S.C.C. File No. 40396

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

THALBINDER SINGH POONIAN and SHAILU POONIAN

APPELLANTS
(Appellants)

AND:

BRITISH COLUMBIA SECURITIES COMMISSION

RESPONDENT
(Respondent)

FACTUM
(THALBINDER SINGH POONIAN and SHAILU POONIAN, APPELLANTS)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – CONCISE OVERVIEW OF POSITION AND CONCISE STATEMENT OF FACTS

A. Overview of the Appellants' Position

1. This appeal concerns whether administrative financial sanctions imposed by a provincial securities regulator will survive a discharge from bankruptcy. A financial fresh start achieved through a discharge from bankruptcy is a legal process allowing Canadians, who are overwhelmed by excessive debt, the opportunity to obtain relief and begin anew with their financial lives. It allows Canadians to address their financial challenges, learn from past mistakes, develop better financial habits, and slowly rebuild their creditworthiness through proactive and ongoing efforts. A financial fresh start neither endorses, overlooks, or condemns the actions that led to bankruptcy, nor does it seek to pass any moral judgment on the bankrupt's behavior or conduct. As with any fresh start, it provides the bankrupt with an opportunity to reintegrate into economic life as a productive member of society. It does not provide them with a solution.

2. Each year, numerous Canadians turn to the *Bankruptcy and Insolvency Act* ["*BIA*"] for relief from their debts. The causes of their financial hardship vary, including a lack of financial literacy or knowledge, job insecurity, divorce, illness, disability, unforeseen hardship, and misconduct like fraud or tax evasion. What brings these individuals together is their need for assistance in handling the debt that they have no realistic chance of repaying. A primary goal of the bankruptcy and insolvency system is to rehabilitate these debtors and grant them a financial fresh start. The *BIA* aims to strike a balance between this goal of granting a financial fresh start to individuals and preserving confidence in the bankruptcy and insolvency system while parliament has imposed limited excepts to the fresh start.[1]

3. During a bankruptcy, a creditor's claim is stayed against the insolvent debtor and the creditor's claim is placed into a single proceeding within the *BIA*. Once a debtor complies with their duties under the *BIA*, they are granted an absolute discharge from bankruptcy and are thereby entitled to a statutory release from the creditor's claims. Yet, a debtor's fresh start is subject to limitations outlined in section 178(1) of the *BIA*, which specifies exemptions to the debts that can be discharged.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 ["*BIA*"] at s. 178(1).

4. Section 178(1) of the *BIA* does not say anywhere that administrative monetary penalties or disgorgement orders arising from securities law violations count as a liability or debt that will survive a discharge from bankruptcy. By way of contrast, the United States Bankruptcy Code explicitly addresses the treatment of such orders from securities regulators.[2] It states that violations of the US securities laws, including any administrative proceeding or court, will survive a discharge from bankruptcy.

5. Securities regulators occupy an important role in Canadian society to ensure the protection of Canada's capital markets. One way securities regulators enforce and protect capital markets is by pursuing monetary penalties and disgorgement orders through its administrative regime to impose financial liability on those found to contravene securities laws.

6. This appeal raises a significant question about insolvency and administrative law. This appeal concerns the limitations of the fresh start principal in debtor rehabilitation and whether liabilities imposed by the British Columbia Securities Commission's (the "Commission") through administrative monetary penalties ("AMP") and disgorgement orders ought to survive a discharge. As a result, this appeal engages an analysis of section 178(1) and the limits of the fresh start principle in debtor rehabilitation.

B. Statement of Facts

7. This appeal challenges the decision of the British Columbia Court of Appeal ("BCCA"). The Appellants in the present appeal proceeding are husband and wife, who are undischarged bankrupts under the *BIA*. This appeal asks whether AMPs and disgorgement orders imposed on the Appellants by the Respondents, the Commission, should survive a discharge from bankruptcy under section 178(1)(a) and (e) of the *BIA*.

8. The BCCA in the BCCA Decision determined that neither the AMPs nor disgorgement orders were survivable debts under section 178(1)(a) of the *BIA*. In their analysis, the BCCA read the scope of section 178(1)(a) of the *BIA* narrowly to preclude fines, penalties and restitution orders imposed by tribunals and registered in a court.[3] Even so, the BCCA ruled that both AMPs and disgorgement orders would survive a discharge from bankruptcy under section 178(1)(e) of the

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[2] Title 11, U.S.C. – Bankruptcy, 523(a)(19) ("US Bankruptcy Code").
[3] Record of the Appellants (the "Record"), Volume I, Tab 6 (the "BCCA Decision"), p. 94, para. 44.

BIA.[4] The BCCA's disposition contradicts the Alberta Court of Appeal's decision in *Hennig CA*.[5] The conflicting jurisprudence of British Columbia and Alberta motivates, in part, this appeal to the Supreme Court of Canada.

9. This matter originated in 2008 when the Commission began investigating the Appellants. On August 2, 2012, the executive director of the Commission (the "Director") issued a Notice of Hearing and temporary order under section 161(2) of British Columbia's *Securities Act*[6] against the Appellants, as well as the other named respondents in those proceedings.

10. In 2013, the Appellants sought to appeal a decision of the Commission and sought a stay of proceedings asserting that the Commission's independence had been compromised and that there was a breach of procedural fairness and natural justice due to communications between the Director of Enforcement and the General Counsel for the Commission.[7] That application was denied.[8] The Appellants then sought leave to appeal to the BCCA. Although the request for leave was denied, it effectively left the door open for the Appellants to seek leave to appeal because "there was a reasonable apprehension of bias and the Commission's independence was compromised." [9]

11. The Appellants have raised and continue to raise concerns with the completeness of the Commission's disclosure obligations and document production right before and during the liability hearing.[10] The tribunal proceedings concluded on August 29, 2014. On September 3, 2014, five days after the tribunal proceedings, the Commission's CEO Branda Leong provided a letter that it would release 166 records but would refuse to provide a further 530 records.[11]

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[4] The BCCA Decision, pp. 100-102, paras. 56-60.
[5] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 ("*Hennig CA*").
[6] *Securities Act*, RSBC 1996, c. 418, s. 161(2) (the "*Securities Act*").
[7] *Sihota v. British Columbia Securities Commission*, 2013 BCCA 473 (the "BCCA Stay Decision") at paras. 1-6.
[8] The BCCA Stay Decision at para. 10.
[9] The BCCA Stay Decision at para. 19.
[10] The Record, Volume III, Tab 20 ("Affidavit #2 of Thalbinder Poonian - VIII"), p. 16, at para. 59.
[11] The Record, Volume IV, Tab 20 ("Affidavit #2 of Thalbinder Poonian - IV"), pp. 268-269.

