Court File No. CV-19-615560-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BONDFIELD CONSTRUCTION COMPANY LIMITED, 950504 ONTARIO INC., 352021 ONTARIO LIMITED, 2433485 ONTARIO INC. AND 2433486 ONTARIO INC.

Court File No. CV-19-630908-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant

- 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

February 7, 2025

INTRODUCTION

1 On March 5, 2019, Bondfield Construction Company Limited ("**BCCL**"), 352021 Ontario Limited ("**352021**"), 950504 Ontario Inc., 2433485 Ontario Inc., and 2433486 Ontario Inc. (each an "**Applicant**" and, collectively, the "**Applicants**") filed an application (the "**CCAA Application**"), returnable on March 6, 2019, seeking an Initial Order pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**") to, among other things, obtain a stay of proceedings to allow them an opportunity to restructure their business and affairs.

2 On April 3, 2019, the Court granted an Initial Order (the "**Initial Order**") that, among other things, appointed Ernst & Young Inc. as monitor (in such capacity, the "**Monitor**"), and approved a continued stay of proceedings in favour of the Applicants until May 3, 2019 (the "**Stay Period**"). A copy of the Amended and Restated Initial Order is attached as **Appendix "A"**.

3 On May 30, 2019, the Court authorized the Monitor and its counsel to undertake a confidential investigation into certain irregular transactions (the "**Phase II Investigation**").

4 On October 30, 2019, the Monitor delivered its report on the Phase II Investigation. The report provided information to the Court regarding the results of the Monitor's investigation into certain transactions of interest. In summary, the Phase II Investigation identified significant cash value transactions over a number of years that appeared to have been entered into between BCCL and fictitious suppliers, with substantial payments going from BCCL to those fictitious suppliers and no corresponding consideration to BCCL (the "**False Invoicing Scheme**").

5 On November 5, 2019, the Monitor was authorized by the Court to commence an application to seek relief against John Aquino (the former President of BCCL), among others, and certain purported suppliers to BCCL regarding the False Invoicing Scheme. The application sought declarations that transactions between BCCL and those purported suppliers were transfers at undervalue for the purposes of Section 96 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") as incorporated into the CCAA and that the respondents, including John Aquino, were jointly and severally liable for the value of all such transactions (the "**Bondfield TUV Application**").

6 On February 21, 2020, KSV Restructuring Inc. (the "**Forma-con Trustee**") in its capacity as trustee in bankruptcy of 1033803 Ontario Inc. ("**Forma-con**"), brought an application against John Aquino, and others, and certain purported suppliers to Forma-con seeking declarations that transactions between Forma-Con and those purported suppliers were transfers at undervalue for the purposes of Section 96 of the BIA and that the respondents, including John Aquino, were jointly and severally liable for the value of all such transactions (the "**Forma-con TUV Application**"), (and collectively with the Bondfield TUV Application, (the "**TUV Applications**")).

7 The TUV Applications were heard by Justice B. Dietrich in September 2020.

8 On March 19, 2021, Justice Dietrich's decision on the TUV Applications were delivered. Justice Dietrich determined that:

(a) Payments made by BCCL in respect of false invoices during the period from April 3, 2014 to April 3, 2019, in the total amount of $21,807,693 were transfers at undervalue and that respondents in the Bondfield TUV Application, including John Aquino, were ordered to pay, on a joint and several liability basis, to the Monitor $21,807,693. A copy of the judgment of Justice Dietrich is attached hereto as **Appendix "B"**; and

(b) Payments made by Forma-con in respect of false invoices during the period from December 19, 2014 to December 19, 2019, in the total amount of $11,366,890, were transfers at undervalue and respondents in the Forma-con TUV Application, including John Aquino, were ordered to pay on a joint and several liability basis, to the trustee in bankruptcy of Forma-con $11,366,890.

(collectively, the "**TUV Judgments**").

9 On November 16, 2021, Justice Dietrich's Costs Endorsement in connection with the TUV Judgments was issued. The Costs Endorsement directed that the respondents in the TUV Applications, other than Lucia Coccia, shall jointly and severally pay to the Monitor the amount of $2,732,885.14, plus HST, on a substantial indemnity basis. The Costs Endorsement also directed the respondents, other than Lucia Coccia and 2104664 Ontario

Inc., to jointly and severally pay the Forma-con Trustee the amount of $669,100.24, including HST, on a substantial indemnity basis. John Aquino has served a motion for leave to appeal these cost awards.

10 The TUV Judgments were appealed to the Ontario Court of Appeal and the Supreme Court of Canada by John Aquino, among others. All appeals have now been dismissed. The decisions of the Court of Appeal and the Supreme Court of Canada are attached hereto as **Appendix "C"** and **"D"**, respectively.

PURPOSE

11 This Twenty-Seventh Report (the "**Twenty-Seventh Report**") is served to provide further information to the Court in support of the Monitor's motion for recovery of funds currently held in trust in an account of the Monitor's counsel, in partial satisfaction of the TUV Judgments and cost awards of the Monitor and the Forma-con Trustee.

12 The Monitor has been advised that the Forma-con Trustee supports the position taken by the Monitor in this Report.

TERMS OF REFERENCE AND DISCLAIMER

13 In preparing this Twenty-Seventh Report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records prepared by the Applicants, discussions with management of the Applicants ("**Management**"), and information from other third-party sources (collectively, the "**Information**"). Except as described in this Twenty- Seventh Report:

(a) the Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of such information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards ("**GAAS**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information; and

(b) some of the information referred to in this Twenty-Seventh Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in the *Chartered Professional Accountants Canada Handbook*, has not been performed.

14 Future oriented financial information referred to in this Twenty-Seventh Report was prepared based on Management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.

15 Unless otherwise indicated, the Monitor's understanding of factual matters expressed in this Twenty- Seventh Report concerning the Applicants and their business is based on the Information, and not independent factual determinations made by the Monitor.

16 Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.

17 Copies of the Monitor's reports, including a copy of this Twenty- Seventh Report, and motion records and Orders in the CCAA proceedings are available on the Monitor's website at www.ey.com/ca/bondfield. The Monitor has also established a toll-free phone number that is referenced on the Monitor's website so that parties may contact the Monitor if they have questions with respect to the CCAA proceedings.

MAREVA FUNDS

18 At the time of service of the Bondfield TUV Application, the Monitor had concerns about dissipation of the respondents' assets ahead of any eventual TUV Judgments.

19 The Monitor took steps to preserve John Aquino's assets to the extent possible in the circumstances.

20 Shortly after the Bondfield TUV Application was served, on December 30, 2019, the Court granted the Monitor's request that the proceeds of John Aquino's interest in the sale proceeds of a property located at 60-74 Gervais Drive, Toronto, (the "**Gervais Funds**") be

frozen and held in the trust account of the Monitor's counsel in view of the pending TUV Application (the "**Gervais Mareva Order**"). A copy of the Gervais Mareva Order and the Court's endorsement is attached as **Appendix "E"**.

21 On February 25, 2020, the Court granted a further order on motion of the Monitor restraining the direct or indirect dealing with John Aquino's assets more broadly in view of the TUV Applications (the "**General Mareva Order**"). A copy of the General Mareva Order and the Court's endorsement is attached as **Appendix "F"**.

22 As a result of the General Mareva Order:

(a) certain other investment income in the amount of $1,666.56 per month has been paid over to the trust account of the Monitor's counsel (the "**Investment Income**"); and

(b) pursuant to an Order granted on October 29, 2021, one half of the net proceeds of sale of a property located at 9 Chieftain Crescent, Toronto, totalling $1,981,103.24, representing John Aquino's interest in such net proceeds, were paid over to the trust account of the Monitor's counsel (the "**Chieftain Funds**"). A copy of the October 29, 2021 order is attached as **Appendix "G"**.

23 The Gervais Funds, the Investment Income and the Chieftain Funds plus accrued interest, and less amounts disbursed to John Aquino for living and legal expenses, held in the Monitor's counsel's trust account currently total approximately $3.7 million (collectively, the "**Mareva Funds**").

24 The Mareva Funds were segregated and held by the Monitor's counsel pursuant to the Gervais Mareva Order and the General Mareva Order to be available to satisfy any future judgments against John Aquino. The Monitor and the Forma-con Trustee now seek to use the Mareva Funds to partially satisfy the TUV Judgments and related cost awards.

EXECUTION CREDITORS OF JOHN AQUINO

25 The Monitor's counsel, Norton Rose Fulbright Canada LLP, has conducted execution searches in the City of Toronto, and the surrounding areas of Peel, York and Durham, current to January 27, 2025. Copies of those search results are attached as **Appendix "H"**.

26 The only execution creditors who have issued writs against John Aquino in these jurisdictions according to these searches are the Monitor, the Forma-con Trustee and Bank of Nova Scotia (in the amount of $26,776.52). Accordingly, these are the only parties currently in a position to proceed with execution on any assets of John Aquino, including the Mareva Funds.

PROPOSED DISTRIBUTION STRUCTURE

27 The *Execution Act* (Ontario) provides that a writ of execution against personal property is binding on that personal property at the time it is filed with the sheriff and entered into the index. The writs of execution filed by the Monitor and the Forma-con Trustee against John Aquino have been filed with the sheriff and registered as reflected in the execution searches attached as **Appendix "H"**.

28 The *Execution Act* (Ontario) further provides that the sheriff may seize money and banknotes belonging to an execution debtor, such as the Mareva Funds.

29 The *Execution Act* (Ontario) further provides that the money and proceeds from property received by the sheriff under an execution shall be applied and distributed in accordance with the *Creditors' Relief Act, 2010* (Ontario) (the "**CR Act**").

30 The CR Act establishes the scheme for distribution of funds held by the sheriff. All execution creditors whose executions were filed with the sheriff at the time the sheriff received the money or who filed an execution with the sheriff within a one-month period after the date the sheriff received the money, shall share proportionately.

31 With respect to the Mareva Funds, the *Execution Act* (Ontario) and the CR Act would provide for the recovery of the Mareva Funds by the sheriff, for subsequent proportionate distribution to the Monitor, the Forma-con Trustee, and Bank of Nova Scotia, with a similar

proportionate distribution to any other valid execution creditor whose execution is filed within one month after the date the sheriff receives the Mareva Funds.

32 The Monitor submits that the same procedures can be more efficiently carried out in these CCAA proceedings by the Monitor, as a court officer, holding possession of the Mareva Funds for distribution to the Monitor, the Forma-con Trustee and Bank of Nova Scotia, pro rata or in such proportions as those parties agree, in partial satisfaction of their claims against John Aquino after the expiry of a period of 30 days prescribed by the CR Act. If, in the interim 30-day period, any other creditor files an execution against John Aquino in the relevant jurisdiction, the distribution amounts could then be modified to account for such additional valid execution creditor.

33 No creditor of John Aquino would be prejudiced by this proposed distribution structure as such creditor would be in the same position as would otherwise arise under the *Execution Act* (Ontario) and CR Act procedures.

BANKRUPTCY ORDERS AND ASSIGNMENTS

34 The Monitor notes that the BIA states that bankruptcy orders or assignments made under that legislation do not take precedence over any executions that have been completely executed by payment to the creditor or the creditor's representative.

35 The Monitor is considering whether any insolvency proceedings may be appropriate in the circumstances.

36 Any execution at this time as proposed by the Monitor would not be affected by such insolvency proceeding.

CONCLUSIONS

37 The Monitor believes it is appropriate at this time to efficiently and quickly deliver recoveries to the estates of Bondfield and Forma-con on account of litigation that has been outstanding for over five years and recommends the proposed distribution order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF FEBRUARY, 2025.

ERNST & YOUNG INC.

Solely in its role as Court-appointed Monitor

of the Bondfield Group, and not in its personal capacity

Per: 

Alex Morrison

Senior Vice President

Per: 

Allen Yao

Senior Vice President

Appendix “A”

Court File No. CV-19-615560-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	WEDNESDAY, THE 3RD
	)	
MR. JUSTICE HAINEY	)	DAY OF APRIL, 2019

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BONDFIELD CONSTRUCTION COMPANY LIMITED, 950504 ONTARIO INC., 352021 ONTARIO LIMITED, 2433485 ONTARIO INC. AND 2433486 ONTARIO INC. (each, an "**Applicant**", and collectively, the "**Applicants**")

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Steven Aquino sworn March 5, 2019 and the Exhibits thereto (the "**Initial Affidavit**"), the supplemental affidavit of Steve Aquino sworn March 29, 2019 and the Exhibits thereto (the "**Supplemental Aquino Affidavit**"), the pre-filing report of Ernst & Young Inc. ("**E&Y**"), in its capacity as proposed monitor of the Applicants (in such capacity, the "**Proposed Monitor**") dated March 5, 2019, the supplement to the pre-filing report of the Proposed Monitor, dated April 1, 2019 (the "**Supplement**"), and hearing the submissions of counsel for the Applicants, counsel to the Proposed Monitor, counsel to Zurich Insurance Company Ltd. ("**Zurich**"), counsel to Bridging Finance Inc., in its capacity as agent (the "**Agent**") under the Credit Agreement between the Agent and Bondfield Construction Company

Limited ("**Bondfield**") dated July 24, 2017 (as amended, the "**Credit Agreement**"), counsel to the directors and officers of the Applicants, counsel to Travelers Guarantee Company of Canada ("**Travelers**"), counsel to KSV Kofman Inc., as receiver for 1033803 Ontario Inc. et al. (the "**FC Receiver**"), and such other counsel as were present, no one else appearing although duly served as appears from the Affidavits of Service of Evan Barz, sworn March 29, 2019 and Shanaz Vellani, sworn April 1, 2019, and on reading the consent of the Proposed Monitor to act as the Monitor of the Applicants (in such capacity, the "**Monitor**"),

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

INTERPRETATION

3. **THIS COURT ORDERS** that defined terms not otherwise defined herein shall have the meanings attributed to them in the Agreement Re: Bondfield CCAA Filing dated as of March 15, 2019 (the "**Bondfield CCAA Agreement**"), a redacted copy of which is attached as Exhibit "C" to the Supplemental Aquino Affidavit.

PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Applicants, with the consent of Zurich, the Agent, and the Monitor, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever,

and wherever situate including all proceeds thereof (the "**Property**"), subject to the provisions of this Order. Subject to further Order of this Court, the Applicants, under the supervision of the Monitor, shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants, under the supervision of the Monitor, are authorized and empowered (i) to continue to retain and employ the employees, independent contractors, sub-contractors, advisors, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, and (ii) to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicants, with the prior consent of the Monitor, shall be entitled to continue to utilize the central cash management system currently in place as described in the Initial Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and from and after the date of this Order, the Applicants, with the consent of the Monitor and on notice to Zurich and the Agent, may establish segregated bank accounts to hold funds advanced to them on the express condition that such funds be used for a specific purpose in respect of a specific portion of the Business of the Applicants. Any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants, of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS** that the Applicants, with the prior consent of the Monitor, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges;

(c) pre-filing amounts not otherwise listed in this paragraph 7, if, in the opinion of the Monitor and with the consent of Zurich and the Agent for payments in excess of $50,000, the supplier is critical to the business and operations of the Applicants including, without limitation, amounts payable to Goodmans LLP (as counsel to Bondfield in the Finch West Litigation) and other expenses incurred in the Finch West Litigation by the Applicants (including amounts payable to TDF, LLC);

(d) pre-filing amounts if required to be paid pursuant to the Bondfield CCAA Agreement, including amounts to be paid to the FC Receiver, AFI and Aluma as contemplated in paragraph 14 of the Bondfield CCAA Agreement;

(e) costs payable or arising under the Contracts, which may be satisfied from any Contract Funds other than the Additional Finch West Funds;

(f) amounts owing by Bondfield to subcontractors or suppliers in respect of the Finch West Station may be satisfied from the Additional Finch West Funds as consented to by each of the Monitor, the Agent, Zurich and Travelers;

(g) subject to the Bondfield CCAA Agreement, payments by the Applicants that are funded by Zurich under its bonded obligations as required to satisfy any construction or other cost that are the subject of Zurich's existing bonded obligations; and

(h) payments by the Applicants for non-bonded construction obligations of the Applicants as funded by Zurich pursuant to the Zurich DIP Facility (as defined below) or otherwise.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants, with the prior consent of the Monitor, shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

9. **THIS COURT ORDERS** that the Applicants, with prior notice to and under the supervision of the Monitor, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages that become due or have accrued on or after the date of this Order, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or, with the prior consent of Zurich and the Agent, other taxes, assessments or levies of any nature or kind which are entitled at

law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants, with prior notice to and under the supervision of the Monitor, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges arising as a result of the insolvency of the Applicants or the making of this Order) or as otherwise may be negotiated between the applicable Applicant, with the prior consent of the Monitor, and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, or provided for in the Bondfield CCAA Agreement, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. **THIS COURT ORDERS** that the Applicants, with the prior consent of the Monitor and subject to the terms of the Bondfield CCAA Agreement and such covenants as may be contained in the Definitive Documents (as hereinafter defined), are hereby empowered but not obligated to:

(a) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property for any purpose pursuant to this Order;

(b) permanently or temporarily cease, downsize or shut down any of the Applicants' business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2 million in the aggregate;

(c) dispose of the Obsolete Collateral pursuant to and in accordance with the Bondfield CCAA Agreement (excluding any Obsolete Collateral to be liquidated by the FC Receiver pursuant to the Bondfield CCAA Agreement); and

(d) terminate the employment of such of the Applicants' employees or temporarily lay off such of their employees as they deem appropriate and in accordance with the terms herein, in consultation with Zurich and the Agent and with the prior consent of the Monitor, and with respect to key employees with the prior consent of the Monitor, Zurich and the Agent;

(e) other than with respect to the Basaltic Lease (as defined below), vacate, abandon or quit any leased premises and disclaim any real property lease and any ancillary agreements relating to any leased premises, subject to paragraphs 13 and 14 of this Order, in each case with the consent of the Monitor, Zurich and the Agent; and

(f) except for the Bondfield CCAA Agreement and the Basaltic Lease (as defined below), disclaim arrangements or agreements of any nature whatsoever with whomever, whether oral or written, or pursuant to further Order of the Court, in accordance with Section 32 of the CCAA;

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

13. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal, which removal will be with the prior consent of the Monitor. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured

creditors, such landlord and the Applicants, with the prior consent of the Monitor, or by further Order of this Court upon application by the Applicants, with the prior consent of the Monitor, on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA by the Applicants, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS, THE MONITOR OR THE PROPERTY

15. **THIS COURT ORDERS** that, subject to paragraph 23, until and including May 3, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien with the consent of the Monitor or leave of the Court.

STAY IN RESPECT OF BMC MASONRY

16A. **THIS COURT ORDERS** that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of 2032686 Ontario Limited ("**BMC Masonry**"), and all rights and remedies of any Person against or in respect of BMC Masonry or affecting the business, assets, undertakings or properties of BMC Masonry, are hereby stayed and suspended, except with the written consent of the Monitor or leave of this Court; provided that, nothing in this Order shall prevent the registration and/or perfection of a claim for lien with the consent of the Monitor or leave of this Court.

NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Applicants, except with the written consent of the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods

and/or services, including without limitation all trademark licenses and other intellectual property, computer software, communication and other data services, centralized banking services, payroll and benefits services, insurance, warranty services, vehicle and transportation services, temporary labour and staffing services, freight services, sub-contractors, trade suppliers, equipment vendors and rental companies, utility, customs, clearing, warehouse and logistics services or other services to the Applicants' Business or in respect of the Applicants' Property, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply or license of such goods, services, trademarks and other intellectual property as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of the trademarks and other intellectual property licensed to, used or owned by the Applicants, premises, telephone numbers, facsimile numbers, internet addresses and domain names and building and other permits, provided in each case that the normal prices or charges for all such goods or services or trademarks or other intellectual property received or used after the date of this Order are paid by the applicable Applicants in accordance with normal payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

EMPLOYEES

20. **THIS COURT ORDERS** that all employees of the Applicants shall remain the employees of the Applicants until such time as the Applicants may terminate the employment of such employees. The Monitor shall not be liable for any employee-related liabilities or duties, including, without limitation, wages, severance pay, termination pay, vacation pay, pension or benefits amounts or any successor employer liabilities, other than such amounts as the Monitor may specifically agree in writing to pay.

