

Supreme Court of Canada demonstrates flexibility of corporate attribution in the bankruptcy and insolvency context



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Should a corporation be affixed with the fraudulent or other nefarious intent of its directing minds? The answer to this question is of key importance in several contexts where the “intent” of the corporation leads to specific legal consequences.

Two recent cases from the Supreme Court of Canada — *Aquino v. Bondfield Construction Co.*^[1] and *Scott v. Golden Oaks Enterprises Inc.*^[2] — have refined the corporate attribution doctrine and demonstrated that the outcome of the analysis can be entirely different, depending on the context in which the question is asked. In confirming the flexible and purposive analytical framework to be applied, the Supreme Court discussed, for the first time, the application of the doctrine in the bankruptcy and insolvency context, including to the determination of whether the corporation possessed the required intent to defeat creditors under the transfer-at-undervalue provision.

The key takeaways from these decisions are:

- The corporate attribution doctrine must always be applied purposively, contextually and pragmatically, having regard to the context and the purpose of the law under which attribution is sought (or resisted).
- The intent of a person who is a “directing mind” of the corporation will be attributed to the corporation where it is necessary to do so in order to give effect to the purpose of the statutory context. By contrast, attribution will not be appropriate if doing so would undermine or defeat that policy.
- Specifically, when applying the corporate attribution doctrine under section 96 of the *Bankruptcy and Insolvency Act* (the BIA)^[3] — which also applies under the *Companies Creditors’ Arrangement Act* (the CCAA)^[4] — the two traditional exceptions (“fraud” and “no-benefit”) to the doctrine do not apply (*Aquino*).
- In other circumstances, the court can refuse to attribute the knowledge or acts of a

directing mind to a corporation where doing so would undermine the policy or purpose of the law under which attribution is sought — e.g., where attribution of the fraudulent acts of a corporate principal would result in a claim being statute-barred before the corporation (or a trustee-in-bankruptcy) is aware of and has the opportunity to bring the claim (*Scott*).

The doctrine of corporate attribution

The doctrine of corporate attribution allows a court to impute the actions or intent of a corporation's directing mind to the corporation itself in circumstances where the intent of the corporation is relevant to a particular legal consequence.

The test for corporate attribution was first developed in the criminal context in *Canadian Dredge & Dock Co. v. The Queen*.^[5] It provides that a person's fraudulent acts will be attributed to a corporation when two conditions are met:

1. The wrongdoer must be a directing mind of the corporation.
2. The wrongful actions of the directing mind must have been within the sector of corporate operation assigned to him or her.

However, in *Canadian Dredge*, the Court held that attribution is not appropriate where the person acted entirely in fraud of the corporation (the "fraud exception") or where their actions were not for the benefit of the corporation (the "no-benefit exception").^[6] This test was intended to balance the need to hold corporations criminally accountable where appropriate without making them responsible for every criminal act of their employees.^[7]

Subsequently, in *Deloitte & Touche v. Livent Inc. (Receiver of)*,^[8] the Court adapted the corporate attribution test for the civil context, emphasizing that it was "a means by which acts may be attributed to a corporation for the particular purpose or defence at issue."^[9] The Court also qualified the test by recognizing a judicial discretion to refuse to attribute actions to the corporation based on the public interest — i.e., where attribution would undermine the policy of the law under which attribution is sought.^[10] Nonetheless, the Court later, in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*,^[11] held 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."^[12]

Aquino v. Bondfield Construction Co.

In *Aquino*, the Supreme Court considered the corporate attribution doctrine in the context of the need to demonstrate that a transfer at undervalue under section 96 of the BIA was intended to "defraud, defeat, or delay" a creditor. Even though Mr. Aquino, a directing mind of two corporations, had transferred millions of dollars out of the corporations through falsified invoices, the Court declined to apply the fraud and no-benefit exceptions and attributed Mr. Aquino's actions and intentions to the corporations.

In reaching this result, the Court rejected a strict, mechanical application of the corporate attribution doctrine in favour of a "purposive, contextual and pragmatic" approach that requires a court to consider the context and purpose of the law under which attribution is sought. The court may have to tailor the general rule of attribution and its exceptions to the particular legal context in which it is being applied. Jamal J. (writing for the Court) clarified that the Court's brief prior reasons in *DeJong*, where the Court's concern "was to reject the suggestion that courts have unfettered judicial discretion to relax the approach to corporate

attribution based on the *factual circumstances of a case*”,^[13] should not be read as departing from the “longstanding, purposive, contextual and pragmatic approach” to corporate attribution recognized in *Canadian Dredge* and, subsequently, in *Livent*.

