S.C.C. File No. 38051

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

BETWEEN:

CHRISTINE DEJONG MEDICINE PREOFESSIONAL CORPORATION

APPLICANT
(Respondent)

- and -

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

RESPONDENTS
(Appellants)

MEMORANDUM OF ARGUMENT OF THE RESPONDENTS, DBDC SPADINA et al.

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada,* SOR/2002-156, as am.)

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SCHEDULE A
RESPONDENTS

DR. BERNSTEIN DIET CLINICS LTD.,

2272551 ONTARIO LIMITED,

DBDC INVESTMENTS ATLANTIC LTD.,

DBDC INVESTMENT PAPE LTD.,

DBDC INVESTMENTS HIGHWAY 7 LTD.,

DBDC INVESTMENTS TRENT LTD.,

DBDC INVESTMENTS ST. CLAIR LTD.,

DBDC INVESTMENTS TISDALE LTD.,

DBDC INVESTMENTS LESLIE LTD.,

DBDC INVESTMENTS LESLIEBROOK LTD.,

DBDC FRASER PROPERTIES LTD.,

DBDC FRASER LANDS LTD.,

DBDC QUEEN'S CORNER INC.,

DBDC QUEEN'S PLATE HOLDINGS INC.,

DBDC DUPONT DEVELOPMENTS LTD.,

DBDC RED DOOR DEVELOPMENTS INC.,

DBDC RED DOOR LANDS INC.,

DBDC GLOBAL MILLS LTD.,

DBDC DONALDA DEVELOPMENTS LTD.,

DBDC SALMON RIVER PROPERTIES LTD.,

DBDC CITYVIEW INDUSTRIAL LTD.,

DBDC WESTON LANDS LTD.,

DBDC DOUBLE ROSE DEVELOPMENTS LTD.,

DBDC SKYWAY HOLDINGS LTD.,

DBDC WEST MALL HOLDINGS LTD.,

DBDC ROYAL GATE HOLDINGS LTD.,

DBDC DEWHURST DEVELOPMENTS LTD.,

DBDC EDDYSTONE PLACE LTD., AND

DBDC RICHMOND ROW HOLDINGS LTD.

ORIGINAL TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

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PART I: OVERVIEW AND FACTS

OVERVIEW

1. The Applicant seeks leave to appeal a decision of the majority of the Court of Appeal for Ontario where that Court:

(a) Rejected the application judge's erroneous reliance on a shareholder's agreement flagrantly ignored by Norma Walton. The inescapable factual finding was long since made in this continuing Commercial List proceeding that Norma Walton both controlled and benefited the Schedule C Companies by her thefts from the Schedule B Companies;

(b) Well appreciated the difference between claims in knowing receipt and knowing assistance. The evidence, long since baked into this continuing record, demonstrated that the Schedule C Companies had received $22.6 million of monies flowing from the Schedule B Companies into which Dr. Bernstein was the sole investor and that Norma Walton orchestrated all of the movements of money;

(c) Understood that the extensive tracing that had already been paid for by the Applicants did all that was necessary to demonstrate participation by the Schedule C Companies orchestrated in concert by Norma Walton as their directing mind;

(d) Applied the recent direction of this Court, in *Deloitte & Touche v Livent*,[1] that a rigid application of the corporate identification theory (followed by the minority below) was not appropriate; and

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

(e) Understood that the material findings were preordained by evidence and prior findings of fact made well before this portion of the application was argued.

2. The revelation in the early fall of 2013 of the Walton fraud led to a continuing application commenced in September of 2013 in which there have been 100 motions, five appeals to the Court of Appeal, a lengthy claims process and full and final adjudication of the application. Fifty-one Manager's reports[2] and over 215 issued Orders[3] resulted.

3. Well before this portion of the application was argued before Justice Newbould, Justice D.M. Brown (as he then was) found that "the DBDC Applicants' investments in the Schedule B Companies [were] a major source of funds for the [Schedule C] Companies".[4]

4. The majority of the Court of Appeal correctly applied the law of knowing assistance and understood that, against this factual backdrop, the conduct of the Schedule C Companies at the control of Norma Walton met the test.

5. For the minority to effectively merge the doctrines of knowing assistance and knowing receipt confuses the law and puts an unrealistic evidentiary burden on the DBDC Applicants that from a cost, and a practicality, point of view is unreasonable.

