File Number: 40396

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

BETWEEN:

THALBINDER SINGH POONIAN, ET AL.

APPELLANTS

AND:

BRITISH COLUMBIA SECURITIES COMMISSION

RESPONDENT

AND:

CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS, ATTORNEY GENERAL OF SASKATCHWAN, THE SUPERINTENDENT OF BANKRUPTCY, FEDERATION OF LAW SOCIETIES OF CANADA, ALBERTA SECURITIES COMMISSION, ATTORNEY GENERAL OF ONTARIO, ONTARIO SECURITIES COMMISSION, ATTORNEY GENERAL OF BRITISH COLUMBIA, and OSGOODE INVESTOR PROTECTION CLINIC

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PART I – OVERVIEW

1. Raised but not addressed in the Courts below, s. 178(1)(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") is not at issue in this appeal — and nor should it be revived. The Federation of Law Societies of Canada ("FLSC") intervenes to highlight the collateral risks for law societies if the Court chooses to address the provision in its judgment.

2. The concern arises as much from practice as from theory. Labeled a "close relation"[1] with s. 178(1)(e), courts have sometimes construed (d) and (e) together, grouping them as "morality concepts"[2] and, sometimes, construing both to require what the Court below called a "direct link" between creditor and debtor. On this view, (d) would apply only where the debtor is in a fiduciary relationship with the specific creditor who invokes the provision. In *Alberta Securities Commission v. Hennig*, 2021 ABCA 411, the Court wrote that there was an "obvious" analogy between (d) and (e) such that a "direct link" was required under both.[3]

3. If accepted, that view could undermine law society disciplinary processes. Like securities commissions, law societies have a public interest mandate to impose monetary sanctions in appropriate cases for professional misconduct. Those sanctions may include fines, cost awards, and orders for the reimbursement of compensation paid to clients. But if (d) requires a "direct link", the provision could become unavailable to law societies when members make an assignment into bankruptcy. In turn, this could allow members to escape the consequences of law society sanctions, diminishing those sanctions' effectiveness or encouraging law societies to impose other sanctions, like suspensions, that may be less well tailored to the public interest.

4. The analogy between (d) and (e), further, is unsound. Section 178(1) is wide-ranging: its text is varied and its protections eclectic. Like the rest of the subsection, (d) and (e) function in distinct ways and for distinct aims. And with its unique statutory text and contrasting provincial interpretations, (d) requires more nuance than this appeal can provide.

5. Section 178(1)(d) ought therefore to await another case. If the Court addresses the provision at all, it should distinguish (d) from (e) expressly, so that the provisions may remain separate, and the collateral risks to law societies can be avoided.

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[1] *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256 at para 39 (per Newbury J.A., dissenting but not on this point).
[2] *Jerrard v. Peacock* (1985), 61 A.R. 161 (Q.B.), 1985 CanLII 1148 at para 44.
[3] At para 86.

PART II – STATEMENT OF POINTS IN ISSUE

6. This Court should ensure that its decision in this appeal does not have the collateral consequence of diminishing law societies' ability to rely on s. 178(1)(d) of the *BIA* when imposing monetary sanctions.

PART III – STATEMENT OF ARGUMENT

Section 178(1)(d) and Law Societies

7. The *BIA* reflects two overarching aims: the equitable distribution of the bankrupt's assets among its creditors and the bankrupt's financial rehabilitiation.[4] Furthering the latter, s. 178(2) provides that discharge from bankruptcy "releases the bankrupt from all claims provable in bankruptcy" — with some exceptions. Section 178(1) lists those exceptions. Together, the two provisions create a "comprehensive" mechanism for deciding which debts survive bankruptcy.[5]

8. At a high level, s. 178(1)'s exceptions amount to "overriding social policy": debts that society considers to "outweigh…any possible benefit to society in the bankrupt being released of [the] obligations".[6] The provision therefore represents "Parliament's attempt to balance financial rehabilitation with other policy objectives".[7] But ranging from wrongful death[8] to outstanding student loans,[9] its list of debts reflects no "master-rationale"; it instead "reflects a number of disparate policy choices by Parliament reflecting different considerations."[10]

