File Number: 40396

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

BETWEEN:

THALBINDER SINGH POONIAN and **SHAILU POONIAN**

APPELLANTS
(Appellants)

AND:

BRITISH COLUMBIA SECURITIES COMMISSION

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

LAWSON LUNDELL LLP

1600-925 West Georgia Street
Vancouver, B.C. V6C 3L2

William L. Roberts
Laura L. Bevan
Sarah B. Hannigan

Tel: 604.685.3456
Fax: 604.669.1620
Email: lbevan@lawsonlundell.com

Counsel for the Respondent
British Columbia Securities Commission

MICHAEL SOBKIN

Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: 613.282.1712
Fax: 613.288.2896
Email: msobkin@sympatico.ca

Agent for Counsel for the Respondent
British Columbia Securities Commission

REEDMAN LAW

800a – 1030 West Georgia Street
Vancouver, BC V6E 2Y3

Cody Reedman
Finn Merritt-Neill

Tel: 604.570.0005
Fax: 604.688.1619
Email: creedman@reedmanlaw.com

Counsel for the Appellants Thalbinder Singh Poonian and Shailu Poonian

SUPREME ADVOCACY LLP

340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613.695.8855 ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Appellants Thalbinder Singh Poonian and Shailu Poonian

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PART I – OVERVIEW AND FACTS

A. Overview

1. Financial sanctions ordered by provincial securities commissions are the types of claims that Parliament intends should survive the appellants' discharge from bankruptcy under the *Bankruptcy and Insolvency Act* (the ***BIA***).[1] The respondent British Columbia Securities Commission (the **Commission**) protects investors from being defrauded by regulating deceptive misconduct in the marketplace. The Commission has the authority to (and did in this case) make very significant financial orders in the public interest to deter misconduct, and to disgorge amounts obtained by wrongdoing so that money collected can be paid to wronged investors. These orders are enforceable as court orders. The *BIA* does not permit the appellants to use the bankruptcy system to avoid the financial consequences of the misconduct found and sanctioned by the Commission.

2. The financial "fresh start" available through the bankruptcy process is not intended to free the appellants from the financial consequences of their serious misconduct. Subsection 178(1) of the *BIA* balances the "fresh start" available to honest but misfortunate debtors with an overriding social policy that ensures a bankrupt is not released through a discharge from 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,"[2] and this purpose must be given effect when interpreting the words used by Parliament.

3. The financial sanctions ordered by a panel of the Commission against the appellants are the "kinds of claims" Parliament intended should not be released by a discharge. The appellants orchestrated a deceptive scheme to manipulate the share price of a publicly traded company they controlled called OSE Inc. (**OSE**), and then to sell OSE shares to financially vulnerable people at an artificially high price. The Commission found that the appellants' scheme was a prohibited market manipulation that compromised the integrity of the capital markets and

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

[2] *Cruise Connections Canada v. Szeto*, 2015 BCCA 363 [***Cruise Connections***] at para. 14, citing *Jerrard v. Peacock* (1985), 61 A.R. 161, [1985] A.J. No. 513 (K.B.) [***Jerrard***] at para. 41.

harmed investors, and ordered the appellants to pay to the Commission amounts obtained through the scheme, collectively totalling approximately $6 million, and administrative penalties totalling $13.5 million.

4. Under s. 178(1)(e) of the *BIA*, "*any debt or liability* arising from obtaining property by false pretences or fraudulent misrepresentation…" will remain enforceable against the appellants after their discharge from bankruptcy. The words used by Parliament are broad; they include every way in which a debt or liability may be incurred for obtaining property deceitfully and do not, on their plain language, exclude administrative enforcement orders that arise from this kind of misconduct. This appeal should be dismissed because the Commission's orders fall squarely within the scope of s. 178(1)(e).

5. The Commission's orders also survive discharge under s. 178(1)(a) of the *BIA*, which applies to "*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…". This section is an "administration of justice"[3] concept. The administration of justice in Canada includes decision-making that is validly delegated to administrative tribunals through provincial legislation. Parliament did not intend that the appellants could avoid financial sanctions for serious misconduct simply because they are the subject of administrative enforcement proceedings, particularly where, as here, the administrative decision is enforceable as a court order.

6. The effect of the appellants' position would be to undermine the Commission's important regulatory mandate and render meaningless its financial sanctions made in respect of deceptive misconduct in the marketplace. Parliament did not intend for the appellants and others found liable for serious misconduct by a provincial securities regulator to then use the *BIA* as a vehicle to escape the financial consequences of that misconduct. This appeal should be dismissed.

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[3] *Jerrard* at para. 42.

B. The appellants' market manipulation scheme

7. The appellants orchestrated and participated in a sophisticated and complex scheme to manipulate the capital markets to create an artificial price for shares in OSE. By assuming control of OSE, and directing share trades among nominees, the appellants and others created the appearance of value in OSE where none existed. Then they arranged to sell shares in OSE to financially vulnerable people already seeking creditor protection, who were convinced to unlock locked-in RRSP funds to purchase shares in OSE at the artificially inflated price. When the appellants' artificial trading activity ceased, these already financially vulnerable investors were left with valueless securities. The book value of their losses exceeded $7 million.[4]

8. The *Securities Act*[5] prohibits deceitful misconduct that harms the investing public and undermines public confidence in the capital markets. Market manipulation and fraud are prohibited under s. 57 of the *Securities Act*,[6] which read as follows during the appellants' deceitful scheme in 2007:[7]

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[4] *Thalbinder Singh Poonian, Shailu Sharon Poonian, Robert Joseph Leyk, Manjit Singh Sihota and Perminder Sihota (Re)*, 2014 BCSECCOM 318 [**Findings**], Appellants' Record [**AR**] Vol. IV, pp. 234-66.

[5] R.S.B.C. 1996, c. 418.

[6] *Securities Act*, s. 57 as it appeared on November 22, 2007. The equivalent provision in the current *Securities Act* is s. 57(1)(a) but, for convenience, the Commission will refer to s. 57(a) throughout this factum, as it read in 2007.

[7] The assertions at paras. 16 and 91 of the appellants' factum that s. 57(a) was found under the heading "acting contrary to the public interest" – and so is somehow less morally culpable than fraud – is wrong. Section 57 was enacted in 1989 under the *Securities Amendment Act, 1989*, S.B.C. 1989, c. 78, s. 17 as s. 41.1 of the *Securities Act*, under the heading "Prohibited transaction or scheme". Section 41.1 became s. 57 in the Revised Statutes of British Columbia in 1996, under the same heading. In 1999, s. 57 was repealed and replaced as part of the *Securities Amendment Act, 1999*, S.B.C. 1999, c. 20, s. 13 under "Prohibited transactions relating to trading in British Columbia". Section 57 was repealed and replaced again effective November 22, 2007, under "Manipulation and Fraud": *Securities Amendment Act, 2007*, S.B.C. 2007, c. 37, s. 13.

Manipulation and fraud

57 A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract, or

(b) perpetrates a fraud on any person.

C. The Commission's administrative enforcement proceedings against the appellants

9. In 2012, the executive director of the Commission commenced administrative enforcement proceedings against the appellants and others by issuing a notice of hearing[8] alleging that their deceitful scheme was a market manipulation contrary to s. 57(a) of the *Securities Act*.

10. Administrative enforcement proceedings (which may result in administrative financial sanctions) are a core function of the Commission and are essential to the effective performance of the Commission's statutory mandate to protect the public and maintain confidence in the capital markets. While the executive director may seek certain orders from the court under the *Securities Act* (discussed below), administrative enforcement proceedings are by far the most frequently used means to regulate misconduct in the capital markets, given the expertise of Commission staff in investigating and enforcing against misconduct, and the expertise of panel members in adjudicating cases.[9]

i. Administrative sanctions under ss. 161(1)(g), 162 and 162.01

11. The notice of hearing issued to the appellants sought orders against the appellants under ss. 161 and 162 of the *Securities Act*.[10] These enforcement provisions of the *Securities Act*

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[8] Temporary Order and Notice of Hearing, 2012 BCSECCOM 306 [**Notice of Hearing**].

[9] *R. v. Samji*, 2017 BCCA 415 [***Samji***] at para. 151, leave to appeal to SCC refused, 37862 (31 May 2018), citing *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 [***Asbestos***] at para. 43.

[10] Notice of Hearing, para. 1.

reflect the breadth of the Commission's expertise and specialization.[11] If, after a hearing, a person is found to have contravened the *Securities Act*, regulations, or a decision, a Commission panel may make a broad range of orders in the public interest that are designed to promote the protection of the public and confidence in capital markets.[12] These orders fall into three categories:

- Market sanctions under s. 161(1) that are intended to regulate a market participant's conduct, such as cease trade orders,[13] or prohibitions against participating in capital market activities;[14]

- Disgorgement orders under s. 161(1)(g) that require a person to "pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention" [emphasis added]; and

- Administrative penalties under s. 162, of up to $1 million for each contravention.[15]

12. Financial sanctions (disgorgement orders and administrative penalties) are provable claims in a bankruptcy. Market sanctions are not provable claims, and continue on unaffected by a bankruptcy.