6. Many people suffer from a complex fraud. The findings in this case, however, followed the inescapable conclusion that Norma Walton's orchestration of this fraud through the

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[2] List of Reports from Schonfeld Inc., Inspector/Manager, filed in *DBDC Spadina Ltd. v Walton*, Court File No. CV-13-10280-00CL, (the "DBDC Application"), DBDC Applicants' Response to the Application for Leave to Appeal ("Response") at Tab 2.
[3] List of Orders made in the DBDC Application, Response at Tab 3.
[4] *DBDC Spadina Ltd. v Walton*, 2014 ONSC 4644, aff'd 2015 ONCA 624 and 2015 ONCA 628 ("Reasons of Justice Brown") at para 168, Response at Tab 4.

Schedule C Companies, often to their benefit, fully supported the decision of the majority of the Court of Appeal.

7. There is no issue of national importance here.

8. The application for leave to appeal should be dismissed.

STATEMENT OF FACTS

(a) Parties

9. Dr. Bernstein is the founder of a number of successful diet and health clinics. He is the ultimate beneficial shareholder and directing mind of the DBDC Applicants.[5]

10. Norma Walton and Ronald Walton (the "Waltons") are the co-founders of the Rose & Thistle Group Ltd. ("Rose & Thistle"), and Eglinton Castle Inc.[6]

11. The Corporations listed on Schedule B to the Notice of Application are corporations that were intended to be owned 50% by Dr. Bernstein (or one of the Corporations listed on Schedule A to the Notice of Application) and 50% by the Waltons (collectively, the "Schedule B Companies").[7]

12. The Schedule B Companies were incorporated for the purpose of purchasing and/or holding commercial real estate properties jointly between Dr. Bernstein and the Walton (collectively, the "Schedule B Properties"). [8]

13. The Schedule C Companies were incorporated for the purpose of purchasing and/or holding the Schedule C Properties. The Schedule C Companies were controlled by the Waltons.[9] The ten respondent companies listed at Schedule C to the Notice of Application are a subset of

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[5] *Ibid* at para 5, Response at Tab 4.
[6] *Ibid*, Response at Tab 4.
[7] *Ibid* at para 7, Response at Tab 4.
[8] *Ibid*, Response at Tab 4.
[9] *Ibid* at para 1, Response at Tab 4.

the Schedule C Companies.[10] The DBDC Applicants limited their relief to these companies based on the work of the receiver/manager and for efficiency.

14. The Schedule C Investors, including Christine DeJong Medicine Professional Corporation ("DeJong"), claim to have various interests in the Schedule C Companies. The Waltons strategically moved many of the Schedule C Investors' shareholdings from property to property, including during the course of the receivership, following surplus funds.[11] The Waltons sought relief from the Court that their other investors should be made whole, to the detriment of Dr. Bernstein.[12] This relief, as well as a proposed settlement between Walton and DeJong, was summarily rejected by Justice Brown.[13]

15. DeJong subsequently sought remedies with respect to four Schedule C Companies in which they claimed an interest: United Empire Lands Ltd., St. Clarens Holdings Ltd., Emerson Developments Ltd., and Prince Edward Properties Ltd. (collectively, the "DeJong Companies").[14]

(b) Procedural Background

16. On October 1, 2013, the DBDC Applicants brought an Application against the Waltons, seeking certain remedies pursuant to the oppression remedy provisions of the *Business Corporations Act (Ontario)*.[15]

17. Justice Newbould found that the Waltons' conduct was oppressive and unfairly prejudicial to the DBDC Applicants' interests, and appointed Schonfeld Inc. as Inspector over the Schedule B Companies.[16]

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[10] DBDC Applicants' Third Fresh as Amended Notice of Application dated November 22, 2016 ("Notice of Application") at p 35, Response at Tab 5.
[11] Affidavit of Christine DeJong, sworn February 11, 2015 at para 15, DeJong Application for Leave to Appeal ("DeJong Application") at Tab 4; Reasons of Justice Brown at para 284-285, Response at Tab 4.
[12] Reasons of Justice Brown at paras 13, 231 and 273, Response at Tab 4.
[13] Reasons of Justice Brown at para 289, Response at Tab 4
[14] *DBDC Spadina Ltd. v Walton*, 2016 ONSC 6018 ("Reasons of Justice Newbould") at para 60, DeJong Application at Tab 2A.
[15] Notice of Application, *supra* note 10, Response at Tab 5.
[16] *DBDC Spadina Ltd. v Walton*, 2013 ONSC 6251 (Endorsement of Justice Newbould dated October 7, 2013), at para 27, Response at Tab 6.