9. The two subsections at issue in this appeal — ss. 178(1)(a) and (e) — highlight that diversity. While (a) captures debts imposed "in respect of an offence", (e) captures debts resulting from misrepresentations, typically a civil matter. If not for the Respondent's unique nature as a regulator, the provisions might seldom meet in a single application or motion. Indeed,

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[4] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para 32.
[5] *Moloney* at para 79.
[6] *Jerrard* at para 41.
[7] *Moloney* at para 37.
[8] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178(1)(a.1)(ii) [*BIA*].
[9] *BIA*, s. 178(1)(g).
[10] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411at para 19 [*Hennig*].

the chambers judge's decision in the case below appears to be the first (and, to date, only) reported decision to find that both subsections applied together.[11]

10. The Respondent also raised s. 178(1)(d) below. It provides that:

> …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…

11. Law societies are not uniquely interested in s. 178(1)(d), but the subsection is uniquely important for them. Allegations of fraud, embezzlement, misappropriation, or defalcation arise frequently in law society disciplinary proceedings, especially in relation to trust accounting. And unlike others, lawyers are *per se* fiduciaries for their clients.[12] Only in rare and unusual cases would law societies invoke s. 178(1)(a), and s. 178(1)(e) arguably adds little to what is available to law societies under (d).[13] But a decision of this Court that limited (d)'s scope would risk influencing law society discipline for the worse.

12. This is because monetary sanctions and reimbursement orders are critical for law societies to enforce conduct and fulfill their mandate to protect the public. While other disciplinary penalties are available to them, monetary sanctions and reimbursement orders are important options where permitting the member or licensee to continue practicing is in the public interest. An unduly restrictive interpretation of s. 178(1), and subsection (d) in particular, could deprive law societies of valuable sanctions or undermine the purpose of sanctions that involve a monetary aspect, insofar as they could allow a member or licensee to escape the consequences of their misconduct.

13. In this case, the risk is most acute with the ground of appeal concerning s. 178(1(e). That issue asks the Court to resolve a conflict between appellate courts over whether (e) requires a "direct link" between the debtor and the creditor — in that context, whether a misrepresentation must have been made to the particular debtor invoking the subsection. The Court of Appeal for

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[11] *Poonian (Re)*, 2021 BCSC 555.
[12] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 33.
[13] In *Goldstein (Re)*, 2011 ONSC 561, the Law Society of Upper Canada invoked both s. 178(1)(d) and (e) but was unsuccessful in both because the court deemed the debt (a costs order) a product of law society disciplinary proceedings, not of the lawyer's underlying conduct: at paras 10-12.

British Columbia concluded that no such link was needed[14]; in *Hennig*, the Court of Appeal of Alberta concluded that it was.

14. Both decisions referred to s. 178(1)(d), although the ABCA more directly confronted the question of concern here: whether (d) requires that the creditor be "itself in a fiduciary relationship with the bankrupt", or whether the subsection can apply even when the fiduciary duty was owed to a third party[15] — in other words, whether (d) too requires a "direct link".

15. The ABCA's judgment in *Hennig* drew on *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465. There, the ONCA reasoned that because s. 178(1) ought to be "construed narrowly and applied only in clear cases", s. 178(1)(d) should only be read to "protect…a creditor that was in a vulnerable position in relation to the bankrupt when its claim arose".[16] So too, the Court in *Hennig* wrote, s. 178(1)(e) "protects creditors who are vulnerable in the sense that they were the *target* of the debtor's fraudulent statements".[17] Despite authority to the contrary, it concluded that this justified the need for a "direct link" under (e).[18]

16. The Court should not draw a similar analogy between (d) and (e) in this appeal, for two main reasons.

17. First, because there is no need — the Court has already pronounced on the link required under (e) in *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53. Rendered just days before the ABCA's decision in *Hennig*, that judgment considered whether a claim was a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" under s. 19(2)(d) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36. The Court turned to 178(1)(e) of the *BIA* — a provision "analogous in every respect to s. 19(2)(d) of the *CCAA*"[19] — and explained that creditors invoking s. 19(2)(d) must establish that "the debtor made a representation *to the creditor*".[20] In other words, both s. 178(1)(e) of the *BIA* and s. 19(2)(d) of the *CCAA* require a "direct link".

