File No. _______

# IN THE SUPREME COURT OF CANADA

**(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

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

**APPLICANTS**
(Appellants)

-and-

**ERNST & YOUNG INC.**, in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited, and **KSV KOFMAN INC.**, in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

**RESPONDENTS**
(Respondents)

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## APPLICANT'S MEMORANDUM OF ARGUMENT

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## MEMORANDUM OF ARGUMENT

## PART I – OVERVIEW AND STATEMENT OF FACTS

1. On November 12, 2019, Ernst & Young Inc., in its capacity as court-appointed monitor ("Monitor") of Bondfield Construction Company Limited ("Bondfield"), commenced an application as against, *inter alios*, all of the herein applicants: John Aquino, 2304288 Ontario Inc. ("230"), Marco Caruso, Giuseppe Anastasio and Lucia Coccia-Canderle (collectively "Applicants"). In its application, the Monitor sought an order, pursuant to Section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*"), as incorporated into the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*") by Section 36.1 thereof, declaring that a number of transactions which occurred between the period of April 3, 2014 and April 3, 2019 ("Impugned Transactions") were "transfers at undervalue", as statutorily defined, and thus void as against the Monitor. Concomitant with this declaration, the Monitor also sought an order requiring the Applicants, as "privies" to the Impugned Transactions, to pay back to Bondfield the full value of these Impugned Transactions. In other words, the Monitor sought to hold the Applicants liable under this sole theory of liability, on a joint and several basis, in the aggregate amount of approximately $33 million. *See* Monitor's Notice of Application, dated November 12, 2019, found at Tab 3-A of the Applicants' Record.

2. On February 21, 2020, KSV Kofman Inc., in its capacity as trustee-in-bankruptcy ("Trustee") of 1033803 Ontario Inc. and 1087507 Ontario Limited (collectively "Forma-Con"), commenced its own application as against the Applicants, *inter alios*. Similar to the Monitor's application, the Trustee sought an order, pursuant to Section 96 of the *BIA*, declaring that a number of transactions occurring between the period December 19, 2014 and

December 19, 2019 ("Trustee's Impugned Transactions) were void as against the Trustee on the basis of being "transfers at undervalue", with the concomitant request that the total value of the Trustee's Impugned Transactions be paid by the Applicants, as privies to these transactions, back to Forma-Con. In other words, under this sole theory of liability, the Trustee sought to obtain judgment as against the Applicants, on a joint and several basis, in the aggregate amount of approximately $11.4 million. *See* Trustee's Notice of Application, issued February 21, 2020, found at Tab 3-B of the Applicants' Record.

3. Pursuant to court order, the two applications were ordered to be heard together. Prior to the applications hearing, the Monitor bifurcated its claim to damages into two discrete categories, one of which it styled the "Fund Cycling Scheme", which was a claim against only John Aquino and 230 and in the amount of approximately $14 million, whereas the other category it styled the "False Invoicing Scheme", which was a claim as against all Applicants, with claimed monetary damages in the amount of approximately $21.8 million. The significance of this bifurcation was that, in the False Invoicing Scheme, since none of the Impugned Transactions occurred within one year of the "initial bankruptcy event" (*i.e.*, April 3, 2019), a different (and more onerous test) applied to those Impugned Transactions which predated the initial one-year review period. *See* Monitor's Seventh Supplement to the Phase II Investigation Report of the Monitor, dated August 18, 2020, found at Tab 3-C of the Applicants' Record.

