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OUR INSOLVENCY & RESTRUCTURING EXPERTISE

Through more than three decades of courtroom experience, we have advanced our clients' interests in some of Canada's most challenging and complex bankruptcy, insolvency and restructuring litigation. We act not only for creditors and debtors, but also for court-appointed officers such as monitors and receivers. We offer clients a wide scope of substantial experience in commercial reorganizations and restructurings, personal property security matters, creditors' rights, receiverships, bankruptcies, and enforcement in secured transactions.

Insolvency & Restructuring

“2024 saw a substantial annual increase in business insolvency filings, especially in Ontario.”

What was the most interesting development of 2024, and why?

The Supreme Court of Canada applied the corporate attribution doctrine in the bankruptcy and insolvency context for the first time in two [important decisions](#). The corporate attribution doctrine is a legal principle that determines when the actions and intentions of individuals within a company (like directors or employees) can be considered as the actions and intentions of the company itself.

In [Aquino v Bondfield Construction Co](#), the Court addressed corporate attribution in the context of the corporation setting aside payments as transfers at undervalue under the [Bankruptcy and Insolvency Act](#). The directing mind of two insolvent family-held construction companies, John Aquino, had siphoned tens of millions of dollars from the companies through a false invoicing scheme. The Court held in *Aquino* that corporate attribution was appropriate in this case to protect the companies' creditors. It found that Mr. Aquino acted within his corporate responsibility in his intention

to defraud, defeat, or delay a creditor, and that his intent should therefore be attributed to the companies. It attributed this intent in spite of the fact that Mr. Aquino had also defrauded the companies themselves, and they did not benefit from his actions.

In [Scott v Golden Oaks Enterprises Inc](#), the Court addressed corporate attribution for the purpose of determining when the corporation discovered claims arising out of a Ponzi scheme perpetrated by the corporation. The Court rejected the argument that the knowledge of a sole directing mind in a “one-person” corporation must *always* be attributed to the corporation, as that effectively sets aside the principle of corporate separateness. Attributing knowledge of the wrongdoer directing mind would have unfairly barred the bankruptcy trustee's claims before it could assert them.

Both cases emphasize the courts will not apply mechanical, “one-size-fits-all” corporate attribution rules in insolvency cases where they create unfairness for corporate stakeholders and creditors.

What's the primary takeaway for businesses from the past year?

Recent developments in both the courts and Parliament have brought significant changes to insolvency rules, underscoring the importance for businesses facing financial distress to stay informed and proactive in protecting their interests.

In [Poonian v British Columbia \(Securities Commission\)](#), the bankrupts engaged in market manipulation causing investors to lose millions of dollars. The BC Securities Commission sought to ensure that its order for \$13.5 million in administrative penalties and its order requiring the bankrupts to disgorge the approximately \$5.6 million in proceeds from their fraudulent scheme survived the individuals' bankruptcies.

The Supreme Court of Canada emphasized that for debts like these to survive a bankruptcy discharge

under [section 178\(1\)\(e\)](#) of the *Bankruptcy and Insolvency Act*, “there must be a direct link between the fraudulent statement in issue and the debt or liability”. It held that the disgorgement order survived the bankrupts' discharge under that section, whereas the administrative penalties did not satisfy this test.

The federal government also enacted the [Global Minimum Tax Act](#) in June 2024, which applies to certain multinational enterprises. It contains measures governing claims by the Crown against insolvent multinational enterprises, including limitation periods for assessments and prosecutions.

What's one trend you are expecting in 2025?

In 2025, we expect the trend of increasing bankruptcy and insolvency litigation to continue. 2024 saw a [substantial annual increase](#) in business insolvency filings, especially in Ontario.

We also expect that courts will continue to emphasize commercial certainty in insolvency proceedings, for example:

- Where parties have agreed to contractual remedies upon default. If a party opposes the enforcement of agreed-upon remedies, for example the appointment of a receiver, they should be ready to provide evidence to support their opposition (see [Canada Ici Capital Corporation v Ecre Smart Living Hinton Inc](#)).
- Where a creditor alleges that an insolvent debtor's transaction is a fraudulent conveyance in bankruptcy, courts will analyze whether the transaction arises directly from the debtor's corporate structure, and whether the creditor knew of that structure prior to lending (see [IE CA 3 Holdings Ltd v NYDIG ABL LLC](#)).

With a likely federal election on the horizon, it is uncertain whether the federal government's 2024 budget proposal to repeal the debt forgiveness rules and the loss restriction rule for bankrupt corporations will be enacted.