SCC File No. 38051

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

Appellant

- and -

DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Respondents

- and -

SCHONFIELD INC., IN ITS CAPACITY AS THE COURT-APPOINTED MANAGER OF THOSE COMPANIES LISTED IN SCHEDULE B AND THOSE PROPERTIES LISTED IN SCHEDULE C HERETO

Intervener

- and -

CANADIAN CHAMBER OF COMMERCE

Intervener

FACTUM OF THE INTERVENER, CANADIAN CHAMBER OF COMMERCE

(Pursuant to Rule 42 OF the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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SCHEDULE A - LIST OF RESPONDENTS*

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

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* Companies are numbered in accordance with the Schedule A to the Reasons of the Court of Appeal for Ontario, dated January 25, 2018.

SCHEDULE B - LIST OF WALTON SCHEDULE B COMPANIES
("WSB COMPANIES")

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Developments Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd
13. Fraser Properties Group
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE C - LIST OF WALTON SCHEDULE C PROPERTIES
("WSC PROPERTIES")

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Price Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lawn Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

TABLE OF CONTENTS

PART I—OVERVIEW AND STATEMENT OF FACTS

1. The Canadian Chamber of Commerce (the "**Chamber**") intervenes on the question of when and in what circumstances it is appropriate for courts to find a corporation liable for the wrongdoing of its directing mind.

2. The Chamber's intervention is focused on two principal submissions.

3. ***First***, the criteria set out by this Court in *Canadian Dredge & Dock Inc. v. The Queen* are the *minimum* criteria needed to identify a corporation with its directing mind.[1] These criteria cannot be applied in a "less demanding fashion" in the civil context, as the Court of Appeal for Ontario did here. The Court of Appeal's approach is contrary to prior jurisprudence from this Court, opens the door to an *ad hoc* and arbitrary application of the doctrine, and will increase the risk of litigation faced by Canadian corporations.

4. ***Second***, two years after this Court sought to clarify the doctrine of corporate identification, there remains uncertainty over its application.[2] This Court should take this opportunity to clarify the test set out in *Dredge* as follows: the doctrine will apply where the actions of a directing mind are: (i) within his or her field of operation; (ii) not substantially (as opposed to not "totally") in fraud of the corporation; and (iii) the corporation substantially (as opposed to "partly") benefits from the wrongdoing. This reformulation is consistent with the principles underlying the doctrine, will provide clarity to lower courts, and will protect corporations and innocent shareholders from wrongdoing for which they are not responsible and from which they do not benefit.

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[1] [1985] 1 SCR 662 [***Dredge***].
[2] *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] 2 SCR 855 [***Livent***].

PART II—POSITION RESPECTING THE APPELLANT'S QUESTIONS

5. The test for the doctrine of corporate identification should not be relaxed in civil cases, as the Court of Appeal for Ontario did here. The test should also be clarified to require that the defendant corporation substantially benefit from the alleged wrongdoing.

PART III—STATEMENT OF ARGUMENT

A. THE *DREDGE* CRITERIA SHOULD NOT BE RELAXED IN CIVIL CASES

6. Corporate fraud is becoming increasingly common and complex, both in Canada and internationally. As a consequence, courts are increasingly asked to attribute the conduct of fraudsters to a corporation – either as a shield in defence of a claim or as a sword to extend liability from the individual wrongdoer to the corporation.[3] But in recent years courts in both Canada and the UK have struggled to consistently apply the doctrine of corporate identification in corporate fraud cases, and this Court now finds itself revisiting the doctrine less than two years after last clarifying it.[4] This appeal demonstrates that additional clarification is required.

7. In *Dredge*, a criminal case, this Court held that the doctrine will apply where the action taken by a directing mind of a corporation is: (i) within the field of operation assigned to him or her; (ii) not totally in fraud of the corporation; and (ii) by design or result partly for

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[3] *Livent*; *Hart Building Supplies v. Deloitte & Touche*, 2004 BCSC 55 (CanLII); *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, 2016 ONSC 5313; *Austenville Properties Ltd. V. Joson*, 2016 BCSC 1963.