4. Needless to say, several defences were raised by the Applicants and argued before Justice Dietrich of the *Ontario* Superior Court of Justice, who was the Judge at first instance who heard these applications. However, since the Monitor's claim to damages under the

"Fund Cycling Scheme" was dismissed in its entirety by the learned applications judge[1], we will focus only on the False Invoicing Scheme common to both the Monitor's and Trustee's applications. To simplify matters further, for the purposes of this leave application, we will focus on only one defence. This defence went as follows: Assuming in *arguendo* that the Impugned Transactions in both applications were non-arm's length, and recognizing the accepted fact that <u>all</u> of the Impugned Transactions in both applications predated by more than one year their respective dates of each initial bankruptcy event, subsection 96(1)(b)(ii) of the *BIA* was implicated. Since both the Monitor and the Trustee <u>expressly</u> disavowed any reliance on subsection 96(1)(b)(ii)(A) of the *BIA* (*i.e.*, that the "debtor was insolvent at the time of the transfer or was rendered insolvent by it"), this meant that the only statutory provision which was applicable was subsection 96(1)(b)(ii)(B) of the *BIA*, which reads as follows: "the debtor intended to defraud, defeat or delay a creditor." In other words, both the Monitor and the Trustee had the burden of proving, on the civil balance of probabilities standard, that the "debtors" (*i.e.*, Bondfield in the Monitor's application, and Forma-Con in the Trustee's application), subjectively intended to "defraud, defeat or delay" their creditors. If they could not satisfy this test, their entire claims would collapse to *nil*. *See*, generally, paras. 112 to 116 of *Ernst & Young Inc.* v. *Aquino*, 2021 ONSC 527 ("*Dietrich Decision*").

5. However, since the "debtors" in the cases at bar were corporations, both the Monitor and the Trustee expressly relied on the intentionality of John Aquino, who was at the relevant times the President and a "directing mind" of each of the corporate debtors. In other words, the Monitor and the Trustee asserted that John Aquino's alleged fraudulent intentionality vis-à-vis Bondfield's and Forma-Con's creditors ought to be attributed to the corporate debtors

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[1]As there was no appeal by the Monitor from this ruling, this issue is now *res judicata.*

themselves for the purposes of subsection 96(1)(b)(ii)(B) of the *BIA*. This of course implicated the venerable common law doctrine of corporate attribution. In particular, pursuant to the seminal decision of the Supreme Court of Canada in *Canadian Dredge & Dock Co.* v. *The Queen*, [1985] 1 S.C.R. 662 (per Estey, J., for the unanimous Court) and its progeny (which will be discussed in some detail below), it was asserted by the Applicants that, on account of the allegations made against John Aquino, his alleged fraudulent intentionality could not, at a matter of law, be attributed to the corporate debtors themselves. Accordingly, if John Aquino's alleged fraudulent intentionality could not be so attributed, the Monitor and Trustee would fail on their subsection 96(1)(b)(ii)(B) of the *BIA* claims. This was one of the main issues that Justice Dietrich had to decide. *See*, generally, paras. 205 to 209 of the *Dietrich Decision*.

6. At para. 210 of the Dietrich Decision, the learned applications judge stated as follows: "The corporate attribution doctrine has yet to be applied in the context of s. 96 of the *BIA*." After reviewing the relevant case law, including of course *Canadian Dredge, supra*, Justice Dietrich stated, in relevant part at para. 217, as follows: "If the *Canadian Dredge* criteria were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations." After further review of the applicable case law, Justice Dietrich stated, in relevant part at para. 222, as follows: "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*."

7. However, rather than ending her analysis of this issue then and there, and thus dismissing the applications in their entirety, Justice Dietrich then considered both the principles of statutory interpretation and policy considerations to determine whether "the

*Canadian Dredge* formulation of attribution of intent should not apply in cases involving s. 96 of the *BIA*." (*See* para. 226.) After conducting this analysis, the learned applications judge ruled at para. 229 as follows: "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." (Emphasis added.)