13. Orders under ss. 161 and 162 of the *Securities Act* are not "punitive" – they are prospective and preventative orders made to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets.[16] Disgorgement orders

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[11] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 593, [1994] S.C.J. No. 58 [***Pezim***].
[12] *Pezim* at 595.
[13] *Securities Act*, s. 161(1)(b).
[14] *Securities Act*, ss. 161(1)(d), (e), (f).
[15] *Securities Act*, s. 162. Contraventions of s. 57 of the Act may be subject to administrative penalties of not more than $5 million for each contravention. Under s. 162.01, if the executive director considers that a person has contravened a prescribed provision of the *Securities Act*, a provision of the regulations or a decision, and it is in the public interest to do so, the executive director may require the person to pay an administrative penalty of not more than $100,000 (for an individual) or $500,000 (for a corporation) by issuing a written notice to the person. The factors to be considered by the executive director are enumerated in s. 162.02 of the Act.
[16] *Asbestos* at paras. 43-45. *Cartaway Resources Corp. (Re)*, 2004 SCC 26 [***Cartaway***] at para. 58.

have a restitutionary effect because, when collected, the funds are paid to wronged investors through a statutory claims process.[17] As this Court has recognized, the sanctions contemplated by the *Securities Act* are "pragmatic sanctions designed to induce compliance with the Act… this has obvious implications for the nation's material prosperity… As such, the effective implementation of securities legislation depends on the willingness of those who choose to engage in the securities trade to comply with defined standards of conduct."[18]

14. The same misconduct that is regulated through administrative enforcement hearings may also be prosecuted by the provincial Crown under the *Securities Act* (or the *Criminal Code of Canada*, as the case may be).[19] Section 157 of the *Securities Act* also permits the Commission to apply to court for certain orders, including a disgorgement order,[20] or an order that the person compensate or make restitution to any other person.[21] Neither s. 155 nor s. 157 of the *Securities Act* confers on courts the jurisdiction to order market sanctions, nor does s. 157 of the *Securities Act* confer on a court the power to order a fine or penalty. In practice, only in relatively rare circumstances will the Commission pursue prosecution under s. 155, or an application to court under s. 157, instead of administrative enforcement proceedings.[22]

ii. The hearing process

15. The *Securities Act*, the *Securities Regulation*[23] and the Commission's published hearing policies and procedures[24] form a "considerable body of rules and policies designed to ensure a

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[17] *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 [**Sanctions Appeal**] at paras. 72-77, rev'g in part *Thalbinder Singh Poonian, Shailu Sharon Poonian, Robert Joseph Leyk, Manjit Singh Sihota and Perminder Sihota (Re)*, 2015 BCSECCOM 96 [**Sanctions Decision**].
[18] *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 59, [1995] S.C.J. No. 32 [***Branch***].
[19] *Securities Act*, ss. 155(2), 155.1. Contraventions of certain sections of the *Securities Act* are subject to lower fines as set out in s. 155(2.1).
[20] *Securities Act*, s. 157(1)(b).
[21] *Securities Act*, ss. 157(1)(b), 157(1)(i).
[22] See e.g. *Samji*.
[23] B.C. Reg. 204/2021.
[24] *Hearings*, BCSC Policy 15-601 (21 December 2022) [**BCSC Hearings Policy**].

high degree of procedural fairness" governing administrative enforcement proceedings.[25] For example:

- In an enforcement hearing, all relevant information that is not privileged is disclosed to a respondent (applying the *Stinchcombe* standard);[26]
- The Commission panel will receive all relevant non-privileged evidence, including oral evidence from witnesses and parties, in the hearing;[27]
- If a party responds to the notice of hearing, the hearing is generally bifurcated into a fact-finding phase, and if liability is found, a sanctions phase;[28]
- The executive director and the respondents may make written and oral submissions at each phase of the hearing;[29] and
- The adjudicative panel issues written reasons at each phase, and the findings of fact and decision on sanctions together constitute the Commission's decision.[30]

16. The appellants' liability hearing before the Commission panel occupied nine hearing days in October and November 2013.[31] A three-person panel concluded in written liability findings (the **Findings**), based on an extensive review of "overwhelming evidence", that the appellant Thalbinder Poonian (**Thalbinder**), directly or through a corporate entity he controlled, arranged for the acquisition of control of OSE through private purchases by his friends and acquaintances; funded private placement purchases of OSE shares; traded in OSE shares and received transfers of OSE shares on his own behalf and through nominee accounts; and entered

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[25] *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279 [***Morabito***] at para. 13.
[26] *Morabito* at para. 10. As part of their continued refusal to accept the Commission's Findings and decisions, the appellants appear to advance an argument about procedural aspects of the proceedings before the Commission at paras. 10-15 of their factum. These matters are not before this Court, nor were they before the lower courts in this proceeding. The appellants' submissions in this regard are both inaccurate and an impermissible collateral attack on the Commission's orders.
[27] BCSC Hearings Policy, ss. 3.6, 4.1.
[28] BCSC Hearings Policy, s. 2.5.
[29] BCSC Hearings Policy, s. 4.4.
[30] BCSC Hearings Policy, s. 9.2.
[31] Findings, AR Vol. IV, pp. 234-66.

into an agreement with Phoenix Group members to pay commissions for inducing Phoenix clients to purchase OSE shares, including by unlocking locked-in RRSP and retirement accounts to invest in OSE.[32]

17. The scheme was especially egregious because it victimized an already vulnerable group: clients of the Phoenix Group. The Commission describes these clients as being "generally unsophisticated investors facing financial duress."[33] The Phoenix Group purported to assist its clients with consumer debt issues, but instead these clients were told that liquidating their RRSPs and retirement accounts and using those funds for investment would solve their financial woes. The proposed investment was, in many cases, OSE shares.[34]

18. In its Findings, the Commission panel reviewed the hallmarks of a market manipulation scheme,[35] and concluded that the "voluminous detailed evidence" before the panel "clearly" established that all of the hallmarks were present in the appellants' scheme:[36]

- Thalbinder directed both the buy and sell sides of trades of OSE shares, in which there was no change in the beneficial ownership of the shares (*i.e.*, "wash trades");
- The price of OSE shares rose 417% in 20 days between December 2007 and January 2008, even though there were no announcements or material changes in OSE's business, leading to an artificial price for OSE shares;
- Thalbinder placed orders to trade OSE shares in nominee accounts to give an artificial appearance of market activity;
- Thalbinder pre-arranged trades by instructing the Phoenix Group on the timing and price of purchases to be made by Phoenix clients;
- Trades between and among Thalbinder (and the other respondents) and their nominees accounted for 89% of the overall sale volume and 90% of the overall sale value of OSE shares between January 2008 and March 2009 – and also accounted for

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[32] Findings at para. 99, AR Vol. IV, pp. 253-54.
[33] Findings at para. 56, AR Vol. IV, p. 246.
[34] Findings at paras. 56-59, AR Vol. IV, p. 246.
[35] Findings at para. 132, AR Vol. IV, pp. 260-61.
[36] Findings at paras. 118-30, AR Vol. IV, pp. 258-60; *Poonian (Re)*, 2021 BCSC 555 [***Poonian* SC**] at paras. 18-19, AR Vol. I, pp. 37-39, aff'd 2022 BCCA 274 [***Poonian* CA**], AR Vol I., pp. 80-110, leave to appeal to SCC granted 40396 (30 March 2023), AR Vol. I, p. 113.

most of the overall purchase volume and value during the same period – indicating market domination, and a misleading appearance of trading activity;

- Trades by Thalbinder (and other respondents) and their nominees accounted for most of the uptick trades (a trade at a price that is higher than the price on the immediately preceding trade), including trades during the final 30 minutes of trading, resulting in higher closing prices (contributing to an artificial price).

19. The panel found that Thalbinder was "the mastermind" of the scheme, and that he tried to disguise his involvement by using an alias, "Tim Jenson", in communications with the Phoenix Group. The panel found that the "inescapable conclusion from his direct involvement in… repeated and extensive activities" was that Thalbinder knew or ought to have known his conduct resulted in or contributed to a misleading appearance of trading activity in OSE shares and an artificial price for OSE shares.[37]

20. Similarly, the panel found that the appellant Shailu (Sharon) Poonian (**Sharon**) was "actively and extensively involved in many aspects of the market manipulation", including by making and receiving numerous payments of funds "used to fuel the manipulation."[38] The panel also determined that the "inescapable conclusion from her direct involvement in these extensive and repeated activities" was that Sharon knew or ought to have known that her conduct resulted in or contributed to a misleading appearance of trading activity and an artificial price for OSE shares.[39]

D. The Sanctions Decision and the Reassessment Decision

21. In its "lengthy and particularized"[40] 2015 sanctions decision (the **Sanctions Decision**), the Commission noted that market manipulation "compromises the integrity of the entire market."[41] The panel considered that the appellants' manipulation was "sophisticated and extensive"[42] and involved "layers of deception to conceal the [appellants'] participation in the

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[37] Findings at paras. 149-51, AR Vol. IV, p. 263.
[38] Findings at para. 152, AR Vol. IV, p. 263.
[39] Findings at para. 154, AR Vol. IV, p. 264.
[40] *Poonian* SC at para. 24, AR Vol. I, pp. 40-41.
[41] Sanctions Decision at para. 15, AR Vol. I, p. 4.
[42] Sanctions Decision at para. 16, AR Vol. I, p. 4.

manipulation,"[43] and that the appellants preyed on a pool of unsophisticated and already financially vulnerable investors as part of the scheme.[44] The panel considered that contraventions of s. 57(a) were "similarly serious" to contraventions of s. 57(b), and considered fraud cases in crafting its sanctions for the appellants' scheme.[45]

22. In addition to permanent market prohibitions and a disgorgement order under s. 161(1)(g), the panel ordered under s. 162 that Thalbinder pay an administrative penalty of $10 million, and Sharon pay an administrative penalty of $3.5 million.[46]

23. The Sanctions Decision was filed in the Vancouver Registry of the BCSC on March 23, 2015, under s. 163(1) of the *Securities Act*.[47] As a result of its filing, the Sanctions Decision "has the same force and effect, and all proceedings may be taken on it, as if it were a judgment" of the BCSC.[48]