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[14] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 at para. 70.
[15] At paras 61 and 65.
[16] *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465 at paras 63-64 and 66 [*Korea Data Systems*].
[17] *Hennig* at para 86.
[18] *Hennig* at para 92.
[19] *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, at para. 24 [*Montréal (City)*].
[20] *Montréal (City)* at para 25 (emphasis added).

18. The Court's analysis of s. 178(1)(e) in this appeal can stop there. Neither party has asked the Court to revisit *Montréal (City)* and it is dispositive of the legal issue on this ground of appeal. It makes recourse to s. 178(1)(d) unnecessary.

19. But the Court should not endorse *Hennig*'s reasoning in any event. At least two issues arise. For one, textual differences between (d) and (e) raise a hard question of bilingual statutory interpretation. For another, divergent appellate decisions would require the Court to resolve a further conflict in provincial laws, but without the benefit of full argument.

20. For both reasons, s. 178(1)(d) should be left for another case.

Statutory Interpretation

21. The statutory interpretation issue rests on a subtle difference in wording.

22. The *BIA*'s English text features a material difference between the language of 178(1)(d) and (e). Whereas (e) applies to "any debt or liability resulting from obtaining property…", (d) applies to "any debt or liability arising out of fraud, embezzlement…". Per the presumption of consistent expression, the term "arising out of" in (d) and "resulting from" in (e) "must be understood to have different meanings", since "otherwise the legislature would have employed only one term or the other".[21]

23. The difference lies in how the terms represent causal relationships. The verb "to result" means to "arise as the actual consequence or follow as a logical consequence (from conditions, causes, etc.)".[22] The primary meaning of "to arise", by contrast, is to "begin to exist; originate".[23] In another context, this Court has stated that the phrase "arising out of" is "broader than 'caused by', and must be interpreted in a more liberal manner."[24] And indeed, the phrase has a broader

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[21] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 53.

[22] Katherine Barber, ed., *Canadian Oxford Dictionary*, 2nd ed., Toronto, Oxford University Press Canada, 2004, sv. "result". *Black's Law Dictionary* defines the term as "To be a physical, logical, or legal consequence; to proceed as an outcome or conclusion": Bryan A. Garner, ed., *Black's Law Dictionary*, 11th ed., St. Paul, MN, Thomson Reuters, 2019, sv. "result".

[23] *Canadian Oxford Dictionary*, sv. "arise". While *Black's Law Dictionary* treats the term as having the secondary meaning "To result (from)", its primary meaning is "[t]o originate; to stem (from)": sv. "arise".

[24] *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at 417.

shade of meaning than "resulting from": criminal charges may *arise out of* an incident, but it would be awkward to say they *result from* an incident. The latter connotes a more proximate and direct causal relationship than the former.

24. In this way, (d)'s English text conveys a more flexible causal meaning, one made effective by reading the provision to capture debts that *originate in* conduct undertaken in a fiduciary relationship, even if the debtor neither directly victimized, nor was a fiduciary to the specific creditor at issue. Had Parliament wished for both (d) and (e) to contemplate the same causal relationships, it could have used identical language in both.