8. Having so ruled, Justice Dietrich ultimately found the Applicants, on a joint and several basis, liable to the Monitor in the amount of $21,807,693[2], and further found the Applicants, also on a joint and several basis, liable to the Trustee in the amount of $11,366,890[3]. Accordingly, with the exception of Lucia Coccia-Canderle, the Applicants were adjudged liable to pay to the Monitor and the Trustee monetary damages in the aggregate amount of $33,174,583. On top of this already staggering amount, Justice Dietrich subsequently ordered the Applicants, again on a joint and several basis[4], to pay costs to the Monitor in the amount of $2,732,885.14 (plus HST) and costs to the Trustee in the amount of $669,100.24 (HST included). *See* paras. 30 and 54 of *Ernst & Young Inc.* v. *Aquino*, 2021 ONSC 7514 ("*Costs Award*"). The Applicants timely appealed to the Court of Appeal for Ontario the *Dietrich Decision* and, in the case of John Aquino and 230, have also sought leave to appeal to the Court of Appeal for Ontario the *Costs Award*[5].

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[2]Lucia Coccia-Canderle's liability was, however, limited to $88,008.

[3]Lucia Coccia-Canderle's liability was limited to the value of the cheques paid to her by the Forma-Con supplier respondents.

[4]Lucia Coccia-Canderle's costs were limited to $13,000 for the Monitor's application and $5,000 for the Trustee's application.

[5]As per agreement between the involved parties, this leave to appeal the *Costs Award* has been held in abeyance pending the release of the Court of Appeal decision. Accordingly, there is no judgment in regards thereto.

9. A total of seven appeals were made from the *Dietrich Decision* and, as per court order, were ordered to be heard together before the same three-member panel of the Court of Appeal. The appeals were heard on September 1 and 2 of 2021. At the conclusion of argument, the panel took the matters under reserve. After more than a six-month reserve, the Court of Appeal rendered its much anticipated decision, which is cited as follows: *Ernst & Young Inc.* v. *Aquino*, 2022 ONCA 202 (per Lauwers, J.A., for the unanimous Court) ("*CoA Decision*"). The Court of Appeal dismissed all the appeals, and thus upheld the judgments rendered by Justice Dietrich in the court below.

10. At para. 51 of the *CoA Decision*, Lauwers, J.A. identified the issue at hand as follows:

> 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*] 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.

11. In the very next paragraph, Justice Lauwers continued by stating the following, in relevant part: "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 in construing and applying the *BIA*?" At para. 58 of the *CoA Decision*, Justice Lauwers continued as follows: "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". At para. 70, Justice Lauwers continued as follows: "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." (Emphasis added.)

12. At para. 74, Justice Lauwers stated as follows: "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." (Emphasis added.) Thereafter, at paras. 78 and 79 of the *CoA Decision*, Justice Lauwers concluded his analysis of this issue as follows:

> 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?
>
> 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-Con 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."

(Emphasis added.)

13. Having thus rejected this argument, together with all other arguments raised on appeal, the Court of Appeal upheld the *Dietrich Decision* in its entirety.

14. The Applicants now seek leave of the Supreme Court of Canada to appeal the decision rendered by the Court below.

**PART II – QUESTION IN ISSUE**

15. For the purposes of this leave application, the sole question in issue is as follows: Was the Court of Appeal entitled to "reframe" the common law corporate attribution doctrine, as formulated by the Supreme Court of Canada in *Canadian Dredge* and its progeny, within the bankruptcy context (*i.e.*, s. 96 of the *BIA*), in the way that it did? For the reasons to be given herein, it is respectfully submitted that the Court of Appeal erred in law in so doing, which error will have significant and unpredictable ramifications throughout Canada within the bankruptcy and insolvency contexts. Accordingly, the decision below should be reversed, with judgments being granted in favour of the Applicants dismissing the applications brought forth by the Monitor and the Trustee in their entirety.

**PART III – STATEMENT OF ARGUMENT**

16. We start our analysis with *Canadian Dredge, supra*. Justice Estey, for the Court, ruled in relevant part (at pages 712-714) as follows:

> 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 the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.
>
> [...] Whether this is so or not, in my view <u>the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to</u>

> <u>him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.</u>

(Emphasis added.) An important point to note here is the fact that an "outer limit" to corporate attribution was delineated by the Supreme Court on the basis of <u>logical coherence.</u> In particular, as a matter of logic, once an officer or director of a company has gone so rogue that he or she is engaging in activities that "intentionally defraud" the company that they purport and are bound to serve, then that person simply cannot be considered its "directing mind". To do so would be, as Justice Estey himself characterized, "unrealistic in the extreme".