[4] In the UK, see, for instance, *Jetivia SA v Bilta (UK) Limited (in liquidation)*, [2015] UKSC 23 and *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39.

the benefit of the company.[5] That same year, the Court of Appeal for Ontario held that the same principles apply to civil claims.[6]

8. In *Dredge*, this Court made clear that the purpose of the doctrine was rooted in policy considerations. There is a "social purpose" in holding corporations responsible for the acts of its employees where those acts are designed and carried out for the benefit of the corporation.[7] Where the application of the doctrine would not promote a social purpose, "the rationale for its application fades away."[8]

9. Two years ago, in *Livent*, this Court held that while the test established in *Dredge* "remains the authoritative test for the application of the corporate identification doctrine" in the civil context, courts retain a residual discretion not to apply the doctrine even where the requirements of the *Dredge* test are met:

> The principles set out in *Canadian Dredge* provide a sufficient basis to find that the actions of a directing mind be attributed to a corporation, not a necessary one. As 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.[9]

10. This qualification appears to have introduced uncertainty into the application of the doctrine in civil claims in Canada. In the case under appeal, the majority of the Court of Appeal for Ontario relied on this passage as a justification for adopting a "less demanding" approach to the *Dredge* criteria in civil cases:

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[5] *Dredge* at para 85. Since 2004, corporate criminal liability in Canada has been governed by ss. 22.1 and 22.2 of the *Criminal Code*, RSC, 1985, c C-46.

[6] *Standard Investments Ltd v. Canadian Imperial Bank of Commerce* (1985), 53 O.R. (2d) 663 (C.A.), leave to appeal refused, [1986] S.C.C.A. No. 29. See also *El Ajou v. Dollar Land Holdings plc (1993)*, [1994] 2 All E.R. 685 (C.A.).

[7] *Dredge* at para. 52; *Livent* at para. 102.

[8] *Dredge* at para. 73; *Livent* at para. 103.

[9] *Livent* at para 104.

> [72] In addition, as I develop below, there are sound policy reasons for not adopting the narrower view favoured by my colleague. This is consistent with the approach recently taken by the Supreme Court of Canada in *Livent*. The Court declined to adopt a rigid application of the *Canadian Dredge* criteria in the context of a civil case, emphasizing that the corporate identification doctrine is one having its roots in policy considerations: see *Livent*, at paras. 100-104.
>
> [….]
>
> [79] …. 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.[10]

11. This is an error. In *Livent*, this Court did not apply *Dredge* more flexibly in the sense of requiring a lower threshold for establishing corporate liability. It held that courts may decline to establish corporate liability, even where the *Dredge* criteria are met, where it would not be in the public interest to do so.

12. This Court should confirm that the *Dredge* criteria cannot be relaxed in civil cases in the manner suggested by the Court of Appeal and the Respondents. The *Dredge* criteria are the *minimum* requirements that must be met in order apply the doctrine. While courts retain discretion not to apply the doctrine for policy reasons even where the criteria *are* met, courts cannot relax these requirements, even in civil cases, to apply the doctrine where the *Dredge* criteria are *not* met.

13. There are three policy reasons supporting the Chamber's submission in this regard.

14. ***First***, relaxing the *Dredge* criteria will introduce uncertainty into the application of the doctrine and increase the litigation risk faced by Canadian corporations. This case

[10] *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60 [*DBDC*], para 70. The Respondents endorse this interpretation of *Livent* at para. 105 of their factum.

illustrates the point. It is only after approaching the second and third *Dredge* criteria in a "less demanding fashion" that the Court of Appeal concluded that the DeJong companies "benefitted at least partly" from the Walton's fraud.[11] The Court of Appeal reached this conclusion even though the DeJong companies were victims of the same fraud; any benefit to them was incidental to the Walton's overall scheme; and the innocent investors in the DeJong suffered an overall net loss. Allowing corporations to be wholly liable for misconduct from which they only partly (or even incidentally) benefit will make investors think twice about investing in Canadian businesses that they do not control. Canadian corporate law should encourage investing in Canadian businesses, not increase the risks of such investments.

15. ***Second***, attributing the wrongful conduct of an individual to a corporation harms innocent shareholders and other stakeholders,[12] and should therefore only be done in the clearest of cases. This is particularly the case in a situation like this one, where innocent shareholders did not receive any benefit from the wrongdoing of the directing mind.