18. Following a review by the Inspector of the Schedule B Companies' affairs and the Waltons' conduct, on November 5, 2013, Justice Newbould found that the Waltons had engaged in oppressive conduct and theft and appointed Schonfeld Inc. as the Manager of the Schedule B Companies and the Schedule B Properties for the benefit of all stakeholders, taking control of the Schedule B Companies away from the Waltons.[17]

19. The Inspector/Manager continued its work with its expanded mandate. Its investigations revealed that:

(a) The Waltons used the bank account of their company, Rose & Thistle, as a clearing house account;

(b) The DBDC Applicants' funds deposited into Schedule B Company accounts were routinely transferred to the general Rose & Thistle account, in many cases almost immediately after they were deposited in the Schedule B Company account and contrary to the express terms of the agreement between the parties;

(c) Funds were both transferred from the Schedule B Companies to Rose & Thistle and from Rose & Thistle to the Schedule B Companies;

(d) Rose & Thistle received a net transfer of $23,680,852 from the Schedule B Companies. That is, Rose & Thistle received approximately $23.6 million more from the Schedule B Companies than it transferred to the Schedule B Companies;

(e) The Schedule C Companies (initially referred to as "Walton Accounts" in the Inspector's reports) also routinely transferred funds to, and received transfers from, the Rose & Thistle account; and

(f) Rose & Thistle made a net transfer of $25,464,492 to the Schedule C Companies. That is, the Schedule C Companies, including the Schedule C Company

[17] *DBDC Spadina Ltd. v Walton*, 2013 ONSC 6833 (Endorsement of Justice Newbould dated November 5, 2013), aff'd 2014 ONCA 428, at paras 12 and 47, Response at Tab 7.

Respondents, received approximately $25.4 million more from Rose & Thistle than it transferred to Rose & Thistle.[18]

20. The Inspector/Manager found that funds transferred to the Rose & Thistle account were used in one of three ways:

(a) Transferred to the Schedule C Companies;

(b) Transferred to other Schedule B Companies; or

(c) Used to make payments directly out of the Rose & Thistle account.[19]

21. To illustrate the flow of funds between the Schedule B Companies, Rose & Thistle and the Schedule C Companies, the Inspector prepared a series of flow of funds charts summarizing the use of the DBDC Applicants' 53 largest advances paid to the Schedule B Companies.[20]

22. The Inspector also produced a spreadsheet, detailing thousands of individual transactions between the Schedule B Companies and Rose & Thistle and Rose & Thistle and the Schedule C Companies (the "Net Transfer Analysis") and a summary of the transactions in the spreadsheet.[21]

23. On the basis of the Inspector/Manager's findings, the DBDC Applicants brought a Motion and Application returnable July 16-18, 2014 before the Honourable Justice D.M. Brown, for, among other things, constructive trusts, where the DBDC Applicants' funds could be traced directly into the purchase of, or the discharge of an encumbrance with respect to, a Schedule C Property. The DBDC Applicants did not seek (and were not granted) constructive trusts for each dollar traceable to a Schedule C Property if used for a purpose other than the purchase or discharge of an encumbrance on the Properties.[22]

24. DeJong brought a cross-motion requesting approval of a settlement that it had reached with the Waltons and opposing the DBDC Applicants' constructive trust claim against 3270

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[18] Fourth Interim Report of the Inspector, dated April 23, 2014, at paras 12-13 ("Fourth Interim Report"), Response at Tab 8; Reasons of Justice Brown, *supra* note 4 at para 39, Response at Tab 4.
[19] Fourth Interim Report, *supra* note 18 at para 17, Response at Tab 8.
[20] *Ibid* at para 18 and Appendix F, Response at Tab 8.
[21] *Ibid* at Appendix A and B, Response at Tab 8.
[22] Reasons of Justice Brown, *supra* note 4 at para 264, Response at Tab 4.

American Drive, a Schedule C Property owned by the Schedule C Company, United Empire Lands Ltd.[23]

25. The other Schedule C Company Investors swore affidavits in support of Norma Walton.[24]

26. In Reasons dated August 12, 2014, Justice Brown found that the Waltons had "mis-used and mis-appropriated" most of the funds advanced by the DBDC Applicants "to their own personal benefit and the benefit of their Schedule C Companies" in contravention of their agreements.[25]