17. We next consider the Supreme Court of Canada decision in *Deloitte & Touche* v. *Livent Inc (Receiver of)*, 2017 SCC 63 (per Gascon and Brown, JJ., for the majority). In relevant part, the Supreme Court (at para. 100 therein) ruled as follows:

> 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. <u>To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met:</u> (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 (pp. 681-82 and 712-13).

(Emphasis added.) There are a couple of highly significant points to take from the foregoing passage. *First*, the Supreme Court extended and applied the corporate attribution doctrine to the civil context. In that case, a court-appointed monitor under the *CCAA*, on behalf of the corporate debtor (*i.e.*, Livent Inc.), had brought suit against the debtor's former auditor for negligence. Any judgment that the monitor could obtain from the former auditor would be

for the benefit of the debtor's creditors. *Second*, the Supreme Court made clear that in Canada, the only mechanism available by which the fraudulent intent (*i.e.*, state of mind) of an employee can be attributed to his or her corporate employer is through the corporate attribution doctrine, as defined in *Canadian Dredge*. In other words, recourse to any other theory of liability, such as *respondeat superior*, was foreclosed.

18. The last in the trilogy of cases decided by the Supreme Court of Canada dealing with the corporate attribution doctrine is *Christine DeJong Medicine Professional Corporation* v. *DBDC Spadina Ltd. et al.*, 2019 SCC 30. Justice Brown (for the unanimous Court) ruled in relevant part as follows:

> In view of the statement of the majority at the Court of Appeal that this Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, invited a "flexible" application of the criteria stated in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 for attributing individual wrongdoing to a corporation, we respectfully add this. 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, 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. The appeal is allowed, with costs throughout.

(Emphasis added.) It is hard to imagine a more unequivocal and clear statement as that made by the Supreme Court in the foregoing passage. Accordingly, when the Supreme Court stated that the criteria outlined in *Canadian Dredge* "must always be met", then the only plausible meaning that can be applied to that statement is that it was meant to apply universally to all cases involving corporate attribution. No exceptions whatsoever.

19. In the cases at bar, Justice Dietrich ruled, in relevant part at para. 217 of the *Dietrich Decision*, as follows: "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 [Bondfield] and Forma-Con and they did not so do." Accordingly, based on the common law corporate attribution doctrine and the fact that the learned applications judge accepted the Monitor's and Trustee's positions with regards to the False Invoicing Scheme, attributing John Aquino's alleged fraudulent intent to the corporate debtors was foreclosed as a matter of law.

20. The only "saving grace" that the Monitor and the Trustee had was the claim that section 96 of the *BIA* ousted or modified the common law corporate attribution doctrine. The insurmountable problem, however, that the Monitor and the Trustee ran into with this approach was the fact that the Supreme Court of Canada had already clearly stated the conditions to be satisfied before the common law can be considered altered or ousted by legislative action. These conditions, however, are clearly absent in the cases at bar.

21. In *Heritage Capital Corp.* v. *Equitable Trust Co.*, 2016 SCC 19 (per Gascon and Côté, JJ., for the unanimous Court), the Supreme Court ruled in relevant part as follows:

> [29] In addition, where the legislature expressly creates a statutory exception to a common law principle, that exception should be narrowly construed, as the legislature is assumed not to have intended to change the common law unless it has done so clearly and unambiguously. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, Iacobucci J., writing for the majority, stated:
>
> > To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire &*

> *Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".

(Emphasis added.)