PIPEDA

21. **THIS COURT ORDERS** that, pursuant to clause 7(3) (c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Monitor may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Monitor, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Monitor, or ensure that all other personal information is destroyed.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

22. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the current or future directors or officers of the Applicants, or Ralph Aquino in his capacity as a former director and officer of the Applicants (collectively, the "**Directors and Officers**"), with respect to any claim against the Directors and Officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the Directors and Officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

22A. **THIS COURT ORDERS** that, except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against John Aquino in his capacity as a director of BMC Masonry, with respect to any claim against him that arose before the date hereof and that relates to any obligations of BMC Masonry whereby the director is alleged under any law to be liable in his capacity as a director for the payment or performance of such obligations, until

such date that the protections provided to the Directors and Officers pursuant to paragraph 22 of this Order cease to be in force and effect or the further Order of this Court.

23. **THIS COURT ORDERS** that nothing in this Order, including, without limitation, the stay of proceedings provided in paragraphs 22 and 22A of this Order, has any effect on any right, remedy, action, suit or proceeding against any personal guarantor in respect of his guarantee under the Credit Agreement (each a "**Personal Guarantor**"), and, subject to the terms of the Bondfield CCAA Agreement and any agreement between the Agent and a Personal Guarantor in connection therewith, the Agent may exercise any right or remedy or bring any action, suit or proceeding in connection with a Personal Guarantor, and no right, remedy or claim against a Personal Guarantor in connection with the Credit Agreement may be compromised, released or otherwise affected or impacted in any way in the CCAA proceedings, or any plan filed thereunder, or any proceedings under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or any proposal filed thereunder.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

24. **THIS COURT ORDERS** that the Applicants shall indemnify their current director and officers against obligations and liabilities that they may incur as director or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

25. **THIS COURT ORDERS** that the current directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2.5 million, as security for the indemnity provided in paragraph 24 of this Order. The Directors' Charge shall have the priority set out in paragraphs 46 and 48 herein.

26. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' current director and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage

under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

APPOINTMENT OF MONITOR

27. **THIS COURT ORDERS** that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA and as set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall act with the prior consent of the Monitor to the extent required pursuant to the provisions of this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions in accordance with the provisions of this Order.

28. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) in the Monitor's discretion, receive and collect, on behalf of the Applicants, all monies and accounts now owed or hereafter owing to the Applicants and to exercise all remedies of the Applicants, on behalf of the Applicants and in consultation with the Applicants, in collecting such monies, including without limitation, to enforce any security held by the Applicants;

(d) disseminate, to Zurich and the Agent and their respective counsel at the times set out in the DIP Agreements or the Bondfield CCAA Agreement, financial and other information as agreed to between the Applicants, the Monitor, Zurich and the Agent, which may be used in these proceedings, including reporting on a basis to be agreed with Zurich and, in the case of the Agent, as set forth in the Bondfield CCAA Agreement and the Agent's DIP Agreement;

(e) advise the Applicants in their preparation of the Applicants' cash flow statements, which information shall be reviewed with the Monitor and delivered to Zurich, the Agent, Travelers and KSV Advisory Inc. in its capacity as financial advisor to the Agent, and their respective counsel on a periodic basis, at the times set out in the applicable DIP Agreement and the Bondfield CCAA Agreement, or as otherwise agreed to by Zurich and the Agent, as applicable;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(g) take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

(h) conduct the Finch West Litigation and instruct Goodmans LLP ("**Goodmans**"), as counsel to Bondfield in the Finch West Litigation, subject to consultation with the Consultation Parties in accordance with the Bondfield CCAA Agreement with regard to the Monitor's instructions to Goodmans concerning material steps in the Finch West Litigation, including with respect to litigation strategy and any potential settlements and including sharing draft copies of any proposed filings in the Finch West Litigation with the Consultation Parties; and

(i) perform such other duties as are required by this Order or by this Court or by the Bondfield CCAA Agreement from time to time.

29. **THIS COURT ORDERS** that the Monitor, in consultation with the Applicants and with Zurich and/or the Agent as may be reasonably requested, and, in the case of clauses (a) and (b), below, with the consent of Zurich and the Agent or further order of this Court for any (x) settlement or compromise for an amount in excess of $1,000,000, (y) settlement or compromise that involves a payment by an Applicant (including a payment funded under the Zurich DIP Facility) in excess of $100,000, or (z) settlement or compromise of a claim asserted by an Applicant for an amount in excess of $1,000,000 (but excluding, in each case, the Finch West Litigation, which shall be exclusively subject to the consultation and consent rights described in

the Bondfield CCAA Agreement, and excluding any settlement, compromise or payment by Zurich of a claim for construction or other costs that is the subject of Zurich's existing bonded obligations (other than the Finch West Litigation or otherwise in connection with the Finch West Contract)), in addition to its prescribed rights and obligations under the CCAA, is hereby empowered but not obligated to, on behalf of the Applicants:

(a) other than in connection with the Finch West Litigation or in connection with the use of the Additional Finch West Funds, settle, extend or compromise any indebtedness owing to the Applicants;

(b) subject to the terms of the Bondfield CCAA Agreement in the case of the Finch West Litigation, initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Applicants (or any one of them), or the Property, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(c) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without approval of this Court, but subject to the terms of the Bondfield CCAA Agreement, in respect of the Obsolete Collateral (other than Obsolete Collateral to be liquidated by the FC Receiver pursuant to the Bondfield CCAA Agreement);

(ii) without the approval of this Court in respect of any transaction not exceeding $500,000, provided that the aggregate consideration for all such transactions does not exceed $2 million; and

(iii) with the approval of this Court and in consultation with Zurich and the Agent in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required.

(d) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(e) report to, meet with and discuss with such affected Persons (as defined below) as the Monitor deems appropriate on all matters relating to the Property and the CCAA proceedings, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(f) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Monitor, in the name of the Applicants;

(g) be at liberty to engage consultants, appraisers, agents, experts, auditors, accountants, managers, independent legal counsel or such other persons from time to time and on whatever basis, including on a temporary basis, as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations, including without limitation those conferred by this Order; and

(h) in consultation with Zurich and the Agent, pursue all avenues of financing or refinancing, restructuring, selling, assigning or in any other manner disposing of and/or reorganizing the Applicants' Business or the Applicants' Property, in whole or part, subject to prior approval of this Court being obtained before any material financing or refinancing, restructuring, sale, assignment, disposition or reorganization.

For greater certainty any settlement, compromise or payment by Zurich of a claim for construction or other costs that is the subject of Zurich's existing bonded obligations as permitted by this paragraph 29 shall not affect the priorities and consent rights set out in paragraph 46 of this Order in respect of distributions on account of CA (as defined below) trust or lien claims.

30. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

31. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession; provided, however, that if the Monitor is nevertheless found to be in possession of any Property, then the Monitor shall be deemed to be a person who has been lawfully appointed to take, and has taken, possession or control of such Property for the purposes of Section 14.06(1.1)(c) of the BIA and shall be entitled to the benefits and protections in relation to the Applicants and such Property as provided by Section 14.06(2) of the BIA to a "trustee" in relation to an insolvent person and its property.

32. **THIS COURT ORDERS** that nothing in this Order and nothing done by the Monitor in carrying out its duties hereunder shall result in, or be deemed to result in, the Monitor being an employer, successor employer, responsible person, operator, officer, director, receiver, trustee, assignee, liquidator, legal representative, receiver-manager, in each case within the meaning of any statute, regulation or rule of law or equity for any purpose whatsoever.

33. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants, Zurich, the Agent and Travelers with information provided by the Applicants in response to

reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

34. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, restructuring counsel to the Applicants, Goodmans, in its capacity as counsel to Bondfield in the Finch West Litigation, and counsel to the Directors and Officers shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants, in accordance with the provisions of this Order, are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel to the Directors and Officers and restructuring counsel for the Applicants on a bi-weekly basis.

36. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

37. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, restructuring counsel to the Applicants and Goodmans, in its capacity as counsel to Bondfield in the Finch West Litigation, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $1 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 46 and 48 hereof.

38. **THIS COURT ORDERS** that each of the Monitor, counsel to the Monitor, restructuring counsel to the Applicants and Goodmans, in its capacity as counsel to Bondfield in the Finch West Litigation, shall have a *pari passu* entitlement to the Property subject to the Administration Charge (excluding the Finch West Litigation and Finch West Litigation Proceeds which shall be subject to the priority ranking in paragraph 46(b)) and provided that any unpaid fees and expenses of Goodmans, in its capacity as counsel to Bondfield in the Finch West Litigation, shall first be satisfied from any available Finch West Litigation Proceeds.

DIP FINANCING

(a) Zurich DIP Facility

39. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from Zurich, as debtor-in-possession lender (the "**Zurich DIP Lender**") in order to fund (i) the reasonable overhead and operational expenses of the Applicants in connection with the Applicants' Business in these proceedings, including all non–bonded construction obligations of the Applicants, but excluding payments required to satisfy any construction or other cost that is the subject of Zurich's existing bonded obligations; (ii) fifty percent of the Agent Expense Reimbursement, as described in the Bondfield CCAA Agreement (the "**Zurich DIP Facility**"), provided that borrowings under the Zurich DIP Facility shall not exceed $8 million, unless any additional amounts are determined by the Monitor as necessary and subject to prior consultation by the Monitor with Bondfield, Zurich and the Agent and as approved by further Order of this Court.

(b) Agent DIP Facility

40. **THIS COURT ORDERS** that the Applicants are also hereby authorized and empowered to obtain and borrow under a credit facility from the Agent, as debtor-in-possession lender (the "**Agent DIP Lender**" and collectively with the Zurich DIP Lender the "**DIP Lenders**", and each a "**DIP Lender**"), to be used solely to fund: (a) any third party costs of Bondfield pertaining to the Finch West Litigation (including, without limitation, the fees and expenses of Goodmans, in its capacity as counsel to Bondfield in the Finch West Litigation, and any experts); (b) fifty percent of the time allocated in support of the Finch West Litigation by certain employees of the Applicants as specified on Schedule "A" to the Bondfield CCAA Agreement, or who Goodmans,

in its capacity as counsel to Bondfield in the Finch West Litigation, may request (the "**Finch West Support Costs**"); and (c) any reasonable expenses incurred by the Agent in connection with the Agent DIP with regard to the negotiation, drafting, approval, registration, administration, participation in these proceedings and any enforcement of the Agent's rights and remedies thereunder (the "**Agent DIP Facility**"), provided that borrowings under the Agent DIP Facility shall not exceed $6 million, unless any additional amounts are agreed upon by the Monitor and the Agent and as approved by further order of this Court.

41. **THIS COURT ORDERS** that the Zurich DIP Facility and the Agent DIP Facility shall be on the terms and subject to the conditions set forth in the respective interim financing agreements attached as Exhibits "G" and "I" to the Supplemental Aquino Affidavit (collectively the "**DIP Agreements**"), filed.

42. **THIS COURT ORDERS** that the Applicants, with the prior consent of the Monitor, are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, including the DIP Agreements, the "**Definitive Documents**"), as are contemplated by the DIP Agreements or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Applicants, with the prior consent of the Monitor, are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

43. **THIS COURT ORDERS** that:

(a) Zurich shall be entitled to the benefit of and is hereby granted a charge (the "**Zurich DIP Charge**") on the Property, which Zurich DIP Charge shall not secure an obligation that exists before this Order is made. The Zurich DIP Charge shall have the priority set out in paragraphs 46 and 48 hereof; and

(b) the Agent shall be entitled to the benefit of and is hereby granted a charge (the "**Agent DIP Charge**" and with the Zurich DIP Charge, the "**DIP Lenders' Charges**") on the Finch West Litigation and the Finch West Litigation Proceeds, which Agent DIP Charge shall not secure an obligation that exists before this Order is

made. The Agent DIP Charge shall have the priority set out in paragraphs 46 and 48 hereof. For the avoidance of doubt, the Agent DIP Charge shall rank in priority to any CA trust or lien claimant in respect of the Finch West Litigation or the Finch West Litigation Proceeds, including, without limitation, Zurich or Travelers.

44. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lenders may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charges or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Agreements, Definitive Documents or the DIP Lenders' Charges, the DIP Lenders may: (i) upon three (3) business days' notice (or such longer period of notice as provided in the applicable Definitive Documents) to the Applicants and the Monitor, cease making advances to the Applicants and set off and/or consolidate any amounts owing by the applicable DIP Lender to the Applicants against the obligations of the Applicants to the applicable DIP Lender under the DIP Agreements, the Definitive Documents or the DIP Lenders' Charges, and make demand, accelerate payment and give other notices; or (ii) apply to this Court, on not less than three (3) business days' notice to the Service List, to exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the applicable DIP Agreement, the Definitive Documents and the Agent DIP Charge or the Zurich DIP Charge, as applicable, including (without limitation) for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants, but in each case subject to the terms of the applicable DIP Agreement, including, without limitation, as regards the relative priorities of the DIP Lenders to the Property as set forth in paragraphs 46 and 48 herein; and

(c) the foregoing rights and remedies of the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

45. **THIS COURT ORDERS AND DECLARES** that the DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the BIA, with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CERTAIN CHARGES

46. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lenders' Charges, the Directors' Charge (the foregoing charges, collectively, the "**Charges**"), the Agent Security, the Zurich Security and CA trust and lien claimants, as among them, shall be as follows:

(a) **Contract Funds and Other Litigation:**

Subject to the rights of any trust or lien claimants under the *Construction Act*, RSO 1990, c. C.30, as amended (as it read immediately prior to June 29, 2018) (the "**CA**"), as consented to by each of the Monitor, the Agent, Zurich, and, with respect to amounts paid under the Finch West Contract, Travelers, or as may be further ordered by this Court, the Charges, Zurich Security and Agent Security on the Contract Funds and Other Litigation or the proceeds thereof shall rank as follows:

First – Administration Charge;

Second — Zurich DIP Charge;

Third — Directors' Charge;

Fourth — Agent Security; and

Fifth — Zurich Security.

(b) **Finch West Litigation and Finch West Litigation Proceeds:**

The Charges, Zurich Security, Agent Security and CA trust and lien claimants on the Finch West Litigation and the Finch West Litigation Proceeds shall rank as follows:

First — Administration Charge (solely to secure Goodmans' fees and expenses in its capacity as counsel to Bondfield in the Finch West Litigation);

Second — Agent DIP Charge;

Third — any amounts due to CA trust or lien claimants, as consented to by each of the Monitor, the Agent, Zurich and Travelers, or as may be further ordered by this Court;

Fourth — Agent Security;

Fifth — Administration Charge (exclusive of Goodmans' fees and expenses in its capacity as counsel to Bondfield in the Finch West Litigation);

Sixth — Zurich DIP Charge;

Seventh — Directors' Charge; and

Eighth – Zurich Security.

(c) **Other Collateral:**

The Charges, Zurich Security and Agent Security on the Other Collateral shall rank as follows:

First — Agent Security;

Second – Administration Charge;

Third — Zurich DIP Charge;

Fourth — Directors' Charge; and

Fifth — Zurich Security.

47. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the

Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

48. **THIS COURT ORDERS** that, subject to the priority ranking set out in paragraph 46, each of the Directors' Charge, the Administration Charge and the DIP Lenders' Charges (all as constituted and defined herein) shall constitute a charge on the Property (or applicable portion thereof) and shall rank in priority to all other security interests, deemed trusts, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

49. **THIS COURT ORDERS** that, except as may be consented to by each of the Monitor, Zurich and the Agent, the Applicants shall not grant any Encumbrances over any Property that ranks in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the DIP Lenders' Charges.

50. **THIS COURT ORDERS** that none of the Charges shall be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy or receivership order(s) issued pursuant to the BIA or otherwise, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes, except to the extent the rights of CA trust and lien claimants are reflected in paragraph 46 hereof; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing constating or governance documents, loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which bind the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Agreements or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Agreements, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the DIP Agreements or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

51. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

BONDFIELD CCAA AGREEMENT

52. **THIS COURT ORDERS** that the Bondfield CCAA Agreement, a copy of which is appended as Confidential Appendix "B" to the Supplement, is hereby approved and the execution of the Bondfield CCAA Agreement by the Applicants and the Monitor is hereby authorized and approved. The Applicants and the Monitor are hereby authorized and directed to perform any obligations under the Bondfield CCAA Agreement or any actions contemplated thereby, or any further steps or actions as may be necessary or desirable in respect of the Bondfield CCAA Agreement, including (without limitation) making all payments contemplated by the Bondfield CCAA Agreement.

53. **THIS COURT ORDERS** that nothing in this Order shall be construed as waiving, derogating from or modifying any of the obligations of any of the parties under the Bondfield CCAA Agreement.

54. **THIS COURT ORDERS** that the Applicants, the Monitor and any interim receiver, receiver, receiver and manager or trustee in bankruptcy appointed in respect of the Applicants or the Property shall not be permitted to disclaim, resiliate, reject or repudiate the Bondfield CCAA Agreement in these CCAA proceedings or in any receivership or bankruptcy proceeding in respect of the Applicants or the Property.

55. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any assignment in bankruptcy or any application for a bankruptcy or receivership order now or hereafter issued pursuant to the BIA and any order issued pursuant to any such application;

(c) any application for a receivership order; or

(d) any provisions of any federal or provincial legislation,

the Bondfield CCAA Agreement shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the Applicants and shall not be void or voidable by creditors of the Applicants, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

OBSOLETE COLLATERAL

56. **THIS COURT ORDERS** that any proceeds of Obsolete Collateral received by the Applicants or the Monitor shall be forthwith distributed in accordance with the priorities established in paragraph 46(c) hereof without the need for any further order of the Court, subject to the rights, if any, of any creditor holding security on Obsolete Collateral with priority over the Agent Security or the Zurich Security, as the case may be.

BASALTIC LEASE

57. **THIS COURT ORDERS** that the lease agreement dated April 3, 2019 (the "**Basaltic Lease**") between the FC Receiver and Bondfield in respect of the real property and buildings located at 407 Basaltic Road, Concord, Ontario (the "**Basaltic Property**") is hereby approved and the execution of the Basaltic Lease by Bondfield is hereby authorized and approved. Bondfield is hereby authorized and directed to take all steps and actions as may be necessary or desirable in respect of, and to comply with all of its obligations pursuant to, the Basaltic Lease.

58. **THIS COURT ORDERS** that the Applicants, the Monitor and any interim receiver, receiver, receiver and manager or trustee in bankruptcy appointed in respect of the Applicants or the Property shall not be permitted to disclaim, resiliate, reject or repudiate the Basaltic Lease in these CCAA proceedings or in any receivership or bankruptcy proceeding in respect of the Applicants or the Property.

RELEASE OF ANY CLAIM TO FC RECEIVERSHIP ASSETS

59. **THIS COURT ORDERS AND DECLARES** that any assets, including the proceeds thereof, that is or was subject to the receivership proceedings of 1033803 Ontario Inc. et al in Court File No. CV-18-608978-00CL (the "**FC Receivership**"), including, without limitation, (i) 3420 Queen Street East, Brampton, Ontario (formerly, 3420 Highway 7 East, Brampton, Ontario); (ii) the Basaltic Property; (iii) 4431 Stouffville Road, Stouffville, Ontario; (iv) 131 Saramia Crescent, Vaughan, Ontario; (v) any project receivables recovered by the FC Receiver; and (vi) the Obsolete Collateral described in Section 13, subparagraph (ii), of the Bondfield CCAA Agreement, and including any proceeds of any of the foregoing that have been distributed to the Agent in the FC Receivership shall not be the subject of any claim by the Applicants, the Monitor or any creditor of the Applicants and shall be subject to the exclusive control of the FC Receiver, including with respect to any prior or future proposed distribution of such assets.

AGENT PROVEN CLAIM IN RESPECT OF CREDIT AGREEMENT

60. **THIS COURT ORDERS** that the Agent shall have an irrevocable proven claim against Bondfield, 950504 Ontario Inc. and 352021 Ontario Limited in respect of amounts owing under the Credit Agreement in the amount of $51,859,199.72 as at March 15, 2019 plus interest and expenses, which shall continue to accrue during the CCAA proceedings in accordance with the terms of the Credit Agreement (the "**Agent Proven Claim**"). For the avoidance of doubt, any payment received by the Agent on account of obligations owing under the Credit Agreement from and after the date hereof shall reduce the amount of the Agent Proven Claim by the amount of such payment.