12. On September 30, 2014, Mr. Paul Rankin, a senior investigator at the Commission swore an affidavit that the Commission was withholding some 560 records and provided a basis claiming exemption from disclosure.[12]

13. The Commission also applied to the Office of the Information & Privacy Commission (the "OIPC") to seek to disregard future requests because those requests would be frivolous or vexatious. The Commission's application to the OIPC was dismissed by Order F14-24.[13]

14. As part of the application to dismiss at the OIPC, the adjudicator noted that "Clearly, the respondent [the Appellant] is not satisfied with just receiving the information that [the Commission] tells him is relevant to the issues before the [Commission]. It is not unreasonable that the respondent might want to form his own opinion about what information is or is not relevant to his defence."[14]

15. Further, on February 26, 2015, the OIPC ordered that the Commission was entitled to only withhold 23 records due to litigation privilege but ordered that the Commission was required to disclose all other records sought by the Appellant.[15]

16. Ultimately, the Appellants were found to have contravened section 57(a) of the *Securities Act* by a panel at the Commission. At the time, this section of the *Securities Act* was found under the heading "acting contrary to public interest". That heading has since been changed to "manipulation and fraud."[16]

17. On March 13, 2015, the Commission held another hearing to determine which sanctions to impose on the Appellants (the "Sanctions Decision").[17] Under section 161(1)(g), Thalbinder Singh Poonian was ordered to pay to the Commission an administrative penalty of $10,000,000.00. Shailu Sharon Poonian, was ordered to pay the Commission an administrative monetary penalty of $3,500,000.00. All the respondents in the Sanctions Decision were ordered to pay the Commission $7,332,936.00, jointly and severally, in the form of a disgorgement order.[18] On

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[12] Affidavit #2 of Thalbinder Poonian - IV, p. 271.
[13] Affidavit #2 of Thalbinder Poonian - IV, p. 353.
[14] Affidavit #2 of Thalbinder Poonian - IV, p. 360, at para. 33.
[15] Affidavit #2 of Thalbinder Poonian - IV, p. 334, at paras. 35-38.
[16] *Securities Act*.
[17] The Record, Volume I, Tab 1, p. 1 (the "Sanctions Decision").
[18] Sanctions Decision, p. 15, at para. 96(9).

March 23, 2015, the Director registered a certified copy of the Sanctions Decision with the British Columbia Supreme Court, under section 163 of the *Securities Act.*

18. On March 4, 2016, the BCCA granted the Appellants leave to appeal solely on the issue of the disgorgement orders in the Sanctions Decision.[19] On May 31, 2017, the BCCA allowed the appeal, thereby remitting the Poonians' and Sihotas' matter to the Commission to have the disgorgement orders reassessed under section 161(1)(g) of the *Securities Act.*[20]

19. On May 16, 2018, the Commission held a new hearing to reassess the disgorgement orders imposed on the Appellants (the "Reassessment Decision").[21] The Commission, under section 161(1)(g) of the *Securities Act,* ordered Shailu Sharon Poonian to pay the Commission a further $3,149,935.00.[22] Thalbinder Singh Poonian was ordered to pay to the Commission a further $1,319,167.00.[23] Thalbinder Singh Poonian and Perminder Sihota were ordered to pay to the Commission a further $1,126,260.00 on a joint and several basis.[24]

20. On April 20, 2018, the Appellants made a voluntary assignment into bankruptcy.

21. On April 8, 2020, the Appellants applied for their discharge from bankruptcy, which was opposed by the Canada Revenue Agency (the "CRA") and the Commission. The Appellant's application for a discharge from bankruptcy was refused. The Appellants remain undischarged bankrupts.

22. On March 26, 2021, on the application of the Commission, the Honourable Mr. Justice Crerar found that the AMPs and disgorgement orders are debts which survive a discharge from bankruptcy under section 178(1)(a) and (e) of the *BIA*.[25] Mr. Justice Crerar declined to address section 178(1)(d) given his finding that the AMPs and disgorgement orders were exempt under section 178(1)(a) and (e).

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[19] The Record, Volume II, Tab 15 ("Affidavit #1 of Shailu Poonian"), p. 321.
[20] The Record, Volume II, Tab 16 ("Affidavit #1 of Thalbinder Singh Poonian"), p. 119.
[21] The Record, Volume I, Tab 2 (the "Reassessment Decision"), p. 16.
[22] Reassessment Decision, p. 31, at para. 85(a).
[23] Reassessment Decision, p. 31, at para. 85(b).
[24] Reassessment Decision, p. 31, at para. 85(c).
[25] The Record, Volume I, Tab 3 (the "Crerar Decision"), p. 72, at para. 121.

23. On May 26, 2021, the Honourable Mr. Justice Grauer granted leave to the Appellants to appeal the decision of the Honourable Mr. Justice Crerar to the BCCA.[26] The Appellants filed their factum with the BCCA on September 22, 2021. The appeal was heard on May 2, 2022, and reasons for judgment were released on August 5, 2022.[27]

24. After the Appellants filed their factum with the BCCA, but before the appeal was heard, the *Hennig QB*[28] decision was further appealed to the Alberta Court of Appeal and ultimately reversed the decisions of the Alberta Court of Queen's Bench.[29] The Appellants provided a supplementary factum to the BCCA so they could benefit from the reasons of the Alberta Court of Appeal in *Hennig CA*, since the Honourable Mr. Justice Crerar had relied on the previous *Hennig QB* decision. A fresh consideration of *Hennig QB* by the BCCA was therefore necessary.

25. The BCCA ultimately declined to follow the Alberta Court of Appeal in *Hennig CA*. The BCCA set aside the finding that the AMP and disgorgement orders survived under section 178(1)(a) but upheld the finding under section 178(1)(e) of the *BIA*.

26. The appeal was dismissed on August 5, 2022.

PART II – QUESTIONS IN ISSUE

27. The Appellants submit that the following questions are in issue in the present appeal:

(I) Did the British Columbia Court of Appeal err in finding that Commission's administrative monetary penalties and disgorgement orders survived the Poonian's discharge from bankruptcy; and

(II) If so, did the British Columbia Court of Appeal err in finding that a creditor seeking to avail itself of section 178(1)(e) of the *BIA* did not have to prove they were the same party the debtor made direct representations by fraud or fraudulent pretense to?

PART III – STATEMENT OF ARGUMENT

28. The Appellants submit that the BCCA erred in its analysis in three ways:

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[26] The Record, Volume I, Tab 5 (the "Grauer Decision"), p. 76.
[27] The BCCA Decision.
[28] *Alberta Securities Commission v. Hennig*, 2020 ABQB 48 ("*Hennig QB*").
[29] *Hennig CA*.

(i) First, it erred by defining the scope and purpose of the *BIA* too narrowly. The result of overriding the Crerar Decision is the significant widening of liabilities that are exempt from discharge, discouraging the debtor's financial rehabilitaiton by subjecting them to ongoing obligations that cannot be eliminated through bankruptcy.

(ii) Second, it erred by determining that only a causal link was required to bring a claim in fraudulent misrepresentation under section 178(1)(e) of the *BIA*.

(iii) Third, it erred by failing to consider how granting the relief sought in the Crerar Decision would undermine the scheme and purpose of the *BIA* because it hinders the equitable and orderly distribution of a debtor's assets to their creditors by allowing more creditor claims to persist beyond the discharge.