22. In *Owners, Strata Plan LMS 3905* v. *Crystal Square Parking Corp.*, 2020 SCC 29 (per Côté, J., for the majority), the Supreme Court ruled in relevant part as follows:

> [39] The common law forms part of the context in which a legislature enacts statutes, and the legislature is presumed not to have intended to alter or extinguish common law rules in doing so: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39. In addition, when the legislature uses a term that has an established legal meaning, it is presumed to have given the term that meaning in the statute in question: *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20. In the *SPA*, the legislature has granted a strata corporation the power and capacity of a "natural person": s. 2(2). At common law, a natural person is capable of entering into a contract by way of objective conduct which signifies the person's assent to be bound by an agreement. Thus, the legislature is presumed to have intended to grant a strata corporation the power of a "natural person" to contract by way of conduct, and is also presumed not to have intended to alter or extinguish the common law rule in this respect.

(Emphasis added.)

23. Applying the foregoing legal principles to the cases at hand, can it be stated that the Federal Legislature, through its enactment of subsection 96(1)(b)(ii)(B) of the *BIA* (*i.e.*, "the debtor intended to defraud, defeat or delay a creditor"), has ousted or modified through

"irresistible clearness" the common law corporate attribution doctrine? The answer to that question is manifestly "no". The operative word, being "intended", is left completely undefined anywhere within the *BIA*. Though recourse to a dictionary can often be useful, however, it would be of no assistance in this case. Therefore, the only option left is for recourse to the common law corporate attribution doctrine, which of course supplies us with the proper meaning of "intended" within the context of s. 96 of the *BIA*.

24. The Monitor and the Trustee put much emphasis on wider policy considerations, including the claim that the *BIA* is designed to maximize recovery for the debtor's estate for the ultimate benefit of its creditors. These policy considerations were instrumental in convincing Justice Dietrich to formulate the test that she did. However, the Court of Appeal for Ontario, in the decision of *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 (per van Rensburg, J.A., for the unanimous Court), ruled as follows:

> [40] I agree with Speedy. While s. 96 [of the *BIA*] no doubt is a tool to address "asset stripping" by a debtor, as the Monitor contends, a bankruptcy trustee or CCAA monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the section to establish that the transfer in question is void. <u>The point of departure is to consider the specific words used in this section of the *BIA*</u> .
>
> [...]
>
> [48] In conclusion, s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, <u>where its conditions are met</u>. The interpretation of the section must be considered in relation to the remedy that is sought.

(Emphasis added.)

25. Accordingly, as the Court of Appeal in *Urbancorp*, *supra*, made clear, s. 96 of the *BIA* is not some "end all, be all" statutory provision that allows a Monitor or a Trustee *carte*

*blanche* to seek to reverse transactions they consider to be “asset stripping”. The prescribed conditions in s. 96 must first be met, and that of course includes the condition of “intentionality”. On account of the fact that this term is not defined in the *BIA*, but does have a defined legal meaning under the common law, recourse must therefore be had to that defined legal meaning.

26. Having covered the legal arguments that were before both Justice Dietrich and the Court of Appeal, we can now finally address the new test formulated by Justice Lauwers. For ease of reference, this test was formulated as follows: “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 authority – the fraudsters or the creditors?” With all due respect, and as will be demonstrated herein, this test is legally unsound and fundamentally flawed, and should not be sustained.

27. *First*, Justice Lauwers appears to have created a new and third branch of law: *i.e.*, criminal, civil *and* bankruptcy. The differentiation between civil and bankruptcy law is, however, a distinction without a difference. Bankruptcy law is of course part and parcel of civil law. It appears that this supposed “third” branch of law was created in order to escape from the universality requirement stipulated by the Supreme Court in *Christine DeJong*, *supra*: *i.e.*, “minimal criteria that must always be met”. This universality requirement applies with full force in the bankruptcy context, and must be respected and adhered to.

