SCC File No. 40396

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

B E T W E E N:

THALBINDER SINGH POONIAN and SHAILU POONIAN

Appellants

– and –

BRITISH COLUMBIA SECURITIES COMMISSION

Respondent

– and –

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

Interveners

FACTUM OF THE INTERVENER, OSGOODE INVESTOR PROTECTION CLINIC

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

STOCKWOODS LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Stephen Aylward
Karen Bernofsky
Tel: 416-593-2496 / 416-593-2486
Fax: 416-593-9345
Email: StephenA@stockwoods.ca
KarenB@stockwoods.ca

Counsel for the Intervener, Osgoode Investor Protection Clinic

JURISTES POWER LAW
50 O'Connor Street, Suite 1313
Ottawa, ON K1P 6L2

Maxine Vincelette
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

Agent for the Intervener, Osgoode Investor Protection Clinic

ORIGINAL TO: **SUPREME COURT OF CANADA**
The Registrar
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

REEDMAN LAW
#702 - 1030 West Georgia Street
Vancouver, BC V6E 2Y3

Cody G. Reedman
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 Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadocacy.ca

Agent for the Appellants, Thalbinder Singh Poonian and Shailu Poonian

LAWSON LUNDELL LLP
#1600 - 925 West Georgia Street
Vancouver, BC V6C 3L2

William L. Roberts
Laura L. Bevan
Sarah B. Hannigan
Tel: (604) 685-3456
Fax: (604) 669-1620
Email: wroberts@lawsonlundell.com
lbevan@lawsonlundell.com
shannigan@lawsonlundell.com

Counsel for the Respondent, British Columbia Securities Commission

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street W.
Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 228-2896
Email: msobkin@sympatico.ca

Agent for the Respondent, British Columbia Securities Commission

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street
Legal Services Branch
Victoria, BC V8W 2C5

Cindy Cheuk
Heather Wellman
Tara Callan
John Lovell
Tel: (778) 389-6364
Fax: (250) 387-0700
Email: cindy.cheuk@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott
Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

Agent for the Intervener, Attorney General of British Columbia

MINISTRY OF JUSTICE SASKATCHEWAN
Legal Services Division, Civil Law Branch
900-1874 Scarth Street
Regina, SK S4P 4B3

Jared G. Biden
Tel: (306) 787-8383
Fax: (306) 787-0581
Email: jared.biden@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener, Attorney General of Saskatchewan

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 8th floor
Crown Law Office - Civil
Toronto, ON M7A 2S9

Susan Keenan
Jacob Eidinger
Tel: (416) 898-1301
Fax: (416) 326-4015
Email: susan.keenan@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Intervener, Attorney General of Ontario

GOWLING WLG (CANADA) LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

Haddon Murray
Heather Fisher
Tel : (416) 862-3604
Fax: (416) 862-7661
Email: haddon.murray@gowlingwlg.com

Counsel for the Intervener, Canadian Association of Insolvency and Restructuring Professionals

ATTORNEY GENERAL OF CANADA
50 O'Connor Street
5th Floor
Ottawa, ON K1A 0H8

Zoe Oxaal
Roy Lee
Tel: (613) 941-4016
Fax: (613) 954-1920
Email: zoe.oxaal@justice.gc.ca

Counsel for the Intervener, Superintendent of Bankruptcy

ATTORNEY GENERAL OF CANADA
50 O'Connor Street
Suite 500, room 557
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Intervener, Superintendent of Bankruptcy

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 - 1040 West Georgia St. W
Vancouver, BC V6E 4H1

Claire E. Hunter, K.C.
Devin Eeg
Tel: (604) 891-2403
Fax: (604) 647-4554
Email: chunter@litigationchambers.com

Counsel for the Intervener, Federation of Law Societies of Canada

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, ON K2P 0C1

Dahlia Shuhaibar
Tel: (613) 501-5350
Fax: (613) 651-0304
Email: dshuhaibar@ovcounsel.com

Agent for the Intervener, Federation of Law Societies of Canada

DENTONS CANADA LLP
77 King Street West, Suite 400
Toronto Dominion Centre
Toronto, ON M5K 0A1