A. The *BIA's* Scope and Purpose Should be Broadly Defined

(i) The *BIA* Balances a Debtor's Fresh Start with Equitable Asset Distribution

29. This court has consistently affirmed the dual purpose of the *BIA*, which ensures an equitable and efficient distribution of a bankrupt's assets to their creditors and facilitates the financial rehabilitation of the debtor through the discharge of debts.[30]

30. In *(Re) Montalban*,[31] Justice Fitzpatrick summarized the purpose of the *BIA*:

> Fundamentally, the [*BIA*] is social policy legislation in a commercial context. It allows an insolvent debtor who is overburdened by debt to employ a process by which he or she can shed those debts and obtain a "fresh start". A debtor may voluntarily assign himself into bankruptcy, as Mr. Montalban did in this case. In other cases, the bankruptcy is involuntary and arises where a creditor or creditors obtain an order from the bankruptcy court placing that debtor into bankruptcy. Even in the latter case, the policy aspects of the [*BIA*] remain, in that it is the overarching purpose of the legislation to allow the debtor/bankrupt to seek a discharge so as to obtain that same "fresh start".

31. When an individual is assigned into bankruptcy, both an existing and contingent[32] statutory stay of proceedings is imposed on the debtor's creditors, preventing them from taking legal action against the debtor or their property. This provision is outlined in section 69.3 of the

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[30] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 ("*Moloney"*).
[31] *Montalban (Re)*, 2013 BCSC 683 at para. 13 ("*Montalban*").
[32] *BIA*, s. 121.

BIA. The debtor's property becomes vested in a Licensed Insolvency Trustee (the "LIT") who manages it for the benefit of the creditors.[33]

32. During the administration of the bankruptcy, the bankrupt is required to aid the LIT and participate in financial counselling and budgeting to aid their financial rehabiliation.[34]

33. At the conclusion of a bankruptcy term, creditors have the opportunity to object to the discharge of the bankrupt. They can seek conditions such as a refusal or suspension of the discharge. Once the discharge is granted, the bankrupt is released from all claims that fall within the scope of the bankruptcy proceedings and are no longer enforceable, except for those specified in section 178(1) of the *BIA*.[35]

34. A LIT is responsible for receiving and liquidating the assets of the debtor, converting them into cash. The proceeds from the sale of assets, as well as other payments, are then distributed to the creditors after the payment of professional fees, in accordance with section 136 of the *BIA*.

35. This court in *Schreyer v. Schreyer*[36] stated the underlying policy objectives and issues involving Parliament's pursuit of balancing the fresh start principle:

> [19] The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice.
> …
> But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the "haircuts" or even outright losses that bankruptcies trigger. So creditors seek to obtain security or third-party guarantees. In other cases, statutory exemptions from the application of the [*BIA*] may apply.
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> [20] As a consequence, the interpretation of the [*BIA*] requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption.

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[33] *BIA*, s. 70.
[34] Directive No. 11R2-2023, Surplus Income; Directive No. 1R7, Counselling in Insolvency Matters; *BIA,* s. 157.1, 158.
[35] *BIA*, s. 178(1).
[36] *Schreyer v. Schreyer*, 2011 SCC 35 ("*Schreyer*").

(ii) Subsection 178(1) Provides Narrow Exemptions

36. Subsection 178(1) of the *BIA* outlines a list of claims which are not released and instead survive a discharge because Parliament has found them to have societal or political importance. These exemptions include court-imposed fines, penalties, and restitution orders, court awards of damages for intentionally inflicted bodily harm or sexual assault, debts for alimony or maintenance or support, and debts arising out of fraud.

37. Save for section 178(1), section 178(2) provides that a bankrupt is released from all other claims upon discharge:

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.	(2) Une ordonnance de libération libère le failli de toutes autres réclamations prouvables en matière de faillite.

38. The complete attainment of financial rehabilitation is undermined when more and more liabilities are excluded from the discharge. Allowing more liabilities to persist prevents the debtor from reentering commercial life without burdensome liabilities. Parliament's pursuit of this balancing act was acknolwedged by the court in *Industrial Acceptance Corp. v. Lalonde*, where it was stated that:

> the purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit ... his rehabilitation as a citizen, unfettered by past debts. [37]

39. The advantage of the single proceeding scheme, which replaces individual creditor claims with a collective proceeding, was recognized in the case of *Century Services*:[38]

> While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in Bankruptcy and Insolvency Law:
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> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each

[37] *Industrial Acceptance Corp. v. Lalonde*, 1952 CanLII 2 (SCC) ("*Industrial*") at p. 110.
[38] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 ("*Century Services*") at para. 22.

> creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought.

(iii) Expanding Section 178(1) is Unnecessary and Contrary to Parliament's Intent

40. The Commission's request to exclude their debts under section 178(1) effectively seeks to introduce another category of debt into the *BIA,* specifically related to securities law violations.[39] However, Parliament has not expressly included securities law violations or the fines, penalties, or restitution orders imposed by regulatory bodies or tribunals in section 178(1) as debts that survive a discharge from bankruptcy. This is analogous to the United States of America where the US Bankruptcy Code expressly included securities law violations in their provisions of claims that are not dischargeable in a bankruptcy.

41. The BCCA and the court in *Hennig CA* found that provincial security regulators liaiblities do not meet the criteria for section 178(1)(a). On appeal, the Appellant argued, and the BCCA accepted, that if Parliament intended to include fines, penalties, or disgorgement orders imposed by provincial securities regulators in the scope of section 178(1), it could have explicitly stated so.

42. Parliament's silence on the matter shows that a broad reading of section 178(1) to capture securities law violations was either considered unnecessary, contrary to the intentions of Parliament, or both.

43. In *Jerrard v. Peacock* [40], the Court examined the starting point for analyzing section 178(1):

> Considering the new start object ingrained in the Act, the logical interpretation of the two subsections in question [ss. 178(1) and (2)] is that subs. (2) creates the

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[40] *Jerrard v. Peacock,* 1985 CanLII 1148 ("*Jerrard*"), at paras. 37-44.

> general principle (being a release of all debts) with subs. (1) being an exception to the general principle. Subsection (2) establishes exceptions, not the principle, and must be viewed in that light.
>
> It is as if the section literally reads that the order of discharge releases the bankrupt from all claims provable in bankruptcy "except the following" and then lists the seven [now six] categories in subs. (1).
>
> …
>
> All of the exceptions in the section are based on what might be classed as an overriding social policy. In other words, they are the kinds of claims which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations.
>
> …
>
> Paragraphs (d) and (e) are morality concepts which look at conduct. Those kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability.

44. According to *Jerrard*, a broad reading of section 178(1) would be unnecessary if there is no overriding social policy that would prevent a bankrupt from being released of liabilties resulting from secuirity law contraventions, as is the case here, since securities regulators can still protect society through other routes.