28. *Second*, it is important to note that, in one of the two cases decided by Justice Dietrich, we were dealing with a proceeding under the *CCAA*, and <u>not</u> with a bankruptcy

proceeding *per se*. The two legislative schemes are distinct. In *Montréal (City)* v. *Deloitte Restructuring Inc.*, 2021 SCC 53, the Supreme Court (per Wagner C.J. and Côté J., for the majority), ruled in relevant part as follows:

> [44] The bankruptcy of large companies often resulted in "the entire disruption of the corporation, loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

29. Accordingly, one of the principal rationales offered by Justice Lauwers as to why a distinction should be made in the bankruptcy context (versus the civil context) is inapplicable to the Monitor's herein proceeding. In particular, at para. 77 of the *CoA Decision*, in relevant part, Justice Lauwers stated the following: "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." In a *CCAA* monitorship, unlike a traditional bankruptcy, the possibility remains for the debtor company to be rehabilitated and to resume its normal operations at some future date. It is also important to recall here that, in the case of *Livent Inc.*, *supra*, we were also dealing with a company placed under a monitorship under the *CCAA*, where no distinction was made between civil and insolvency matters.

30. *Third*, the test formulated by Justice Lauwers runs afoul of two fundamental doctrines of the common law: *i.e.*, the doctrine of *stare decisis*, and the doctrine of

incrementalism. In *Canada (Attorney General) v. Confédération des syndicats nationaux* 2014 SCC 49, the Supreme Court (per LeBel and Wagner JJ., for the Court) ruled as follows:

> [24] Of course, the doctrine of *stare decisis* is no longer completely inflexible. As the Court noted in *Bedford*, the precedential value of a judgment may be questioned "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (para. 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (*Bedford*, at para. 46).

31. In the cases at bar, the legal issues remained the same. All that was required to be done was to apply the corporate attribution doctrine within the context of subsection 96(1)(b)(ii)(B) of the *BIA*. In other words, the Court of Appeal was not at liberty to reframe the test for corporate attribution in the way that it did, which effectively ignored binding precedent from the Supreme Court of Canada. This was an error in law.

32. In *Nevsun Resources Ltd.* v. *Araya*, 2020 SCC 5, Justices Brown and Rowe, dissenting in part, though not on this point, stated as follows:

> [225] It is of course open to Parliament and the legislatures to make such a change. Absent statutory intervention, however, the ability of courts to shape the law is, as a matter of common-law methodology, constrained. Courts develop the law *incrementally*. This is a manifestation of the unwritten constitutional principle of legislative supremacy, which goes to the core of just governance and to the respective roles of the legislature, the executive and the judiciary. It also reflects the comparative want of expertise of the courts, relative to the legislature. The legislature has the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts are confined by the record to considering the circumstances of the particular parties before them, and so cannot anticipate all the consequences of a change.
>
> [226] The importance, both practical and normative, of confining courts to making only incremental changes to the common law was stated by this Court in *Watkins*, at pp. 760-61:

> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, <u>based largely on the mechanism of extending an existing principle to new circumstances.</u> While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

(Underlining added; internal citations omitted.)

33. Accordingly, on account of the doctrine of incrementalism, the only change in the law that the Court of Appeal should have recognized and applied was to simply extend the common law corporate attribution doctrine to subsection 96(1)(b)(ii)(B) of the *BIA*. However, instead of implementing this incremental change, the Court of Appeal effectively ousted the corporate attribution doctrine "in the bankruptcy context", and replaced it with something akin to *respondeat superior*. Needless to say, there was nothing incremental about this change; rather, it represented a paradigm shift or, if one prefers, a tectonic shift, in the law.

34. Unless one lives in a parallel universe where up is down and black is white, whenever there is a choice to be made between a "fraudster", on the one hand, and a "creditor", on the other hand, the decision is a foregone conclusion. This was made manifest by Justice Lauwers himself, where (at para. 79), he stated the following: "Permitting the fraudsters to get a benefit at the expense of creditors would be perverse." Accordingly, on a *de facto* basis, if not a *de jure* basis, the "test" reframed by the Court of Appeal is <u>not</u> a test at all. It completely ousts the corporate attribution doctrine, and imposes *de facto* liability

on the corporation regardless of the criteria formulated in *Canadian Dredge*. This is a clear error in law.