25. The *BIA*'s French text casts the problem in a different light. There, both (d) and (e) indeed use the same expression « résultant de », which suggests that they should have the same meaning:

(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	d) de toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors qu'il agissait, dans la province de Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire
(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	e) de toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation qui découle d'une réclamation relative à des capitaux propres

26. The surrounding context sheds little light on this concordance in the French text. Section 178(1) uses many terms to describe causal relationships ("arising out of a recognizance or bail" (a); "arising under a judicial decision...or under an agreement" (c); "in respect of a loan" (g and g.1)) — without using consistent equivalents in French (« provenant d'un engagement ou d'un cautionnement en matière pénale » (a); « aux termes de la décision d'un tribunal…ou aux termes

d'une entente » (c); and « découlant d'un prêt » (g and g.1)). Alternately rendered « résultant de », « provenant de », « aux termes de » or « découlant de », the French text uses no single term for "arising". Subsection (a) suggests that the term "arising out of" in s. 178(1)(d), which it mirrors, could equally have used « provenant de », whose meaning — « Avoir son origine dans; tirer son origine de »[25] — is near the English. But both « résultant de » and « provenant de » can be synonymous with the English verb "arise".[26]

27. Construing s. 178(1)(d) against this backdrop requires identifying the text's common meaning, if one exists. A two-part procedure applies: (1) is there a "discordance" between the texts, and if so, can they be reconciled on a "purposive and contextual" approach?; and (2) if a common meaning can be found, is that "common or dominant meaning…according to the ordinary rules of statutory interpretation, consistent with Parliament's intent"?[27]

28. As noted, the phrase "arising out of" in the English text implies a broader approach to causation than the French « résultant de » would suggest. And typically, where the precise meaning of both provisions is unclear, the narrower meaning of the two — here, the more direct causal relationship — should prevail as their common meaning.[28] But as the second part of the test suggests, that is not decisive. Rather, "the narrower meaning of one of the two versions should not be preferred where such meaning would clearly run contrary to the intent of the legislation and would consequently tend to defeat rather than assist the attainment of its objects."[29]

29. Such is the case here. In construing s. 178(1), Parliament's specific criteria matter — it "must be taken to have have intended that only [the] specific categories, on the specific terms identified, will be given [s. 178(1)'s] effect."[30] And (d) adds a criterion that is lacking in (e): unlike (e), it addresses both the behaviour giving rise to the claim (fraud, embezzlement, etc.)

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[25] Josette Rey-Debove and Alain Rey, eds., *Le nouveau petit Robert,* Paris, Dictionnaires le Robert, 2002, sv. « provenir ».

[26] *Le Robert & Collins*, 11th ed., New York, HarperCollins Publishers, 2020, sv. "arise". It can also be rendered « découle de » : see Government of Canada, *TERMIUM Plus: The Government of Canada's terminology and linguistic data bank*, online: www.btb.termiumplus.gc.ca, sv. "arise".

[27] *R. v. Daoust*, 2004 SCC 6 at paras 27-30 [*Daoust*].

[28] *Daoust* at para 29.

[29] *R. v. Compagnie Immobilière BCN Ltée.*, [1979] 1 S.C.R. 865 at 871-872; Ruth Sullivan, *The Construction of Statutes*, 7th ed., LexisNexis, Online, at §5.04[2].

[30] *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925 at para 39.

and the type of relationship that must underlie that claim (a fiduciary relationship).[31] This explains why (d) would embody a more flexible approach to causation: it suggests Parliament meant to compensate for conditions that could otherwise make the provision relatively stringent.

30. The legislative history reinforces this conclusion. Before 2007, s. 178(1)(e) read in English "any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation", while (d), and the French versions of (d) and (e), retained the present terms "arising out of" and « résultant de ». Then in 2007, Parliament amended the English version of (e) to give it the present wording "any debt or liability resulting from…", but without altering subsection (d).[32] Parliament could have made (d) and (e) uniform on this point, but chose not to. Construing (e) but not (d) to require a "direct link" gives that choice its proper effect.

31. Contrary to *Korea Data Systems*, reading s. 178(1)(d) in this way does not "expand [its] reach…well beyond what it exists to protect".[33] As discussed below, for a creditor to successfully invoke (d), they must still be owed a debt by the debtor; that debt must arise from specified conduct; and the debt must have arisen while the debtor was in a particular type of relationship, namely a fiduciary one. The provision is stringent even without a "direct link" as under (e). There is no risk of throwing open (d)'s doors to undue claims.