61. **THIS COURT ORDERS** that any distribution on the Agent Proven Claim shall be payable in full, free from any reduction for set-off or any other counter-claims (whether past, present of future) that any of the Applicants, the Monitor or any other person may allege.

FINCH WEST LITIGATION PROCEEDS

62. **THIS COURT ORDERS** that any Finch West Litigation Proceeds received by the Applicants or the Monitor shall be immediately distributed in accordance with the priorities established in paragraph 46(b) hereof without the need for any further order of the Court.

MARKETABLE SECURITIES

63. **THIS COURT ORDERS** that all remaining marketable securities owned by the Applicants (or the proceeds thereof) shall be delivered to the Agent without any need for further order of the Court. For the avoidance of doubt, the proceeds of such marketable securities shall be applied against amounts owing by the Applicants in respect of the Agent Proven Claim.

SERVICE AND NOTICE

64. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The National Post (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five (5) business days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names or addresses of the individuals who are creditors publicly available.

65. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL '<http://www.ey.com/ca/bondfield>' (the "**Monitor's Website**").

66. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in these proceedings (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's Website, provided that the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

67. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

68. **THIS COURT ORDERS** that the Applicants, the Monitor, the DIP Lenders and their respective counsel are at liberty to serve or distribute this Order, any other materials and Orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

SEALING

69. **THIS COURT ORDERS** that the confidential version of the Supplement (including Confidential Appendices "B" and "I" to the Supplement) shall be and are hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

GENERAL

70. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

71. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

72. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

73. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

74. **THIS COURT ORDERS** that the comeback motion shall be heard on April 30, 2019 (the "**Comeback Motion**") and that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order at the Comeback Motion on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

75. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

SUPERIOR COURT OF JUSTICE
ENTERED

APR 3 0 2019

RW

COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, RSC 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BONDFIELD CONSTRUCTION COMPANY LIMITED, 950504 ONTARIO INC., 352021 ONTARIO LIMITED, 2433485 ONTARIO INC. and 2433486 ONTARIO INC.

Court File No: CV-19-615560-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

Matter No: 1192590

Appendix “B”

CITATION: Ernst & Young Inc. v. Aquino, 2021 ONSC 527
COURT FILE NOs.: CV-19-630908-00CL
CV-20-00636754-00CL
DATE: 20210319

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited Applicant	*Alan Merskey* and *Evan Cobb*, for the Applicant
– 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	*Michael Citak* and *Chris Junior*, for the Respondents John Aquino and 2304288 Ontario Inc. *George Corsianos*, for the Respondent Marco Caruso *Terry Corsianos*, for the Respondents Giuseppe Anastasio, a.k.a. Joe Ana and Lucia Coccia, a.k.a. Lucia Canderle
AND BETWEEN:	
KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED Applicant	*Scott A. Bomhof*, *Jeremy Opolsky*, *Craig Gilchrist*, for the Applicant
– 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	)	*Michael Citak* and *Chris Junior*, for the Respondents John Aquino and 2304288 Ontario Inc. *George Corsianos*, for the Respondent Marco Caruso *Terry Corsianos*, for the Respondents Giuseppe Anastasio, a.k.a. Joe Ana and Lucia Coccia, a.k.a. Lucia Canderle *Brian Belmont*, for the Respondent 2104664 Ontario Inc. **HEARD:** September 14, 15, 16 and 22, 2020

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REASONS FOR DECISION

DIETRICH J.

OVERVIEW

[1] Bondfield Construction Company Limited ("BCCL") was a family-owned construction company that took on large scale construction projects in the Greater Toronto Area and elsewhere, such as the expansion and redevelopment of St. Michael's Hospital.

[2] Its affiliate 1033803 Ontario Inc., commonly known as Forma-Con Construction ("Forma-Con"), was in the concrete forming business. BCCL and Forma-Con are part of the Bondfield Group of Companies.

[3] The Bondfield Group of Companies ("Bondfield Group") was a full-service group of construction companies operating in the Greater Toronto Area and Southern Ontario since the mid-1980's. Prior to its insolvency, the Bondfield Group was operated by the Aquino family. Ralph Aquino ("Ralph") founded the Bondfield Group and was joined in the family business first by his son John Aquino in 1994, and later by son Steven Aquino ("Steven") in 2000.

[4] By 2018, the Bondfield Group was in serious financial trouble. BCCL commenced *CCAA* proceedings on April 3, 2019 and this court appointed the applicant Ernst & Young Inc. ("EY") as Monitor of BCCL and certain of its affiliates. On December 19, 2019, this court appointed the applicant KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con (the "Trustee").

[5] Following their respective appointments, each of the Monitor and the Trustee discovered that BCCL and Forma-Con had illegitimately paid out tens of millions of dollars. These payments were made in false invoicing schemes over a number of years prior to BCCL commencing *CCAA* proceedings and prior to Forma-Con's bankruptcy.

[6] At BCCL, the Monitor also discovered what it describes as a "fund cycling scheme." In this alleged scheme, the respondent John Aquino, the then president of BCCL, would use his holding company to inject capital into BCCL. He would make these capital injections at the end of a year so that BCCL would appear to its stakeholders to be financially stronger than it was. He would then arrange for the injected capital to be returned to his holding company early in the following year. The Monitor asserts that the bulk of the funds comprising the capital injections were funds transferred from BCCL to John Aquino or his holding company at undervalue.

[7] The Monitor seeks a declaration that the transfers made out of BCCL as part of the false invoicing scheme and the fund cycling scheme, during the relevant period, were transfers at undervalue for which Bondfield received no consideration. It also seeks a declaration that those who benefited from the schemes are jointly and severally liable for the amounts transferred.

[8] The Trustee seeks a declaration that the transfers made out of Forma-Con as part of the false invoicing scheme were transfers at undervalue, for which Forma-Con received no consideration. It also seeks a declaration that those who benefited from the scheme are jointly and severally liable for the amounts transferred.

[9] Justice Hainey ordered that these two applications, being the Monitor's application (Court File No. 19-630908-00CL) (the "Bondfield Application") and the Trustee's application (Court File No. 20-00636754-00CL) ("Forma-Con Application") be heard at the same time and that the evidence adduced and admitted in one application, unless objected to by a party, would be deemed to be evidence in both applications. This hearing covers both applications.

[10] For the reasons that follow, I find that the payments by BCCL during the statutory review period as part of the false invoicing scheme were transfers at undervalue, for which the Monitor is entitled to compensation from those who benefited. I also find that the payments made by Forma-Con during the statutory review period as part of the false invoicing scheme were transfers at undervalue, for which the Trustee is entitled to compensation from those who benefited.

[11] I will now set out the background facts, the positions of the parties, and the evidence in respect of each of the Bondfield Application and the Forma-Con Application, followed by the issues to be determined. The law and analysis will follow as applied to both BCCL and Forma-Con in respect of the false invoicing scheme, and as applied to BCCL in respect of the fund cycling scheme.

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A. The Bondfield Application

Background Facts

[12] Ralph is the controlling shareholder of the Bondfield Group. During the period when the alleged schemes were being carried out, John Aquino was BCCL's president and owned 33 percent of the non-voting shares of BCCL. At that time, he was also the principal with primary responsibility and control over BCCL's finances.

[13] As of March 2015, Ralph and Steven were also officers of BCCL. Ralph held the position of CEO and Steven held the position of vice president.

[14] The Bondfield Group began to experience liquidity issues in 2015 and 2016 when it expanded its operations by taking on a number of P3 projects. While the Bondfield Group was able to obtain short-term replacement financing to resolve certain of these issues, by 2018 the financial condition of the Bondfield Group had deteriorated. Many subcontractors and other vendors refused to continue to provide services or materials. Progress on several construction projects slowed considerably or came to a standstill. These construction delays exacerbated the Bondfield Group's financial situation as project owners began to withhold payment on the project receivables. BCCL's bonding company, Zurich Insurance Company Ltd. ("Zurich"), paid out on a number of claims resulting in some of the subcontractors resuming work and suppliers delivering materials again.

[15] In 2018, Zurich engaged EY to review the financial situation of the Bondfield Group. EY reported that the Bondfield Group had a cash flow concern. On June 18, 2018, Zurich advised that it would be winding down the Bondfield Group.

[16] In October 2018, BCCL's primary lender, Bridging Finance Inc. ("Bridging"), called in its $80,000,000 loan.

[17] John Aquino's employment with the Bondfield Group was terminated on October 15, 2018. Steven is now the president of the Bondfield Group.

[18] On April 3, 2019, this court granted BCCL's application under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA"*).

[19] Following the Monitor's appointment on April 3, 2019, it commenced the Bondfield Application against the respondents therein (the "Bondfield Respondents"), who are alleged to have participated in and benefited from the false invoicing scheme. Insofar as the alleged fund cycling scheme is concerned, the Monitor conceded that the only Bondfield Respondent that benefited was John Aquino's personal holding company 2304288 Ontario Inc ("230").

[20] The Monitor proceeds pursuant to section 36.1 of the *CCAA* and section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). The provisions of the *BIA* are modified in the *CCAA* context. The date of the commencement of the *CCAA* proceedings is the first date of the relevant review period (as opposed to the date of the initial bankruptcy event)

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pursuant to s. 96. The *BIA* gives the Monitor the same impeachment powers that may be exercised by a trustee in bankruptcy.

[21] Following its appointment, the Monitor conducted a preliminary investigation and reported to this court that it appeared that BCCL had illegitimately transferred amounts to certain of the Bondfield Respondents in an aggregate amount of approximately 35,700,000 CAD and 35,030 USD between April 3, 2014 and April 3, 2019. This period is the five-year statutory period under the *BIA* during which the Monitor may review transfers at undervalue (the "Bondfield review period").

[22] The Monitor's report stated that the impugned transactions (the "Bondfield impugned transactions") occurred in one of two ways.

[23] One set of transactions involved a false invoicing scheme by which $21,807,693 was removed from BCCL during the Bondfield review period through false invoices submitted by Bondfield Respondents 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") (collectively, the "BCCL Supplier Respondents"). The Monitor alleged that the BCCL Supplier Respondents had submitted false invoices to BCCL that were improperly charged to and paid from various BCCL projects.

[24] Despite initial denials of any impropriety, eventually, under cross-examination, Bondfield Respondents Mario Caruso ("Caruso"), Giuseppe Anastasio ("Anastasio"), and Lucia Coccia (a.k.a. Lucia Canderle) ("Coccia"), each of whom was involved in operating the BCCL Supplier Respondents, admitted that they did not dispute the Monitor's contention that no value was provided by any of the suppliers identified by the Monitor for any of the transfers underlying these false invoices (not including 230). John Aquino made the same admission.

[25] However, the Bondfield Respondents, other than the Estate of Michael Solano (the "Solano Estate"), Anthony Siracusa ("Siracusa"), and Time Passion, Inc., which was operated by Siracusa, deny that there was any intent to defraud, defeat or delay creditors of BCCL. The Estate Trustee of the Solano Estate claims to have no knowledge of the BCCL impugned transactions, and Siracusa and Time Passion, Inc. did not respond to the Bondfield Application.

[26] The other set of transactions involved an alleged scheme by which funds in excess of $14,029,369 were transferred from BCCL to 230 for no value. From time to time during the Bondfield review period, at or close to year-end, 230 returned funds to BCCL, on a temporary basis, to create the impression of greater financial strength.

B. The Forma-Con Application

Background Facts

[27] John Aquino was at all material times the president and a shareholder of Forma-Con.

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[28] At the time of Forma-Con's bankruptcy on December 19, 2019, the Trustee discovered that Forma-Con had $215,000,000 in liabilities, including millions owing to each of BCCL, Bridging, Canada Revenue Agency and the Workplace Safety & Insurance Board. BCCL's surety, Zurich, is a secured creditor of Forma-Con.

[29] Following the Monitor's delivery of its investigatory report on October 30, 2019, the Trustee undertook its own investigation. It concluded that between 2011 and 2017, Forma-Con had paid more than $34,000,000 to certain suppliers for no consideration, and that $11,366,890 of that amount (the "Forma-Con impugned transactions") was paid to six suppliers during the five years preceding the bankruptcy.

[30] The Trustee brings the Forma-Con Application against the respondents therein (the "Forma-Con Respondents"), which include the six suppliers, five of which are common to the Bondfield Application. They are also alleged to have participated in and benefited from a false invoicing scheme involving Forma-Con. The Trustee brings the Forma-Con application pursuant to s. 96 of *BIA*.

[31] The six suppliers are the corporate respondents Clearway, MMC, MTEC, Strada, 230 and 2104664 Ontario Inc. (the "Forma-Con Supplier Respondents"). The Trustee's investigation also implicated the individual Forma-Con Respondents. John Aquino was Forma-Con's president when the payments were made and signed the majority of the cheques making the payments. Anastasio sent invoices on behalf of MMC to Solano. Caruso sent cheques on behalf of three of the Forma-Con Supplier Respondents to Solano. Coccia is listed on the Corporation Profile Reports as a director of three Forma-Con Supplier Respondents, and is a signatory on the bank accounts of these companies. Solano emailed to Anastasio and Caruso the details to be included on the invoices and signed cheques associated with the impugned transactions.

[32] The Forma-Con Supplier Respondents are alleged to have participated in a transfer of an aggregate amount of $11,367,000 from Forma-Con between December 19, 2014 and December 19, 2019 (the "Forma-Con review period").

[33] The transfers at Forma-Con involved an alleged scheme by which funds were removed from Forma-Con, during the Forma-Con review period, through false invoices submitted by Forma-Con Supplier Respondents to, and paid from, various Forma-Con projects.

[34] The scheme generally followed a pattern whereby Solano would send an email to Caruso or Anastasio with instructions for a Forma-Con Supplier Respondent to invoice Forma-Con, including the amount to be invoiced, the project to be invoiced, and the description of work to be included. Shortly thereafter, Caruso or Anastasio would send an invoice matching those instructions to Solano, and within hours of sending the invoice, a cheque signed by John Aquino or Solano would be issued to pay the invoice. The invoices would purport to be in respect of ongoing Forma-Con projects. Some of the Forma-Con Supplier Respondents had names similar to legitimate suppliers to the Bondfield Group. Forma-Con's controls and standard payment practices were not followed in respect of the Forma-Con impugned transactions.

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[35] Despite initial denials of any impropriety, eventually, under cross-examination, Forma-Con Respondents John Aquino, Caruso, Anastasio and Coccia admitted that he or she did not dispute the Trustee's contention that no value was provided by any of the suppliers identified by the Trustee with which they had some connection (not including 230). None of the purported services or materials set out in the false invoices relating to those suppliers were in fact provided to Forma-Con. Despite their admission, John Aquino, Caruso, Anastasio and Coccia deny that there was any intent to defraud, defeat or delay creditors of Forma-Con.

[36] 2104664 Ontario Inc. ("664 Ontario") did not make the same admission. 664 Ontario asserts that it provided value to Forma-Con for the amount it was paid based on the invoice it submitted during the Forma-Con review period.

[37] John Aquino personally received payments from 230. He identified 230 as his personal holding company, but offered no explanation or evidence to support his assertion that the payment made by Forma-Con to 230 was for valuable consideration.

[38] The Estate Trustee of the Solano Estate claims to have no knowledge of the Forma-Con impugned transactions.

POSITIONS OF THE PARTIES

The Monitor

[39] The Monitor asserts that the transfers made by BCCL to the BCCL Supplier Respondents through the false invoicing scheme and the transfers to 230 as part of the fund cycling scheme were transfers at undervalue made with the intent to defraud, defeat or delay Bondfield's creditors. These creditors now suffer tens of millions of dollars of loss as a consequence of these transfers, well in excess of the amount of the transfers that took place during the Bondfield review period.

[40] The Monitor further asserts that the Bondfield Respondents' argument that the transfers were not made with an intent to defraud, defeat or delay Bondfield creditors, and therefore are not transfers at undervalue, is untenable. The Monitor contends that their conduct not only put in excess of $35,000,000 in the hands of John Aquino for his personal benefit and the benefit of the participants in the scheme, but also misled BCCL's creditors as to the true financial status of BCCL.

[41] The Monitor also asserts that the funding for the transfers from BCCL to 230 made through the fund cycling scheme during the Bondfield review period had to have come from wrongful transfers from BCCL outside of the Bondfield review period. The Monitor is not aware of any other potential source of funding available to John Aquino or 230 to make these payments. Accordingly, John Aquino's capital injections via 230 were payments to BCCL using BCCL's own funds and BCCL's return of those funds to 230 was therefore a transfer for no consideration.

[42] The Monitor asserts that all the Bondfield Respondents are jointly and severally liable for the damages owing to BCCL in the false invoicing scheme, but only 230 is liable for damages in the fund cycling scheme.

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The Trustee

[43] The Trustee asserts that the transfers made through the false invoicing scheme were transfers at undervalue made with the intent to defraud, defeat or delay Bondfield's creditors. It seeks to set those transactions aside and to recover $11,366,890 for the benefit of Forma-Con's creditors.

[44] The Trustee's opinion is that the fair market value of services and materials provided by the Forma-Con Supplier Respondents to Forma-Con is nil. John Aquino and the other individual Forma-Con Respondents have admitted that this is correct. The Trustee rejects the claim of 664 Ontario that it provided legitimate services. The Trustee asserts that it did not, and that 664 Ontario has not established that Forma-Con received any value for its alleged services. Further, the Trustee asserts that extensive refusals by 664's principal on cross-examination have made its evidence impossible to test, resulting in an adverse inference.

[45] The Trustee asserts that the false invoicing scheme was conducted in such a surreptitious and fraudulent manner that the only reasonable conclusion can be that the scheme was undertaken with the intent to defraud, defeat or delay creditors. Clandestinely taking money from Forma-Con would unavoidably affect the corporate stakeholders, including its creditors, when the scheme was discovered and there were insufficient funds to pay the creditors, who now suffer hundreds of millions of dollars of loss, well in excess of the amount of the transactions that occurred within the Forma-Con review period.

John Aquino

[46] John Aquino asserts that the Monitor and the Trustee are unable to meet their burden of proof under s. 96 of the *BIA*. He submits that neither of them can show that the impugned transactions, as part of the false invoicing schemes, fall within the scope of the section because the transactions were not made with an intention to defraud, defeat or delay creditors.

[47] Regarding the alleged fund cycling scheme, John Aquino asserts that the transfers from 230 into BCCL fully offset the transfers of funds from BCCL to 230 during the Bondfield review period and that the latter were therefore not transfers at undervalue. He asserts that, in fact, the financial records show that 230 is in a net positive position at the end of the period and that BCCL actually owes 230 $3,270,631.

[48] John Aquino further asserts that each of BCCL, Forma-Con and the Bondfield Group were in a strong financial position during the respective review periods and that at all relevant times they were able to satisfy their creditors. He states that it was the cash restraints that arose in 2017 and 2018, together with the harmful conduct of Zurich, among other causes, that jeopardized the business of the Bondfield Group. John Aquino also asserts that Zurich's damage to BCCL cannot be used to support the contention that the Bondfield impugned transactions that took place years earlier were intended to defraud, defeat or delay creditors.

[49] John Aquino submits that he was not the sole directing mind of BCCL and Forma-Con, and that he and the other directing minds, namely, Ralph and Steven, were paying BCCL's and

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Forma-Con's creditors in a timely fashion. He also asserts that he was taking steps to save BCCL from its current financial predicament in late 2017 and early 2018 by borrowing money and injecting it into BCCL.

[50] John Aquino further contends that the Monitor and the Trustee have unfairly targeted him in these proceedings and made him the scapegoat for the plight of BCCL and Forma-Con, without challenging transactions that are similar to the impugned transactions and that were being made by Ralph and Steven or even questioning their involvement. He further contends that he has been deprived of information that could exonerate him.