35. *En passant*, it is important to remind ourselves of the legal maxim: "Hard cases make bad law." No doubt, the Court of Appeal was troubled by the fact that the Applicants, whom it characterized as "fraudsters[6]", would completely escape liability if the corporate attribution doctrine were applied to prevent the attribution of John Aquino's state of mind to the corporate debtors. However, it cannot be emphasized strongly enough that this predicament arose because the Monitor and the Trustee[7] chose to put all of their proverbial eggs in one very small basket. In other words, had the Monitor and the Trustee sought leave of the Court to pursue the Applicants in a derivative capacity, and thus seek to hold them liable for causes of action such as breach of fiduciary duty, breach of contract or fraud, the corporate attribution doctrine would be inapplicable.

## PART IV – SUBMISSIONS ON COSTS

36. The Applicants ask for their costs.

[6] At no time did either the Monitor or the Trustee seek findings of fraud as against any of the Applicants and, in point of fact, no such findings were ever made by Justice Dietrich. Though John Aquino's state of mind was imputed onto the corporate debtors for the purposes of s. 96 of the *BIA*, it is the corporate debtors themselves, as a matter of law, who have been found to have had this fraudulent intent vis-à-vis the third-party creditors.

[7] Judicial notice can be taken of the fact that both the Monitor and the Trustee are sophisticated parties (*i.e.*, institutional players), with vast expertise in the bankruptcy and insolvency arenas.

## PART V – ORDER REQUESTED

37. The Applicants seek an order granting them leave to appeal to this Honourable Court, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21st day of April 2022

Terry Corsianos and George Corsianos
Counsel for the Applicants

## PART VI – TABLE OF AUTHORITIES

| **Caselaw** | **Paragraph(s)** |
|---|---|
| *Canada (Attorney General) v. Confédération des syndicats nationaux,* 2014 SCC 49 | 30 |
| *Canadian Dredge & Dock Co.* v. *The Queen*, [1985] 1 S.C.R. 662 | 5-7, 15-18, 34 |
| *Christine DeJong Medicine Professional Corporation* v. *DBDC Spadina Ltd. et al.*, 2019 SCC 30 | 18, 27 |
| *Deloitte & Touche* v. *Livent Inc (Receiver of)*, 2017 SCC 63 | 17, 29 |
| *Heritage Capital Corp.* v. *Equitable Trust Co.*, 2016 SCC 19 | 21 |
| *Montréal (City)* v. *Deloitte Restructuring Inc.*, 2021 SCC 53 | 28 |
| *Nevsun Resources Ltd.* v. *Araya*, 2020 SCC 5 | 32 |
| *Owners, Strata Plan LMS 3905* v. *Crystal Square Parking Corp.*, 2020 SCC 29 | 22 |
| *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 | 24, 25 |

| **Statutory Provisions** | |
|---|---|
| Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 96<br>Loi sur la faillite et l'insolvabilité (L.R.C. (1985), ch. B-3, s. 96 | 1, 2, 4-7, 11, 15, 20, 23, 25, 31, 33 |
| Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36.1<br>Loi sur les arrangements avec les créanciers des compagnies (L.R.C. (1985), ch. C-36), s. 36.1 | 1, 17, 28, 29 |

## PART VII – STATUTES AND REGULATIONS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 96

Transfer at undervalue

➉ **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

➉ (a) the party was dealing at arm's length with the debtor and

➉ (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,

➉ (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

➉ (iii) the debtor intended to defraud, defeat or delay a creditor; or

➉ (b) the party was not dealing at arm's length with the debtor and

➉ (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

➉ (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

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

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

➉ Marginal note: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.

➉ 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.

- ❿ R.S., 1985, c. B-3, s. 96
- ❿ 1997, c. 12, s. 79
- ❿ 2004, c. 25, s. 57
- ❿ 2005, c. 47, s. 73
- ❿ 2007, c. 36, s. 43