with intent to defraud, defeat or delay creditors. The facts relevant to this fundamental question remain much the same as they were at the time Justice Hainey heard the moving parties' motion. If anything, the application has become less complex because the Respondents have now admitted that the transfers (other than the transfers relating to 230) occurred at undervalue, and they do not dispute any of the details or the operation of the false invoices scheme. Accordingly, the motion is dismissed.[105]

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[104] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 38.10(b).
[105] Endorsement of Dietrich J., dated September 15, 2020, at para. 18.

[101] John Aquino identifies as the first issue in the appeal "whether the applications should have been converted into an action, and if not, whether there should have been a trial of an issue on the financial position of BCCL and Forma-Con and its application to the issues thereon".

[102] John Aquino advances several grounds. First, he argues that he was not the only "directing mind" at Bondfield and Forma-Con and believes that his father Ralph and brother Steven should also have been embroiled, noting: "The machinery of a trial was necessary in order for the Court to test the credibility of these material players, most fundamentally on whether the Bondfield Group had an intention to defeat creditors, and whether Ralph and Steven were privy to the impugned transactions." I agree with the application judge that this internecine fight is not relevant to the applications the monitor and the trustee brought. The application judge pointed out that it was open to John Aquino to pursue his father and sibling elsewhere. She found, quite rightly, that the participation of all three directing minds was not necessary to trigger s. 96 liability on the part of one of them.[106]

[103] Second, John Aquino asserts, as noted earlier, that Bondfield and Forma-Con were in strong financial shape and had no creditors at the time that he and his associates were looting them. He claims that expert evidence and cross-

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[106] Decision Below, at para. 196.

examination about the "true financial condition" of each company "at the time of each impugned transaction" was therefore required. I noted above that the application judge acknowledged that there was "a divergence of opinion" on the financial condition of the companies and that the "true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court."[107] But as described earlier, there was enough evidence to support the application judge's conclusion: "The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con."[108]

[104] The application judge's discretionary decision not to convert the consolidated applications into an action or to order the trial of an issue is entitled to appellate deference, in the absence of a legal error, an error in principle, or a palpable and overriding factual error. The appellants have not identified any. I would dismiss this ground of appeal.

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[107] Decision Below, at paras. 165, 193.
[108] Decision Below, at para. 197.

E. DISPOSITION

[105] I would dismiss the appeals by all of the appellants with costs. With respect to the appellants other than 664 Ontario, costs in the agreed upon amount of $75,000 all-inclusive are awarded to the respondents.

[106] If 664 Ontario and the respondents are unable to agree on costs, then the respondents may file a written submission no more than three pages in length within ten days of the date of the release of these reasons and 664 Ontario may file a written submission no more than three pages in length within ten days of the date the respondents' submission is due.

Released: March 10, 2022 "P.L."

"P. Lauwers J.A."
"I agree. Coroza J.A."
"I agree. Sossin J.A."