24. The appellants sought leave to appeal the Commission's findings and sanctions decisions to the Court of Appeal for British Columbia (**BCCA**) under s. 167 of the *Securities Act*.[49] The BCCA denied the appellants leave to appeal the Findings and the administrative penalties, but granted leave to appeal the disgorgement orders on the limited issue of whether the Commission could make joint and several disgorgement orders under s. 161(1)(g) of the *Securities Act*. The Court remitted the determination of joint and several liability for any order under section 161(1)(g) back to the Commission.[50]

25. In its decision (the **Reassessment Decision**) the Commission panel detailed the amounts obtained by each of the appellants directly and indirectly. The Commission found that the total "amount obtained" by the appellants' contraventions was the aggregate net trading gain during

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[43] Sanctions Decision at para. 17, AR Vol. I, p. 4.
[44] Sanctions Decision at para. 18, AR Vol. I, p. 4.
[45] Sanctions Decision at para. 60, AR Vol. I, p. 9.
[46] Sanctions Decision at para. 96, AR Vol. I, pp. 14-15.
[47] *Poonian* SC at para. 26, AR Vol. 1, p. 41.
[48] *Securities Act*, s. 163(2).
[49] *Securities Act*, s. 167.
[50] Sanctions Appeal at paras. 152, 165, 166.

the manipulation.[51] The Commission panel found that the appellants each obtained, directly, the total net trading gain realized in their trading accounts of $746,676 (Thalbinder) and $3,149,935 (Sharon), during the course of and as a result of their conduct in the manipulation.[52] Thalbinder also obtained a total of $1,698,751 indirectly through the accounts of Secondary Participants[53] and another respondent.[54]

26. The Reassessment Decision was filed in the BCSC on June 5, 2018 under s. 163(1) of the *Securities Act*[55] and is enforceable as a judgment of the BCSC.[56]

27. The appellants continue to dispute the Findings, the Sanctions Decision and the Reassessment Decision, even though these decisions are not before this Court.[57]

E. The appellants make a joint assignment into bankruptcy to avoid the Commission's financial sanctions

28. In April 2018, shortly before the panel released the Reassessment Decision, the appellants made a joint assignment into bankruptcy. Collection of the amounts owed to the Commission was therefore subject to the automatic stay of the proceedings in s. 69 of the *BIA*. The proven liabilities in the bankruptcy total $25,184,694[58] – $19,095,362 of which is owed to the Commission (exclusive of interest) and $4,335,253 of which is owed to the Canada Revenue Agency.[59] The trustee in bankruptcy realized assets in the estates of a combined $3,189 and the

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[51] *Re Poonian*, 2018 BCSECCOM 160 [**Reassessment Decision**] at paras. 36-79, AR Vol. I, pp. 23-30.
[52] Reassessment Decision at paras. 46-47, AR Vol. I, p. 25.
[53] "[C]ertain relatives, friends and associates of Thal[binder] Poonian and Sharon Poonian": Findings at paras. 7, 12, AR Vol. IV, p. 236.
[54] Reassessment Decision at paras. 78-79, AR Vol. I, p. 30.
[55] *Poonian* SC at para. 53, AR Vol. I, p. 47.
[56] *Securities Act*, s. 163(2).
[57] Appellants' factum, para. 74.
[58] Report of Trustee on Bankrupt's Application for Discharge, AR Vol. I, p. 198.
[59] *Poonian (Re)*, 2020 BCSC 547 [**Discharge Reasons**] at paras. 26, 20, 24, aff'd 2021 BCSC 222 [**Discharge Appeal SC**], aff'd 2021 BCCA 417 [**Discharge Appeal CA**].

appellants have made no effort to pay even token amounts to their estate for the benefit of investors and other creditors.[60]

29. On February 13, 2020, the appellants applied for an absolute or suspended discharge from bankruptcy under s. 172 of the *BIA*. The Commission opposed. A registrar found that the appellants were not entitled to an absolute discharge, as it was plain that the bankrupts' assets do not equal 50 cents on the dollar amount of their unsecured liabilities, in circumstances where the bankrupts could not show that they were not justly responsible for the disparity.[61] The registrar further concluded that a conditional or suspended discharge would "do little to advance the twin principles of rehabilitating the bankrupt and upholding the integrity of the bankruptcy system,"[62] as the appellants appeared to refuse to acknowledge responsibility for their actions or the consequences of those actions for others.[63] The registrar dismissed the application for discharge from bankruptcy, and that order was upheld on appeal.[64]

30. The appellants have not applied again for a discharge from bankruptcy under s. 172 of the *BIA*, and as a result they remain undischarged bankrupts.[65]

F. The BC courts find that the Commission's financial sanctions are enforceable after discharge under s. 178(1) of the *BIA*

31. In December 2020, the Commission applied to the BCSC for a declaration that the amounts owed by the appellants to the Commission shall not be released by any order of discharge from bankruptcy granted to the appellants, under ss. 178(1)(a), (d) and (e) of the *BIA*. Section 178 of the *BIA* reads as follows:

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[60] Discharge Reasons at paras. 64-67; Discharge Appeal SC at para. 2.
[61] *BIA*, s. 173(a); Discharge Reasons at para. 39.
[62] Discharge Reasons at para. 68.
[63] Discharge Reasons at paras. 64-67.
[64] Discharge Appeal SC; Discharge Appeal CA.
[65] The Trustee in Bankruptcy has been discharged, and as such no provable claims have been released and the stay of proceedings for all provable claims has been lifted.

Debts not released by order of discharge

178(1) 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.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(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;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or

(ii) within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

…

Claims released

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[Emphasis added.]

i. The chambers judge orders that the Commission's sanctions survive under ss. 178(1)(a) and (e)

32. The chambers judge declared that the Commission's orders survived discharge from bankruptcy under ss. 178(1)(a) and (e) of the *BIA*, relying heavily on the reasons of Justice Romaine of the Alberta Court of Queen's Bench (as it then was) in *Alberta Securities Commission v. Hennig* (***Hennig* QB**).[66] The chambers judge held that the "essence" of s. 178(1)(e) of the *BIA* is "obtaining property through deceitful conduct"[67], and that "deceit has a wide scope, consistent with the overarching principle of s. 178(1)(e), that a bankrupt who has profited from morally objectionable actions should not be shielded by discharge".[68] The chambers judge found that it was not necessary that the tort of deceit, fraudulent misrepresentation, or false pretences be pleaded or made out for s. 178(1)(e) to apply.[69] The appellants' market manipulation scheme was "at its core a fraudulent misrepresentation and false pretense: deliberately misleading the public generally and investors (such as the Phoenix clients) as to the true value of the OSE shares, through a deceitful scheme."[70] The chambers

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[66] *Poonian SC*, AR Vol. I, pp. 32-72; *Alberta Securities Commission v. Hennig*, 2020 ABQB 48 [***Hennig* QB**], rev'd 2021 ABCA 411 [***Hennig* CA**].
[67] *Poonian SC* at para. 105, AR Vol. I, p. 66.
[68] *Poonian SC* at para. 105, AR Vol. I, p. 66.
[69] *Poonian SC* at paras. 106-110, AR Vol. I, pp. 66-68.
[70] *Poonian SC* at para. 103, AR Vol. I, p. 64.

judge accepted the panel's determination in the Reassessment Decision that the appellants had "obtained property" in the form of millions of dollars as a result of their scheme.[71]

33. The chambers judge also concluded that there was "no principled basis" to find that the Commission's orders fell outside the scope of s. 178(1)(a).[72] The court held that the scope of s. 178(1)(a) is not limited to criminal or quasi-criminal penalties, and agreed with *Hennig* QB that the Commission's orders, once filed in the BCSC in accordance with s. 163 of the *Securities Act*, were orders "imposed by a court" under s. 178(1)(a) of the *BIA*.[73]

ii. The BCCA dismisses the appellants' appeal

34. The BCCA upheld the lower court's order on s. 178(1)(e) and endorsed the articulation of the principles applicable to that section, including the following:[74]

- Section 178(1)(e) uses the expressions "false pretences" and "fraudulent misrepresentation" disjunctively; only one basis of liability must be proven to engage this subsection;
- The core content of the phrases "false pretences" and "fraudulent misrepresentation" is deceitful statements;
- The essential test for both "false pretences" and "fraudulent misrepresentation" is whether the bankrupt was "deceitful" in obtaining property;
- Reliance on any representation need not be shown; it must be demonstrated that the debtor obtained its property by pretences which they knew to be false; and
- A causal connection between the bankrupt's wrongdoing and the creation of the debt or liability is required.

35. The BCCA concluded that s. 178(1)(e) should not be read "so narrowly as to fail to give effect to the purpose of the exemption"[75] and the plain language chosen by Parliament. The

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[71] *Poonian SC* at para. 103, AR Vol. I, p. 64.
[72] *Poonian SC* at para. 92, AR Vol. I, pp. 59-60.
[73] *Poonian SC* at paras. 85, AR Vol. I, pp. 57-58.
[74] *Poonian CA* at para. 55, AR Vol. I, p. 100.
[75] *Poonian CA* at para. 70, AR Vol. I, p. 104.

BCCA rejected the "deserving victim"[76] requirement articulated by the ABCA in its reversal of *Hennig* QB (***Hennig* CA**),[77] and noted that in any event, the debt arising from the Commission's disgorgement order is "indirectly collected by the Commission for the benefit of the victims of the deceit."[78] The Court found that the *Securities Act* clearly constitutes the Commission as a body that can act for limited purposes on behalf of victims.[79]

36. The BCCA overturned Crerar J.'s ruling on s. 178(1)(a). The BCCA accepted that the application of s. 178(1)(a) is not limited to criminal or quasi-criminal fines, penalties and restitution orders, and opined that s. 178(1)(a) has "occasionally been interpreted too narrowly in that respect."[80] However, the BCCA concluded that the Commission's orders were not "imposed by a Court", notwithstanding their filing in the BCSC under s. 163 of the *Securities Act*. In that respect, the Court reasoned that while the effect of registration under s. 163 of the *Securities Act* is to "make all enforcement proceedings available to the Commission that would be available if an order had been imposed" by a court, that provision does not "overcome the BIA's requirement that the exempted debt must arise from an order 'imposed' by a court."[81]

PART II – RESPONDENT'S POSITION ON APPELLANTS' QUESTIONS

37. The Commission frames the issues as follows:

(a) Are the Commission panel's orders against the appellants, filed in the BCSC, a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" within the meaning of s. 178(1)(e), and therefore enforceable after the appellants' discharge from bankruptcy?