[51] John Aquino also submits that all major decisions in the Bondfield Group were made by Ralph, Steven and him, and that at the highest level it was a three-man operation. He asserts that the accounting department, and the CFO, Dominic DiPede, as well as the Controller, Rocco Micciola, reported to all three on all aspects of the accounting department and financial affairs of the Bondfield Group. John Aquino further asserts that Ralph and Steven were fully aware of the alleged impugned transactions and had access to the financial status and affairs of the Bondfield Group.

Anastasio, Coccia and Caruso

[52] Anastasio, Coccia and Caruso support John Aquino's position that he did not have the requisite intent to defraud, defeat or delay creditors, and they rely on his affidavit of June 14, 2020 in support of their position. They also assert that even if it were found that John Aquino had the requisite intent, that intent could not be attributed to BCCL and Forma-Con because BCCL and Forma-Con did not benefit from the false invoicing schemes.

[53] Further, Anastasio, Coccia and Caruso assert that even if it were found that John Aquino had the requisite intent and it could be attributed to BCCL and Forma-Con, the court should exercise its discretion to decline to grant the relief sought by the Monitor and the Trustee in respect of the false invoicing schemes at BCCL and Forma-Con because the Monitor and the Trustee have unfairly taken the side of Ralph and Steven against John Aquino in a bitter family dispute.

[54] Anastasio asserts that if he is found to be liable, he should be entitled to a set off in the amount of 3,750,000 USD. He claims that he is due this amount as a fee for his services in effectuating the term sheet for a bank loan from Deutsche Bank to the Bondfield Group, even though the loan was never advanced.

[55] Coccia asserts that there is insufficient evidence to find that she was privy to the false invoicing schemes. Even if there were sufficient evidence, she asserts that court should decline to find her liable given her limited involvement in the false invoicing transactions.

The Solano Estate

[56] Luana Solano, as Estate Trustee of the Solano Estate, asserts that she had no knowledge of any involvement by Solano in directing the issuance of invoices or signing cheques as alleged

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by the Monitor and the Trustee. She further asserts that she had no knowledge of Solano receiving any payments or funds through any scheme as alleged by the Monitor and the Trustee.

664 Ontario

[57] 664 Ontario submits that in 2014 it was consulted by the Bondfield Group to provide consulting services relating to its tender for the Hawkesbury Hospital project, and that it provided that service to Forma-Con, for which it was paid. Accordingly, that payment was not a transfer at undervalue and not part of a false invoicing scheme.

ISSUES

[58] The issues in the Bondfield Application are as follows:

1. Are the Bondfield impugned transactions relating to the false invoicing scheme transfers at undervalue under s. 96 of the *BIA*?

2. If yes, are the Bondfield Respondents liable for the transfers at undervalue relating to the false invoicing scheme?

3. Is the Monitor entitled to recover the entirety of the value of the Bondfield impugned transactions relating to the false invoicing scheme, totalling $21,807,693?

4. Are the Bondfield impugned transactions relating to the alleged fund cycling scheme transfers at undervalue under s. 96 of the *BIA*?

5. If yes, is 230 liable for the transfers at undervalue relating to the alleged fund cycling scheme?

6. Is the Monitor entitled to recover the entirety of the value of the Bondfield impugned transactions relating to the alleged fund cycling scheme, totalling 13,985,743 CAD and 35,030 USD?

[59] The issues in the Forma-Con Application are as follows:

1. Are the Forma-Con impugned transactions transfers at undervalue?

2. If yes, are the Forma-Con Respondents liable for the transfers at undervalue?

3. Is the Trustee entitled to recover the entirety of the value of the Forma-Con impugned transactions totalling $11,366,890?

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The Monitor's Evidence

The False Invoicing Scheme

[60] The Monitor's reports detail the discovery of the false invoicing scheme and how it was carried out. Those details follow.

[61] For about seven years, from 2011 to 2018, purported suppliers to BCCL (the "Suppliers") delivered invoices to BCCL seeking payment for services or materials purportedly supplied to BCCL on various projects. No such services or materials were provided. These invoices were approved and paid out by BCCL under the supervision of John Aquino even though BCCL received no consideration.

[62] None of the Suppliers had any apparent business activity or business address, and many of them shared an address, phone number, and/or bank account. Payments made to five different Suppliers were all deposited into a single account at the Bank of Montreal.

[63] On review of BCCL's records, the Monitor did not locate any ordinary course correspondence between BCCL's operations teams and the Suppliers regarding the purported services or materials provided. The Monitor found no evidence in the Suppliers' bank accounts of the kinds of expenditures that would have been expected in connection with the supply of purported services or materials to BCCL.

[64] Steven confirmed to the Monitor that none of the Suppliers were legitimate suppliers of BCCL, though some had names substantially similar to legitimate suppliers. The services or materials referred to in the invoices from the Suppliers were not supplied by them, and BCCL's records showed no evidence of contracts, quotations or other relevant and customary documentation pertaining to legitimate suppliers in respect of the Suppliers.

[65] The BCCL Supplier Respondents represent a subset of the Suppliers involved in the invoicing scheme during the Bondfield review period. During that time, the BCCL Supplier Respondents received $21,807,693 from BCCL through their participation in the false invoicing scheme. There was an additional $20,451,749 in false invoices that fell outside of the Bondfield review period, which the Monitor asserts is relevant in determining whether John Aquino is entitled to any offset or credit for amounts he injected into BCCL.

[66] John Aquino and his cousin Solano operated the scheme inside Bondfield. They received, approved and made payment on the false invoices. On the outside, Caruso, Anastasio, Coccia and Siracusa (together with John Aquino and Solano, the "individual Bondfield Respondents") acted on behalf of the BCCL Supplier Respondents, being the shell companies that supplied the invoices.

[67] The Monitor has been unable to trace all of the proceeds of the false invoicing scheme, but it can demonstrate that the BCCL Supplier Respondents distributed proceeds from the scheme to individual Bondfield Respondents or the corporations they controlled.

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[68] Under the scheme, John Aquino personally received and initialed a large number of the invoices from the BCCL Supplier Respondents. Approximately 130 invoices (in respect of both BCCL and Forma-Con) were found and approximately 50 appear to have been initialed by John Aquino. He also approved and/or signed cheques for a significant number of payments from BCCL to the BCCL Supplier Respondents. The Monitor sampled 150 cheques issued to BCCL Supplier Respondents and found that John Aquino had signed 100 percent of them. John Aquino has provided no explanation as to why he, as president, would be receiving and approving the invoices submitted by the BCCL Supplier Respondents.

[69] John Aquino also corresponded with the BCCL Supplier Respondents through Caruso, Anastasio and Siracusa, and received fictitious invoices from them by way of e-mail. This marked a departure from the typical practice at BCCL, by which suppliers would deliver both electronic and hard copy invoices to the accounting department at BCCL for processing.

[70] John Aquino benefitted personally from the scheme. His corporation, 230, received not less than $5,829,939 from the BCCL Supplier Respondents during the Bondfield review period. In turn, 230 paid John Aquino $5,184,346.

[71] Solano was BCCL's former head of Information Technology. He had no relevant experience or responsibilities for vendor or procurement matters, yet he sent over 100 emails to individuals, including Caruso and Anastasio, who were acting on behalf of BCCL Supplier Respondents. Solano instructed them on: (i) the amounts to be invoiced to BCCL for work or supplies supposedly provided by those Suppliers; (ii) the description that should be included in the invoices for that supposed work or supply, and (iii) the projects to be charged for the alleged work or supply. Solano was paid at least $507,000 directly by the BCCL Supplier Respondents.

[72] The chart below shows the breakdown of the funds received by each of the BCCL Supplier Respondents and 230 from BCCL during the Bondfield review period. The amount shown for 230 represents receipts that related to the fund cycling scheme and not the false invoicing scheme.

Corporate Supplier Respondent	**Reeipt from BCCL**
2466601 Ontario Inc./MMC General Contracting	$4,208,798
2483251 Ontario Corp./Clearway Haulage	$7,566,887
2420595 Ontario Ltd./Strada Haulage	$6,097,028
2420570 Ontario Ltd./MTEC Construction	$3,093,827
RCO General Contracting Inc.	$282,500
Time Passion, Inc.	$558,653

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2304288 Ontario Inc.	$13,985,743 US$35,030
Total (after April 3, 2014)	35,793,436 CAD 35,030 USD

[73] Caruso, Anastasio, Siracusa and Coccia directed or acted on behalf of one or more of the BCCL Supplier Respondents.

[74] Caruso acted on behalf of Clearway, MTEC and Strada, which account for 54.22 percent of the value of payments made to the BCCL Supplier Respondents. Caruso submitted invoices directly to John Aquino and received at least $667,000 from the BCCL Supplier Respondents.

[75] Anastasio acted on behalf of MMC and RCO, which account for approximately 12.5 percent of the value of payments made to the BCCL Supplier Respondents. Anastasio also submitted invoices directly to John Aquino and received at least $1,892,672 from the BCCL Supplier Respondents.

[76] Coccia is a director listed on the corporate profiles of MTEC, Strada, and RCO and is a signatory on the bank accounts for these companies into which payments were made in respect of the fictitious invoices. She was paid $88,008 by BCCL Supplier Respondents.

[77] Siracusa submitted invoices on behalf of Time Passion, Inc. and corresponded directly with John Aquino in respect of these invoices.

The Scheme Involving 230

[78] The Monitor's reports detail the discovery of the fund cycling scheme and how it operated. Those details follow.

[79] The transfers from BCCL to 230 during the Bondfield review period do not appear to directly involve any of the Bondfield Respondents other than John Aquino and 230. The Monitor's reports show that this scheme resulted in about $14,029,369 in transfers from BCCL to 230 during the Bondfield review period. There were also transfers of about $9,507,544 from BCCL to 230 prior to the Bondfield review period. Having occurred prior to the Bondfield review period, the Monitor acknowledges that those transfers cannot be challenged as transfers at undervalue for the purposes of s. 96, but asserts that they are relevant in the context of John Aquino's claims for an offset or credit for the $17,300,000 of capital he alleges to have injected into BCCL during the Bondfield review period.

[80] This scheme involved John Aquino directing payments from 230 into BCCL during the Bondfield review period. John Aquino admits that he made these payments as capital injections.

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The capital injections were made late in the year in anticipation of a year-end review of the financial status of the Bondfield Group by stakeholders to temporarily increase the cash and working capital for the purpose of increasing BCCL's borrowing and bonding capacity. The information would be used in a financial snapshot required by BCCL's lenders and Zurich, and would create a more favourable and positive outlook for the company. Following the review, BCCL would return the funds to 230.

[81] The Monitor and John Aquino agree that John Aquino, through 230, advanced $17,300,000 to BCCL during the review period. The Monitor alleges that BCCL illegitimately returned and/or paid $13,985,743 of those funds to 230. The Monitor asserts that these transfers are transfers at undervalue because the $17,300,000 supposedly injected or "lent" to BCCL through 230 must have originated from BCCL and been transferred to 230, for no consideration, through the false invoicing scheme or pre-review period gratuitous transfers from BCCL to 230.

[82] In its Seventh Supplement to the Phase II Investigation Report of the Monitor, the Monitor reports: "… the Monitor is unaware of any significant source of funds that John Aquino ultimately had outside of Bondfield. Moreover, John Aquino's own evidence on the Extended Mareva motion is that, since his departure from Bondfield he has insufficient assets to support his lifestyle of expenses of approximately $60,000 per month. Accordingly, it is probable based upon the information available to the Monitor that any funds flowing in from 230 to Bondfield originally arose from funds removed from Bondfield, whether through the Fund Cycling Scheme, the False Invoice Scheme, or otherwise." The Monitor further asserts that it has no information on other sources of income available to John Aquino and relies on evidence from Ralph that John Aquino had no source of income other than the Bondfield Group.

The Trustee's Evidence

[83] The chart below shows the breakdown of the funds received by each of the Forma-Con Supplier Respondents and 230 from Forma-Con during the Forma-Con review period.

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$000s, unaudited	Payments Before 12/19/2014	Payments After 12/19/2014	Total Payments
Supplier Respondents			
Clearway Haulage	-	968	968
MMC General Contracting	-	2,795	2,795
MTEC Construction	3,859	5,260	9,119
Strada Haulage	109	1,711	1,820
2104664 Ontario Inc.	170	90	260
2304288 Ontario Inc.	565	543	1,108
	4,703	11,367	16,070
Other Suppliers of Interest			
2299726 Ontario Inc.	14,134	-	14,134
2104661 Ontario Inc.	1,516	-	1,516
B.I.C. Haulage	37	-	37
Terra Haulage	832	-	832
TP Inc	229	-	229
Vaughan Haulage	639	-	639
GGC Gem General Contracting	362	-	362
GH Gem Haulage	91	-	91
Gem Stone	249	-	249
ABC Masonry	58	-	58
	18,147	-	18,147
Total	22,850	11,367	34,217

[84] During the Forma-Con review period, the Forma-Con Respondents participated in a scheme that stripped $11,366,890 from Forma-Con while providing no value in return. The scheme involved Solano sending an email to a Forma-Con Supplier Respondent, which provided that Respondent with an amount to be invoiced and the relevant description of the services. The Respondent would then issue an invoice (often with a 10 percent mark-up), and Forma-Con would issue a cheque, often within a day, signed by John Aquino or Solano. Whereas Forma-Con typically paid its invoices within 30 to 90 days of receipt, the cheques payable to the Forma-Con Supplier Respondents were paid within 1.3 days.

[85] Also, unlike typical invoices, the invoices in respect of the impugned transactions were not accompanied by timesheets, contracts and other supporting documentation, and were not approved by a project manager.

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[86] John Aquino was a shareholder of Forma-Con and its president at the relevant time. He approved most of the Forma-Con impugned transactions by signing the majority of the cheques associated with the Forma-Con impugned transactions and personally received payments from 230. John Aquino has provided no evidence in support of his assertion that the payment made by Forma-Con to 230 during the Forma-Con review period was made for valuable consideration.

[87] The transactions provided no value to Forma-Con. The Forma-Con Supplier Respondents did not carry on any active business in the purported nature of the Forma-Con impugned transactions. There were no supporting documents and the usual controls around invoicing were not followed. The false invoicing scheme is largely conceded, including by John Aquino.

John Aquino's Evidence

The Alleged Schemes

[88] John Aquino filed two affidavits, dated June 14, 2020 and July 27, 2020, respectively, upon which he relies in the both the Bondfield Application and the Forma-Con Application. In those affidavits, he does not offer any explanation for the Bondfield impugned transactions, the Forma-Con impugned transactions, the false invoices, or the emails underpinning the false invoicing scheme, and he does not explain why he, as president, approved many of the invoices and signed the cheques in payment of them.

[89] Regarding the transfers between 230 and BCCL, John Aquino disputes that these were transfers at undervalue and contends that during the Bondfield review period he advanced $17,300,000, through 230, to BCCL and that the $13,985,743 that the Monitor asserts was illegitimately returned to 230 was not illegitimately returned at all. Rather, it represents a legitimate payment of funds, including Christmas bonuses and salary correctly paid to him and shareholder loan repayments. He asserts that 230 is in a net positive position in the amount of $3,314,257 at the end of the Bondfield review period, which the Monitor does not dispute.

[90] John Aquino's evidence is that in December of each 2014, 2015 and 2016, he, like others in upper management in the Bondfield Group, received a single salary and Christmas bonus for his employment services to BCCL and Forma-Con and it was paid to his holding company. John Aquino's evidence is that HST was charged on the amount of the Christmas bonus because Christmas bonuses paid by the Bondfield Group were, at times, billed to a particular project. He further asserts that there was no financial disadvantage to BCCL in paying the HST because it would receive an input tax credit for it.

[91] John Aquino asserts that his capital injections into BCCL were similar to the capital injections being made by Ralph through a company known as Highbourne Estates, owned by Ralph and John Aquino jointly. He submits that the Bondfield Group accounting department approved all the capital injections, and that the transfers between 230 and BCCL were carried out by Mr. DiPede, who was hired in 2002 as the controller of the Bondfield Group and head of the accounting department.

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[92] In addition, John Aquino asserts that he borrowed $7,500,000 from a third party in 2018, which is included in the $17,300,000 advanced from 230 to BCCL and was injected into BCCL in March 2018. Of this amount, John Aquino states that $2,000,000 was repaid to 230 on April 6, 2018 and the balance was recorded in his shareholder loan ledger. Accordingly, he asserts that the $2,000,000 repayment was not a transfer at undervalue as the Monitor suggests, but rather a shareholder loan repayment.

[93] John Aquino also asserts that he has a legitimate shareholder loan owing to him by the Bondfield Group in the amount of $11,922,811. He contends that this amount was confirmed in the report of Ross Hamilton of Cohen Hamilton Steger & Co. Inc., the forensic and investigative accounting experts that John Aquino retained to opine on the financial status of BCCL and the Bondfield Group during the relevant review periods (the "CHS Report"). John Aquino asserts that he should be entitled to a set off in this amount in respect of any liability found against him.

[94] John Aquino argues that there was no intent to defraud, defeat or delay creditors because the Christmas bonuses were legitimate remuneration earned in the ordinary course of business and the capital injections were also made in the ordinary course of business. In his affidavit, he states that he made the injections because "the perceived increase of capital was necessary to BCCL's ability to tender on large constructions projects, and approved by Steven, Ralph, and known to the company's auditors."

[95] John Aquino concludes that the total amount of the Bondfield impugned transactions as alleged by the Monitor ($35,837,062) must be reduced by the $17,300,000 that 230 contributed to BCCL during the Bondfield review period.

Injurious conduct of Zurich caused the financial problems in the Bondfield Group

[96] John Aquino submits that the Bondfield Group operated successfully in Ontario for over 45 years. However, in 2018, it experienced significant financial challenges owing to rapid expansion, collection issues on construction projects and conduct by Zurich that led to the application for *CCAA* protection.

[97] 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. In addition, there were delays on the projects and the Bondfield Group was required to pay liquidated damages and high interest on its loan from Bridging. Litigation against the Bondfield Group was increasing. By March 2018, the cash crunch was critical, and Zurich declined to bond liens registered against the construction projects, to bond any new projects, to pay any claims owing under labour and material bonds, and to provide many pre-qualification letters or bid bonds for new projects. As a result of Zurich's failure to bond off

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any liens, project owners were unable to advance any funds owing to the Bondfield Group for services rendered resulting in a liquidity crunch. The Bondfield Group had to act as its own surety and cover costs that ought to have been covered by Zurich.

The financial health of the Bondfield Group

i) The Deloitte Audits

[98] John Aquino submits that BCCL and the Bondfield Group retained Deloitte to audit their respective financial statements in the years 2013 and thereafter, and that the audits of those financial statements evidenced a strong financial position. Deloitte's audits for the years ending 2013, 2014, 2015 and 2016 showed that the companies were in a strong financial position. The BCCL audit for 2017 showed the same result. The Deloitte audits showed growth in contract revenue and retained earnings year over year from 2013 to 2017. Based on the Deloitte audits, John Aquino submits that there was no suggestion of any kind that the Bondfield Group was insolvent. He believed that the Bondfield Group had a positive financial outlook and was able to satisfy all of its creditors for the foreseeable future. John Aquino confirmed that he believed that for the entirety of the Bondfield review period, or at least a significant portion of it, all of the creditors, suppliers and subtrades of BCCL and the Bondfield Group were paid in full and on time, subject to normal course business disputes.

[99] John Aquino further submits that notwithstanding Zurich's challenge to Deloitte's audit in its claim against Deloitte, Deloitte has not withdrawn its audit and is defending the proceeding Zurich has brought against it.

[100] John Aquino's evidence is that it was the rapid expansion that the Bondfield Group embarked on in 2012 that ultimately led to its financial problems. It was selected as the successful bidder on a number of large-scale P3 projects from 2012 to 2015, which it was required to finance with its equity and special purpose vehicle financing while awaiting the release of payments and holdbacks, to continue its operations. Eventually, as referenced above, it sought to increase its lending facility with National Bank from $60,000,000 to $120,000,000. National Bank declined as did a number of other Canadian banks.

ii) The CHS Report

[101] John Aquino retained Mr. Hamilton and CHS in 2020 to a) conduct an analysis of the BCCL and Forma-Con accounting documentation and financial information for the years 2014 to 2017 (2017 being the most recent date for available data) and to quantify the total amount owing to BCCL's and Forma-Con's creditors; b) to determine if creditors were paid on a timely basis; and c) to review and summarize the shareholder loan account and loans relating to John Aquino and 230.