27. Justice Brown went on to find as follows:

> The Inspector conducted a tracing analysis of some of the funds advanced by the Applicants to the Schedule B Companies. The scope of its analysis was described in the Inspector's Fourth Interim Report (April 23, 2014). The Inspector identified the largest 53 advances by the Applicants to the Schedule B Companies and then examined the activity in the relevant Schedule B Company bank account immediately following each advance. The Inspector then looked for any contemporaneous transfer of funds from the relevant Schedule B Company account to the Rose & Thistle bank account and, finally, examined the Rose & Thistle bank account to ascertain what activity occurred following the receipt of the funds transferred in from the Schedule B Company account, in particular whether there was any contemporaneous transfer of funds from the Rose & Thistle account to a Schedule C Company's account…
>
> The second aspect is the Inspector's conclusion, which I accepted, that the Waltons used new equity invested in, and mortgage amounts advanced to the Schedule B Companies by the Applicants to fund the ongoing operations of Rose & Thistle and the Schedule C Companies and that the Applicants' investment in the Schedule B Companies was a major source of funds for the Walton Schedule C Properties/Companies.[26]

[23] DeJong Notice of Cross-Motion dated July 16, 2014, Response at Tab 9.
[24] Reasons of Justice Brown, *supra* note 4 at paras 263 and 272, Response at Tab 4.
[25] *Ibid* at para 15, Response at Tab 4.
[26] *Ibid* at paras 17 and 269, Response at Tab 4.

28. Justice Brown granted constructive trusts with respect to the DBDC Applicants' funds that could be traced directly into the purchase or the discharge of an encumbrance of a Schedule C Property.[27]

29. Justice Brown specifically rejected Ken Froese's (Ms. Walton's expert) evidence that the DBDC Applicants' funds could not be traced into the Schedule C Companies:

> Froese opined that the co-mingling of Schedule B Company funds and other funds in the Rose & Thistle account prevented, in most cases, the tracing of the Applicants' funds through Schedule B Companies to Schedule C Companies. For reasons which I will discuss in Section VI below, I do not accept Froese's opinion on that point. I also accept the point made by the Inspector that Froese did not offer an explanation of where the Waltons' Schedule C Companies otherwise sourced their funds, no doubt because he was not retained to express such an opinion.[28]

30. In his Reasons, Justice Brown referred to the Schedule C Companies as "controlled by the Waltons", "Walton-owned" and "the Waltons' Schedule C Companies". His Honour also held that:

> Throughout these proceedings Norma Walton has presented herself to the Court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of Schedule B Companies, Rose & Thistle or the Schedule C Companies…[29]

31. The fact of the Waltons' exclusive control of the Schedule C Companies was uncontroverted and accepted by all parties. The Waltons claimed the support of all the Schedule C Investors and attempted to enter into a settlement agreement with DeJong in order to frustrate the DBDC Applicants' claims into certain Schedule C Properties.[30]

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[27] *Ibid* at para 267, Response at Tab 4.
[28] *Ibid* at para 40, Response at Tab 4.
[29] *Ibid* at para 96, Response at Tab 4.
[30] *Ibid* at paras 272 and 281-290, Response at Tab 4.

32. Justice Brown held that he required further argument before he could decide the issue of the damages to be awarded to the DBDC Applicants as against the Waltons and the DBDC Applicants' $22.6 million[31] unjust enrichment claim as against the Schedule C Companies.[32]

33. Justice Brown rejected the Waltons' settlement agreement with DeJong as an unjust preference.[33]

34. Justice Brown's decision was appealed to the Court of Appeal by both the Waltons and DeJong. The Court of Appeal dismissed both appeals with costs. Importantly, the Court of Appeal rejected the submissions that Justice Brown had erred in his tracing analysis:

> The motions judge was entitled to accept the Inspector's analysis and prefer it over that of Mr. Froese…Moreover, the motions judge made no error in terms of commingling. As we explain in the companion appeal DBDC Spadina Ltd. v. Walton, 2015 ONCA 624 (CanLII), at para. 6, in which a similar attack was made on tracing accepted by the motions judge, the motions judge imposed constructive trusts on only those properties in which commingling was not an issue. [34]

(c) Return of Application

35. The DBDC Applicants amended their claim to include an award of damages against the Schedule C Companies on the basis of knowing assistance and knowing receipt.[35] On June 3, 2016, Justice Newbould heard the Motion and Application for the further relief sought by the DBDC Applicants, together with the Waltons' counter-Application and DeJong's Application.[36]

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[31] Justice Brown credited the Waltons with $1 million for management fees. The DBDC Applicants' current claim against the Schedule C Companies is $23.6 million (the net gain from the Waltons' fraudulent scheme) - $1 million credit to the Waltons in respect of management fees.
[32] Reasons of Justice Brown, *supra* note 4, at paras 227 and 268, Response at Tab 4.
[33] *Ibid* at para 289, Response at Tab 4.
[34] *DBDC Spadina Ltd. v Walton*, 2015 ONCA 624 at para 6, Response at Tab 10; *DBDC Spadina Ltd. v Walton*, 2015 ONCA 628 at para 19, Response at Tab 11.
[35] Notice of Application, *supra* note 10 at paras 1(jj), 3(rr-ccc) and (kkk-uuu), Response at Tab 5.
[36] Reasons of Justice Newbould, *supra* note 14 at paras 1-3, DeJong Application at Tab 2A.