(b) Are the Commission panel's orders against the appellants a "fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution

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[76] The ABCA in *Hennig* CA concluded that a creditor must also "deserve" to have their debt survive a bankrupt's discharge, and so found that the creditor must be directly victimized by the debtor to engage s. 178(1)(e).

[77] *Hennig* CA at para. 81.

[78] *Poonian* CA at para. 80, AR Vol. I, pp. 107-08.

[79] *Poonian* CA at para. 81, AR Vol. I, p. 108.

[80] *Poonian* CA at para. 39, AR Vol. I, p. 93.

[81] *Poonian* CA at para. 48, AR Vol. I, p. 97.

> order, imposed by a court in respect of an offence" within the meaning of s. 178(1)(a) of the *BIA*, and therefore enforceable after discharge from bankruptcy?

38. The Commission submits that applying a purposive analysis to s. 178(1), and considering the purpose of the scheme under the *Securities Act*, the Commission's orders under ss. 161(1)(g) and 162, made after a finding of a contravention of s. 57(a) of the *Securities Act*, fall within the scope of each of s. 178(1)(e) and s. 178(1)(a). The appeal should be dismissed.

PART III – ARGUMENT

A. The *BIA* should be read purposively and dynamically

39. The modern approach to statutory interpretation requires a purposive analysis of legislation: "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament,"[82] and every enactment given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[83]

40. Purposive analysis of legislative texts is based on the following propositions:[84]

(a) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

(b) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning [emphasis added].

(c) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

41. Part of a purposive analysis of legislation is understanding legislation in its dynamic context. Legislation is "always speaking… it shall be applied to the circumstances as they arise,

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[82] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, [1998] S.C.J. No. 2.
[83] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.
[84] Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada Inc., 2022) at § 9.01, Respondent's Book of Authorities [**RBOA**], p. 15.

so that effect may be given to the enactment according to its true spirit, intent and meaning."[85] Legislation should be read so as to adapt to changes in our legal and social realities (so long as the words chosen by Parliament permit that adaptation), not to ignore those changes.[86]

i. The "fresh start" principle in the *BIA* was not intended as absolute

42. There are three groups of stakeholders in an insolvency: the insolvent person or entity, their creditors and the insolvency professional administering the estate or proposal (Trustee in Bankruptcy, Trustee in a Proposal or Receiver). The *BIA* comprehensively addresses the rights, remedies and obligations of each of these stakeholders, and their relationships with one another. Once the *BIA* has been engaged, creditors no longer jockey for position to recover on their claims, and instead creditor/debtor relationships are normalized by the imposition of a stay of proceedings that allows all claims to be addressed equitably and under the supervision of an insolvency professional.

43. One of the purposes of the *BIA*, as it applies to individual bankrupts, is to provide for the equitable distribution of a bankrupt's assets to their creditors, and to permit the bankrupt's rehabilitation as a citizen, unfettered by past debts.[87] The latter purpose, the "fresh start" principle, underpins the discharge provisions of the *BIA*.[88] The discharge provisions of the *BIA* deal separately with an individual bankrupt's entitlement to a discharge (under ss. 172 and 173 of the *BIA*), and the financial effect of a discharge (under s. 178 of the *BIA*) to balance and give effect to two competing social policies:[89] an honest but unfortunate debtor's entitlement to a "fresh" financial start, and Parliament's decision to ensure that certain types of debts remain enforceable notwithstanding a bankrupt's fresh financial start obtained through a discharge.

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[85] *Interpretation Act*, s. 10.
[86] Sullivan at § 6.02, RBOA, pp. 12-13.
[87] *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 at 120, [1952] 3 D.L.R. 348; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [***Moloney***] at paras. 32, 36.
[88] Note that only individual bankrupts are able to obtain discharges from bankruptcy and compromise their debts: *BIA*, s. 169(4).
[89] *Montalban (Re)*, 2013 BCSC 683 at para. 13.

ii. A bankrupt's entitlement to a discharge is governed by ss. 172 and 173 of the *BIA*

44. The intention of the *BIA* is that every individual bankrupt will make an application for discharge.[90] Under s. 169(1) of the *BIA*, every assignment into bankruptcy by an individual, or bankruptcy order made against an individual, operates as an application for discharge, unless the individual is entitled to an automatic discharge.[91] Sections 172 and 173 of the *BIA* set out how long an individual bankrupt remains undischarged, and the criteria to be considered by the court on a discharge application.

45. Automatic discharges are available on a first or second bankruptcy, if no creditors have opposed discharge, by waiting a specified period of time.[92] If (as in this appeal) a bankrupt is not entitled to an absolute discharge, a bankruptcy court may grant or refuse an absolute discharge, suspend the discharge for a period of time, or order a conditional discharge, typically on the payment of a sum of money to creditors.[93] If one of the facts listed in s. 173 of the *BIA* has been proven, then the bankrupt is not entitled to an absolute discharge. The conduct of the bankrupt before or during the bankruptcy may be relevant to the facts listed in s. 173 (e.g. the bankrupt's assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's liabilities), and therefore relevant to the availability of a discharge altogether or the type of discharge ordered by the court.[94]

B. Subsection 178(1) of the *BIA* should be read purposively to give effect to Parliament's intention that certain classes of debt remain enforceable in full after a bankrupt's discharge

46. The "fresh start" principle, and the discharge order inevitably made under s. 172, does not offer to all bankrupts a release from *all* debts. Subsection 178(2) of the *BIA* provides that

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[90] *Montalban (Re)* at para. 22.
[91] *BIA*, s. 169(1). A bankrupt corporation may not apply for a discharge unless it has satisfied the claims of its creditors in full: *BIA*, s. 169(4).
[92] *BIA*, s. 168.1.
[93] *BIA*, s. 172(1).
[94] *BIA*, s. 173.

"subject to subsection (1)", an order of discharge releases the bankrupt from all claims provable in bankruptcy.

47. No matter what type of discharge a bankrupt obtains under s. 172 (absolute, suspended or conditional), the kinds of debts and liabilities listed in s. 178(1) of the *BIA* remain enforceable in full. These classes of debt or liability represent an "overriding social policy" – 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."[95] The classes of debt enumerated in s. 178(1) represent the financial consequences of intentionally bad conduct, ongoing support of dependents, or repayment of public obligations.[96] Subsection 178(1) does nothing more than ensure these types of debts remain enforceable, and by s. 178(2) renders all other types of debts unenforceable.[97]

48. A bankruptcy court hearing an application for discharge under s. 172 cannot order that a bankrupt is entitled to a release from any of the debts under s. 178(1),[98] nor can a bankrupt earn an entitlement to be free from the debts and liabilities set out in s. 178(1) through the bankruptcy process (other than by payment of the obligation in full).

49. Subsection 178(1) lists classes of debts and liabilities – it does not purport to anticipate and enumerate the sources and circumstances of each type of liability, nor is it desirable for Parliament to do so. The task of the court on an application under s. 178(1) is to determine whether a particular debt or liability is within the scope of the categories identified by Parliament, in order to give effect to the purpose of s. 178(1). Typically, when a party applies for an order that a liability is not released by a discharge under s. 178(1), the fact-finding mission and the assessment of liability is long over. The task of the court hearing an application under s. 178 is therefore to review the circumstances that gave rise to the provable debt or

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[95] *Cruise Connections* at para. 14, citing *Jerrard* at para. 44.
[96] *Mutual Transportation Services Inc. v. Saarloos*, 2020 NSSC 198 at para. 14. See also *Cruise Connections* at para. 14, citing *Simone v. Daley* (1999), 43 O.R. (3d) 511, 1999 CanLII 3208 (C.A.).
[97] *Moloney* at para. 85.
[98] Except in relation to student loan obligations as provided in s. 178(1.1).

obligation (in the present case, the Findings, Sanctions Decision and Reassessment Decision) to determine whether the criteria set out in the applicable section are met, not to find new facts or retry the case on new evidence.[99]

50. Some of the jurisprudence interpreting s. 178(1) urges a narrow interpretation of that subsection in service of the interpretive principle that statutory exceptions are to be interpreted narrowly.[100] The ABCA applied this approach in *Hennig* CA in the extreme, and permitted the general mandate to interpret statutory exclusions narrowly to overwhelm their purpose.[101] This Court should reject that approach.