[102] CHS could not render an opinion up to December 2017 regarding BCCL's ability to pay its creditors due to data restrictions in the accounting software used by the Bondfield Group. CHS did render confirmatory findings as of December 2017 with respect to the Bondfield Group's ability to pay payroll liabilities, equipment financing, HST remittances and BCCL's net holdback

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position, among others. CHS concluded that BCCL paid its creditors on a timely basis up to at least December 2016, BCCL had positive earnings each year, and its assets were consistently greater than its liabilities at each year end, evidencing a positive working capital position.

[103] Regarding Forma-Con, CHS concluded that Forma-Con paid its creditors on a timely basis up to at least December 2017, and found that its current assets were consistently greater than Forma-Con current liabilities evidencing a positive working capital position. It also found that accounts payable were paid promptly, as were payroll and HST remittances, among other expenses.

Evidence of Anastasio, Coccia, Caruso and the Solano Estate

[104] Anastasio, Coccia and Caruso filed affidavits on which they rely for both the Bondfield Application and the Forma-Con Application. In those affidavits, they do not offer any explanation for the Bondfield impugned transactions, the Forma-Con impugned transactions, the false invoices, or the emails underpinning the false invoicing scheme.

[105] Each of Anastasio, Coccia and Caruso stated that the Bondfield impugned transactions could not have been made with the intent to defraud, defeat or delay creditors because BCCL's financial position was sound during the Bondfield review period and the Forma-Con review period and each of these corporate debtors was then able to and was paying its debts. They rely on John Aquino's evidence respecting the financial health of BCCL and Forma-Con as set out in his affidavit sworn June 14, 2020.

[106] In addition to denying that the impugned transactions described by the Monitor in these proceedings were transfers at undervalue pursuant to s. 96 of the *BIA*, Anastasio submits that he has known John Aquino for nearly 20 years, he has assisted the Bondfield Group, including John Aquino and Steven, and he was remunerated for his services by the Bondfield Group. His services included dispute resolution and an introduction in 2017 to Deutsche Bank, which considered providing the Bondfield Group a credit facility of 150,000,000 USD for which Anastasio expected a fee of 3,750,000 USD. The facility was never arranged, and he was never paid any of that sum. He asserts that if he is found to be liable for any amount in the Bondfield Application, this amount owing to him by the Bondfield Group ought to be taken into account.

[107] Luana Solano, the spouse of Solano and the Estate Trustee of the Solano Estate, filed an affidavit in which she stated that she had no knowledge of any involvement by her late husband in directing the issuance of invoices or signing cheques while employed by the Bondfield Group as alleged by the Monitor. She further stated that she had no knowledge of Solano having received any payments or funds as alleged by the Monitor or the Trustee.

664 Ontario's Evidence

[108] On behalf of 664 Ontario, its principal Antonio Caranci ("Caranci") filed an affidavit in which he stated that 664 Ontario was retained by the Bondfield Group to consult on the Hawkesbury Hospital project. In particular, he advised on a repair to a slab on grade area of the hospital. He submits that he succeeded in this work, and as a result of his consultation, and the

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input of another consultant that he engaged, the repair was done at a very competitive cost. The reduced cost resulted in considerable savings and allowed the Bondfield Group to credit the Hawkesbury Hospital project over $8,000,000. In turn, Forma-Con paid 664 Ontario $80,000, being approximately 1 percent of the credit, plus HST, for a total of $90,400. 664 Ontario asserts that the Trustee's allegations that its invoice for the consulting services it provided was not legitimate, not rendered at arm's length, and a transfer at undervalue, are speculative and without evidentiary support. It submits that it provided legitimate services and that the funds it received from Forma-Con in exchange for those services are therefore not a transfer at undervalue.

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LAW

[109] A "transfer at undervalue" is defined in s. 2 of the *BIA* as follows:

> **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.

[110] A "creditor" is defined in s. 2 of the *BIA* as follows:

> **creditor** means a person having a claim provable as a claim under this Act.

[111] The test for proving a transfer at undervalue and a person's liability in respect of the same is set out in subsection 96(1)(b) of the *BIA*. It provides, in part, as follows:

> **Transfer 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
>
> …
>
> (b) the party was not 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 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. (emphasis added)
>
> Establishing values
>
> (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.
>
> Meaning of person who is privy
>
> (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.

ANALYSIS

Were the Bondfield impugned transactions and the Forma-Con impugned transactions transfers at undervalue?

[112] With the exception of a single payment of $2,000,000 made by BCCL to 230 within one year of BCCL's insolvency, the Monitor relies on s. 96(1)(b)(ii)(B) of the *BIA* to show that the Bondfield impugned transactions are all transfers at undervalue. With respect to the $2,000,000 payment, it is presumed to be a transfer at undervalue if the party receiving the payment was not dealing at arm's length with the debtor. In such a case, the Monitor does not need to show that the debtor was insolvent or that the debtor intended to defraud, defeat or delay the interests of a creditor.

[113] The Trustee also relies on s. 96(1)(b)(ii)(B) to show that the Forma-Con impugned transactions are transfers at undervalue.

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[114] In relying on s. 96(1)(b)(ii)(B), the Monitor and the Trustee do not need to show that the corporate debtors BCCL and Forma-Con were insolvent, but must show that the corporate debtors intended to defraud, defeat or delay the interests of creditors.

[115] To order that a party to an impugned transaction or a privy to the transfer, or all of those persons, pay the difference between the value of the consideration received by the corporate debtors BCCL and Forma-Con and the value of the consideration given by BCCL and Forma-Con, respectively, I must find that a) the party was not dealing at arm's length with the debtor; b) the transfer occurred during the period that begins on the day that is five years before the date of the of commencement of *CCAA* proceedings or the initial bankruptcy event; and c) the debtor intended to defraud, defeat or delay a creditor.

[116] The Bondfield Respondents do not dispute that the Bondfield impugned transactions took place within the Bondfield review period; and the Forma-Con Respondents do not dispute that the Forma-Con impugned transactions took place within the Forma-Con review period.

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The False Invoicing Schemes

a) Was value provided in the Bondfield impugned transactions and the Forma-Con impugned transactions relating to the false invoicing scheme?

[117] The Monitor and the Trustee assert that each of them discovered a false invoicing scheme in which invoices were created for services or materials that were never delivered to BCCL and Forma-Con, respectively. BCCL and Forma-Con received no consideration in respect of these invoices, yet money flowed to the Bondfield Respondents and the Forma-Con Respondents, respectively.

[118] In their respective reports, the Monitor stated its opinion that there was nil value to BCCL in respect of any of the Bondfield impugned transactions, and the Trustee stated its opinion that there was nil value to Forma-Con in respect of any of the Forma-Con impugned transactions. Under s. 96(2) of the *BIA*, in the absence of any evidence to the contrary, the value of the Bondfield impugned transactions is the value provided by the Monitor, and the value of the Forma-Con impugned transactions is the value provided by the Trustee.

[119] Four of the individual Bondfield Respondents and the same four individual Forma-Con Respondents, namely, John Aquino, Anastasio, Coccia and Caruso, have conceded that no value was provided by the BCCL Supplier Respondents and the Forma-Con Supplier Respondents for the Bondfield impugned transactions and the Forma-Con impugned transactions (not including 230). This result is supported by the lack of evidence uncovered in the Monitor's and the Trustee's investigations. I therefore find the value to BCCL of the Bondfield impugned transactions relating to the false invoicing scheme to be nil.

[120] Regarding the Forma-Con impugned transactions, John Aquino, the sole shareholder of 230, offered no evidence to show that 230 provided valuable consideration to Forma-Con during the Forma-Con review period for the payment it received. The Trustee did not locate any evidence in its investigation to support that result. Despite their exclusion of 230 from their concessions,

none of the individual Forma-Con Respondents adduced any evidence to show any valuable services or materials provided by 230 to Forma-Con during the Forma-Con review period. Accordingly, the presumption in s. 96(2) applies and the value of the consideration received by Forma-Con from 230 is the value stated by the Trustee. I find this value to be nil.

[121] The Trustee asserts that the payment made to Forma-Con Supplier 664 Ontario, which is captured in the Forma-Con review period, is a transfer at undervalue. 664 Ontario argues that it provided legitimate services to Forma-Con for the payment of $90,400, which was not a transfer at undervalue.

[122] The 664 Ontario invoice was issued at the request of Solano, and contained minimal description of the service: "Consulting." The invoice was paid by cheque on the same day. The Trustee has not been able to find any supporting accounting records or correspondence at Forma-Con to show that the work was done. John Aquino states in his affidavit sworn July 27, 2020 that the explanation provided by Mr. Caranci for the invoice relates to a Bondfield project and has no relation to Forma-Con or the alleged payment.

[123] In its evidence, 664 Ontario states that the consulting work was done on the Hawkesbury Hospital project, and that 664 Ontario entered into an agreement with Solano to provide consulting services. The Trustee has not been able to find, and 664 Ontario has not produced, any internal records to corroborate the work or the agreement. Despite the alleged value of the services provided, there are no email exchanges between Solano and 664 Ontario on the alleged $8,000,000 savings for which 664 Ontario takes credit. 664 Ontario asserts that the work it was asked to do required a "high degree of structural engineering experience." However, 664 Ontario has no expertise in structural engineering and Caranci confirmed under cross-examination that he was not qualified to read the report, which allegedly addressed the issues. The Trustee has not been able to confirm the report's existence or to assess the value of the report. A search of Solano's inbox turned up nothing to connect 664 Ontario to the Hawkesbury project. Caranci stated that he cannot find the report.

[124] The Trustee specifically asked 664 Ontario to provide any relevant documents or correspondence regarding the work allegedly performed for Forma-Con. It got no response initially, but at Caranci's cross-examination, Caranci produced scanned versions of email correspondence between Caranci and Rich Ramos, a principal of Canarch Consulting Services Inc. ("Canarch"), and an invoice from Canarch for work purportedly done on the Hawkesbury Hospital project at the request of 664 Ontario. The Trustee asked for the original correspondence in order to test the authenticity of the documents, but 664 Ontario refused to provide the original electronic versions for this purpose. 664 Ontario has provided no direct evidence and has refused to let the Trustee test the circumstantial evidence proffered by it in support of the payment.

[125] Further, Caranci refused to answer questions about the invoices that 664 Ontario and its affiliate 2104661 Ontario Inc., which was another supplier of interest to the Trustee, billed to Forma-Con in years prior to the Forma-Con review period. Caranci also refused to disclose the income of 664 Ontario in the year prior to the year in which the invoice for $90,400 was submitted to test whether it had a legitimate going concern business.

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[126] The Trustee asserts that the method of invoicing used by 664 Ontario reflects substantially the same pattern as is evident in the false invoicing scheme in respect of which John Aquino and the other living individual Forma-Con Respondents conceded that no valuable services were provided.

[127] I find that the method of invoicing used by 664 Ontario is consistent with the false invoicing scheme relating to the other Forma-Con Supplier Respondents. Solano was at the centre of that scheme. Apart from Caranci, none of the Respondents in either the Bondfield Application or the Forma-Con Application has suggested that Solano, whose position was in IT, and who dealt with accounting for expenditures for the John Aquino family, had any role in managing or troubleshooting construction projects or hiring subcontractors or instructing structural engineers.

[128] In light of the concessions made regarding the existence of a false invoicing scheme at Forma-Con, the absence of records in support of 664 Ontario's work on Forma-Con's projects and the dubious explanation about Solano's role at Forma-Con, 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. 664 Ontario has not met its burden to show that the invoice from 664 Ontario was something other than a false invoice, like the other invoices used in the false invoicing scheme. Further, I am prepared to draw an adverse inference against 664 Ontario based on its refusal to answer proper questions, which if answered honestly may have exposed facts unfavourable to 664 Ontario's position.

[129] Accordingly, I find the 664 Ontario transaction to be a transfer at undervalue, and the value of the services provided to Forma-Con by 664 Ontario in respect of this invoice to be nil.

[130] In its reports for February and May 2020, the Trustee stated its opinion that there was nil value for any of the Forma-Con impugned transactions. Under s. 96(2) of the *BIA*, in the absence of any evidence to the contrary, the value of the Forma-Con impugned transactions is the value provided by the Trustee. I find this value to be nil.

b) Did the Bondfield impugned transactions and the Forma-Con impugned transactions take place on a non-arm's length basis?

[131] Section 4 of the *BIA* provides that "related persons" are deemed to be acting on a non-arm's length basis. It is a question of fact whether persons not related to one another were, at a particular time, dealing with each other at arm's length.

[132] The Monitor and the Trustee assert that with respect to the impugned transactions relating to the false invoicing schemes, none of the BCCL Supplier Respondents or the Forma-Con Supplier Respondents or the parties billing for these transactions were dealing at arm's length. They further assert that the surrounding circumstances relating to the payments from BCCL to the BCCL Supplier Respondents, and from Forma-Con to the Forma-Con Supplier Respondents in respect of the false invoices underpinning the impugned transactions establish as a matter of fact that the transfers took place on a non-arm's length basis. I agree.

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[133] Two persons deal on a non-arm's length basis if they are acting on "non-economic considerations" that result in the consideration for the transfer failing to reflect the fair market value of the transferred property, or if they are not acting towards each other on the basis of normal commercial imperatives: *National Telecommunications, Re*, 2017 ONSC 1475, 45 C.B.R. (6th) 181 at paras. 43 and 48 ("*National Telecommunications*").

[134] In *National Telecommunications*, Myers J. held that an arrangement where a transferor "agrees to pay someone … for doing nothing" can lead to the necessary conclusion that the persons, including both the corporation that received the payment and the individual benefiting from the payment, were not dealing at arm's length with the debtor: para. 48.

[135] With respect to Clearway, MMC, MTEC, and Strada, the concession that neither BCCL nor Forma-Con received any consideration for the payments made to them in respect of the false invoicing is conclusive of the non-arm's length nature of the transactions. The parties did not deal with each other at arm's length because they all collaborated in the false invoicing schemes. In *National Telecommunications v. Stalt*, 2018 ONSC 1101, 59 C.B.R. (6th) 263 at para. 41 ("*Stalt*"), Justice Pattillo stated that s. 4(4) of the *BIA* requires a determination, based on the totality of the evidence, of whether the transaction involves "generally-accepted commercial incentives such as bargaining and negotiation in an adversarial format and maximizing of a party's economic interest," and that "in the absence of any such indicia, the inference that arises is that the parties were not dealing at arm's length."

[136] John Aquino, Anastasio and Caruso effectively admitted their participation in the false invoicing schemes where there was an obvious absence of ordinary commercial incentives and dealings between the parties. The Bondfield Respondents (other than 230) were acting collaboratively to carry out the scheme, and BCCL and the BCCL Supplier Respondents acted in concert to effect the transfers for the benefit of the individual Bondfield Respondents.

[137] The Forma-Con Respondents (other than 664 Ontario) similarly were acting collaboratively to carry out the scheme, and Forma-Con and the Forma-Con Supplier Respondents (other than 230 and 664 Ontario) acted in concert to effect the transactions for the benefit of the individual Forma-Con Respondents.

[138] Anastasio, Coccia and Caruso acknowledged that, for the purposes of these Applications, the Bondfield impugned transactions and the Forma-Con impugned transactions, in respect of the false invoicing schemes with which they were involved, were all non-arm's length transactions.

[139] I find that 230 was not dealing with BCCL and Forma-Con at arm's length because it is a related person under s. 4 of the *BIA*. John Aquino identified 230 as his company and he controlled it in all material respects. The Monitor and the Trustee assert that John Aquino was the directing mind of BCCL and Forma-Con during the relevant periods, though John Aquino asserts that control of BCCL and Forma-Con was shared between Ralph, Steven and him. Ralph and Steven dispute that they were directing minds of BCCL or Forma-Con. I find that for the purposes of s. 4 of the *BIA*, and the false invoicing schemes, John Aquino controlled 230, BCCL and Forma-Con. Consequently, they are deemed not to deal with each other at arm's length.

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[140] I find that 664 Ontario was also not acting at arm's length with Forma-Con. Its principal, Caranci did not provide any consideration for the payment made by Forma-Con to it. This lack of consideration is conclusive of its non-arm's length relationship with Forma-Con.

[141] In the case of each of BCCL and Forma-Con, there is no evidence that the transactions in issue between BCCL and the Bondfield Respondents, and between Forma-Con and the Forma-Con Respondents, displayed any of the generally accepted commercial incentives such as bargaining and negotiation with a view to maximizing a party's economic self-interest. Accordingly, I find that BCCL was not dealing at arm's length with the Bondfield Respondents, and Forma-Con was not dealing at arm's length with the Forma-Con Respondents.

c) Were the Bondfield impugned transactions and the Forma-Con transactions designed to, or made with an intent to, defraud, defeat or delay a creditor?

[142] The Monitor submits that the transfers of approximately $21,807,693 through the false invoicing scheme, which occurred within the 5-year period preceding BCCL's insolvency, were transfers at undervalue because they were made with an intent to defraud, defeat or delay creditors. The Monitor asserts that John Aquino, as the directing mind of BCCL, engaged in a clandestine scheme that would hide from BCCL's creditors the fact that tens of millions of dollars were paid out of BCCL under the guise of job costs, which were not job costs at all, but rather payments to John Aquino himself and others who assisted him in this deception.

[143] The Trustee submits that the transfers out of Forma-Con in the amount of $11,366,890 that occurred within the Forma-Con review period were transfers at undervalue because they were made with an intent to defraud, defeat or delay creditors. The Trustee asserts that the surreptitious and fraudulent manner in which the false invoicing scheme was undertaken leaves that intent as the only reasonable conclusion.

[144] The principal argument of both the defending Bondfield Respondents and the defending Forma-Con Respondents (other than 664 Ontario) is that there could be no intent on behalf of BCCL and Forma-Con to defraud, defeat or delay creditors because both BCCL and Forma-Con, throughout the respective review periods, were in strong financial positions and paying their respective debts until around late 2016 in the case of BCCL and late 2017 in the case of Forma-Con.

[145] While I accept that the financial health of the debtor may be considered in determining whether the debtor intended to defraud, defeat or delay creditors, this factor is not determinative. In this case, there are a number of badges of fraud that, in my view, 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.

[146] Fraudulent intent under the *BIA* has not been widely considered by the courts. As such, much of the jurisprudence on fraudulent intent derives from cases involving Ontario's *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*"). However, unlike the *FCA*, which specifically encompasses a "creditor or other", the *BIA* refers only to a "creditor" which would seem to

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preclude a future creditor. See Roderick Wood, *Bankruptcy and Insolvency Law*, (Toronto: Irwin Law, 2005) at 228.

[147] Also, under the *FCA*, the knowledge or intent of the transferee is relevant because both the debtor and the transferee must be privy to the fraud. Under the *BIA*, the knowledge or intent of the transferee is not a consideration: see *Wood*, at 228. It is only necessary to establish fraudulent intent on behalf of the debtor. The courts require proof of a debtor's fraudulent intent.

[148] In *Jonas v. McConnell*, 2014 ONSC 6169, 35 B.L.R. (5th) 304 at para. 11 ("*McConnell*"), Justice Penny set out three requirements under the *FCA* to set aside a transaction. They are a) a conveyance of property; b) an intent to defeat; and c) a creditor or other towards whom the intent is directed. With the sole caveat that the *BIA* does not include "or other", in my view, the requirements identified by Justice Penny ought to apply under s. 96 of the *BIA* as well.

[149] The conveyances of property are not disputed. I will now address whether there was the requisite "intent to defeat" and a creditor (or creditors) towards whom that intent was directed.

Intent to defraud, defeat or delay creditors

[150] John Aquino has admitted that there was no consideration for the payments issued by BCCL and Forma-Con on the false invoices (excluding payments to 230). This admission by the president of BCCL and Forma-Con that tens of millions of dollars were paid out of the debtor companies for no services or materials could be construed as some evidence of a subjective intent to defeat the companies' creditors. However, it is generally accepted that proof of a person's subjective intent is nearly impossible: *National Telecommunications*: para. 53. John Aquino disputes that the payments were made to defeat creditors, and the onus to prove otherwise remains upon the Monitor and Trustee.