16. In *Dredge*, this Court acknowledged that the rationale for applying the doctrine is stronger in the case of single shareholder companies, where there was no risk of harm to innocent investors:

> Where there are several directing minds, and there is no economic identity between the directing minds and the shareholders, it is less realistic to extend

[11] *DBDC*, para. 79.
[12] This Court has noted on several occasions that Canadian corporate law takes into account, at least to some extent, the interests of non-shareholder corporate stakeholders, including creditors, employees, consumers, governments and the environment: see *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 40-45 and *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at paras. 48-51.

> the fiction of identity. The dishonest directing mind is in fact cheating the company and thereby its shareholders and not himself.[13]

However, the Court ultimately held that any harm to innocent shareholders would simply encourage them to better supervise the corporations in which they invest.[14] There is little merit to this justification in cases of complex frauds like this one. Ordinary shareholders – much less other corporate stakeholders who are not shareholders – do not have the same degree of supervision and control over the conduct of a corporation as directors and officers. They are always to some extent reliant on the good faith and proper management of these directors and officers. This is why Canadian corporate law imposes on directors and officers a statutory duty to act in good faith and in the best interest of the corporation.[15] The doctrine of corporate identification should better reflect this reality.

17. ***Third***, the corporate identification doctrine is an exception to the principle that a corporation is a separate legal personality. This principle lies at the foundation of corporate law and any exceptions to it should be clear and limited. The Court of Appeal for Ontario recently confirmed that the other major exception to this principle, piercing the corporate veil, should only apply in the rare circumstance where the corporation "is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."[16] The Court endorsed this stringent test in part on the grounds that it provides "certainty and clarity" to Canadian corporate law.[17] This rationale applies equally to the corporate identification doctrine. There is no principled basis for having a stringent test for piercing

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[13] *Dredge* at para. 64.
[14] *Dredge* at para. 33.
[15] *Canada Business Corporations Act*, R.S.C. 1985, c. C‑44, ss. 122(1).
[16] *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472 at para. 66, leave to appeal to the S.C.C. refused, [2018] S.C.C.A. No. 255.
[17] *Ibid* at para. 83.

the corporate veil on the grounds that it provides certainty and clarity to Canadian corporate law, and then having a more relaxed and discretionary test for the corporate identification doctrine when the same policy reasons apply to both.

B. THE *DREDGE* CRITERIA SHOULD BE CLARIFIED

18. In addition to confirming that the *Dredge* criteria should not be relaxed in civil cases, this Court should also take this opportunity to clarify the criteria by requiring that the corporation *substantially* benefit from the alleged wrongdoing.

19. In 2007, Professor MacPherson observed that "[t]he cases considering the application of the identification doctrine to a civil case… have been marked by inconsistency and confusing judicial analysis."[18] One reason for this inconsistency is that the *Dredge* test is imprecise. In *Dredge*, this Court held that the actions of an individual may be attributed to the corporation if (among other things) the wrongful conduct is "not totally in fraud of the corporation" and is "by design or result partly for the benefit of the company" (emphasis added).[19] The qualifiers "not totally" and "partly" give judges too much latitude to apply the test where it would be unreasonable to do so, as the Court of Appeal did in this case.[20] They also provide little clarity to lower courts in cases such as this one, where a directing mind acts partly for the benefit of a company but also partly in fraud of that company.

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[18] Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta L. Rev. 171, p. 201.

[19] *Dredge*, para. 65; *DBDC*, para. 69. Indeed in their factum on this appeal at para. 118, the Respondents insist that "the conduct must be in total fraud of the corporation with no benefit of any kind to the corporation."

[20] The majority of the Court of Appeal found that the Listed Schedule C Companies "benefitted at least partly from Ms. Walton's actions." *DBDC*, para. 79.