32. But the point is only illustrative of the problems with attempting to address (d) here: the Court, again, need not — and should not — take up this controversy in this appeal. It should instead steer clear of deciding it. This is best done by not addressing (d) at all.

Conflicting case law

33. This leads to the second issue. Much like under s. 178(1)(e), provincial courts are not unanimous on whether (d) requires a "direct link". While Courts in Alberta (*Hennig*) and Ontario (*Korea Data Systems*) have concluded that a "direct link" is required, courts in other Provinces

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[31] Most cases have held that the words "while acting in a fiduciary capacity" refer to the whole of the clause rather than to "misappropriation or defalcation" alone: Lloyd Houlden et al., *The 2023 Annotated Bankruptcy and Insolvency Act*, Toronto, Thomson Reuters, 2023, at §7:192.

[32] *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 54.

[33] *Korea Data Systems* at para 66.

— including Quebec — have framed the test to require only that the debtor "received the money as a fiduciary".[34] The latter approach comports with the broader sense of "arising from" in (d).

34. Granted, courts have typically applied s. 178(1)(d) in claims brought by the person to whom the fiduciary duty was owed, rather than by an intermediary. In *Valastiak v. Valastiak,* 2010 BCCA 71, the Court went further and asked whether a director, clearly a fiduciary to their corporation, was also in a fiduciary relationship with a creditor shareholder, apparently accepting the lower court's finding that such a link was required.[35]

35. But the test framed in those cases does not compel that approach. It has three elements:

(a) The money taken to create the debt must have belonged to someone other than the taker;

(b) The taking must involve a wrongful use of the money; and

(c) The taker must have received the money as a fiduciary.[36]

36. None of these elements require a "direct link". And for the reasons discussed above, this is preferable to the approach taken in *Hennig* or *Korea Data Systems,* since it gives proper effect to the words "arising out of" in (d).

37. A pronouncement by this Court on (d), however, could alter that test and effectively resolve a difference between provincial appellate courts, without argument from the parties. It should await the proper case to do so.

Conclusion

38. These issues illustrate the problems with addressing s. 178(1)(d) in this appeal. Put simply, (d) cannot be addressed meaningfully without engaging issues that exceed the appeal's proper scope. Caution would therefore dictate that it be left for another case. If the Court

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[34] *Valastiak v. Valastiak*, 2010 BCCA 71 at para 30; *Ross & Associates v. Palmer*, 2001 MBCA 17 at para 24 [*Ross & Associates*]; *Syndic de la Succession de Rochefort*, 2022 QCCS 281 at para 36.
[35] *Valastiak v. Valastiak*, 2009 BCSC 204, rev'd 2010 BCCA 71, at para 17.
[36] *Ross & Associates* at para 24; Houlden, *The 2023 Annotated Bankruptcy and Insolvency Act*, at §7:192.

addresses the provision in its judgment at all, it should distinguish (d) from (e) expressly, to avoid an outcome that could pose collateral risks to law society disciplinary activities.

PART IV – COSTS AND ORDER SOUGHT

39. The FLSC takes no position on the appeal's disposition and asks that no costs be awarded for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia this 10th day of October, 2023.

Claire E. Hunter, K.C. and Devin Eeg

Counsel for Federation of Law Societies of Canada

PART V – TABLE OF AUTHORITIES

CASES	Paragraph(s)
Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24	11
Alberta (Attorney General) v. Moloney, 2015 SCC 51	7, 8,
Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53	22
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Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc., 2021 ONCA 925	29
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Ruth Sullivan, *The Construction of Statutes*, 7th ed., LexisNexis, Online	28
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PART VI – LEGISLATION AT ISSUE

LEGISLATION	**Paragraph(s)**
An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36	30
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3	1-20, 22, 24-27, 29-38
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