[151] Given the obvious limitations in proving a debtor's subjective state of mind, and whether a transaction as undertaken with fraudulent intent, the Monitor and the Trustee rely on the "badges of fraud" displayed in the impugned transactions relating to the false invoices to establish a presumption of intention.

[152] In *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 36 C.B.R. (6th) 169 ("*Montor Business Corp.*") at paras. 72-73, the Court of Appeal for Ontario identified a non-exhaustive list of "badges of fraud" and stated that an inference of intent to defraud, defeat or delay a creditor may arise from the existence of one or more badges of fraud; but whether the intent exists is a question of fact determined from all of the circumstances as they existed at the time of the conveyance. As stated by Justice Brown, as he then was, in *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, 37 C.B.R. (6th) 200 ("*Goldfinger*") at para. 6635, "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."

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[153] Courts have identified several badges of fraud, including the following:

1. The conveyance was general (i.e., a transfer of substantially all of the transferor's property).
2. The transferor continued in possession and used the goods as the transferor's own, including selling them.
3. The conveyance was secret.
4. The conveyance was made in the face of an ongoing legal process.
5. The conveyance amounted to a trust of the goods.
6. The deed contained the self-serving and unusual provision "that the gift was made honestly, truly, and bona fide."
7. The deed gives the transferor a general power to revoke the conveyance.
8. The deed contains false statements as to the consideration.
9. The consideration is grossly inadequate.
10. There is unusual haste to make the conveyance.
11. Some benefit is retained under the settlement by the settlor.
12. Cash is taken in payment instead of a cheque.
13. A close relationship exists between the parties to the conveyance.

[154] These badges serve an evidentiary function. They can be viewed as "circumstantial evidence that may cause a court to draw an inference of intent.": Roderick Wood, "Transfers at Undervalue: new wine in old skins?" *Annual Review of Insolvency Law* (Toronto: Ontario: Thomson Reuters: 2017) Online: WestlawNext Canada.

[155] Where a transaction displays one of the badges of fraud, this will usually be enough to establish the debtor's illegal purpose unless the debtor can provide an innocent explanation: Anthony Duggan et al., *Canadian Bankruptcy and Insolvency Law*, 3rd ed. (Toronto: Emond Montgomery 2015) at 223.

[156] The Trustee asserts that all of the "badges of fraud" identified by the Court of Appeal for Ontario in *Montor Business Corp.* exist in this case: the consideration for the transaction was grossly inadequate; the transfer was made to a non-arm's length person; the transfer was secret; the transfer was effected with unusual haste; and the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking.

[157] Based on the evidentiary record, and as noted above, I find that both the Bondfield and the Forma-Con impugned transactions were conducted between non-arm's length parties. There was also a lack of consideration for the transfers. Inherent in the false invoicing schemes was a complete absence of value to BCCL and to Forma-Con. With the exception of transfers made to 230, John Aquino, Anastasio, Coccia and Caruso conceded this lack of value. The transactions were furthermore concealed through the creation and delivery of phony invoices, which purported to describe services that were never delivered. Both the Bondfield impugned transactions relating to the false invoicing scheme and the Forma-Con impugned transactions were generally conducted with unusual haste. Where the typical billing cycle was 30 to 90 days, payments made in association with these impugned transactions were on average made in a few days at most. Many

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of the transactions were facilitated by Solano, who was understood by the Monitor and the Trustee to have worked in Bondfield's IT Department and accounting departments, but who was not engaged in vendor or procurement matters.

[158] 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 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.

[159] I note that, in *Stalt*, at para. 57, the court held that a false invoicing scheme that had the effect of falsifying the debtor's receivables and payables established an intent to "defeat, defraud or delay" a creditor.

[160] In my view, the facts that the transfers were made by BCCL and Forma-Con, in secret, in haste, to non-arm's length persons, and that the consideration for the transfers, being no consideration, was grossly inadequate, are sufficient circumstantial evidence to find fraudulent intent. The record also shows that these transfers were being made at a time when the Bondfield Group was expanding its business without the support of its primary lender, the National Bank. National Bank had declined to increase its lending and had classified its existing loan as a "special loan", which would require closer monitoring. 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.

[161] The existence of badges of fraud creates a rebuttable presumption of the intention to defraud, defeat or delay creditors. The onus then shifts to those defending the fraud to adduce evidence to show the absence of fraudulent intent: *Purcaru v. Seliverstova*, 2015 ONSC 6679, 69 R.F.L. (7th) 388 at para. 57.

[162] The onus is high for John Aquino. He was the insider at BCCL and Forma-Con, the president of the debtor companies, who knowingly approved invoices and signed cheques for an aggregate of tens of millions of dollars based on phony invoices in relation to services or materials that were never delivered. There is no innocent explanation for a false invoicing scheme.

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[163] The defending Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario) attempt to rebut the presumption by arguing that there could be no intention on the part of BCCL or Forma-Con at the time of the transfers to defraud, defeat or delay creditors because the financial condition of the Bondfield Group, BCCL, and Forma-Con at the time of the transfers was such that each was paying all of its debts as they came due, in full.

[164] For the reasons that follow, I find that the defending Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario) have not rebutted the presumption of fraudulent intent by adducing evidence of the purported financial condition of the Bondfield Group.

[165] 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. John Aquino and, in turn, other Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario), rely on the Bondfield Group's financial statements, as audited by Deloitte, in support of their view that BCCL and Forma-Con could not have had the intent to defraud, defeat or delay creditors. They assert that the financial statements show a prosperous and growing group of companies with a strong balance sheet during the relevant times, and show that the Bondfield Group could pay all of its creditors on time and in full at least until late 2017. As further evidence of the financial health of the Bondfield Group, John Aquino also relies on the CHS Report. The CHS Report shows that the Bondfield Group was in a strong financial position during the relevant review periods and was paying its current debts on time and in full until late 2017.

[166] John Aquino further submits that Mr. Hamilton's evidence regarding the ability of BCCL and Forma-Con to pay its creditors in full has not been challenged and that no countervailing expert report has been filed by the Monitor or the Trustee.

[167] Deloitte undertook an audit of the Bondfield Group, including BCCL, and Forma-Con, for the years 2013 to 2016 inclusive and prepared an audit in draft form for BCCL in 2017. In each of those years, Deloitte showed growth in contract revenue and retained earnings increasing year over year. John Aquino argues that the directing minds of the Bondfield Group therefore had no intention to defraud, defeat or delay creditors during those years. Rather, they believed that the companies comprising the Bondfield Group had healthy growth, and a strong financial outlook and would be able to satisfy all of its creditors for the foreseeable future.

[168] The Monitor raises concerns about the reliability of the financial statements on which Deloitte relied and asserts that the actual financial condition of BCCL contradicts the defending Bondfield Respondents' position that BCCL was financially healthy during the Bondfield review period. The Monitor's investigation found that 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

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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 financial statements that the defending Bondfield Respondents and Forma-Con Respondents rely upon.

[169] The Monitor submits that the information that CHS relied on was fundamentally inaccurate and unreliable. In its investigation, the Monitor found evidence that incorrect supplier invoice dates were entered into the accounting system and that BCCL had a practice of holding payment cheques while recording suppliers as having been paid. These practices extended use of BCCL's funds and kept supplier payments outstanding for longer periods of time than the periods reflected in the accounting system. For example, in June 2018, the Monitor discovered $23,214,486.95 of cheques written to suppliers but not released.

[170] 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.

[171] Shortly after the *CCAA* filing, BCCL began to recognize large reversals of previously recognized revenue and profits because it had been previously recognizing revenue and earnings aggressively and without taking into account known cost overruns and project delays. BCCL's accounting records were restated by a new CFO with the assistance of the Monitor. The Monitor reported that this restatement resulted in adjusted deferred revenue from $37,000,000 as of March 31, 2018 to approximately $107,000,000 as of June 30, 2018 and then to approximately $170,000,000 as of September 30, 2019. The Monitor asserts that these adjustments were necessary because BCCL overstated the level of completion of its projects during the Bondfield review period and recognized revenue early based on those overstatements. Given John Aquino's admitted knowledge of the state of BCCL's projects, including attendance at job sites, management of projects, suppliers and subcontractors, and job site meetings, it is notable that he permitted BCCL's financial statements to be prepared in reliance on inaccurate information regarding the state of completion of the projects in order to inflate BCCL's revenues.

[172] The Monitor reported that BCCL was reporting negative gross profit of $382,000,000 during the period from 2018 to 2020 and that a significant portion of those losses was actually incurred during the Bondfield review period.

[173] The Monitor also reported write-offs for accounts receivable amounts of $53,000,000 relating to the Bondfield review period in the fourth quarter of 2018.

[174] Thus, according to the Monitor's evidence, contrary to the position asserted by the defending Bondfield Respondents, BCCL's financial position during the Bondfield review period was that of a corporation in financial decline, which could ill afford the additional drain of the Bondfield impugned transactions.

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[175] According to the Trustee reports, Forma-Con owed approximately $9,000,000 in 2014; $96,000,000 in 2015; and approximately $119,000,000 in 2016. Forma-Con was also a guarantor of BCCL's credit facility with National Bank with contingent obligations of $48,000,000, $55,000,000, and $56,000,000 at the end of fiscal 2014, 2015 and 2016, respectively. Further, Forma-Con became a guarantor of BCCL's $80,000,000 credit facility with Bridging Finance Inc. when the facility was entered into in July 2017.

[176] The Trustee asserts that the CHS report is flawed with respect to Forma-Con. The report concludes that Forma-Con paid its liabilities on a timely basis at least until December 31, 2017. Despite this conclusion, Mr. Hamilton agreed on cross-examination that he did not conduct a solvency analysis or consider Forma-Con's liabilities on a "balance-sheet test" and could not opine on Forma-Con's solvency during the review period. Mr. Hamilton also agreed that his analysis was limited to Forma-Con's short-term liabilities and that he did not consider any of the long-term, contingent or off-balance sheet liabilities of Forma-Con. Mr. Hamilton conceded that he was not aware that Forma-Con was a guarantor of BCCL's credit facilities with National Bank. He did not consider Forma-Con's ability to pay its related-party liabilities.

[177] Both the Monitor and the Trustee challenge the CHS Report because it focused on only one measure of corporate solvency, the cash flow test. When examined, Mr. Hamilton, admitted his lack of expertise in insolvency matters and conceded that he did not consider BCCL's ability to pay its long-term creditors and contingent creditors.

[178] John Aquino asserts that many of the issues raised by the Monitor and the Trustee have no impact on the fact that BCCL and Forma-Con were in strong financial positions and able to pay their respective creditors on a timely basis.

[179] Irrespective of the precise financial condition of the Bondfield Group, on which the parties do not agree, the Monitor and the Trustee assert that the test under the *BIA* is disjunctive: a monitor or trustee must show that the debtor was insolvent at the time of the impugned transaction *or* that the debtor intended to defeat, defraud or delay creditors. The Monitor argues that this choice is reflected in the fact that the statute contemplates recovery for transactions made with an intent to defeat, defraud or delay creditors up to five years prior to an insolvency event; therefore, it is no answer to assert that during this five-year period, the debtor may not have yet been insolvent.

[180] In response to the arguments of the Monitor and the Trustee on the financial condition of BCCL, Forma-Con and the Bondfield Group, the defending Bondfield Respondents submit that Mr. Hamilton adjusted his accounting in the CHS Report to take into account the $23,214,486.95, which had not been released to suppliers, and found that it had no impact on BCCL's ability to pay its bills on time and in full during the Bondfield review period.

[181] The defending Bondfield Respondents also submit that the Monitor is incorrectly using hindsight to determine John Aquino's intent and cannot consider all of the Bondfield impugned transactions cumulatively, but must put itself in John Aquino's shoes in each of the years covered by the Bondfield review period and determine his intent at that time. They submit that if the Bondfield impugned transactions are examined in each year, the results would show that the

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amount paid out on false invoices was a relatively small fraction of the gross revenue for that year. They assert that it cannot be said that John Aquino could have had the intent to defeat creditors if he was only permitting BCCL to pay out about 1 percent of its gross revenue. They submit that this would have been the case in 2014 when the total of the false invoices paid was $5,749,917 as compared to gross revenue of $475,000,000, and that even with the payment on the false invoices, the net profit for that year was $17,400,000.

[182] I am not persuaded that the quantum of the amounts paid out on the false invoices as compared to the gross revenue or the net profit of BCCL in a given year absolves John Aquino of an intent to defeat creditors. 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. Each of these payments reduced the funds available to pay long-term creditors and increased bank indebtedness as shown in the Monitor's reports.

[183] In further support of their position, the defending Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario) rely on the *Goldfinger* case for the proposition that "[w]here a debtor remains in a position to pay off liabilities, an impugned transaction cannot have been made with an intent to defeat, defraud or delay a creditor." That case involved a trustee attacking a settlement reached between the debtor and a former investor (Dr. Goldfinger). The trustee sought to set aside a payment to Goldfinger as a transfer at undervalue under s. 96 of the *BIA*. The court found that, at the time of the transfer, the parties believed that the real properties held by the debtor possessed significant future value which would "prove sufficient to pay off those companies' liabilities and generate a profit for [the corporation's directing mind] and Goldfinger to share." (see para. 274). The court placed "significant weight" on this evidence in finding that, while the debtor may have been unreasonable in his belief as to the future value of the real property, the debtor did not intend to defraud or delay creditors. Notably, there were no badges of fraud present in that case. See paras. 275-280.

[184] The Bondfield and Forma-Con Respondents also rely on *Commerce Capital Mortgage Corp. v. Jemmet*, [1981] 37 C.B.R. (N.S.) 59 [Ont. Sup. Court] for the proposition that "where a conveyance occurred at a time where there was no evidence of the debtor experiencing financial difficulty, the plaintiff was unable to prove that the conveyance had the intent to defeat, hinder, delay or defraud creditors." In that case, the court considered the conveyance of a matrimonial residence from Mr. Jemmet to his wife. Mr. Jemmet made this conveyance one and a half years before he provided personal guarantees for loans made to his corporation, Jeroy Limited. The plaintiff creditor, seeking to recover under this guarantee, attacked the conveyance under the *FCA*. Importantly, the court noted, at para. 9, that there "was no evidence adduced by the plaintiff that at the time of the conveyance to Mrs. Jemmet there were any current and anticipated financial obligations or debts of Jeroy Limited." It held that there was no intention to defraud or delay creditors. I note that the court did not appear to identify any badges of fraud in this case. While the case does illustrate the importance of the debtor's financial position in assessing intent, I do not find this case to be analogous to the case at bar.

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[185] The Respondents also rely on *Fleming v. Edwards*, [1896] 23 O.A.R. 718 (Ont. C.A.), as a case "where a debtor made a voluntary conveyance of property at a time when he was solvent and subsequent events impacted on his ability to pay his creditors in full, the voluntary conveyance did not meet the requisite intent to defeat, hinder, delay or defraud creditors." This case involved a fairly unique fact scenario. In this very old decision, the defendant made a conveyance of property to his wife prior to entering into a hotel business. He only became insolvent as a result of a fire that destroyed the premises. The court held that there was no intent to defraud creditors at the time the defendant made the transfer.

[186] As shown by these cases, the financial position of a debtor at the time of the impugned transactions can indeed be a relevant consideration in assessing whether the debtor had an intent to defraud, defeat or delay creditors. However, in my view, the relevance of that consideration should not be overstated. The debtor's financial position serves as additional circumstantial evidence of the debtor's intent that should be considered alongside the badges of fraud, if present, in determining whether the debtor had the requisite intent under s. 96. The debtor's financial position is but one factor for the court to consider in determining the debtor's intent. Like the badges of fraud, it is circumstantial evidence worthy of the Court's consideration. As noted by the Court of Appeal for Ontario in *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23 at para. 64: "there is no special rule that makes evidence of debtor's insolvency determinative as opposed to one factor to be considered. … Instead, the crucial question remains whether the applicant has proved the fraudulent intent of the debtor."

[187] The Trustee does not rely on the branch of s. 96 that requires a showing of insolvency. Further, the CHS report offers no opinion on the solvency of BCCL or Forma-Con. Their respective current liabilities are only part of their overall liabilities, and the payment of those liabilities is only part of the equation. As noted, to the extent that funds are withdrawn from the company, it becomes less able to meet its long-term or contingent liabilities, and the long-term creditors are affected by those withdrawals.

[188] I was not provided with any authority in support of the position that a company's financial health positively precludes a finding of fraudulent intent, and I do not find that it does. Even if BCCL and Forma-Con were paying their respective current suppliers for a period of time, this does not sanitize the fraud, which is supported by a number of badges of fraud.

[189] I accept that John Aquino may have had other motives, apart from defeating creditors, in paying out tens of millions of dollars from BCCL and Forma-Con. However, to meet its onus, the Monitor and the Trustee need only demonstrate that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor: *Juhasz Estate v. Cordiero*, 2015 ONSC 1781, 24 C.B.R. (6th) 69 at para. 54.

[190] I find that the badges of fraud in this case establish John Aquino's intent to defraud, defeat or delay creditors. He was a directing mind of BCCL and Forma-Con and signed a number of the cheques associated with the impugned transactions. In cross-examination he stated that he would have been familiar with 100 percent of the suppliers and subtrades. He conceded that BCCL and Forma-Con received no value in the impugned transactions (not including 230).

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[191] At the same time as he was authorizing payments on false invoices, he was injecting capital into BCCL from time to time in an attempt to disguise the true financial condition of BCCL. An intent to defraud, defeat or delay creditors, for the purposes of s. 96 of the *BIA* can be established through evidence of an explicit fraudulent act in the sense of evidence that a representation was made concerning the ownership of [the debtor's] assets to a creditor or potential creditor which was not true: *Incondo v. Sloan*, 2014 ONSC 4018, 16 C.B.R. (6th) 220 at para. 81, aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110.

[192] It is reasonable to infer that John Aquino took these actions to avoid BCCL's and Forma-Con's obligations and defeat their creditors. Neither he nor any of the other Respondents has given evidence of an alternative explanation.

[193] 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. Based on the evidence, there were a number of unusual accounting practices. These 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 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.

[194] The defending Bondfield Respondents and Forma-Con Respondents assert that Ralph and Steven were also directing minds of BCCL and Forma-Con and, therefore, an intent to defraud, delay or defeat creditors cannot be met without establishing their intent as well. In his affidavit, Anastasio attested that the Bondfield Group had three directing minds, Ralph, John Aquino and Steven, and that all three of them knew and approved at all times all of the impugned transactions underpinning the false invoicing scheme.

[195] I disagree that a finding of an intent to defraud, defeat or delay creditors requires a mutual intent among all of Ralph, John Aquino and Steven. First, Ralph and Steven have denied knowledge of the false invoicing scheme involving BCCL and Forma-Con and the alleged fund cycling scheme involving 230. John Aquino has adduced evidence of their alleged participation in other off-book transfers of values. Based on the record, I cannot conclude to what extent Ralph and Steven in fact engaged in other off-book transfers; however, I see no evidence of Ralph's or Steven's participation in the schemes under review in these matters to strip BCCL and Forma-Con of tens of millions of dollars and to disguise such stripping, in the case of BCCL, through attempts to represent an inaccurate financial picture of the companies for creditors and other stakeholders.

[196] In my view, whether Ralph and Steven did or did not participate is of no assistance to John Aquino. If they did participate, their participation would support the Monitor's and the

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Trustee's position that the BCCL impugned transactions and the Forma-Con impugned transactions were entered into with an intent to defraud, defeat or delay creditors. If they did not participate and were not aware of the impugned transactions, this fact does not assist John Aquino, who has admitted that as president of each of BCCL and Forma-Con, he was one of its directing minds. As president, he was able to, and did take binding actions on behalf of BCCL and Forma-Con, not the least of which were the acts in issue in these Applications.

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[197] 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. The badges of fraud permit an inference of intent and evidence a presumption of intent that is not rebutted by the evidence that current liabilities were being paid in the ordinary course of business during the Bondfield review period and the Forma-Con review period.

Was there a creditor towards whom the intent was directed?