45. First, unsecured creditors still have remedies available if debts fall outside the scope of section 178(1). These debts can be addressed at a discharge hearing before a presider, such as a Registrar in Bankruptcy, where the presider can consider the existence and circumstances leading to the accumulation of those liabilities. Unlike tax-driven bankruptcies, there is no requirement for the presider to consider mandatory factors for liabilities owed to a provincial securities regulator under section 172 or section 172.1 of the *BIA*.

46. Second, reprehensible behavior can be identified during bankruptcy proceedings and addressed during the discharge by a presider.[41] While debt that survives under section 178(1) disincentives the debtor from further cooperation, the court may impose a substantial conditional order that requires the bankrupt to make payments to the LIT, which would then be distributed to the creditors on a *parri passu* basis in accordance with their priority under section 136.

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[41] *Kozack v. Richter*, 1973 CanLII 166 (SCC).

47. Third, securities regulators can choose between criminal, administrative, or civil proceedings when seeking to remedy security law contraventions. In criminal proceedings, the public intrest can be protected by imposing sentences that include a period of imprisonment and orders imposed by a provincial or superior criminal court, which would be considered a liability that survives a discharge from bankruptcy under section 178(1)(a) of the *BIA*. Similarly, fines imposed by a superior court or provincial criminal court would also fall within the scope of section 178(1)(a) and be exempt from discharge in bankruptcy.

48. Since the Appellants are indebted to the Commission due to violations of the *Securities Act*, the *Securities Act* empowers the Commission to impose both financial sanctions and non-monetary sanctions, such as bans or prohibitions on participating in the capital markets. The *Securities Act* also includes quasi-criminal offenses that can result in fines of up to $5 million and potential imprisonment for up to six months.

49. Here, and similar to the case of *Hennig CA*[42] in Alberta, the regulator chose the administrative path in seeking remedies against the Appellants, as well as prohibitions on participating in the capital markets, restrict the appellants' ability to act as directors or officers of reporting issuers and act as promoters.

50. Unlike criminal proceedings, these administrative proceedings have lessor procedural safeguards in place. Therefore, not only is the introduction of a new category of debt under section 178(1) redundant because the Commission can readily choose between several options, the option of excluding debts under section 178(1) also unnecessarily places the bankrupt in a vulnerable position.

51. Had the Commission pursued the matter criminally, the Appellants would have been afforded the highest procedural protections available under the *Charter of Rights and Freedoms*.[43] This would include various charter protections against state action such as the right to be tried within a reasonable time, the right to remain silent, and a burden of proof beyond a reasonable doubt based on criminal standards.[44]

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[42] *Hennig CA*, at para 30.
[43] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, ss. 7, 11 and 15.
[44] *Ibid,* ss. 11(b) and (c), s. 7; *R. v. Lifchus*, 1997 CanLII 319 (SCC).

52. Moreover, in British Columbia, appeals from the commission are made to the British Columbia Court of Appeal, where issues must be granted leave before they are heard. Unlike criminal proceedings, there is no automatic right to appeal. Here, the Appellants attempted to appeal the liability decision but were only granted leave to appeal on a single issue pertaining to the interpretation of section 161(1)(g) of the *Securties Act* concerning the disgorgement remedy.[45]

53. Allowing securities regulators and the Commission to have their liabilities survive under section 178(1) would open the floodgates for other provincial or federal tribunals and regulators to seek similar treatment for their liabilities in insolvency proceedings, whether under the *BIA* or *Companies' Creditors Arrangement Act*.[46] This could broaden the number of claims and create uncertainty in the insolvency process.

54. If the Commission's liabilities were recognized as surviving a bankruptcy discharge, it could set a precedent for other regulatory or government bodies to argue that their liabilities are also not dischargeable, including entities like the CRA that issues penalties or fines. Various regulatory or government bodies would then seek to enforce their liabilities with lower procedural protections and a lower burden of proof, potentially undermining the fresh start principle and creating uncertainties in the bankruptcy process.

55. Even if a broad reading of section 178(1) was deemed necessary notwithstanding the issues raised above, it was clearly not the intention of Parliament. While drafting the *BIA*, Parliament would have contemplated including administrative bodies and tribunals, like a provincial securities regulator, given their important role in protecting the capital market and the importance of the captial market itself.

56. Moreover, Parliament can change the categories enumerated under section 178(1) and has done so historically. For example, prior to *BIA* amendments, government student loans did not enjoy any special status and were considered unsecured liabilities that could be released after an absolute discharge. Parliament saw fit to modify the timing requirement of federal and provincial student loans from 10 years to 7 years for such liabilities to be automatically released in an insolvency process.[47]

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[45] Affidavit #1 of Shailu Poonian, p. 321.
[46] *Companies' Creditors Arrangement Act,* RSC 1985, c. C-36.
[47] *Hildebrand (Re),* 2010 SKQB 321 at para. 14.

57. In light of Parliament's discretion, *BIA*'s ommission of adminstrative bodies and tribunals specifically signals that Parliament intended for the equal treamtent of a provincial securities regulator alongside other unsecured debts and liabilities.

B. Section 178(1)(e) Requires More than a Causal Link Between Fraudulent Conduct and Debt

(i) Parliament Deliberately Limited the Power of Regulatory Bodies by Omission from Section 178(1)(e)

58. The Appellant courts in *Hennig CA* and the BCCA Decision differed on their approaches to section 178(1)(e), and specifically, on whether these were debts or liabilties obtained by fraud or fraudulent pretences. In full, section 178(1)(e) states that:

178 (1) An order of discharge does not release the bankrupt from … (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;	178 (1) Une ordonnance de libération ne libère pas le failli: … e) de toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation qui découle d'une réclamation relative à des capitaux propres;

59. The Court in *Hennig CA* articulated the underyling policy goals of the *BIA* against the exceptions to debts that are discharged from bankruptcy:

> [25] So, the proper approach to interpreting the exemptions in s 178(1) starts from the position that every debt is released on a discharge of the bankrupt unless one or more of s 178(1)'s subsections clearly exempts the debt from release. The exemptions should be construed narrowly and applied only in clear cases: *Korea Data Systems* at paras 62-63; Ruth Sullivan, Halsbury's Laws of Canada (online), HLG, Legislation "Determining Legislative Intent, Presumed Intent, Strict and Liberal Construction" (VIII.4.(2).(d)) at HLG-97. That approach is justified because the more debts that survive discharge by falling within s 178(1) the more difficult it becomes for a bankrupt debtor to be rehabilitated: Maloney SCC at para 79.
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> [26] The approach articulated here is different than that taken by the chambers judge. She incorrectly identified the purpose of s 178(1) as ensuring that debtors who engage in reprehensible, dishonest, or immoral conduct do not receive the benefit of discharge: QB Decision at para 17. She then found that Mr Hennig's conduct was reprehensible, dishonest or immoral and rationalized the circumstances as falling within the exceptions under s 178(a) and (e) – a bit of

> reverse engineering. If the focus remains squarely on the financial rehabilitation of the bankrupt, which is the purpose of s 178, then discharge should be granted subject only to very specific exceptions. Section 178(1) does not specifically exempt all debts arising from reprehensible or dishonest conduct, only those identified in that section. In effect, the chambers judge took a purposive and remedial approach to interpreting only the exceptions in s 178(1)(a) and (e), rather than s 178 as whole, which resulted in shifting the delicate balance achieved by Parliament.[48]

60. When considering that all claims, except those specifically listed in section 178(1), are released under the *BIA*, it becomes apparent that Parliament made deliberate choices regarding which claims are to be exempted. By exempting only certain types of morally reprehensible conduct and not others, Parliament intended to provide a comprehensive framework for the discharge of debts, with explicit exceptions for specific types of liabilities. This approach suggests a careful consideration of the balance between granting a fresh start to debtors and ensuring that certain obligations are not discharged.