51. A purposive analysis of s. 178(1) does not lead to a restrictive interpretation of s. 178(1).[102] Where (as in the *BIA*), legislation is intended to strike a balance between two competing policy interests or rights, exceptions should not be interpreted restrictively simply because they are "exceptions" to a rule.[103] The purpose of the exceptions should still be given effect. The New Brunswick Court of Appeal rejected a restrictive interpretation of s. 178(1)(a.1)(i) of the *BIA* in *Martin v. Martin*,[104] where it determined that debtors who had not participated in a physical attack giving rise to damages, but who were found to be joint tortfeasors, were not released from the damages award upon a discharge from bankruptcy. The Court in that case warned against interpreting s. 178(1) so narrowly so as to defeat the purpose of the section: "[t]o allow joint tortfeasors to use the discharge as a shield in such circumstances would, in my view, defeat the clear policy statement embodied in the exception."[105]

52. This same purposive analysis was applied by the BCCA in *Cruise Connections*, where it determined that the debtor need not have participated in the actual deceptive conduct himself in order for his liability for participating in a deceptive and wrongful scheme to survive bankruptcy

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[99] *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256 [***H.Y. Louie***] at para. 88.
[100] *Hennig* CA at para. 25, citing *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465.
[101] *Hennig* CA at para. 26.
[102] Sullivan at § 15.05, RBOA, p. 29.
[103] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 48.
[104] 2005 NBCA 32 [***Martin***].
[105] *Martin* at para. 18.

under s. 178(1)(e).[106] The Manitoba Court of Appeal has also applied a purposive analysis to s. 178(1)(e) in *Bannerman Lumber Ltd. et al. v. Goodman*,[107] noting that it should be interpreted broadly, consistent with its overall objectives.[108]

C. Subsection 178(1) of the *BIA* should be interpreted dynamically

53. The appellants (supported by the reasoning in *Hennig* CA)[109] argue that recognition of the Commission panel's orders as debts or liabilities falling within any of the categories under s. 178(1) is an "expansion" of s. 178(1) that is "unnecessary" or "contrary to the intentions of Parliament."[110] They argue that Parliament's failure to expressly incorporate administrative decisions in the categories of debts and liabilities in s. 178(1) is proof of its intention to exclude administrative decisions (even those that have the same force and effect as a judgment of the court), from the scope of s. 178(1)(a) and (e).

54. As further argued below, the words used by Parliament (e.g. "any debt or liability" in s. 178(1)(e), or "any fine, penalty, restitution order…" in s. 178(1)(a)) are broad enough to capture administrative decisions. But the appellants' argument should also fail because it advocates for an unduly restrictive interpretation of s. 178(1) generally that obscures, rather than serves, Parliament's intent in s. 178(1). As this Court held in *R. v. 974649 Ontario Inc.*, "[p]reserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities… the will of the legislature must be interpreted in light of prevailing, rather than historical, circumstances."[111]

55. In this appeal, understanding the important statutory context in which the Commission's orders are made informs the task of interpreting the scope of s. 178(1).

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[106] *Cruise Connections* at para. 49.
[107] 2021 MBCA 13 [***Bannerman***].
[108] *Bannerman* at paras. 61, 73, citing *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52 at para. 108.
[109] *Hennig* CA at paras. 100-03.
[110] Appellants' factum, paras. 40-42.
[111] 2001 SCC 81 at para. 38.

i. Effective regulation of the securities market through the Commission is essential to Canada's economic integrity

56. The purpose of s. 178(1) is to ensure that bankrupts cannot avoid through bankruptcy 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."[112] These "kinds of claims" may now be adjudicated through administrative tribunals in the modern administrative state, and nothing in s. 178 or elsewhere in the *BIA* suggests that financial sanctions arising from these decisions are to be treated differently from other provable claims in the bankruptcy. This Court should reject the appellants' argument in this regard.

57. The *Securities Act* is part of a large framework of legislation that regulates Canada's capital markets. Each province and territory enacts its own legislation and regulations in service of shared goals: protection of the investing public, capital market efficiency and ensuring public confidence in capital markets.[113] Protection of investors is a goal of "paramount importance" to the economic health and integrity of our country.[114] This Court has recognized the "pre-eminence of securities regulation in our economic system",[115] and characterized securities regulation as a "highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets."[116] The protective role of securities regulators in Canada gives them a "special character… which must be recognized when assessing the way in which their functions are carried out under their Acts."[117]

58. Effective administrative enforcement is "fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic… [and is]

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[112] *Cruise Connections* at para. 14, citing *Jerrard* at para. 44.
[113] *Pezim* at 592.
[114] *Branch* at para. 34.
[115] *Branch* at para. 34.
[116] *Pezim* at 589.
[117] *Branch* at para. 34, citing *Pezim* at pp. 593, 595.

essential to prevent and deter abuses of such asymmetries of information, and therefore to maintain the integrity of the securities system and protect the public interest."[118]

59. This Court has recognized the importance of the modern administrative state on numerous occasions and affirmed the role of administrative structures to intervene in economic and other spheres of activity "whose growing complexity requires constantly evolving expertise," and recognized regulatory legislation as playing a "legitimate and vital role" in protecting Canadian society's most vulnerable members.[119]

60. Parliament "intends its laws to co-exist with provincial laws",[120] and as a matter of cooperative federalism, courts should favour an interpretation of the federal legislation that is in harmony with an *intra vires* provincial legislative scheme.[121] The interpretative aid of cooperative federalism applies in this context because proper interpretation of the types of claims that Parliament intended would fall within s. 178(1) of the *BIA* requires the court to consider claims that have been determined under the provincial *Securities Act*.

61. The U.S. Bankruptcy Code (the **U.S. Code**) does not support the appellants' restrictive reading of s. 178(1). The U.S. Code reflects an intent to specifically identify the types of debts that will not be released by discharge, as can be seen from the reasonably lengthy and specific list of claims in that legislation. The U.S. Code, however, supports the Commission's position that effective and enforceable securities regulation is a goal shared by our partners in global markets. Under the U.S. Code, debts arising from (i) the "violation of any of the Federal securities laws …, any of the State securities laws, or any regulation or order issued under such Federal or State securities laws"; or (ii) "common law fraud, deceit, or manipulation in connection with the purchase or sale of any security" survive discharge from bankruptcy.[122] Rather than delineate specific types of debts like the U.S. Code, Parliament has chosen to

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[118] *Branch* at para. 77.
[119] *R v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para. 26, [1998] S.C.J. No. 32; *R v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 233-34, [1991] S.C.J. No. 79.
[120] *Moloney* at para. 27.
[121] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para. 18
[122] 11 U.S.C. § 523(a)(19)(A).

enumerate general categories of debts that survive discharge from bankruptcy into which the Commission's decisions fall. These are two different ways of achieving the same outcome.

D. The Commission's orders are "liabilit[ies] resulting from obtaining property or services by false pretences or fraudulent misrepresentation" within the meaning of s. 178(1)(e) of the *BIA*

i. The test under s. 178(1)(e)

62. Under s. 178(1)(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" remains enforceable after a bankrupt's discharge. Unlike other categories of liability in s. 178(1), an order under s. 178(1)(e) recognizes a "moral sanction" against the bankrupt for obtaining property through deceitful means, ensuring that a deceitful wrongdoer will not be able to use the courts and the bankruptcy regime to avoid the consequences of their actions.[123] Paragraph 178(1)(e) ensures that dishonest debtors who obtain property or services from their dishonesty do not retain the benefit of that dishonesty.[124]

63. The "essential test" for both "false pretences" and "fraudulent misrepresentation" is simply whether the bankrupt was deceitful in obtaining the property.[125]

ii. The appellants obtained property by false pretences or fraudulent misrepresentation

64. The appellants do not argue that their market manipulation scheme is not the type of conduct captured by s. 178(1)(e);[126] rather, they argue that s. 178(1)(e) does not apply because a regulator is the creditor. Such an interpretation entirely undermines the purpose of s. 178(1)(e).

65. Market manipulation is deception on a grand scale. The artificial price created by a manipulation is essentially the product of intentional misrepresentation of genuine demand or

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[123] *Cruise Connections* at para. 15; *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925 [***Shaver-Kudell***] at para. 40.
[124] *McAteer v. Billes*, 2006 ABCA 312 at para. 10; *Bannerman* at paras. 63, 75.
[125] *Cruise Connections* at para. 13; *Poonian CA* at para. 55, AR Vol. I, p. 100; *Shaver-Kudell* at para. 36.
[126] Appellants' factum, paras. 58-63.

supply.[127] Artificial prices interfere with the free and fair operation of capital markets as a whole.[128] The market manipulation perpetrated by the appellants "is at its core a fraudulent misrepresentation and false pretence: deliberately misleading the public generally and investors… as to the true value of the OSE shares, through a deceitful scheme."[129] The Commission noted in the Sanctions Decision that the "scheme was elaborate, involving layers of deception to conceal the [appellants'] participation in the manipulation."[130] Examples of the myriad deceitful statements by the bankrupts – made verbally and in writing, and made through blameworthy, cunning and strategic silence[131] – include:

- Thalbinder and/or Sharon directed trading in accounts held in the names of Secondary Participants in the scheme, and Thalbinder and others funded many of the purchases of OSE shares purportedly made by Secondary Participants, including by using blank cheques signed by nominees to draw funds from nominee accounts;[132]
- Thalbinder used an alias in his communications with the Phoenix Group to hide his involvement in the scheme;[133]
- the bankrupts engaged in pre-arranged trades in which Thalbinder instructed the Phoenix Group on the timing and price of share purchases. [134]

66. The entirety of the scheme rests on false pretence or fraudulent misrepresentation within the plain meaning of s. 178(1)(e).