[198] As set out above, under the *FCA*, there must be a "creditor or other" towards whom the fraudulent intent was directed. Cases have held that the language "creditors and others" is "broad enough to contemplate a person that, while not a creditor at the time of the conveyance, may become one in the future": *Bearsfield Developments Inc v McNabb*, 2016 ONSC 6294, 41 C.B.R. (6th) 310 at para. 47. Future creditors are clearly contemplated by the *FCA*; however, as noted, the *BIA* does not contain this broad language and therefore arguably does not apply to future creditors.

[199] John Aquino asserts that neither the Monitor nor the Trustee can meet its onus to show that BCCL and Forma-Con, in participating in the impugned transactions, had the intent to defraud, defeat or delay creditors because both corporations were paying their debts as they came due and therefore had no "creditors", as that term is defined in the *BIA*, during the Bondfield review period or the Forma-Con review period. He further asserts that the Trustee's argument that the impugned scheme unavoidably affected Forma-Con's stakeholders "when the music stopped" inappropriately reads into s. 96(1)(b)(ii)(B) future or subsequent creditors. I disagree with this interpretation of the Trustee's argument.

[200] The definition of "creditors" in the *BIA* includes persons who are owed debts and those with unliquidated claims. As such, an intent to defeat either of these two types of claimants will suffice. However, as noted, "it is more doubtful whether the transfer at undervalue provisions encompass future creditors":

> the significance of the additional words "and others" after creditors is widely known and featured in every major work that studies fraudulent conveyance law. The choice not to include this wording should therefore be taken as an indication on the part of the drafters to limit the application of the section: Roderick Wood, "Transfers at Undervalue: new wine in old skins?" *Annual Review of Insolvency Law*.

[201] As set out in *McConnell*, the determination of whether a transaction should be set aside depends on an intent to defeat a creditor towards whom that intent is directed. If the debtor intended

to defeat, defraud or delay present creditors, then the transaction can be attacked under s. 96 of the *BIA*. However, if the debtor intended to defeat, defraud or delay future creditors, then the transaction cannot be attacked under s. 96 of the *BIA*. In *Re Silbernagel* 20 C.B.R. (5th) 155 (ONSC) at para. 7, the court found that a person who might become a creditor of a bankrupt at a future date is not a "creditor."

[202] While I accept that the *BIA* does not define "creditor" to include future creditors, John Aquino's submission seems to conflate the distinction between present and future creditors with the financial health of the Bondfield Group, stating that *Goldfinger* establishes that there can be no intent to defeat creditors where, at the time of the transfer, a debtor remains in a position to pay off current liabilities. I disagree that this conclusion follows from the analysis in that case. As noted, in my view, the corporation's financial position is only circumstantial evidence that may or may not support an inference that the corporation intended to defeat creditors. In *Goldfinger*, the court merely held there was an absence of evidence of fraudulent intent. Nowhere in that case did the court state that a healthy financial outlook precludes a finding of fraudulent intent. As a matter of logic, even if a corporation is meeting its current liabilities, transactions can nevertheless be undertaken to defeat current creditors at some unspecified future date.

[203] As such, in my view, if any debts owing at the time of the impugned transactions were indeed paid, then this may evince a lack of intent to defraud then-existing creditors and effectively bar the Monitor and Trustee from attacking the transfers. However, if there were debts owing at the time of the impugned transactions which were ultimately not paid, then it remains open to the Court to find that there was the requisite intent to defeat then-current creditors under s. 96.

[204] Given that the Bondfield Group had outstanding debts, including a substantial loan from its primary lender and shareholder loans, at the time of the transfers (even though monthly payments on the bank loan were being made), it follows that there was a creditor or creditors toward whom BCCL's and Forma-Con's intent to defraud, defeat or delay could be directed. The Court is, therefore, not precluded from finding that the transactions were intended to defeat creditors that existed at the time of the transfers. The fact that the Bondfield Group remained in a position to pay off current liabilities is only one piece of circumstantial evidence to consider. The fact that each of BCCL and Forma-Con were paying off current liabilities at the time of the impugned transactions does not *per se* mean that those transfers were never intended to defeat then-current creditors.

Can John Aquino's intent be imputed to BCCL and Forma-Con?

[205] In applying s. 96, for transactions in the year prior to the insolvency or the initial bankruptcy event, there is no need to show that the debtor was insolvent nor that the debtor intended to defeat the interests of creditors. However, for transactions between one and four years prior to the bankruptcy event, the Monitor and the Trustee must prove that the debtor intended to defeat the interests of creditors.

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[206] As noted, it is the intention of the transferors (the *CCAA* debtor and the bankrupt) and not the transferees that matters under s. 96. As such, it is the intention of the corporate debtors, BCCL and Forma-Con that matters in this case.

[207] Anastasio, Coccia and Caruso argue that even if John Aquino acted fraudulently, his intention in effecting the schemes cannot be imputed to BCCL and Forma-Con because corporate intentionality has not been established. These Respondents also argue that John Aquino acted fraudulently in respect of BCCL and Forma-Con, and as such his actions cannot be imputed to Bondfield and Forma-Con.

[208] The Monitor and the Trustee dispute this formulation of corporate wrongdoing. They argue that the intent of John Aquino can and should be imputed to BCCL and Forma-Con.

[209] In an ordinary case, the intention of a corporation's "directing minds" can be imputed to the corporation itself through the corporate attribution doctrine. The corporate attribution doctrine derives from the Supreme Court of Canada decision in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662. While that case dealt with criminal liability, the doctrine has been recognized in the civil context as well. See: *Golden Oaks Enterprises Inc. (trustee of) v. MRL Telecom Consulting Inc*, 2016 ONSC 5313, 33 O.R. (3d) 513 at para. 127.

[210] The corporate attribution doctrine has yet to be applied in the context of s. 96 of the *BIA*.

[211] Notably, the doctrine does not apply where the directing mind commits fraud on the corporation, as set out in *Canadian Dredge*, at para. 65:

> In my view, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. Where this entails fraudulent action, nothing is gained from speaking of fraud in whole or in part because fraud is fraud. What I take to be the distinction raised by the question is where all of the activities of the directing mind are directed against the interests of the corporation with a view to damaging that corporation, whether or not the result is beneficial economically to the directing mind, that may be said to be fraud on the corporation. (emphasis added)

[212] The modern test is described in the following paragraph from *Deloitte & Touche v. Livent Inc (Receiver of)*, 2017 SCC 63, 2 S.C.R. 855 at para. 100:

> The test for corporate attribution was set out by this Court in Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662. 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

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> 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 (pp. 681-82 and 712-13).

[213] As stated by Van Rensberg J.A. in *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409 (at para. 233):

> *Canadian Dredge* instructs that where a corporation's alleged wrongdoing involves fraud by its directing mind, the court must be satisfied that (i) the directing mind was acting within her assigned field of operation, and that her actions (ii) were not totally in fraud of [the corporation], and (iii) were by design or result partly for the benefit of the corporation.

[214] Anastasio, Coccia and Caruso submit that the minimal criteria to satisfy corporate attribution cannot be satisfied. Specifically, they argue that the Monitor and the Trustee have not shown that John Aquino's actions were within the scope of his authority, nor that his actions were intended to benefit the corporate debtors or had the effect of doing so. Therefore, they argue, John Aquino's alleged fraudulent intentionality cannot be attributed to the corporate debtors.

[215] I disagree with the suggestion of these Respondents that, based on Steven's testimony, John Aquino did not have authority to enter into the transactions. Therefore, the specific impugned transactions were not authorized by BCCL and Forma-Con. In my view, the courts take a broader view of what constitutes corporate authority. Professor Anthony VanDuzer, in *The Law of Partnerships and Corporations*, 3rd ed. (Toronto: Irwin Law, 2009), at 201 states:

> The corporation is responsible for any act by a directing mind <u>in the general area of her responsibility, even if not specifically authorized by a corporate rule or policy.</u> Indeed, even if there is a corporate rule or policy prohibiting the action, that is no defence to corporate responsibility.…Liability may be imposed on corporations where, by virtue of the practice of the corporation, the person with the guilty mind exercised corporate authority in the area in which the offence was committed. (emphasis added)

[216] The question is not whether specific activity was authorized, but rather whether the specific activity fell within the individual's area of responsibility. John Aquino's areas of responsibility included engaging with suppliers and overseeing the provision of services and materials.

[217] The real issue in this matter relates to whether the actions were by design or result partly for the benefit of the corporations. I agree that the actions of John Aquino were not intended to benefit BCCL and Forma-Con and they did not so do. If the *Canadian Dredge* criteria were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations.

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[218] The Monitor and the Trustee argue that the formulation of corporate intent set out in *Canadian Dredge* should not be applied mechanically, and should not apply in this case. They submit that the *Canadian Dredge* formulation is incompatible with the very purpose of s. 96 of the *BIA*, which is aimed at restoring value for the benefit of the debtors' creditors.

[219] It has been repeatedly affirmed that the corporate identification doctrine is concerned with policy. As stated in *Deloitte & Touche*:

> 102... the policy factors identified therein which weigh in favour of imputing a corporation with the illegality or wrongdoing of its directing mind flow from the "social purpose" of holding a corporation responsible for the *criminal* acts of its employees where those acts are designed and carried out, at least in part, to benefit the corporation (Canadian Dredge, at p. 704).
>
> 103 However, as Estey J. himself recognized, 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" (Canadian Dredge, at pp. 707-8 and 718-19).

[220] Notably, the Supreme Court held in *Christine DeJong Medical Corp v. DBDC Spadina Ltd.*, 2019 SCC 30 that policy considerations cannot relax the application of the *Canadian Dredge* criteria. On the contrary, it only provides a reason for courts to not apply the doctrine even where the *Canadian Dredge* criteria are met:

> What the Court directed in Livent, at para. 104, was that even where those criteria are satisfied, "courts retain the discretion to refrain from applying [corporate attribution] where, in the circumstances of the case, it would not be in the public interest to do so" (emphasis added). In other words, <u>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.</u> The appeal is allowed, with costs throughout (emphasis added).

[221] The Supreme Court, in these brief reasons, adopted the dissent from Van Rensberg J.A in *DBDC Spadina Ltd. v. Walton*. That decision strongly affirmed that, even in civil cases, the criteria in *Canadian Dredge* is not relaxed (at para. 236):

> … When the *Canadian Dredge* criteria have been accepted and applied in civil cases, this has occurred without relaxing the criteria for finding a corporation is liable for a wrong, when its directing mind is acting fraudulently….

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[222] All of this would suggest that the *Canadian Dredge* criteria is to be applied strictly in all civil cases, including, arguably, those arising under s. 96 of the *BIA*. However, it is worth noting that the dissent from Van Rensberg J.A. strongly underscored the seriousness of the allegations (which involved knowing assistance in the breach of a fiduciary duty) and the level of knowledge required:

> 237 I do not accept that the adoption of a less demanding standard is warranted here. As I see it, neither the civil burden of proof nor the nature and extent of the fraud would justify a less rigorous approach if the Listed Schedule C Companies are to be fixed with responsibility for the conduct of their director, Ms. Walton.[27] Knowing assistance in the breach of a fiduciary duty is a serious wrong that requires actual and not constructive knowledge by the participant. The investors in the Listed Schedule C Companies did not themselves know about or cause the companies to participate in Ms. Walton's breach of fiduciary duty. (emphasis added)

[223] The requirement for actual knowledge (as opposed to constructive knowledge) in establishing knowing assistance in the breach of fiduciary duty does not arise under s. 96 of the *BIA*. This was an important part of the court's reasoning in that decision. Elsewhere in the dissent, Van Rensberg J.A. underscored this point while also noting the fault-based nature of the wrongful act:

> 216 Liability for knowing assistance in a breach of fiduciary duty is fault-based. It requires an intentional wrongful act on the part of the "stranger" or accessory, to knowingly assist in the fraudulent and dishonest breach of fiduciary duty. Participation in a breach of fiduciary duty for the purpose of knowing assistance requires that the accessory "participated in or assisted the fiduciary's fraudulent and dishonest conduct."

[224] While it might be contended that s. 96 is similarly fault-based, in that it requires an "intentional wrongful act," I note that the *BIA* generally is remedial legislation and that s. 96 is directed towards recovering funds for creditors. This gives me some hesitancy about whether Van Rensberg J.A.'s reasoning ought to apply in the context of s. 96.

[225] I also note that in *Goldfinger*, Justice Myers did not seem to consider whether the *Canadian Dredge* criteria should apply under s. 96 and held (at para. 259) that "...the intention of [the corporate debtor] at the time should be determined by reference to the intention of Kimel, the person who directed the company's affairs." While there is little discussion of attributing intent in this decision, it does provide some basis for finding that courts should readily infer that the intent of the corporate debtor is that of the person directing the company's affairs without engaging in the *Canadian Dredge* analysis.

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The effect of principles of statutory interpretation

[226] The Monitor and the Trustee submit that principles of statutory interpretation support their view that the *Canadian Dredge* formulation of attribution of intent should not apply in cases involving s. 96 of the *BIA*. They urge on this court a purposive interpretation that provides protection to the debtors' creditors as the section is intended to do.

[227] They submit that the rules of statutory interpretation favour a broad interpretation of s. 96, including the definition of debtor. The Supreme Court of Canada in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 indicated that fraudulent conveyance law should be interpreted liberally in favour of creditors:

> 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. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation…

[228] I think that, additionally, there are sound policy considerations that support the interpretation advanced by the Trustee and the Monitor. Policy considerations are relevant to the proper interpretation of a statute. Ruth Sullivan, in her text *Statutory Interpretation* 2nd edition. Irwin Law: Toronto: 2007 at page 245, notes that courts have generally begun to accept that "direct appeal[s] to policies…are relevant to the text to be interpreted." Indeed, in the context of the *Bankruptcy Act*, Iaccobucci J. stated in *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765:

> My opinion is, furthermore, fortified by public policy considerations... In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have 'regard to the family responsibilities and personal situations of the bankrupt.' This demonstrates, to my mind, an overriding concern for the support of families.

[229] Given that the *BIA* is concerned with providing proper redress to creditors, the "intention of the debtor" in s. 96 should be interpreted liberally to include the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself.

[230] For these reasons, I find that the 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 BCCL and Forma-Con.

[231] As a directing mind and a shareholder of BCCL and Forma-Con, John Aquino exercised total control over the false invoicing schemes, in respect of which he tacitly acknowledged his

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wrongdoing. He conceded that the corporate debtors received no consideration for the payments made in the false invoicing schemes (excluding 230). Ralph and Steven deny any knowledge of these schemes. This degree of control by John Aquino, in and of itself, militates in favour of imputing his intent to defeat creditors to BCCL and Forma-Con.

[232] The majority decision in *DBDC Spadina Ltd.* is instructive on the point. Although the case was overturned by the Supreme Court in *Christine DeJong*, in my view, the majority's reasoning applies aptly in the context of s. 96. The majority made special note of the relaxed burden of proof in civil cases:

> 70 …The case law has applied *Canadian Dredge* in the criminal and civil contexts without discrimination. In my view, it does not follow, however, that the criteria need be applied in a rigid, identical, fashion in all circumstances. The burden of proof is less onerous in civil cases. This particular civil case involves a complex multi-real estate transaction investment fraud, perpetrated over an extended period of time, and implicating numerous corporate actors (operating at the instance of the fraudster) and numerous victims. In these circumstances, it makes sense that, of the Canadian Dredge criteria, (b) and (c) at least may be approached in a less demanding fashion than would be the case were *mens rea* for purposes of establishing criminal responsibility in play.

[233] The Court of Appeal noted the impugned action in *Christine DeJong* (assisting in the breach of a fiduciary duty) was fault-based rather than receipt-based, which strengthened its view that the *Canadian Dredge* criteria should be applied less strictly:

> 71 Contrary to the view expressed by my colleague, I do not think it is the case in such circumstances that the claimant must necessarily show "evidence of each company's individual benefit from the scheme" (at para. 234). As noted earlier, and as I shall explain more fully below, liability for knowing assistance is fault-based rather than receipt-based and does not require the defendant to have obtained a benefit from the defaulting fiduciary's breach. To apply criterion (c) of Canadian Dredge — "by design or result partly for the benefit of the company" — too strictly therefore makes little sense, as it would risk muddying the distinction between the two categories of claim. (emphasis added)

[234] Finally, the majority noted that characterizing the corporations as victims of the fraud was artificial and seemed to undermine the policy reasons underlying the identification doctrine:

> 82 My colleague's approach is also influenced by her view that the Listed Schedule C Companies are, themselves, victims of the fraud. If that were the case, it may be a consideration in determining

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> whether liability may be avoided on overall "equity" grounds, discussed further below. However, I do not think it has much bearing on the "directing and controlling mind" analysis or on the analysis of whether the Listed Schedule C Companies in fact assisted and participated in the fraudulent breach of fiduciary duty. In addition, as I shall explain later, I do not view the Listed Schedule C Companies as being "victims" of the fraud; rather, their investors are the victims of the fraud.

[235] While the Supreme Court rejected the majority's reasoning in that case, in my view, the approach has merit in the context of the objectives of s. 96. Many of the points made by the majority apply with equal force to the policy considerations underlying the *BIA*. Accordingly, I find that for the purposes of s. 96 of the *BIA*, John Aquino's intent may be attributed to each of BCCL and Forma-Con.

d) Were the Respondents parties or privies to the transactions?

[236] The Monitor submits that all of the Bondfield Respondents were parties or privies to the Bondfield impugned transactions relating to the false invoicing scheme. John Aquino, 230, the Solano Estate and all of the BCCL Supplier Respondents colluded in the drafting of phony invoices, the directing and receiving of payments for the purpose of stripping funds from BCCL, from which they benefited and caused others to benefit. The individual Bondfield Respondents benefited from the false invoicing scheme as well. They were also involved in the incorporation and/or management of the shell companies. The evidentiary record supports this finding.

[237] The Trustee asserts that John Aquino, the Solano Estate, and all of the Forma-Con Supplier Respondents were parties to the impugned transactions relating to the false invoicing scheme. They were involved in one or more of drafting phony invoices and directing or receiving of payments for the purposes of stripping funds from Forma-Con. They may also have caused others to benefit from the transactions and they received benefits themselves. I agree. The evidentiary record also supports this finding.

[238] The individual Forma-Con Respondents, as well as 230, were privies to the transactions because they had knowledge about the transfers, and were dealing with the parties to the transfers. They received benefits themselves. The individual Respondents (other than the Solano Estate and 230) also established and/or operated the shell companies. The evidentiary record supports this finding.

[239] In *Peoples Department Store Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, the Supreme Court considered the purpose of s. 96 [then s. 100] of the *BIA* in considering the definition of "privy". The Supreme Court held:

> The primary purpose of [s. 96] of the *BIA* is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to

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> the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

[240] The courts have interpreted the term "privy" to include those persons who have knowledge of a transaction for less than fair market value and benefit either directly or indirectly from it: *Bank of Montreal v. EL04 Inc.*, 2012 ONCA 90.

[241] Section 96 extends liability to privies, who can be held jointly and severally liable. The remedy extends not only to the parties to the transfers at issue, but also to any person who "directly or indirectly, receives a benefit or causes a benefit to be received by another person." Given the collaborative involvement of the Bondfield Respondents and the Forma-Con Respondents in the false invoicing schemes at BCCL and Forma-Con, respectively, and the expansive definition of a privy, all of the Bondfield Respondents and all of the Forma-Con Respondents may be held liable in respect of all of the impugned transactions underpinning these false invoicing schemes.

[242] The individual Bondfield Respondents, the individual Forma-Con Respondents, and 230 have provided no explanation for the impugned transactions related to the false invoicing schemes or the false invoices themselves. They do not deny their involvement in these impugned transactions and they do not deny that they personally benefited from these impugned transactions. None of them has provided any evidence to rebut the presumptions drawn from the badges of fraud outlined in the evidence of each of the Monitor and the Trustee.

[243] Coccia argues that she should be exempt from any liability because she was only provided with a chart showing what she was paid in the false invoicing scheme after she had filed her responding materials, and because she denies being a director of any BCCL or Forma-Con Supplier Respondent. She also submits that she was not provided with the bank documents allegedly signed by her on behalf of Supplier Respondents until her cross-examination. Further, she argues that if it is found she played a role, she should not be held liable because, in relation to the other Respondents, her role would be insignificant and inconsequential.