36. DeJong opposed the relief sought by the DBDC Applicants in respect of the Schedule C Companies, and advanced its own claims into certain Schedule C Companies in which DeJong was a shareholder and to which DeJong said it made shareholder loans. [37]

37. On September 23, 2016, Justice Newbould issued his Reasons for Judgment.[38] In his decision, Justice Newbould awarded damages to the DBDC Applicants in the amount of $66,951,021.85, plus interest, against the Waltons for fraudulent misrepresentation, deceit and breach of fiduciary duty, and declared that this award would survive bankruptcy.[39]

38. Justice Newbould rejected the DBDC Applicants' claim for damages against the Schedule C Companies as a result of the knowing assistance or knowing receipt, on the basis that Norma Walton was not the controlling mind of the Schedule C Companies. He further concluded that the DBDC Applicants had not established on a balance of probabilities that the Schedule C Companies' net gain of $23.6 million was funded by the DBDC Applicants' investments.

39. Justice Newbould did not determine the issue of unjust enrichment.[40]

40. Justice Newbould granted DeJong constructive trusts in the aggregate amount of $2,075,085.99 against four properties owned by Schedule C Companies.[41]

(d) Court of Appeal Decision

41. The DBDC Applicants appealed Justice Newbould's decision. Justice Blair, writing for a majority of the Court of Appeal, held that Norma Walton was, in fact and in law, the directing mind of the Schedule C Companies. Applying the well-established law of corporate identification first developed by Viscount Haldane L.C. in *Lennards Carrying Co. Ltd. v Asiatic,*[42] and most recently considered by this Court in *Deloitte & Touche v Livent,*[43] he held that Norma Walton's knowledge and conduct of the fraud could be attributed to the Schedule C Companies. He concluded:

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[37] DeJong Amended Notice of Application dated February 11, 2015, Response at Tab 12.
[38] Reasons of Justice Newbould, *supra* note 14, DeJong Application at Tab 2A.
[39] *Ibid* at para 35, DeJong Application at Tab 2A.
[40] *Ibid* at para 51, DeJong Application at Tab 2A.
[41] *Ibid* at para 60, DeJong Application at Tab 2A.
[42] [1915] AC 705.
[43] *Livent*, *supra* note 1.

> [O]n any view of the evidence in these proceedings – including, it seems, even her own – Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies for the purposes of the acquisition, construction, renovation, financing and management of the Schedule C Companies and, more particularly, with respect to the transfer of source funds from the investors and, in some cases, the re-casting of corporate shareholding structuring necessary to effect those purposes. Respectfully – "adopt[ing] a pragmatic approach", to borrow the expression employed in *El Ajou* – it is not open on this record to hold that Ms. Walton was not the alter ego and directing and controlling mind of the Listed Schedule C Companies, acting within "the field of operations delegated to her" and as the "primary representative…though whom [the corporations] act[ed], sp[oke] and [thought] for these purposes:[44]

42. Justice Blair also held that the Schedule C Companies assisted in the Walton fraud as knowing actors in a shell game through which the co-mingling and hiding of Schedule B Company funds was orchestrated.[45] As participants in the fraud, they were jointly and severally liable in damages to the DBDC Applicants for the amount of funds which they assisted in diverting away from the Schedule B Companies – a total of $22.6 million.[46]

43. Justice van Rensburg disagreed on the basis that the Net Transfer Analysis prepared by the Inspector/Manager did not demonstrate with specificity which Schedule B Company funds were transferred into particular Schedule C Companies.[47] She concluded that, because the Schedule C Company investors were also victims of the Walton fraud, Norma Walton's misconduct should not be attributed to the Schedule C Companies in which they claim an interest.[48]

44. The DeJong claim for constructive trusts over the properties owned by the Schedule C Companies in which they were (now the sole) shareholders[49] was unanimously rejected by the Court of Appeal as an attempt to "leapfrog over other creditors in its capacity as a lender by