61. Parliament did not specifically include regulatory bodies or administrative tribunals in section 178(1) of the *BIA*. Even so, other sections of the *BIA* specifically deals with regulatory bodies, such as section 69.6. A regulatory body is defined as a "person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act."

62. The Appellant Court in *Hennig CA* highlighted the express intention of Parliament to recognize a regulatory body's right to continue investigations even in the event of a debtor's bankruptcy, subject to certain exceptions and limitations if the regulatory body is acting as a creditor. This acknowledgment of the limitations placed on regulatory body in the bankruptcy context was considered significant in analyzing the enumerated exemptions listed in section 178(1) of the *BIA*.[49]

63. The broad focus on a debtor's misconduct can disrupt the intended balance and purpose of the *BIA*. Therefore, it is crucial to examine the test and framework of section 178(1)(e) to determine

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[48] *Hennig CA*, at paras. 25-26.
[49] *Hennig CA*, at para. 36-40.

how debts arising from fraudulent misrepresentation should be treated. This ensures that the appropriate balance is maintained and the goals of the *BIA* are upheld.

(ii) Debt Survives Only if the Debtor Made the Fraudulent Representation to the Creditor Relying on Section 178(1)(e)

64. The framework for determining whether a debt survives under section 178(1)(e) derives from the section itself. Courts have consistently considered three elements in their analysis: (i) the presence of fraudulent misrepresentation or false pretenses, (ii) a connection between the debt and the fraud, and (iii) the transfer of property as a result of the fraud. These elements guide the evaluation of whether a liability falls within the scope of section 178(1)(e).[50]

65. As the first step or stage of the test, the court must look for a fraudulent misrepresentation or false pretenses. The *BIA* neither defines fraud or fraudulent pretense in section 2 nor in section 178(1).

66. As a result, the courts have devloped a definition of fraudulent misrepresentation and false pretences, summarized by the Appellant Court in *Hennig CA* as:

> [58] It is sometimes said that fraudulent misrepresentation is significantly different from false pretences. Fraudulent misrepresentation is usually identified with the tort of deceit, and the elements of that tort are set out in cases like Derry v Peak (1889) 14 App Cas 337 (UKHL) and *The Toronto-Dominion Bank v Merenick*, 2007 BCSC 1261 at para 30. The elements are: (1) a representation (2) that was false (3) made knowingly, without belief in its truth or recklessly indifferent to whether it was true or false (4) the creditor relied on the representation to his detriment. False pretence, as defined in s 361(1) of the *Criminal Code*, does not require detrimental reliance. Nevertheless, the language of s 178(1)(e) requires a transfer of property as a result of the fraudulent misrepresentation or false pretences, and often this will mean that there is no practical difference between a fraudulent misrepresentation and a false prssssetence under s 178(1)(e). While the section requires only one of false pretence or fraudulent misrepresentation, practically it does not matter which is engaged in this case. …[51]

67. The court then examines the link between the debt or liability and the fraud. That said, there has been inconsistency among the courts in applying a precise legal test for the level of causation required when establishing the link between the fraud and the debt or liability. Some suggest that the test is "but for" causation, meaning that the debt or liability would not have

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[50] *Hennig CA*, at para. 57; *McAteer v. Billes*, 2007 ABCA 137 *("McAteer")* at para. 16.
[51] *Hennig CA*, at para. 58.

occurred if not for the fraud. [52] Others argue that it is sufficient for the false representation to be materially connected to the actions of the plaintiff that resulted in damage. [53]

68. The difficulty in identifying the proper test to apply was set out by the court in *Hennig QB*, which was mindful of the underyling policy goals of the *BIA*. The BCCA Decision considered the Alberta Court of Appeal's approach in *Hennig CA,* which held that:

> [69] Justice Khullar held (at para. 78): "The required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on s 178(1)(e)." The debt the commission sought to exempt from discharge was owed to the commission, not to the potential investors and existing shareholders to whom misleading statements were made. This conclusion was driven by three objectives: limiting the scope of the exemption "in tune with the intention of Parliament" (at para. 80); favouring creditors who have been "directly victimized" by the fraudulent behaviour of the debtor, because both the fraudster and the victim should "deserve" the outcome resulting from exemption (at para. 81, emphasis original); and the outcome was considered to be most consistent with the jurisprudence (particularly *Goldstein (Re)*, 2011 ONSC 561; *Kurtz (Re)* (2002), 2002 CanLII 49607 (ON SC), 35 C.B.R. (4th) 273 (Ont. S.C.J.); and, by analogy, Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc., 2015 ONCA 465).[54]

69. The Court in *Hennig CA* articulated three reasons why a "link" was required between fraudulent statements:

(i) First, section 178(1)(e) should be narrowly interpreted and applied only in clear cases, as it is an exception to the fresh start principle;

(ii) Second, preferential treatment should be limited to creditors directly victimized by the debtor's behavior; and

(iii) Third, it is consistent with decided cases.[55]

70. It is unlikely that administrative tribunals or regulatory bodies would meet the criteria for "direct victimization" such that their liabilities or debts can fall under section 178(1)(e). In this case, the BCCA determined that although no fraudulent misrepresentation had been made directly

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[52] Jassmine Girgis and Thomas GW Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System," 2022 20th Annual Review of Insolvency Law, 2022 CanLIIDocs 4295.
[53] *Darde v. Morris Bureau*, 2013 NSCA 121.
[54] BCCA Decision, p. 104, at para. 69.
[55] *Hennig CA*, at paras. 80-82.

to the Commission, it did not prevent the Commission from seeking relief under section 178(1).[56] Resultingly, the BCCA found that no "direct link" was required between the debt and fraudulent conduct to bring the Comission's liability within section 178(1)(e), rejecting the narrow approach espoused by *Hennig CA.*

71. After reviewing *Hennig CA* on this point, the BCCA rejected *Hennig CA*'s reasoning, finding that it was too narrow and plain a reading of section 178(1)(e). In the BCCA's view, section 178(1)(e) "does not restrict this exception to only those claims where the bankrupt made a deceitful statement to the creditor."[57] By contrast, in *Hennig CA*, the court found that a direct statement made to a victimized creditor was required to bring the debt or liability under this section.