On the facts of *Aquino*, this purposive approach involved considering the purpose of section 96 of the BIA as a tool to protect creditors by remedying asset stripping by a debtor and ensuring that improperly transferred assets (or their value) are returned to the debtor for equitable distribution to creditors as a whole. Mechanically applying the fraud and no-benefit exceptions would deny creditors the benefit of this statutory protection and thus undermine the purpose of section 96. For the purposes of determining the “intent” requirement in section 96, therefore, the Court held that a court must determine “simply whether the person was the directing mind and whether their actions were performed within the sector of corporate responsibility assigned to them.”^[14] If this test is met, “the actions, knowledge, state of mind, or intent of the directing mind should be attributed to the corporation, regardless of whether the fraud and no benefit exceptions are engaged.”^[15]

The basis of this determination was specific to the underlying policy of section 96 of the BIA, which would have been defeated if the fraud or no-benefit exceptions had precluded the attribution of Mr. Aquino’s intentions to the corporation. However, the reasoning for this decision is not necessarily limited to BIA restructurings: notably, the Court explicitly rejected the narrow approach of the Court of Appeal, which had held that the fraud and no-benefit exceptions did not apply under the BIA because the corporation was nothing more than a “bundle of assets to be liquidated,” thereby suggesting that the exceptions only did not apply in the context of “liquidating” insolvency proceedings in which the assets of the debtor company are to be entirely distributed to creditors. The Court instead adopted a broad approach, holding that its reasoning also applied in the context of a restructuring insolvency, such as a corporate restructuring under the CCAA, in which some possibility remains for the debtor company to exit the proceeding intact.^[16]

Scott v. Golden Oaks Enterprises Inc.

Applying the same flexible, purposive and pragmatic approach as affirmed in *Aquino*, the Supreme Court of Canada reached the opposite conclusion in refusing to attribute the fraudulent intent of a directing mind to the corporation in *Scott*. In doing so, the Court confirmed that the same test for corporation attribution applies to one-person corporations, or corporations with a sole director, officer and shareholder, as applies to a widely held corporation. In other words, there is no presumption that the intention of a sole director, officer and shareholder will be attributed to a one-person corporation, as such presumption would disregard bedrock concepts of corporate separateness.

Golden Oaks Enterprises Inc. purported to be a legitimate rent-to-own residential property business but was actually a Ponzi scheme in which the company loaned money from investors at unreasonably high rates and paid back those investors by recruiting new investors. Some of the investors participated in the scheme by helping to bring in new investors. When the scheme collapsed, the trustee in bankruptcy brought actions against the participating investors to recover the illegal interest and commissions they were paid by Golden Oaks. The investors argued that the limitation period had expired because the actions were commenced more than two years after the payments were made. They asserted that the sole director, shareholder and officer of the company, Mr. Lacasse, knew of the payments when they were made (because he was operating the fraudulent scheme) and that his knowledge should be attributed to the corporation.

The Court concluded, however, that attributing Mr. Lacasse’s knowledge to Golden Oaks would not promote the purpose of either the discoverability rules in section 5(1) of the

Limitations Act, 2002^[17] or the BIA. The purpose of the discoverability rules is to avoid the injustice of precluding an action before the person is able to raise it. On the facts of *Scott*, attributing Mr. Lacasse's knowledge to Golden Oaks would bar Golden Oaks' claims before the company (or its trustee in bankruptcy) could realistically have advanced the claims. As the Court explained, even though Mr. Lacasse, who controlled Golden Oaks, knew of the illegal payments, he would not have sued the investors at a time when doing so would have revealed the scheme he was orchestrating and profiting from.

The underlying policy of the BIA — which is intended to help preserve and maximize the value of the debtor's assets and to distribute those assets among its creditors equitably — further supported the Court's refusal to attribute Mr. Lacasse's knowledge to the corporation for the purpose of applying the limitation period. Attributing Mr. Lacasse's knowledge to Golden Oaks would deprive the trustee of a remedy that would solely benefit the creditors of the company by increasing the value of the company's assets available for distribution.

Considerations for the future

In *Aquino* and *Scott*, the Supreme Court demonstrated the flexibility of the corporate attribution doctrine, modifying it as needed in the bankruptcy and insolvency context to ensure that the doctrine does not operate to undermine the policy of bankruptcy and insolvency legislation. These decisions should provide welcome comfort to creditors whose recoveries may be impacted by the application of the corporate attribution doctrine to particular circumstances.

For example, the automatic application of the fraud and no-benefit exceptions in *Aquino* could have significantly limited the utility of section 96 of the BIA for creditors. At the same time, in *Scott*, the Court demonstrated that, where the policy of the underlying statutory context would be undermined by applying the corporate attribution doctrine, attribution should be refused.

The Court's rejection of the narrow approach taken by the Court of Appeal in *Aquino* demonstrates that this reasoning applies broadly and must be taken into account in both liquidating and restructuring insolvency proceedings going forward. Also notable is that the Court affirmed the principles of corporate separateness even in the context of one-person corporations.

Corporations will need to be mindful of the possibility that the intentions of particular senior officials could provide a basis for unwinding improper transfers, even where those intentions are not shared by, or even known to, other corporate insiders.

[1] *Aquino v. Bondfield Construction Co.*, 2024 SCC 31.

[2] *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32.

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

[4] R.S.C. 1985, c. C-36.

[5] *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 SCR 662.

[6] *Canadian Dredge*, at p. 704.

[7] *Aquino*, at para. 66, citing *Canadian Dredge*, at p. 701.

[8] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.

[9] *Livent*, at para. 97 (emphasis added).

[10] *Livent*, at para. 104.

[11] *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30.

[12] *DeJong*, at para. 2 (emphasis in original).

[13] *Aquino*, at para. 74 (emphasis added).

[14] *Aquino*, at para. 89.

[15] *Aquino*, at para. 89.

[16] *Aquino*, at paras. 92–96.

[17] S.O. 2002, c. 24, Sched. B.