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[44] *DBDC Spadina Ltd. v Walton*, 2018 ONCA 60 ("Reasons of the Court of Appeal") at para 64, DeJong Application at Tab 2D.
[45] *Ibid* at para 86, DeJong Application at Tab 2D.
[46] *Ibid* at paras 126-129, DeJong Application at Tab 2D.
[47] *Ibid* at paras 195 and 197, DeJong Application at Tab 2D.
[48] *Ibid* at para 237, DeJong Application at Tab 2D.
[49] Judgment and Order of Justice Newbould (Court File No. CV-15-10879-00CL), dated September 23, 2016, DeJong Application at Tab 2C.

obtaining a proprietary remedy not available to other creditors"[50] which would result in DeJong recovering more than 50% of their lost investments while the DBDC Applicants recovered only 28% recovery of their losses.[51]

PART II: STATEMENT OF QUESTIONS IN ISSUE

45. The Applicants contend that there are three issues of national importance:

(a) How is the *Canadian Dredge* test for corporate identification to be applied in the context of a complex fraud;

(b) What is the degree of participation required in a knowing assistance claim; and

(c) Is this a case where the Court should exercise its discretion to decline a remedy for knowing assistance?

46. To the extent they can be extracted from this complex record, none of these issues are of national importance nor can they be fashioned into principles of wider application. DeJong is essentially asking this court to revisit the highly fact-specific application of established legal tests and the exercise of judicial discretion.

PART III: STATEMENT OF ARGUMENT

Issue 1: The test for corporate identification in civil fraud has recently been addressed by this Court

47. As DeJong notes in paragraph 62-63 of its Memorandum, this Court has very recently addressed the issue of how to apply the *Canadian Dredge* criteria in the context of a complex civil fraud in *Deloitte & Touche v Livent*.[52]

48. No further guidance is needed on this issue, and in any event could not emerge from the highly specific facts of this case. *Livent* established that "[C]ourts retain the discretion to refrain from applying it where, in the circumstances of the case, it would not be in the public interest to

[50] Reasons of the Court of Appeal, *supra* note 44 at para 147, DeJong Application at Tab 2D.
[51] *Ibid* at para 134, DeJong Application at Tab 2D.
[52] *Livent*, *supra* note 1.

do so." [53] If this court were to revisit the Court's exercise of discretion in this (procedurally and factually) complex case, it is unlikely that the outcome would produce any clear guidance that would meaningfully develop the jurisprudence.

49. The *Canadian Dredge*[54] criteria were met in this case:

(a) Norma Walton was in charge of the entire Schedule C Company enterprise and was acting well within the field of operations and corporate powers delegated and assigned to her;

(b) Despite Ms. Walton having breached her fiduciary duties to the Schedule C investors, her actions were not totally in fraud of the Schedule C Companies, which continued to acquire properties as they were intended to do;

(c) The Schedule C Companies were net beneficiaries of the Walton fraud – while specific funds could not be traced into individual companies in every instance as a result of co-mingling in the Rose & Thistle "clearing house", the DBDC Applicants' investments were "a major source of funds for the [Schedule C] Companies" which was necessary for their ongoing operations. [55]

50. The facts underlying these conclusions were found by Justice Brown in lengthy Reasons delivered on August 12, 2014. These findings were challenged by both the Waltons and DeJong on appeal, and were upheld by a unanimous court. Attempting to challenge these findings yet again: (a) ignores the fact that they are *res judicata*; and, in any event (b) is not an issue of national or public importance.

Issue 2: Participation does not require receipt in knowing assistance claims

51. At paragraph 53 of its Memorandum, DeJong submits that the Court of Appeal has "diverge[d] significantly from the law in the U.K., British Columbia and the US and imposed a "minimalist approach" to participation in knowing assistance.

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[53] *Ibid* at para 103-104.
[54] *Canadian Dredge & Dock Co. v The Queen*, [1985] 1 SCR 662.
[55] Reasons of the Court of Appeal, *supra* note 44 at para 74-77 and 79-80, DeJong Application at Tab 2D

52. The Court of Appeal did not apply a minimalist approach to participation in knowing assistance. The gravamen of the fraud in this case involved the use of related companies as part of a shell game to further the Waltons' deception. The Schedule C Companies benefited from knowingly becoming part of that shell game. They were not merely passive bystanders. The proceeds of their participation in the overall scheme funded their operations.[56]

53. The majority applied established legal principles and found that Norma Walton's conduct was imputed to the Schedule C Companies. There was no "uncertainty" as submitted by DeJong in respect of the Schedule C Companies' actual knowledge and participation - Norma's participation and knowledge was the Schedule C Companies' participation and knowledge.