(iii) Deprivation of Property Must Benefit the Debtor and Not Third Parties

72. The third element of the test is that the creditor must be deprived of "goods or services" as a result of the fraud and the debtor must obtain goods or property. This section is silent on exactly who must make the misrepresentation and whether the transferor must be the debtor[58] or if a third party can receive the property.

73. This issue was raised in *Hennig CA* but the court declined to address it:

> [98] Mr Hennig argues first that s 178(1)(e) requires the creditor invoking s 178(1)(e) to have transferred property as a result of the fraudulent misrepresentation or false pretence. Alternatively, even if s 178(1)(e) requires only that property be transferred by or to someone as a result of the fraudulent statements, there was no evidence or findings that property was transferred in this case.
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> [99] It is unnecessary to address this issue because the conclusions to this point establish neither 178(1)(a) nor (e) apply to the ASC's debt. Since the parties' oral and written submissions did not cover this topic in detail, the wiser course is to leave its determination to another appeal where it would make a difference to the outcome.[59]

74. The BCCA briefly addressed section 178(1) by noting that the Commission had made factual findings that the Appellants obtained property in the millions of dollars. These findings

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[56] BCCA Decision, p. 100, at para. 56.
[57] BCCA Decision, p. 104, at para. 70.
[58] *Hennig CA*.
[59] *Hennig CA*, at paras. 98-99.

were based on the Reassessment Decision, which have been strenuously denied by the Appellants.[60]

75. The purpose and underlying policy goals of the *BIA* would be best recognized to limit and narrow exempt debts as a whole. Accordingly, each part of the test under s. 178(1)(e) should be interpreted narrowly. As such, it follows that in order to provde a narrow construction that it must be the debtors who receive the benefit of goods or services, rather than a third party. To hold otherwise would greatly open or expand the potential claims and liabilities that could fall in this part of the debt and frustrate the financial rehibilation of the bankrupt.

(iv) ***Goldstein (Re)* Supports a Direct Link Between Fraudulent Conduct and Debt**

76. One of the decided cases relied on in *Hennig CA* was *Goldstein (Re)*,[61] wherein a lawyer assigned into bankruptcy after obtaining mortgage proceeded under false pretenses. The Law Society of Upper Canada ("LSUC") had Mr. Goldstein's license revoked and obtain a costs awards of $60,000.00. The LSUC then sought a declaration that their $60,000.00 costs award survived Mr. Goldstein's bankruptcy under section 178(1)(d) or (e) of the *BIA*. The Court concluded that the costs award arose out of disciplinary proceedings and not in connection with debts or liabilities obtained by fraud against the LSUC and dismissed the application.[62]

77. This case illustrates the absent link between a regulatory body and that debt. In *Goldstein*, the lender that advanced the funds to Mr. Goldstein would have a claim that would survive under section 178(1) since each constituent element would be made out. While there is a factual link between the underlying conduct and the debt, the absence of a direct representation to the LSUC is the sailient factor in whether a creditor will have special status for a claim that to not be released from bankruptcy.

(v) **Australian Courts Consider the Direct Link Requirement in *Barodawala v. Perinparajah***

78. Canada's insolvency law is rooted in English common law and shares a foundation with other Commonwealth jurisdictions. Australia is recognized as one such comparable jurisdiction,

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[60] BCCA Decision, p. 102, paras. 61-62.
[61] *Goldstein (Re)*, 2011 ONSC 561 ("*Goldstein*").
[62] *Goldstein* at paras. 11-13.

warranting an analysis of the Australia court's recent treatment of debts surviving bankruptcy. Section 178(1)(e) of Canada's *BIA* resembles sections 153(1) and 2(b) of Australia's *Bankruptcy Act 1966* ["*ABA*"].[63] Upon discharge from bankruptcy, the bankrupt in Australia is released from all provable debts, including secured debts, regardless of the surrender of security by the creditor. Even so, fraud-related debts and debts obtained through fraudulent breach of trust or forbearance remain enforceable. While the *ABA* is silent on administrative monetary penalties imposed by a securities regulator, liabilities under a "pecunairy penalty order" will survive a discharge. Those debts include those imposed by the statute concerning "unexplained wealth orders", or orders similar to restitution orders.

79. Like section 178(1)(e) of the *BIA*, the text of section 153(2)(b) of the *ABA* is silent to the status of judgment debts.[64]

80. In 2022, the Australian courts examined the case of *Barodawala*, which bore similarities to the case of the BCCA Decision currently considered by this court. The case focused on the question of whether debts incurred through fraudulent means could survive.

81. *Barodawala* ruled that a judgment can be considered debt incurred by fraud within the meaning of section 153(2)(b) of the *ABA* if the original debt on which the creditor sued was incurred because of the fraudulent conduct of the debtor. This was treated as the case irrespective of whether the representation was made directly to the creditor.

82. The Australian court's rulings in *Barodawala* overturned the longstanding authority of *Power v. Kenny*. The *Power* decision, which had remained uncontroversial and unchallenged for 45 years, held that once a debt incurred through fraud merged into a judgment debt, the fraudulent debt ceased to exist.

83. The *Barodawala* court provided the following reasons for diverging from *Power*. First, the court's focus should be on the debtor's fraudulent conduct that gave rise to the debt, rather than the legal source of the debt, even if the underlying cause of action has merged into a judgment.[65] Second, if Parliament intended to exclude judgment debts from section 153(2)(b) of the *ABA*, it

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[63] *Bankruptcy Act 1966* ["*ABA*"].
[64] *Barodawala v. Perinparajah,* [2022] VSCA 198 ("*Barodawala*"), at para. 77.
[65] *Barodawala*, at para. 78.

would have done so expressly.[66] Third, the court ruled that their interpretation aligns with the purpose of the *ABA*, which aims to protect honest debtors and hold dishonest debtors accountable.[67]

84. The court criticized the construction of section 153(2)(b) adopted in *Power*, noting that it creates an unjustifiable distinction between creditors who have obtained a judgment for fraud and those who have not.[68] They asserted that a creditor pursuing a claim of fraud should not be in a worse position than one who has not pursued such a claim.[69] The court found no justification for implying such a distinction, especially considering that it is not reflected in the text of the provision.[70]

85. The BCCA Decision remains distinguishable from *Barodawala* because the Australian court limited its analysis to judgment debts and not administrative monetary penalties. This difference is important because administrative monetary penalties sought by the Commission are distinct from court imposed orders like judgment debts. Therefore, the argument in *Barodowala* that *Powers* creates an unjustifiable distinction between creditors does not apply, since the Commission is a distinct kind of creditor that has other ways to pursue their objectives outside the *BIA*.

86. As for the requirement of a direct link between fraudulent conduct and debt, the *Barodawala* ruling does not fully apply to the current case in the Canadian court. This is because *Barodawala's* emphasis on the debtor's honest behavior, while important, overlooks the need to restrict preferential treatment to creditors who have been directly harmed by the debtor's actions.