67. The Commission's orders are liabilities arising from obtaining property through deceit. The disgorgement order specifically recognizes that the appellants "obtained" property from the

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[127] *Poonian SC* at para. 104, citing *Workum and Hennig, Re*, 2008 ABASC 363 at paras. 1141-43, AR Vol. I, pp. 64-66.
[128] Findings at para. 129, citing *Re Podorieszach*, [2004] A.S.C.D. 360 (Alta Sec. Comm.), AR Vol. IV, p. 260.
[129] *Poonian SC* at para. 103, AR Vol. I, p. 64; *Poonian CA* at paras. 24, 62, AR Vol. I, pp. 88, 102.
[130] Sanctions Decision at para. 17, AR, Vol. IV, p. 340.
[131] *H.Y. Louie* at para. 49, citing *Szeto (Re)*, 2014 BCSC 1563 at paras. 37-41.
[132] Findings at paras. 69-76, 79, 85-87, AR Vol. IV, pp. 248-51.
[133] Findings at para. 149, AR Vol. IV, p. 263.
[134] Findings at para. 123, AR Vol. IV, p. 259; Sanctions Decision at para. 17, AR Vol. IV, p. 340.

market manipulation. The purpose of the order (which requires the person to pay "the amount obtained, or payment loss avoided, directly or indirectly" by the contravention) is to deter persons from contravening the *Securities Act* by ensuring a person subject to the order does not retain the benefit of their wrongdoing.[135] Similarly, the administrative penalties ordered under s. 162 are crafted to reflect (among other things) the significant harm to investors caused by the manipulation, the "egregious"[136] nature of the scheme, and the appellants' individual involvement in the scheme.[137] This Court need not look behind the Commission's decisions to determine whether its orders represent liabilities arising from obtaining property through false pretences or fraudulent misrepresentation.

iii. Paragraph 178(1)(e) is not limited to "deserving victims"

68. The appellants advocate for the extremely narrow approach to the interpretation of s. 178(1)(e) adopted in *Hennig* CA,[138] which limits the application of s. 178(1)(e) to creditors who have been "directly victimized" by the debtor's deceitful conduct.[139] This approach undermines the purposes of both s. 178(1)(e) and the *Securities Act*, and it should be rejected by this Court.

69. As the BCCA recognized in this appeal, all of the paragraphs in s. 178(1) relate to classes of debt that fall outside the legitimate objectives of the bankruptcy regime.[140] The common thread among these classes of debts is that they are "of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations."[141] All of the paragraphs in s. 178(1) refer to types of liability, not to types of creditor, or types of losses that could be suffered by the creditor (*i.e.*, pecuniary or non-pecuniary loss, or aggravated or punitive damages).

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[135] Reassessment Decision at para. 18, AR Vol. I, p. 19, citing Sanctions Appeal at para. 143.
[136] Sanctions Decision, AR Vol. IV, p. 349, para. 92.
[137] Sanctions Decision, AR Vol. IV, p. 349, para. 92, p. 350, para. 94.
[138] Appellants' factum, paras. 89-101; *Hennig* CA at paras. 78-81.
[139] *Hennig* CA at para. 81.
[140] *Poonian* CA at para. 73, AR Vol. I, p. 105.
[141] *Poonian* CA at para. 74, citing *Jerrard*, AR Vol. I, pp. 105-06.

70. Moreover, the plain language of s. 178(1)(e) is not so narrow as to restrict the section to "deserving victims".[142] Paragraph 178(1)(e) applies to "*any debt or liability* resulting from obtaining property or services by false pretences or fraudulent misrepresentation…" (emphasis added). The words chosen by Parliament are broad, and are designed to disincentivize a bankrupt from using the bankruptcy system to avoid the consequences of morally culpable misconduct. The purpose of s. 178(1)(e) would be undermined by an unduly narrow interpretation that disincentivizes misuse of the bankruptcy system only if the 'right' kind of creditor seeks to enforce their debt or liability under s. 178(1)(e).

(a) *The Securities Act provides a statutory "link" between the Commission as creditor and the appellants as debtors*

71. The provincial Legislature has given the Commission a mandate to regulate deceptive conduct in the public markets through, among other provisions, ss. 57, 161(1)(g) and 162 of the *Securities Act*.[143] The "link" between the debt or liability ordered by the Commission and the deceitful conduct necessary to engage s. 178(1)(e) is a statutory one, based on the Commission's jurisdiction to make findings and orders in respect of deceitful conduct under s. 57(a) of the *Securities Act*. The Commission makes an order under s. 161(1)(g) because it has found that the person did obtain an amount (or avoid a loss) from the misconduct. The words in s. 178(1)(e) – "*any debt or liability* resulting from obtaining property or services by false pretences or fraudulent misrepresentation..." – clearly capture liabilities resulting from financial sanctions ordered in the public interest resulting from deceitful misconduct.

(b) *Recognition of the Commission's orders under s. 178(1)(e) supports efficiencies in the bankruptcy system*

72. The appellants argue that the Commission's statutory mandate to distribute funds to wronged investors interferes with a licensed insolvency trustee's administration of a claims process in the bankruptcy in accordance with the priorities set out in s. 136 of the *BIA*.[144] This is not correct. While a bankrupt and the trustee are undischarged, the stay of proceedings

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[142] *Poonian* CA at paras. 70-71, AR Vol. I, pp. 104-05.
[143] See also s. 50 of the *Securities Act* ("Representations prohibited").
[144] Appellants' factum, paras. 99-100.

imposed under the *BIA* applies to the enforcement of all claims – whether they would survive discharge under s. 178(1) or not. The trustee is able to administer the estate without any interference from any claimant whose debt will survive under s. 178(1). The Commission's status as a holder of claims provable in the bankruptcy (*i.e.*, financial sanctions ordered under the *Securities Act*) has no impact at all on the trustee's role as impartial distributor of the bankrupt's estate to all creditors.

73. The Commission's orders in fact create an *efficiency* in the bankruptcy claims process. The trustee in the appellants' bankruptcy was only required to evaluate a single claim filed in the bankruptcy by the Commission arising from the appellants' misconduct, not the claims of the potentially hundreds of Phoenix Group clients or other investors victimized by the appellants' scheme.[145]

74. For collection purposes, the Commission acts on behalf of investors to provide an efficient and fair mechanism to distribute funds to claimants.[146] The *Securities Act* requires the Commission to make funds collected from disgorgement orders made under the *Securities Act* (whether by the courts or the Commission) available to pay claims for pecuniary loss that is a direct result of the misconduct that gave rise to the order, through a claims process administered by the Commission.[147] Disgorgement orders made under the *Securities Act* – whether by courts or by the Commission – have priority over "all other claims of every person", except secured claims registered before a notice of hearing, or claims arising under the *Employment Standards Act* or the *Family Maintenance Enforcement Act*.[148] The provincial Legislature clearly chose the Commission as the proxy for individual investors, not least because doing so eases the burden on individual investors, and levels the playing field between well-resourced investors and those who face barriers to access to justice (such as the Phoenix Group investors duped by

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[145] The Commission panel found that Phoenix Group clients suffered estimated book losses of $7,102,902, excluding commission costs. Thirty-six of the Phoenix clients had addresses in British Columbia and they suffered estimated book losses of $1,198,308: Findings at para. 58, AR Vol. IV, p. 246.

[146] *Poonian* CA at para. 81, AR Vol. I, p. 108.

[147] *Securities Act*, s. 15.1; *Securities Regulation*, Part 3.

the appellants' market manipulation scheme). In light of the Commission's statutory mandate, there is no reason to read s. 178(1)(e) down to exclude the Commission's orders.

(c) *Australian jurisprudence does not assist the appellants*

75. The appellants cite to the Victoria Court of Appeal's consideration of s. 153(2)(b) of the *Bankruptcy Act 1966* in *Barodawala v. Perinparajah.*[149] To the extent that *Barodawala* is relevant to this appeal, it simply confirms that other courts apply a purposive analysis to the interpretation of bankruptcy legislation in that jurisdiction.[150] The Court confirmed that the focus of s. 153(2)(b) is the "conduct of the debtor" not the "legal source" of the debt, meaning that it is immaterial to the application of s. 153(2)(b) whether the debt was recognized in a judgment, or remained unprosecuted by the claimant.[151] The Commission agrees with the appellants that this appeal differs from *Barodawala*, which concerned a private law claim for a statutory cause of action under Australia's *Trade Practices Act 1974*, not an administrative decision.

iv. Administrative tribunals are competent to find facts

76. This Court should reject the argument advanced by the appellants (supported by *Hennig* CA) that findings made by administrative tribunals should not "qualify" under s. 178(1)(e).[152] The idea that administrative tribunals are incompetent to find facts that have meaning outside of the administrative context, or that administrative decision-making does not "qualify" as real justice in Canada, does not reflect the "more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" towards which courts have moved in the last 50 years.[153]

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[148] *Securities Act*, s. 163.1.
[149] 2022 VSCA 198 [***Barodawala***].
[150] *Barodawala* at para. 86.
[151] *Barodawala* at para. 78.
[152] Appellants' factum, paras. 89-94, citing *Hennig* CA at para. 62.
[153] *Pezim* at 593, citing *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336, [1990] S.C.J. No. 110.

77. One example of how this Court has already rejected this idea is the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[154] In that case, this Court wrote that "administrative decision making [is] one of the principal manifestations of state power in the lives of Canadians,"[155] and noted the "ubiquity and practical importance of administrative decision making."[156] The intent of recalibrating the standard of review analysis in judicial review of administrative decisions was to avoid the two-tier justice system the appellants now advocate in respect of enforceability of administrative decisions.[157] This Court held that the presumptive starting point is that administrative decisions are subject to reasonableness review, in recognition of the "*very fact*" (emphasis in the original) that the legislature has chosen to delegate authority to an administrative decision maker.[158] This presumption is rebutted where, as in the *Securities Act*,[159] the legislature has chosen an appellate standard of review[160] (or where the rule of law requires a correctness review[161]). Whatever standard applies by institutional design, the new framework articulated in *Vavilov* rejects the idea that administrative fact-finding is inherently inferior.