54. Justice Blair correctly applied the well-established criteria set out in *Air Canada v M & L Travel Ltd.*[57]:

> The liability of the Listed Schedule C Companies – the "strangers" to the fiduciary relationship in this scenario – therefore turns on a determination of the third and fourth requirements for knowing assistance: their actual knowledge of the fiduciary relationship and the fraudulent breach, and their participation or assistance in the breach itself. The resolution of those issues depends primarily on whether Ms. Walton acted as the directing and controlling mind of the Schedule C Companies in question, such that her actions may appropriately be attributed to them for these purposes.
>
> …In those circumstances, her knowledge and conduct can be attributed to the corporations. Ms. Walton exercised complete management and control over all relevant actions executed by the Schedule C Companies. To paraphrase from *El Ajou*, for these purposes her mind was their mind; her intention, their intention; her knowledge, their knowledge. She was the person through whom the corporations acted, spoke and thought for these purposes: *Canadian Dredge*, at p. 682. In short, her perpetration of the scheme was their participation in the scheme.[58]

55. Through Norma Walton, the Schedule C Companies had knowledge of and participated in this scheme by receiving and transferring funds from Rose & Thistle. Their assistance permitted the Waltons to appear as though they was meeting their obligations to the Schedule B

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[56] Reasons of Justice Brown, *supra* note 4 at para 15 and 168, Response at Tab 4; Reasons of the Court of Appeal, *supra* note 44 at para 104, DeJong Application at Tab 2D.
[57] *Air Canada v M & L Travel Ltd.*, [1993] 3 SCR 787.
[58] Reasons of the Court of Appeal, *supra* note 44 at para 51 and 68, DeJong Application at Tab 2D.

Companies by, in her words, "smoothing out the cash flow"[59], as well as providing a means of laundering the stolen funds as she purchased, renovated, managed or otherwise dealt with the properties owned by the Schedule C Companies.

56. Contrary to DeJong's assertion at paragraph 59 of its Memorandum that the only transfers in evidence were between the Schedule C Companies generally and Rose & Thistle, the Net Transfer Analysis demonstrates with specificity that:

(a) At least $6,528,325 of the DBDC Applicants' funds were diverted to the Schedule C Companies for the acquisition of or discharge of encumbrances on certain Schedule C Properties. In those cases, the DBDC Applicants were granted constructive trusts;[60] and

(b) Despite the difficulties of directly tracing the diverted funds, certain Schedule C Companies were net beneficiaries of funds flowing through the Walton clearing house in at least the following amounts:

(i) 6195 Cedar Street Ltd. - $556,135;

(ii) Atala Investments Inc. - $139,139;

(iii) Bible Hill Holdings Inc. - $172,050;

(iv) Cecil Lighthouse Ltd. - $776,050;

(v) The Old Apothecary Building - $1,285,721; and

(vi) United Empire Lands - $337,600.[61]

57. Again, these facts were uncovered by the Inspector/Manager and accepted in their entirety by Justice Brown and the Court of Appeal in 2015. In the almost five years that this

[59] Reasons of Justice Brown, *supra* note 4 at para 181, Response at Tab 4; Reasons of the Court of Appeal, *supra* note 44 at para 66, DeJong Application at Tab 2D.
[60] Reasons of Justice Brown, *supra* note 4 at para 264, Response at Tab 4.
[61] Fourth Interim Report at Appendix B, *supra* note 18, Response at Tab 8.

litigation has been on-going, DeJong has not put forward any evidence whatsoever that would unsettle these findings.

58. The majority of the Court of Appeal carefully considered the extensive record in this case to arrive at the conclusion that the Schedule C Companies' involvement in the Walton scheme was hardly *de minimis* – rather, Norma Walton's ability to exercise complete control over these companies was necessary to work her scheme:

> In substance, the fraudulent scheme worked in this fashion…the Waltons moved their investors' monies in an out of the numerous corporations, through their own "clearing house" – Rose & Thistle Group Ltd. – in a shell game designed to avoid their obligations and to further their own personal interests.
>
> …
>
> The corporate documentation and contractual framework had little, if any, bearing on how the Schedule C Companies, and the Listed Schedule C Companies in particular, operated, except to provide Ms. Walton with her entrée to the corporate levers necessary to work the Walton scheme.
>
> …
>
> Ms. Walton exercised complete management and control over all relevant actions executed by the Schedule C Companies…her mind was their mind; her intention, their intention; her knowledge, their knowledge…in short, her perpetration of the scheme was their participation in the scheme.[62]

59. This was an express finding of participation in the Waltons' fraudulent scheme on the particular facts of this case. DeJong has identified no development in the jurisprudence that could be achieved by any revisitation of this factual finding.