87. That Australian Parliament was also silent on the matter of judgment debts under section 153(2)(b), as Canadian Parliament was with section 178(1)(e), should not imply their inclusion, but the contrary. This is in accordance with the statutory interpretation principle of implied exclusion (*expressio unius est exclusio alterius*) commonly exercised by Canadian courts.[71]

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[66] *Barodawala*, at para. 79.
[67] *Barodawala*, at para. 71.
[68] *Barodawala*, para. 93.
[69] *Barodawala*, para. 99.
[70] *Barodawala*, para. 99.
[71] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), at para. 65.

88. Finally, the Honourable Justice Garde, sitting before the Australian court in May 2022 before *Barodowala* was appealed in September 2022, provided reasons that succinctly explain the purpose of section 153(2)(b) in a manner relevant to section 178(1)(e):

> [165] The reason for the exception is not to enable full recovery but rather the participation of the defrauded party in the bankruptcy process so as to ensure such party receives her aliquot share, no more and no less. Unless and until this happens, such rights are preserved. Once a fraud claim is converted to a provable debt, such participation takes place. The legislation provides for a right to participate and no more. Otherwise a defrauded creditor may be able to undertake multiple bankruptcies.[72]

(vi) Fraud Findings Made by Administrative Tribunals Should Not Qualify Under Section 178(1)(e)

89. In *Hennig CA*, the Court held that a judicial determination or a finding of fraud would be required for a debt or liability to survive section 178(1):

> [62] With respect to s 178(1)(e) specifically, if there is a prior judicial finding of fraud in underlying litigation related to the debt then the task for the application judge under the BIA will likely be straightforward. If it is not clear what a court determined in the prior judicial proceedings, courts in Alberta and elsewhere have long recognized that the application judge can look to the judgment recognizing the debt (if any), the pleadings and context to determine if there were fraudulent statements for the purpose of 178(1)(e). The early cases adopted this approach when it was not clear from the record whether a debtor had made fraudulent statements. In *Morgan v Demers*, 1986 ABCA 100, all this Court had to go on was the formal judgment. There were no written reasons and no transcript of the oral reasons. So, this Court assessed the preamble of the formal judgment, which referred to an affidavit and questioning on the affidavit, to determine if there had been an admission of fraudulent misrepresentation for the purpose of s 178(1)(e). Similarly, in *Berthold v McLellan*, 1994 ABCA 122, this Court had to look to pleadings and evidence to make sense of a brief bench judgment to decide whether the judgment debt fell within s 178(1)(d); see also *Covey (Re),* 2012 ABQB 565 at para. 11; *HY Louie Co Limited v Bowick*, 2015 BCCA 256 at paras. 57, 60-61, 88.

90. The BCCA noted it was open to the court to consider whether findings of civil fraud by administrative tribunals could effectively determine whether those liabilities could come within the fraud except, although the law in this area remains unsettled.[73]

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[72] *Barodawala*, at para. 165.

[73] BCCA Decision, pp. 98-99, at paras. 52-53; *Canada (A.G.) v. Bourassa (Trustees of)*, 2002 ABCA 205 at paras. 37-39; *Manitoba Securities Commission v. Werbeniuk*, 2009 MBQB 59.

91. On appeal, the Appellants argued before the chambers judge that the Commission chose to pursue contraventions "acting contrary to the public interest" under section 57(a) of the *Securities Act* rather than proceeding under section 57(b), which pertains to fraud, which the Appellants argued held significance for expressly seeking to pursue allegations of fraud.

92. There is no independent tort of market manipulation, the crux of the allegations claimed by the Commission against the Appellants. Instead, the liability arose from the contravention of the *Securities Act*. The Appellants have not been subject to civil litigation, and have had no civil judgments or criminal restitution orders impose as a result of these proceedings.

93. A tension exists between administrative and regulatory bodies in this regard. While they have a role to uphold matters within its jurisdiction, a regulatory body may act as both creditor and adjudicator simuaneously. It would be contrary to the intention of Parliament that these sanctions imposed by administrative bodies could effectively tailor or make findings of fraud, or fraud adjacent behavior without being scrutinized by a court, that have the status of surviving any discharge from bankruptcy.

94. From a textual analysis, again, nowhere in the plain reading of section 178(1) permits the liabilities or claims of administrative tribunals to survive a discharge even though their decisions and orders have the force of law.

(vii) Policy Goals Promote a Narrow Interpretation of Section 178(1)(e) that Requires a Direct Link

95. Permitting a narrow interpretation of section 178(1)(e) has positive effects for the insolvency system as a whole. Encouraging debtor cooporation is a postive policy goal and without the promise of a financial fresh start, a discharge from bankruptcy becomes less of an incentive to cooperate with a LIT and discourages a bankrupt to comply with their duties. The discharge becomes meaningless in these scenarios.

96. A discharge and a financial fresh start is significantly important to debtor rehabiliation and commercial life. A debtor who is heavily indebted with many millions of dollars of AMPs or disgorgement orders impose by a regulatory body, who is hopelessly insolvent, and without any ability to pay would have limited options to practically deal with their situation.

97. On the other hand, permitting the Commission's fines to survive a discharge also contravene the other underlying currrents of the *BIA*, namely the orderly distribution of a debtor's assets to his or her creditors.

98. The BCCA identified that the *Securities Act* establishes a claims process to be established by the Commission for any collected proceeds of a disgorgement order due to financial loss as a result of a contravention. [74] The BCCA found that this special role to set up compensation schemes provided limited standing to the Commission to alternatively step into the shoes of directly aggrieved investors to make a collective claim on their behalf.[75]

99. When examining the role of the provincial securities regulator, they are acting not only as an adjucicator and creditor, but also a Trustee for the aggrieved individuals who suffered a loss as a result of the contravention. In the context of insovlency proceedings, this role is problemantic in that the role of an impartial LIT is to operate a claims process themselves in accordance with section 136 of the *BIA*.

100. Allowing the Commission's debts to survive further frustrates the *BIA*'s policy goal of providing an equitable and orderly distribution of claims by fettering with the role of the LIT in the process. Not only will the Commission's fines survive, but also any proceeds recovered from a disgorgement order will be distributed to applicants under such a scheme taking them outside the *BIA* process as a whole. Taken to its extreme, the Commission's steps to seek recovery places it at odds with an LIT whose role is to fairly and effectively adjudicate all creditors claims, not only claims for aggrieved investors.

101. It was not the intention of Parliament that section 178(1) should permit a provincial securities regulator to act as a representative counsel for aggrieved investors. To allow the Commission to receive special standing would amount to a judicial amendment, rather than interpretation, of the *BIA*.

C. Section 178(1)(a) Does Not Include Tribunal Fines, Penalties, or Restitution Orders

102. The courts in the BCCA Decision and *Hennig CA* both reached the same conclusion respecting section 178(1)(a) that a decision of a tribunal registered as a judgment of a superior

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[74] *Securities Act*, s. 15.1.
[75] BCCA Decision, pp. 107-108, at paras. 80-82.

court are not fines, penalties, or resitution orders imposed by a court. Section 178(1)(a) states that an order of discharge does not release the bankrupt from:

(a) Any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;	(a) de toute amende, pénalité, ordonnance de restitution ou toute ordonnance similaire infligée ou rendue par un tribunal, ou de toute autre dette provenant d'un engagement ou d'un cautionnement en matière pénale;

103. The findings of both the courts in the BCCA Decision and *Hennig CA* are correct on this point of law. There are good policy reasons for upholding the courts' decision in the BCCA Decision and *Hennig CA* with respect to section 178(1)(a).