78. *Hennig* CA relied on the decision in *Canada (Attorney General) v. Bourassa (Trustees of)*[162] for the proposition that courts must look behind the decision of an administrative tribunal to consider the "overall context" of the proceedings, including the sophistication of the parties, the nature of the body making the decision, and "the evidence and the reasons for decision."[163] The court in *Hennig* CA characterized the lower court's reliance only on the facts found by the tribunal as a "problem".[164] The ABCA suggested that the task of the court on an application

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[154] 2019 SCC 65 [***Vavilov***].
[155] *Vavilov* at para. 4.
[156] *Vavilov* at para. 5.
[157] *Vavilov* at para. 11.
[158] *Vavilov* at para. 30.
[159] *Mountainstar Gold Inc. v. British Columbia Securities Commission*, 2022 BCCA 406 at paras. 54-57.
[160] *Vavilov* at para. 49.
[161] *Vavilov* at para. 53.
[162] 2002 ABCA 205 [***Bourassa***].
[163] *Hennig* CA at paras. 63-67.
[164] *Hennig* CA at para. 69.

under s. 178(1)(e) is to re-litigate the matter that was before the given tribunal (which in that case had already occupied 38 hearing days and 24 witnesses) so that the chambers judge could arrive at their own determination of whether Hennig made fraudulent statements[165] – not, as the question should be, whether the tribunal's orders *arise from obtaining property or services by false pretences or fraudulent misrepresentation*.

79. As the BCCA noted in the case at bar,[166] *Bourassa* does not stand for the proposition that administrative orders are insufficient to ground an application under s. 178(1)(e). In *Bourassa*, the majority found that a mere "recitation of [the] power" to impose penalties on a claimant when it is aware of facts that, in its opinion, establish a person has made false or misleading statements "without more" does not grant the tribunal jurisdiction to establish false pretences or fraudulent misrepresentation for the purposes of s. 178(1)(e).[167] There was no evidence of any administrative decision before the court in *Bourassa* at all, there was simply an assertion of a power to make a decision, and an assertion that the tribunal had done so. The tribunal's appeal was decided on the "procedural pre-requisites"[168] of the application, not on a substantive determination of the nature of the tribunal's decision.

80. The concurring reasons of Fraser C.J.A. in *Bourassa* expand on the point that there is a difference between recognizing the binding effect of a tribunal's order, and properly reviewing the order made to determine if its scope falls within s. 178(1)(e).[169] As to the binding effect of the order, Fraser C.J.A. wrote that there was "no merit to the submission that a Commission decision is nothing more than an internal administrative review which lacks the force of law." Court affirmation of administrative decisions is not required to lend "legitimacy in the law" to administrative decisions, which may be enforced as judgments of the court when filed in the courts.[170]

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[165] *Hennig* CA at para. 69.
[166] *Poonian* CA at paras. 51-52, AR Vol. I, pp. 98-99.
[167] *Bourassa* at para. 7.
[168] *Bourassa* at para. 1.
[169] *Bourassa* at para. 41 (Fraser C.J.A., concurring).
[170] *Bourassa* at para. 37 (Fraser C.J.A., concurring).

81. The relevant question is whether the foundational elements of the orders made against the appellants (obtaining amounts through a market manipulation contrary to s. 57(a) of the *Securities Act*, which is at its core deceitful misconduct resulting in an artificial price for shares), is "congruent" with the foundational element of s. 178(1)(e) – obtaining property deceitfully.[171] The answer is clearly yes. The Commission's orders should remain enforceable after the appellants' discharge from bankruptcy under s. 178(1)(e).

E. The Commission's orders are "penalt[ies], restitution order[s], or other order[s] similar in nature … imposed by a court in respect of an offence" within the meaning of s. 178(1)(a) of the *BIA*

82. The purpose of s. 178(1)(a) is to ensure that a bankrupt cannot use the bankruptcy system to avoid financial liabilities arising from an offence against the state. Outside of the recognizance or bail context, there are three elements to s. 178(1)(a) that must be satisfied: 1) the order must be a fine, penalty or restitution order, or other order "similar in nature" to a fine, penalty or restitution order; 2) the order must be "imposed by a court"; and 3) the order must be "in respect of an offence". The Commission's orders satisfy all three elements and therefore remain enforceable after a discharge from bankruptcy.

i. Paragraph 178(1)(a) is not limited to criminal or quasi-criminal orders

83. In *Hennig* CA, the ABCA wrote that s. 178(1)(a) reflected the "the division of labour (and authority) within the legal system," and that s. 178(1)(a) was intended to ensure that criminal sanctions remained outside of the control of the civil bankruptcy courts.[172] This interpretation is not supported by a textual or a purposive analysis of the *BIA*.

84. Paragraph 178(1)(a) applies to "*any* fine, penalty or restitution order, or other order similar in nature…" [emphasis added], not only to punitive or criminal fines or penalties. The plain wording of s. 178(1)(a) does not exclude "prospective and preventative" orders made by the Commission from its scope, nor is there any reason to make the arbitrary distinction between criminal and administrative penalties in this context.

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[171] *Bourassa* at para. 42 (Fraser C.J.A., concurring).
[172] *Hennig* CA at para. 49.

85. Disgorgement orders made under s. 161(1)(g) are orders "similar in nature to" a restitution order – they are a gain-based remedy designed to deter persons from contravening the *Securities Act* by ensuring that the person does not retain the benefit of their wrongdoing. The restitutionary effect of disgorgement orders – whether ordered by a panel of commissioners under s. 161(1)(g) or by the court under s. 155.1(b) or 157(1)(b) – is achieved through the claims process authorized under s. 15.1 of the *Securities Act* and Part 3 of the *Securities Regulation*,[173] in which money collected under a disgorgement order is paid to eligible applicants who have suffered pecuniary loss as a direct result of the contravention resulting in the order.[174]

86. Orders made under s. 162 of the *Securities Act* are penalties within the meaning of s. 178(1)(a). The Commission has a statutory mandate to craft appropriate sanctions to protect the public interest and deter and penalize conduct that could undermine investor protection and confidence in public markets.[175] Panels craft sanctions having regard to a host of relevant factors, including the seriousness of the respondents' conduct, the harm suffered by investors as result of the misconduct, the damage done to the integrity of the capital markets in British Columbia, the respondents' enrichment, mitigating factors, past conduct, future risk to investors and markets, fitness to participate in the market, specific and general deterrence, and past orders made in similar circumstances.[176]

87. Revenue collected in payment of administrative penalties is not paid into general revenue. Under s. 15 of the *Securities Act*, this revenue must be expended for the purpose of (1) education of market participants and the public about investing, financial matters, or the

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[173] *Securities Regulation*, s. 7.1. Under s. 7.4 of the *Securities Regulation*, when determining an amount to be paid to an eligible applicant, the Commission must consider the amount of money received from the order; the loss suffered by the eligible applicant, the losses suffered by all eligible applicants, and any other information it considers appropriate in the circumstances. If the funds collected are not sufficient to pay all claims, the Commission may prorate claims among eligible applicants in accordance with a set formula.
[174] Sanctions Appeal at para. 143.
[175] *British Columbia (Securities Commission) v. Liao*, 2021 BCCA 470 [***Liao***] at para. 22.

operation or regulation of securities markets; (2) benefiting an appropriate third party, (3) enforcement of the decision ordering the penalty, or another decision ordering financial sanctions, or (4) administration of the claims process under s. 15.1 of the *Securities Act*.

88. The Commission's administrative penalties have a regulatory purpose that includes, among other things, general deterrence. This Court in *Cartaway Resources Corp. (Re)* confirmed that, like courts considering general deterrence in the criminal sentencing context, it is reasonable for specialized expert tribunals like the Commission to consider general deterrence in crafting penalties.[177]

89. In light of the expansive wording of s. 178(1)(a) ("any fine… or other order similar in nature"), courts should adopt an approach to interpretation of s. 178(1)(a) that promotes, rather than undermines, the purposes of financial sanctions made under valid provincial enactments.

90. The characterization of s. 178(1)(a) as an "administration of justice concept" originates with *Jerrard v. Peacock* (***Jerrard***).[178] In that case, the court considered whether a decree nisi requiring a husband to make mortgage payments on a property transferred to his spouse would survive discharge from bankruptcy under what was then s. 148(1)(c) of the *BIA* ("any debt or liability under a maintenance or affiliation order or under an agreement for support of a spouse or child living apart from the bankrupt"). At the time of *Jerrard*, in 1985, the equivalent provision of the *BIA* (s. 148(1)(a)) read as follows:

> 148(1) An order of discharge does not release the bankrupt from
>
> (a) any fine or penalty imposed by a court or any debt arising out of a recognizance or bail bond.

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[176] *Liao* at para. 22, citing *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22.
[177] *Cartaway* at paras. 60 and 62. See also *Samji* at paras. 93-96.
[178] *Jerrard* at paras. 36, 42.

91. Bill C-22,[179] enacted in 1992, expanded the scope of s. 178(1)(a) to include "restitution order or any other order similar in nature to a fine, penalty or restitution order". Committee discussion in 1992 suggests the scope of s. 178(1)(a) was intended to include any fine or penalty, because "one must have respect for the law."[180]

92. Subsection 178(1) must be interpreted in the dynamic context in which it operates, not as a static record of the administration of justice as it was on the original enactment of the section, (which occurred in what was then s. 135 of the *Bankruptcy Act, 1949*[181]). Subsection 178(1) speaks in a modern context that recognizes the administrative state as a fundamental component of the justice system in Canada. Parliament need not have expressly referenced orders made by administrative tribunals in s. 178(1)(a) to satisfy the criteria in s. 178(1)(a). The orders made by the Commission panel under s. 161(1)(g) and s. 162 of the *Securities Act* are the types of orders to which s. 178(1)(a) applies.

ii. The Commission's orders are "imposed by a court" when filed under s. 163 of the *Securities Act*

93. Once filed under s. 163(1) of the *Securities Act*, a Commission decision "has the same force and effect", and all proceedings may be taken on it, "as if it were a judgment" of the court.[182] Subsection 163(2) of the *Securities Act* expresses the Legislature's policy choice to ensure that administrative decisions by a specialized, expert tribunal are to be enforced by courts *as if they were* orders of the court. This Court should interpret the words "imposed by a court" in s. 178(1)(a) to include orders that are deemed by legislation to be enforceable as orders of the court, once filed.