[244] I find that Coccia is liable for her involvement in the false invoicing schemes. She did not deny that she received money from the BCCL Supplier Respondents nor did she deny that she had signing authority on the bank accounts of Supplier Respondents. At her examination, she refused to answer any questions about the banking documents she was alleged to have signed.

[245] However, given the limited role that the evidence indicates Coccia played in the BCCL false invoicing scheme, I would limit her liability to the extent of the benefit she derived from her involvement, which I find to be $88,008. Given the limited role that the evidence indicates Coccia played in the Forma-Con false invoicing scheme, I would limit her liability with regard to that false invoicing scheme to the extent of the benefit she derived from her involvement, being the value of the cheques paid to her by the Forma-Con Supplier Respondents.

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The Fund Cycling Scheme

[246] The Trustee makes no allegation of any fund cycling scheme involving Forma-Con.

[247] The Monitor conceded that it does not have information connecting Anastasio, Coccia and Caruso to the BCCL transfers to 230 as part of the alleged fund cycling scheme and it does not seek to hold them liable in respect of those transfers.

[248] The Monitor seeks to hold only John Aquino and 230 liable for the funds withdrawn from BCCL through the alleged fund cycling scheme.

[249] The Monitor submits that the transfers from BCCL directly to 230 during the Bondfield review period are part of John Aquino's overall pattern of improper removal of funds from BCCL. Specifically, the Monitor asserts that John Aquino removed significant sums from BCCL and placed them in 230. Then, he went further to deceive BCCL's creditors by disguising the payments that he received through the alleged fund cycling scheme. Specifically, he would create a false sense of corporate liquidity in BCCL for a period of time, at year end, when stakeholders were more likely to review its financial status. He did this by contributing money to BCCL late in the year, under the guise of capital injections, which he also characterizes as shareholder loans, and then, early in the following year, he would return the funds to 230 for his own benefit. The Monitor asserts that these steps were being taken during the same time period during which the false invoicing scheme was underway, and they helped to mask the impact of that scheme on Bondfield's liquidity and financial strength, and on Bondfield's creditors.

[250] This assertion is supported by John Aquino's own evidence. In his affidavit sworn June 14, 2020, John Aquino states: "capital injections were advanced to BCCL annually in or around … December on a temporary basis in order to increase the cash on hand and working capital of BCCL for the purposes of increasing the borrowing and bonding capacity of BCCL … I had understood that bonding companies required a financial snapshot of BCCL at the beginning of the fiscal year to assess the condition and financial security of the company. … Bondfield group would submit to lenders, amongst others, a financial snapshot as of the beginning of the year, which portrayed a more favourable and positive outlook as a result of the Capital Injections."

[251] The Monitor argues that any payment to BCCL by John Aquino, via 230, and then repaid to 230 by BCCL, was made with BCCL funds transferred to 230 at undervalue, both inside and outside of the Bondfield review period. According to the Monitor's reports, BCCL made transfers out to 230 totalling $14,029,369 that fell squarely within the Bondfield review period. However, the Monitor's reports show that there were additional transfers from BCCL to 230 totalling $9,507,544 made prior to the Bondfield review period. The Monitor does not claim any damages in respect of, or a return of, these pre-review period transfers, but asserts that they are relevant to John Aquino's claims for offsets for any amounts owing by him in respect of the transfers between 230 and BCCL during the Bondfield review period, and they are relevant to showing a pattern of illegitimate transfers from BCCL to 230.

[252] Of the $14,029,369 transferred from BCCL to 230 during the Bondfield review period, $2,000,000 was transferred within the first year of the commencement of the *CCAA* proceedings.

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John Aquino signed a cheque for payment of $2,000,000 to 230 on April 6, 2018. Accordingly, it constitutes a transfer at undervalue regardless of the intent of the payment, if there was no consideration for the transfer.

[253] The Monitor asserts that the books and records for BCCL are not consistent with any alleged entitlement of John Aquino to the funds received from the false invoicing scheme or the alleged fund cycling scheme, with the possible exception of certain limited bonus payments or legitimate shareholder loan amounts. The Monitor further asserts that any compensation or shareholder loan amounts that John Aquino alleges were legitimately paid by BCCL to him via 230 are only a small portion of the overall funds the Monitor seeks to recover.

[254] The Monitor further asserts that the core of a transfer at undervalue claim is an absence or diminution in value, and that in the case of monetary transfers without consideration, the transfer at undervalue is equal to the amount of the funds removed. To the extent that John Aquino seeks to claim that "value" was provided to Bondfield as a result of the inflows from 230 to BCCL in the Bondfield review period, the Monitor contends that it is also relevant to consider the effect of transfers outside the Bondfield review period. It asserts that the cycle of outflows and inflows is all part of the same pattern or series of transactions. As such, the value provided to BCCL through any inflows from 230 during the Bondfield review period can only be assessed in light of their effects on the totality of the schemes.

[255] The outflows from BCCL to 230 within the Bondfield review period were $14,029,369. The inflows to BCCL from 230 within the Bondfield review period amount to $17,300,000. John Aquino claims to be entitled to a credit of $17,300,000 against outflows from BCCL during the Bondfield review period without any reference to the value in the transfers from BCCL to 230 prior to the Bondfield review period. He asserts that the $17,300,000 that 230 loaned to BCCL came from his own funds or funds that he borrowed specifically for the purposes of lending to BCCL to improve its financial situation. Within the Bondfield review period, accounting for all ins and outs, 230 is in a net positive position at the end of the period and appears to be owed $3,270,631. The Monitor does not dispute this point.

[256] The Monitor asserts, however, that because it has no knowledge of any significant source of funds that John Aquino had outside of Bondfield, it is probable, based on information available to it, that any funds flowing in from 230 to BCCL originated from funds removed from BCCL, whether through the alleged fund cycling scheme, the false invoicing scheme, or otherwise. Therefore, any alleged capital injection made by 230 to BCCL was made, at least in part, with funds transferred by BCCL to 230 for no consideration, and any return of those funds by BCCL to 230 would be a transfer at undervalue. The Monitor asserts that when the totality of the transfers from BCCL to 230 before and during the Bondfield review period is considered, it is apparent that the transfer of funds from BCCL to 230 far exceeds the transfers from 230 into BCCL, even if a part of those transfers includes John's own funds (e.g., Christmas bonuses and salary). The Monitor's report shows that the total funds transferred from BCCL to 230 between 2012 and 2018 is $23,493,287.

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[257] In this regard, the Monitor also relies on Ralph's evidence that John Aquino's only source of income is the Bondfield Group. It also relies on John Aquino's evidence on a motion for a Mareva injunction in these proceedings, in which he stated that he had insufficient funds to support his lifestyle expenses of $60,000 per month.

[258] The Monitor's argument raises two issues. The first is whether it has met its onus to show that most of the transfers from BCCL to 230 within the Bondfield review period were transfers for which no consideration was provided. The second is whether the Monitor can review the transactions in the pre-Bondfield review period for the purpose of determining damages during the Bondfield review period.

a) Has the Monitor demonstrated that the transfers from BCCL to 230 during the Bondfield review period were transfers at undervalue?

[259] The Monitor asserts that it is "probable", based on information available to it, that any funds flowing in from 230 to BCCL between 2012 and 2018 originated from funds removed from BCCL, whether through the alleged fund cycling scheme, the false invoicing scheme, or otherwise.

[260] It asserts that the books and records of BCCL are not consistent with any alleged entitlement of John Aquino to the funds received through the alleged fund cycling scheme or the false invoicing scheme with the exception of certain limited bonus payments to John Aquino, and that any alleged employment compensation or shareholder loan amounts are only a small portion of the overall funds forming part of the fund cycling scheme.

[261] John Aquino asserts that the Monitor has not met its onus to show that the amounts transferred by BCCL to 230 during the Bondfield review period were transfers at undervalue.

[262] John Aquino asserts that the payments from BCCL to 230 during the Bondfield review period, in the total amount of $14,029,369, were not transfers at undervalue because they were payments made in the ordinary course of business. He asserts that these payments include Christmas bonuses of $678,000 on December 19, 2014, $734,500 on December 17, 2015, and $565,000 on December 21, 2016, for a total of $1,977,500. Further, he asserts that the payments also include repayments of loans temporarily made to BCCL in the form of capital injections.

[263] In his testimony, Mr. Micciola, a former Controller employed by BCCL, stated that the Christmas bonuses described by John Aquino in his testimony were in fact paid to John Aquino. Mr. Micciola provided documentary evidence in support of these payments in the form of copies of the cheques, one for each of the said Christmas bonuses paid. Also attached to Mr. Micciola's affidavit are records of deposit showing that the cheques were deposited into the bank account for 230.

[264] John Aquino, Mr. DiPede, and Mr. Micciola all gave evidence that Christmas bonuses were discussed between Steven, John Aquino and Mr. DiPede and paid in the ordinary course of business. Ralph, John Aquino and Steven would sign Christmas bonus cheques. They also testified that compensation payable to some employees of the Bondfield Group was paid to their holding companies as opposed to them directly.

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[265] Mr. Micciola and John Aquino gave evidence that, like John Aquino, Steven was paid a Christmas bonus on or about the very same dates in 2014, 2015 and 2016, in the amounts of $350,000, $350,000 and $250,000, respectively, and that John Aquino and Steven discussed and approved the Christmas bonuses. Ralph deposed that he was not aware of the Christmas bonuses.

[266] John Aquino also asserts that he made loans to BCCL from time to time and BCCL repaid the loans. He states that these temporary loans were known to Ralph and Steven, as well as Mr. DiPede, who carried out the transfers of funds.

[267] For example, in his June 14, 2020 affidavit, he states that in March 2018 he borrowed $7,500,000, which he then lent to BCCL, via 230, and that $5,500,000 of that loan was recorded in his shareholder loan account with the Bondfield Group at that time. The bank statement for 230 shows funds of $12,744,239 being deposited into the account for 230 at that time. John Aquino says that these are funds loaned from Cameron Stevens Mortgage Capital to himself and a co-borrower. Subsequent withdrawals from 230 were made on each of March 10, 2018, March 17, 2018, and March 20, 2018, in the amounts of $4,000,000, $2,000,000 and $1,500,000, respectively, for a total amount of $7,500,000. John Aquino also produced copies of corresponding cheques from 230 to BCCL on the same dates in the same amounts. He asserts that these loans were part of the $17,300,000 advanced by 230 to BCCL during the Bondfield review period. He also points to the CHS Report for evidence that $5,500,000 was added to John Aquino's shareholder loan account in March 2018 in respect of the March 10, 2018 loan of $4,000,000 and the March 20, 2018 loan of $1,500,000. There is no evidence of the $2,000,000 loan having been recorded as a shareholder loan, but John Aquino's evidence is that it was repaid to 230 on April 6, 2018. That transfer is consistent with the Monitor's records. John Aquino asserts that this $2,000,000 payment from BCCL to 230 cannot be a transfer at undervalue as alleged by the Monitor because it was clearly a repayment of a loan by 230 to BCCL.

[268] John Aquino also submits that 230 made loans to BCCL in March 2016 and on June 22, 2017 in the amounts of $1,000,000 and $500,000, respectively, and that these loans are also recorded in his shareholder loan account as confirmed in the CHS Report. Accordingly, John Aquino asserts that the Monitor has not proven that the alleged Bondfield impugned transfers from BCCL to 230 as part of the alleged fund cycling scheme were transfers at undervalue because John Aquino can show that there was consideration for these transfers.

[269] I find that the Monitor has not adduced sufficient direct or circumstantial evidence to show that the amounts transferred to 230 by BCCL during the Bondfield review period were transfers at undervalue for which there was no consideration.

b) May the Monitor review transactions prior to the Bondfield review period?

[270] The Monitor only seeks to recover $14,029,369 (13,985,798 CAD + 35,030 USD), which represents the total transfers out of BCCL and into 230 during the Bondfield review period. The Monitor argues that the inflows from 230 to BCCL, which the Monitor and John Aquino agree total $17,300,000, are entirely offset by the absence of value in all pre-Bondfield review period outflows. In other words, even if some of the funds transferred by 230 to BCCL during the

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Bondfield review period were legitimately owned by 230, the value of the funds transferred by BCCL to 230 at undervalue, over the entire period from 2012 to 2018, far exceeds any funds that 230 could claim as legitimately its own.

[271] Notwithstanding that courts tend to deal with timelines under the *BIA* in a strict fashion, the Monitor submits that taking into account the distribution of funds from BCCL to 230 prior to the Bondfield review period to determine whether value was provided is consistent with the ordinary treatment of the repayment of debts and the application of the "rule in Clayton's case … sometimes referred to as the 'first-in, first-out' rule. Under this rule, where a debtor borrows successive amounts of money, each repayment will apply against the oldest outstanding debt, unless the debtor specifies otherwise": *Dhawan v. Shails et al.*, 2018 ONSC 7116, 85 B.L.R. (5th) 294 (Div. Ct.) (para. 55).

[272] The *BIA* sets out a complete framework in ss. 95 and 96, which is aimed at ensuring fairness and predictability: Dr. Janis P. Sarra, The Honourable Geoffrey B. Morawetz, and The Honourable L.W. Houlden, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto: Thompson Reuters, 2019) at 610. Most cases that deal with the statutory review periods do so to determine whether a transfer occurred within that period. Courts deal with these timelines in a strict fashion; once a transfer is established to have occurred outside the review period, it is excluded from the analysis: *Montor Business Corp.*

[273] I have not been provided with any authority in support of a monitor's or a trustee's authority to review transactions outside of the five-year review period prescribed by the *BIA* for the purposes of establishing the source of funds allegedly transferred within the review period. I do not see a principled basis on which such a review should be permitted, especially in this case where I find that the Monitor has not proven that the transfers that occurred in the pre-Bondfield review period between BCCL and 230 were, in fact, transfers at undervalue for which there was no consideration.

[274] There is no evidence of tracing the payments from BCCL to 230 during the pre-Bondfield review period with any explanation of the purpose or lack of purpose or evidence of consideration or lack of consideration. The Monitor merely submits that "it is probable", based on information available to it, that the funds flowed into 230 from BCCL as part of the false invoicing scheme or the alleged fund cycling scheme. If indeed some of the funds originated from the Bondfield false invoicing scheme, it would appear that the Monitor is attempting a double recovery of those amounts.

DISPOSITION

A. The Bondfield Application

[275] In light of my finding that BCCL and the Bondfield Respondents were not acting at arm's length in respect of the Bondfield impugned transactions, s. 96(1)(b) of the *BIA* is engaged.

[276] Section 96(1)(b)(ii) of the *BIA* encompasses a transaction that occurred within five years prior to the date of the commencement of the *CCAA* proceedings, which I have found is April 3,

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2019, if it intended to defraud, defeat or delay a creditor. The evidence establishes that all of the Bondfield impugned transactions undertaken as part of the false invoicing scheme were made with an intent to defraud, defeat or delay creditors and are therefore brought within s. 96(1)(b)(ii).

[277] Accordingly, pursuant to s. 96 of the *BIA*, the payments by BCCL made in respect of the false invoices during the Bondfield review period, which I find to be April 3, 2014 to April 3, 2019, in the total amount of $21,807,693, are transfers at undervalue. The Bondfield Respondents, each of which or whom was either a party or a privy to the transfers are ordered to pay, on a joint and several liability basis (excepting Coccia), to the Monitor $21,807,693. This amount is the difference between the monies paid by BCCL to the BCCL Supplier Respondents and the value of the services or materials provided by them to BCCL, which I found to be nil. As noted, Coccia's liability is limited to $88,008.

[278] The Monitor has not met its onus to show that any of the Bondfield impugned transactions as they relate to the alleged fund cycling scheme are transfers at undervalue within s. 96(1)(b)(ii). Accordingly, the Monitor is not entitled to recover 13,985,743 CAD and 35,030 USD allegedly transferred as part of a fund cycling scheme.

B. The Forma-Con Application

[279] In light of my finding that Forma-Con and the Forma-Con Respondents were not acting at arm's length in respect of the Forma-Con impugned transactions, s. 96(1)(b) of the *BIA* is engaged.

[280] Section 96(1)(b)(ii) of the *BIA* encompasses a transaction that occurred within five years prior to the date of the first bankruptcy event, which I have found is December 19, 2019, if it intended to defraud, defeat or delay a creditor. The evidence establishes that all of the Forma-Con impugned transactions undertaken as part of the false invoicing scheme were made with an intent to defraud, defeat or delay creditors and are therefore brought within s. 96(1)(b)(ii).

[281] Accordingly, pursuant to s. 96 of the *BIA*, the payments by Forma-Con made in respect of the false invoices during the Forma-Con review period, which I find to be December 19, 2014 to December 19, 2019, in the total amount of $11,366,890, are transfers at undervalue. The Forma-Con Respondents, each of which or whom was either a party or privy to the transfers, are ordered to pay, on a joint and several liability basis (excepting Coccia and 664 Ontario), to the Trustee $11,366,890. This amount is the difference between the monies paid by Forma-Con to the Forma-Con Supplier Respondents and the value of the services or materials provided by them to Forma-Con, which I found to be nil. As noted, Coccia's liability is limited to the value of the cheques paid to her by the Forma-Con Supplier Respondents.

[282] 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.

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Set Off

[283] John Aquino submits that, based on the CHS Report, he has made shareholder loans in the amount of $11,900,000. He asserts that if he is found liable for any of the impugned transactions, he should be entitled to set off such damages against this shareholder loan amount. He has not provided evidence to establish an entitlement to legal or equitable set off in the context of these insolvency and bankruptcy proceedings. Such relief is denied.

[284] Although Anastasio claims that each of John Aquino, Ralph and Steven were aware of and agreed that he would be paid a fee of 3,750,000 USD for his services relating to the Deutsche Bank term sheet, he has provided no documentary or corroborating evidence in support of his alleged claim against the Bondfield Group in this amount. In John Aquino's affidavit sworn July 27, 2020, he states that Anastasio made an introduction at Deutsche Bank, but he makes no mention of any fee owing to Anastasio for his services. Anastasio has not established an entitlement to legal or equitable set off. Accordingly, I find that Anastasio has no right of set off in this amount as against his liability for the Bondfield impugned transactions and the Forma-Con impugned transactions.

Costs

[285] The parties are strongly encouraged to agree on the matter of costs. If they cannot, they may arrange a 9:30 am scheduling appointment before me to set a date for costs submissions.

Dietrich J.

Released: March 19, 2021

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CITATION: Ernst & Young Inc. Inc. v. Aquino, 2021 ONSC 527
COURT FILE NOs.: CV-19-630908-00CL
CV-20-00636754-00CL
DATE: 20210319

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Moving Parties

– 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.

Responding Parties

AND BETWEEN:

KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Moving Parties

– 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.

Responding Parties

REASONS FOR DECISION

Dietrich J.

Released: March 19, 2021

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Appendix “C”

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

2022 ONCA 202 (CanLII)

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

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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)

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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.

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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*").

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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.

[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".

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[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.

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(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.

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[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?

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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

[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."

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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
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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

[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".

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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.

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[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.

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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]

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

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[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

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> 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.

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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

[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.

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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

[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.

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> 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.

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> 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.

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> 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.

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"[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

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

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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

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

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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.

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[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.

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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]

[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.

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- 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

[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, 2020 CanLIIDocs 3598.

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> 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.

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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

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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.

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[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.

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[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.

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[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.

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[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

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

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– 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]

[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.

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[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, except in so far as any claim for set-off or compensation is affected by the provisions of this Act

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

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> 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.

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$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

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

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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.

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[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

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

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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.

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(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]

[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.

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[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-

[106] Decision Below, at para. 196.

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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.

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

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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."

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Appendix “D”

2024 SCC 31 (CanLII)

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)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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2024 SCC 31 (CanLII)

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

2024 SCC 31 (CanLII)

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

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.

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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)

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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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*").

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[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

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.

[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.

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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.

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[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

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.

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[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

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.

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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

> **(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.

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[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*

(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).

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[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

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.

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[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

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.

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[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

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.

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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

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

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(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*

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

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[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

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

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[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.

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)*

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[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

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 for the particular purpose or defence at issue" (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.

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[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:

> 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

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).

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(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