Issue 3: There is no injustice in holding the Schedule C Companies liable for knowing participation

60. DeJong is incorrect in saying at paragraph 70 of its Memorandum that the majority ignored the existence of other victims of the Walton fraud when granting the DBDC Applicants a

[62] Reasons of the Court of Appeal, *supra* note 44 at para 3, and 67-68, DeJong Application at Tab 2D.

remedy in knowing assistance. What the majority did was properly, and repeatedly, emphasize the distinction between the victimized *investors* and the complicit *companies*:

> Because I do not view the Listed Schedule C Companies as themselves victims of the fraud, I see no basis for excusing them from "fault" on the ground that they were simply caught up in, and used, as part of the wrongdoer's wrongful scheme…In the result, I do not see any overriding "equitable" considerations that militate against application of the knowing assistance remedy in the circumstances of this case. Moreover, as the majority found, awards in damages, as were awarded in this case, do not give rise to the same degree of discretion in favour of third parties as would a trust-based proprietary remedy or a preferential settlement, as was sought by DeJong in the courts below. [63]

61. In July 2014, well after they had full knowledge of the Walton fraud, DeJong brought a motion seeking court approval of a settlement with Walton. Justice Brown rejected this agreement holding:

> The proposed settlement agreement would prefer the DeJong's interests as creditors of the Waltons over other creditors in respect of 3270 American Drive [a Schedule C Company] and, in the circumstances, I conclude that such a preference would be unfair to other creditors including, but not limited to, Dr. Bernstein.[64]

62. In the June 2016 hearing which underlies this Application for Leave, DeJong sought constructive trusts over the properties owned by their Schedule C Companies. The Court of Appeal unanimously rejected the DeJong's proprietary claim as an attempt to "leapfrog over other creditors" and recover more than 50% of their losses, while leaving Dr. Bernstein with a far lesser recovery in proportion to his loss.[65]

63. There is no question that Walton preferred some investors over others when she perpetrated her scheme.[66] She used the DBDC Companies as the cash cow to keep her other companies and investors afloat.[67]

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[63] Reasons of the Court of Appeal, *supra* note 44 at para 125 (see also paras 82, 104, 121 and 149), DeJong Application at Tab 2D.
[64] Reasons of Justice Brown, *supra* note 4 at para 289, Response at Tab 4.
[65] Reasons of the Court of Appeal, *supra* note 44 at para 147 and 134, DeJong Application at Tab 2D.
[66] Reasons of Justice Brown, *supra* note 4 at para 272, Response at Tab 4.

64. DeJong made certain strategic choices over the course of this litigation in repeated attempts to gain priority over Dr. Bernstein and other creditors. They now attempt to claim indirectly what they have not claimed directly by arguing that this court should reassess the record in this case for the purpose of establishing a new principle of equity preferring their interests over those of the DBDC Applicants as damage claimants against the Schedule C Companies. This is not an appropriate request of this court.

CONCLUSION

65. The application to these complex facts of established tests for corporate identification and knowing participation, and the interpretation of the Net Transfer Analysis in particular, is not a matter of national importance. Neither is the exercise of judicial discretion as to whether the interests of DeJong should have been preferred over those of the DBDC Applicants.

PART IV: SUBMISSIONS ON COSTS

66. The Respondent seeks its costs of the application for leave to appeal.

PART V: ORDER REQUESTED

67. The Respondent respectfully requests an order dismissing the application for leave to appeal, with costs.

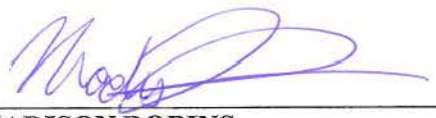
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of May, 2018.

PETER H. GRIFFIN

SHARA N. ROY

DANIELLE GLATT

[67] *Ibid* at paras 15 and 168, Response at Tab 4; Reasons of the Court of Appeal, *supra* note 44 at para 80, DeJong Application at Tab 2D.



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PART VI: TABLE OF AUTHORITIES

AUTHORITY	Cited in Para
Deloitte & Touche v Livent Inc. (Receiver of), 2017 SCC 63	1D, 41, 47
Lennards Carrying Co Ltd. v Asiatic, [1915] AC 705	41
Canadian Dredge & Dock Co. v The Queen, [1985] 1 SCR 662. 52	45A, 47, 49, 54
Air Canada v M & L Travel Ltd., [1993] 3 SCR 787. 57	54

PART VII: STATUTORY PROVISIONS

Nil.