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[179] *An Act to enact the Wage Claim Payment Act, to amend the Bankruptcy Act and to amend other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-1992, cl. 124(1).

[180] House of Commons, Standing Committee on Consumer and Corporate Affairs and Government Operations, Minutes of Proceedings and Evidence, 34-3, No. 43 (12 May 1992) at 43:69-70.

[181] S.C. 1949 (2nd Sess.), c. 7, RBOA, p. 7. The predecessor to s. 135 of the *Bankruptcy Act, 1949* was s. 61 of the *Bankruptcy Act*, S.C. 1919, c. 36, RBOA, pp. 2-3, which became s. 147 of the *Bankruptcy Act*, R.S.C. 1927, c. 11 in the Revised Statutes of 1927, RBOA, p. 5. Section 135 of the 1949 Act became s. 178 in R.S.C. 1985, c. B-3.

94. The ordinary meaning of the words "imposed by a court" does not require the narrow interpretation advanced by the appellants and adopted in *Hennig* CA and by the BCCA in this appeal.[183] The word "imposed" means "to officially force a rule, tax, punishment, etc. to be obeyed or received";[184] or "to lay on, as something to be borne, endured or submitted to … to levy or enforce authoritatively…".[185] The words "imposed by a court" do not mean "adjudicated" or "decided by a court" – where Parliament has intended to refer to judicial decisions it has done so, for example, in s. 178(1)(c) of the *BIA*.[186] The narrow approach also undermines the "social policy" purpose of the *BIA* by permitting those who deliberately engage in serious misconduct contrary to the *Securities Act* to escape the financial consequences of that conduct.

95. The modern approach to statutory interpretation requires an "expansive"[187] view of the words and the scheme of the *BIA*. The words "imposed by a court" are broad enough to include fines, penalties and restitution orders (or other orders similar in nature) in administrative decisions that, once filed, are enforceable as court orders. This interpretation does not require a court to find that the tribunal's orders are *the same as* court orders – they are not. The legislative mandate is simply that tribunal orders filed in a court are enforceable as if they were court orders.[188] This dynamic interpretation gives effect to the purpose of s. 178(1)(a), which is to ensure that bankrupts cannot use the shield of discharge to avoid the "kinds of claims" that are in s. 178(1)(a) (*i.e.*, fines, penalties, restitution orders or other orders similar in nature, in respect of an offence), simply because they are adjudicated by expert tribunals rather than courts.

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[182] *Securities Act*, s. 163(2).
[183] *Poonian CA* at para. 47, citing *British Columbia (Employment Standards) v. Kwok*, 2022 BCCA 196 at paras. 37-39, AR Vol. I, pp. 96-97.
[184] *Cambridge Dictionary*, sub verbo "impose".
[185] *Oxford English Dictionary*, sub verbo "impose".
[186] "[A]ny debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt".
[187] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 27 [***Bell ExpressVu***].
[188] *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 939-41, [1992] S.C.J. No. 37.

96. A dynamic interpretation also promotes "harmony, coherence and consistency between statutes dealing with the same subject matter"[189] (*i.e.*, enforceability of claims). This has an important practical effect: securities markets extend across provincial, territorial and international borders, and regulators must be able to "surmount borders where legally possible,"[190] including to enforce their orders. Securities regulators rely on the enforceability of their decisions as court orders to enforce these orders extrajurisdictionally. This is achieved through registration of judgments in the regulator's home province, followed by reciprocal recognition of those orders where local legislation permits that recognition.[191] It is incongruous with the plain language of s. 163(2) of the *Securities Act*, and the legislative regimes that permit local recognition of foreign judgments based on that registration, to fail to give effect to Commission orders registered under s. 163(2) in the bankruptcy context.

iii. Contraventions of s. 57(a) of the *Securities Act* are an offence under that Act

97. The Commission panel's orders are made "in respect of" an offence under the *Securities Act*, and therefore satisfy the third component of s. 178(1)(a) of the *BIA*. The appellants' contravention of s. 57(a) of the *Securities Act* is deemed an offence by s. 155 of the *Securities Act*, which reads:

> 155(1) Any person who does any of the following commits an offence: …
>
> (b) contravenes any of sections 34, 4-57, 57.2, 57.3, 57.5, 57.6, 58, 61, 85(b), 87, 125, 143.2, 148 or 168.1(1) of this Act...

98. Not all contraventions of the *Securities Act* are offences.

99. Proceedings before a Commission panel, and sanctions imposed under ss. 161 and 162, are administrative – not criminal – in nature and, to be clear, the Commission does not assert that it is conducting the prosecution of a quasi-criminal offence under s. 155 when it conducts

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[189] *Bell ExpressVu* at para. 27, citing *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 52. See also s. 8.1 of the *Interpretation Act*.

[190] *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 at para. 27.

[191] *Lathigee v. British Columbia Securities Commission*, 136 Nev. Adv. Op. 79 (Nev. Sup. Ct. 2020, *en banc*).

an enforcement hearing under ss. 161 and 162. But the scope of s. 178(1)(a) is broad enough to include administrative proceedings in respect of conduct that is an offence under the *Securities Act* and orders made in a criminal proceeding in which penalties imposed represent a true penal consequence. Both types of proceedings may occur, and the orders arising out of both types of proceeding fall within the scope of s. 178(1)(a).[192]

100. This is so because Parliament used the words "in respect of an offence" in s. 178(1)(a). This Court has characterized the phrase "in respect of" as "exceptionally broad language"[193] and "probably the widest of any expression intended to convey some connection between two related subject matters."[194] If Parliament intended to limit s. 178(1)(a) only to orders made in the context of prosecution of criminal offences, it would have chosen the narrow language required to achieve that purpose, such as "in a prosecution for" an offence, or "where a person is charged with" an offence.[195] Parliament's choice to cast s. 178(1)(a) broadly should be given effect.

101. This broad interpretation of the words "in respect of an offence" in s. 178(1)(a) best achieves Parliament's purpose, which is to ensure that a bankrupt cannot use the bankruptcy system to avoid the financial consequences of conduct that is an offence against the state. It is immaterial that the Commission (the expert administrative tribunal charged with regulating the securities industry) chose to proceed with administrative sanctions rather than refer the misconduct to the Crown for prosecution, or seek orders from the court under s. 157. The misconduct is no less serious, and the resulting orders no less enforceable. The Commission panel is obviously best positioned to hear evidence and make findings of fact about complex market manipulations, matters that are well within the Commission's established expertise.

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[192] *Samji* at para. 118.
[193] *R. v. Barton*, 2019 SCC 33 [***Barton***] at para. 73.
[194] *Barton* at para. 72, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39, [1983] S.C.J. No. 5.
[195] *Barton* at para. 73.

F. Recognition of the Commission's orders under s. 178(1) does not open the "floodgates" or undermine the fresh start principle

102. The appellants' "floodgates" argument should be rejected.[196] The Commission's orders are claims provable in a bankruptcy, whether they survive or not. The number of claims administered by the trustee does not change. Nor does recognizing the Commission's orders under s. 178(1) expand the *categories* of debts Parliament said should remain enforceable in s. 178(1). Parliament did not intend to limit the legal sources of the debts and liabilities (as indicated by the repeated use of the phrase "*any* debt or liability" or "*any* fine, penalty or restitution order") that fall within the scope of the categories in s. 178(1).

103. The categories have natural limitations in any event. Not every administrative tribunal has the statutory mandate to make orders that deal with deceitful misconduct that would fall within s. 178(1)(e). Similarly, not every contravention of a regulatory statute is made an offence by provincial legislatures or Parliament. Regular debts owed to government arising from normal commercial life are not captured under s. 178(1)(a). No interpretation of s. 178(1) could confer on an administrative tribunal a statutory mandate not contained in its enabling statute.

PART IV – COSTS

104. There is no reason to depart from the ordinary rule that costs should follow the event.

PART V – ORDER SOUGHT

105. The respondent submits that the appeal should be dismissed with costs.

106. The respondent seeks a declaration that the amounts owed by the appellants to the Commission pursuant to the decisions of the Commission dated March 13, 2015 (2015 BCSECCOM 96) and May 16, 2018 (2018 BCSECCOM 160), and registered with the Supreme Court of British Columbia in SCBC Action Nos. L-150104 and L-180185 respectively, shall not be released by any order of discharge granted to the appellants by reason of s. 178(1)(a) and s. 178(1)(e) of the *BIA*.

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[196] Appellants' factum, paras. 53-57.

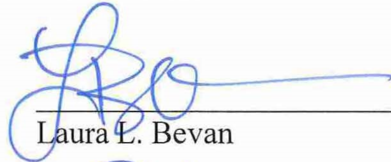
PART VI – SUBMISSIONS ON CONFIDENTIALITY

107. Not applicable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 18, 2023

William L. Roberts



Laura L. Bevan

Sarah B. Hannigan

Counsel for the Respondent
British Columbia Securities Commission

PART VII – TABLE OF AUTHORITIES

JURISPRUDENCE		**Cited at paragraph(s)**
1.	*Alberta (Attorney General) v. Moloney*, 2015 SCC 51	43, 47, 60
2.	*Alberta Securities Commission v. Hennig*, 2020 ABQB 48	32
3.	*Alberta Securities Commission v. Hennig*, 2021 ABCA 411	32, 35, 50, 53, 68, 76, 78, 83, 94
4.	*Bannerman Lumber Ltd. et al. v. Goodman*, 2021 MBCA 13	52
5.	*Barodawala v. Perinparajah*, 2022 VSCA 198	75
6.	*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42	95, 96
7.	*British Columbia (Employment Standards) v. Kwok*, 2022 BCCA 196	94
8.	*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, [1995] S.C.J. No. 32	13, 57, 58
9.	*British Columbia (Securities Commission) v. Liao*, 2021 BCCA 470	86
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