20. The *Dredge* criteria should be clarified so that the wrongdoing of a directing mind may only be attributed to a corporation if the corporation *substantially* benefits from the wrongdoing, and where the conduct at issue is not *substantially* in fraud of the corporation. This would mark an incremental modification to the *Dredge* criteria, one that is consistent with the reasoning in *Dredge* itself. As Justice Estey explained in *Dredge*:

> 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. [emphasis added][21]

21. Conduct that is substantially in fraud of a corporation cannot be to the benefit of that corporation except incidentally, and indeed this Court acknowledged in *Dredge* that the two concepts "raise the same legal issues."[22] Courts should not apply the doctrine where (as here) a corporation is substantially (but not "totally") defrauded and may be said to "at least partly" benefit from the conduct at issue.[23] When that happens, there is no "community of interest" between the directing mind and the corporation and the rationale underlying the doctrine ceases to apply.[24]

22. As such, the Chamber proposes that the test for corporation identification be clarified as follows: courts may apply the doctrine where the action taken by the directing mind is:

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[21] *Dredge*, para. 65.
[22] *Dredge*, para. 47. In *Dredge*, Justice Estey wrote that "nothing is gained from speaking of fraud in whole or in part because fraud is fraud." But his subsequent use of the phrase "total fraud" suggests that fraud can be partial.
[23] *DBDC*, para. 70.
[24] Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171, p. 187.

i. within the field of operation assigned to him or her;

ii. not substantially in fraud of the corporation; and

iii. by design or result, substantially for the benefit of the corporation.

23. The first two criteria justify equating the actions of the individual wrongdoers with the actions of the corporation. They confirm that "[t]heir minds are its mind; their intention its intention; their knowledge its knowledge."[25] The third criterion ensures that liability will only attach where the corporation actually benefitted from the wrongdoing at issue (as opposed to merely being used for the fraudster's benefit).[26] As the UK Court of Appeal held: "It is necessary to identify the natural person or persons having management and control *in relation to the act or omission in point*."[27] Only in these circumstances is it just and equitable to attach liability to a corporation, to the detriment of its innocent shareholders.

24. As this Court held in *Livent*, courts will retain the discretion not to apply the doctrine where it would not be in the public interest to do so.[28] But these criteria should remain the minimum requirements to attribute the wrongdoing of an individual to a corporation, in both criminal and civil cases.

PART IV—SUBMISSIONS CONCERNING COSTS

25. The Chamber requests that no costs be awarded either for or against it.

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[25] *El Ajou v. Dollar Land Holdings plc*, (1993), [1994] 2 All E.R. 685 (C.A.).
[26] *Ibid*, p. 695.
[27] *Ibid*, p. 695.
[28] *Livent*, para. 104.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of May, 2019.

McCarthy Tétrault LLP
Geoff R. Hall/Anu Koshal/Natalie Kolos

PART V—TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced in Factum
Austenville Properties Ltd. V. Joson, 2016 BCSC 1963	6
BCE Inc. v. 1976 Debentureholders, 2008 SCC 69	15
Canadian Dredge & Dock Inc. v. The Queen, [1985] 1 SCR 662	3, 7, 8, 16, 19, 20, 21
DBDC Spadina Ltd. v. Walton, 2018 ONCA 60	10, 14, 19, 21
Deloitte & Touche v. Livent Inc. (Receiver of), [2017] 2 SCR 855	4, 6, 9, 10, 24
El Ajou v. Dollar Land Holdings plc, (1993), [1994] 2 All E.R. 685 (C.A.)	7, 23
Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde, 2016 ONSC 5313	6
Hart Building Supplies v. Deloitte & Touche, 2004 BCSC 55 (CanLII)	6
Jetivia SA v Bilta (UK) Limited (in liquidation), [2015] UKSC 23	6
Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68	15
Standard Investments Ltd v. Canadian Imperial Bank of Commerce (1985), 53 O.R. (2d) 663 (ONCA), leave to appeal to SCC refused, [1986] S.C.C.A. No. 29	7
Stone & Rolls Ltd. v Moore Stephens, [2009] UKHL 39	6
Yaiguaje v. Chevron Corporation, 2018 ONCA 472, leave to appeal to the S.C.C. refused, [2018] S.C.C.A. No. 255	17
Secondary Sources	
Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007), 45 Alta. L. Rev. 171, pp. 187, 201.	19, 21
LEGISLATIVE PROVISIONS	
Canada Business Corporations Act, R.S.C. 1985, c. C‑44, ss. 122(1)	16
Criminal Code, RSC, 1985, c. C-46, ss. 22.1 and 22.2	7