104. In the BCCA Decision, the Appellants advanced three lines of argument that the Crerar Decision erred in law in finding that AMPs and disgorgement orders imposed by the Commission fall within the scope of section 178(1)(a):

(i) The court failed to apply the modern approach to statutory interpretation when interpreting section 178(1)(a);

(ii) The court failed to consider relevant jurisprudence applicable to section 178(1)(a) because of its reliance on *Hennig QB* and *Alberta Securities Commission v. Smylski* (7 October 2020), Calgary Action 1001-15242 (ABQB); and,

(iii) That there is an operational conflict between the Federal *BIA* and Provincial *Securities Act.*[76]

(i) <u>Tribunal Orders are not Imposed by Superior Courts</u>

105. The BCCA disagreed with the Appellants that a plain reading of section 178(1)(a) limits its scope to fines, penalties and resitutuion orders imposed in either criminal or quasi-criminal contexts.[77] The BCCA did, however, agree with the Appellants that orders of administrative tribunals, despite being registered with a superior court of a province, were not imposed by a court

[76] BCCA Decision, p. 91, at para. 33.
[77] BCCA Decision, p. 94, at para. 41.

within the meaning of section 178(1)(a).[78] In making this finding, the BCCA cited the following passage in *Hennig CA:*

> [52] … Section 2 of the *BIA* defines "court" for most purposes as the superior courts of the Provinces but that definition does not apply to s 178(1). "Court" as it appears in s 178(1) is undefined. … When the ASC filed the Decisions with the Court of Queen's Bench, the Court did not take any action apart from putting them on file. Rather, the act of filing enabled the ASC to use civil enforcement methods to enforce the Decisions that it (not the Court of Queen's Bench) had already made. The involvement of the Court of Queen's Bench was passive — by accepting a filing, a string of collection possibilities opened up to the ASC. Giving the word "impose" its ordinary meaning is consistent with the interpretive approach to s 178(1) urged in these reasons.
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> [53] Nor does the dismissal of Mr. Hennig's appeals of the Merits Decision and the Sanctions Decision to this Court bolster the ASC's argument. The dismissal of the appeals confirmed that Mr. Hennig owed a debt to the ASC comprising the administrative penalty and the costs order. It does not mean that this Court "imposed" them. Rather, it upheld the ASC's decision to do so.

106. It is the Appellants' submission that the courts in the BCCA Decision and *Hennig CA* are correct with respect to whether tribunal orders are imposed by courts by virtue of being registered with the superior courts. In BCCA Decision considered the case of *British Columbia (Employment Standards) v. Kwok,* 2022 BCCA 196,[79] in which the BCCA was tasked with determining whether a certificate of judgment for the Director under the *Employment Standards Act,* RSBC 1996, c 113, counted as a judgment, order or award of the Supreme Court of British Columbia, or a government claim as defined by the *Financial Administration Act,* RSBC 1996, c. 138 for enforcement purposes. In that case, the Honourable Mr. Justice Grauer was asked whether such an order was enforceable as a judgment of the court, not whether it was imposed by a court.[80]

107. The plain reading of "imposed" led the BCCA in the BCCA Decision to reject the Commission's argument that fines and disgorgement ordes are imposed by a court since the *Securities Act* requires that such orders be treated as a judgment of the Supreme Court for enforcement purposes.[81]

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[78] BCCA Decision, pp. 94-96, at paras. 42-44.
[79] *British Columbia (Employment Standards) v. Kwok,* 2022 BCCA 196 (CanLII).
[80] BCCA Decision, p. 96, paras. 45-47.
[81] BCCA Decision, p. 97, para. 48.

108. There are good policy reasons for rejecting the Commission's arguments that tribunal decisions are imposed by a court by operation of registration with a superior court. Should this Court recognize that tribunal decisions are enforcement as orders imposed by provincial superior courts, then merely registrating any tribunal in a court for enforcement purposes would then transform that financial penalty or financial sanction into a debt that survives a discharge under s. 178(1)(a) . The effect of this would open the flood gates for any regulator to ensure their monetary orders are non-dischargeable in bankruptcy. Such a finding would frustrate, and be contrary to, the purpose of the *BIA* of providing debtors with a financial fresh start. Many regulatory offences, which provide monetary or financial orders as remedies do not rise to the level of moral blameworthiness contemplated by section 178(1)(a) of the *BIA*.

109. Although monetary orders imposed by provincial regulators may fall under other exemptions created under section 178(1), it is evident that subsection 178(1)(a) was not intended as a catch-all provision for regulators to protect their monetary orders. In the absence of explicit provisions to the contrary, the proper interpretation of section 178(1)(a) is that tribunal orders are dischargeable in bankruptcy.

D. Conclusion

110. Allowing the Commission's liabilities to survive a bankruptcy disrcharge will circumvent the *BIA* process by permitting the continuation of debt collection activities sactioned by section 178(1) of the *BIA*. This contradicts the goal of providing a debtor with a financial fresh start. An insolvent debtor encumbered by significant administrative fines would struggle to achieve financial rehabilitation if those fines are not discharged. While there may be cases where it is appropriate for certain liabilities to fall within section 178(1), it is important to consider the overall policy framework of the *BIA*.

111. Parliament deliberately excluded certain claims and liabilities from discharge, and it is important to interpret this exclusion narrowly. This ensures both the rehabilitation of the bankrupt and the orderly distribution of a debtor's assets is confidently maintained within the credit community.

112. Placing undue emphasis on the behavior and conduct of the bankrupt individual undermines the analysis necessary for proper interpretation of section 178(1) of the *BIA* and to give it full effect.

113. Absent a remedy pursued through 178(1), remedies remain available to the Commission as an unsecured creditor when a debtor goes bankrupt. These remedies include filing a proof of claim, objecting to the discharge, and seeking greater payment through a conditional order. As a regulator, the Commission can also continue to monitor and enforce market sanctions that are uneffected by a discharge.[82]

PARTS IV AND V – SUBMISSIONS CONCERNING COSTS AND ORDER(S) SOUGHT

114. The Appellants seek costs agains the Respondent.

115. The Appellants request that:

(i) The appeal be allowed;

(ii) The Respondent's application for a declaration under s. 178(1)(a), (d) and (e) of the *BIA* for the amounts owed by the Poonians to the Commission under its Sanctions Decision dated March 13, 2015 and registered with the Supreme Court of British Columbia in BCSC Action No. L-150104 is dismissed.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

116. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

[82] *BIA*, s. 121; *Securities Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June, 2023.

Cody G. Reedman
Counsel for the Appellants,
Thalbinder Singh Poonian and Shailu Poonian

PART VII – TABLE OF AUTHORITIES

Paragraph(s)

CASES