Raphael T. Eghan
Michael Beeforth
Brandon Barnes Trickett
Kelly Osaka
Tel: (416) 863-4507
Email: raphael.eghan@dentons.com

Counsel for the Intervener, Alberta Securities Commission

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott
Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

Agent for the Intervener, Alberta Securities Commission

ONTARIO SECURITIES COMMISSION
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Erin Hoult
Khrystina McMillan
Namita Balgi
Tel: (416) 593-8290
Email: ehoult@osc.gov.on.ca

Counsel for the Intervener, Ontario Securities Commission

SUPREME LAW GROUP
1800 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Intervener, Ontario Securities Commission

TABLE OF CONTENTS

Page

PART I - CONCISE OVERVIEW OF POSITION 1

PART II - QUESTIONS IN ISSUE 1

PART III - STATEMENT OF ARGUMENT 1

A. LEGISLATIVE HISTORY OF THE DISCHARGE BAR 1

B. SECTION 178(1)(D) APPLIES TO ALL FRAUD-RELATED DEBTS 5

C. SECTION 178(1)(E) APPLIES TO MARKET MANIPULATION 9

PART IV - SUBMISSIONS CONCERNING COSTS 10

PART V - ORDER OR ORDERS SOUGHT 10

PART VI - TABLE OF AUTHORITIES 11

PART VII - STATUTES AND REGULATIONS 13

PART I - CONCISE OVERVIEW OF POSITION

1. The easier it is for fraudsters to obtain a "fresh start" through discharge from bankruptcy, the harder it is for their victims to obtain compensation for their losses. Allowing discharge for fraud runs counter to the longstanding policy that bankruptcy law does not assist dishonest debtors. This policy is reflected in ss. 178(1)(d)-(e) of the *Bankruptcy and Insolvency Act* (the **"*BIA*"**), which bars discharge for fraud-related debts. Appellate courts have adopted an unduly narrow interpretation of the discharge bar, holding that s. 178(1)(d) is limited to cases of fraud committed by a fiduciary, while s. 178(1)(e) is limited to fraud involving a misrepresentation made to the creditor. This leaves a gap in the discharge bar for other forms of fraud, like non-fiduciary embezzlement, fraudulent conveyances, or as in this case, market manipulation. This differential treatment creates an arbitrary "hierarchy of frauds" that is entirely at odds with the history and purpose of the discharge bar.

2. Section 178(1)(d) bars discharge for debts arising out of "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity". The orthodox view is that the words "while acting in a fiduciary capacity" qualifies the entire clause and not just "defalcation", i.e. that s. 178(1)(d) applies only to fiduciary fraud. But the orthodox view is incorrect. It is based on superficial analysis that does not apply the modern approach to statutory interpretation. The text, context, and purpose of s. 178(1)(d) demand that this provision be interpreted as barring discharge for all forms of fraud. In the alternative, s. 178(1)(e) captures monetary penalties for and disgorgement orders for market manipulation.

PART II - QUESTIONS IN ISSUE

3. The Osgoode Investor Protection Clinic (**"IPC"**) focuses its submissions on two issues: (1) is s. 178(1)(d) limited to fraud by a fiduciary? and (2) is s. 178(1)(e) limited to fraud by misrepresentation made directly to the creditor?

PART III - STATEMENT OF ARGUMENT

A. Legislative History of the Discharge Bar

4. To understand the text, context, and purpose of ss. 178(1)(d)-(e), it is necessary to review the historical development of the bar against discharge for fraud-related debts. This history shows that a broad exclusion for fraud-related debts has long been part of bankruptcy legislation in England and the U.S., upon which Parliament modelled the *BIA*. The history also sheds light on the

meaning of the words in s. 178(1)(d). In particular, it shows that "defalcation while acting in a fiduciary capacity" is a set phrase that has been in use in U.S. bankruptcy legislation since 1841.

5. **England.** At common law, the only way for a debtor to be discharged from unpaid debts was to secure a release from each of their creditors.[1] Although the first English bankruptcy statute was enacted in 1542, it was not until 1705 that legislation provided for a discharge. The goal was to provide a more workable mechanism by which honest and cooperative debtors could obtain a "fresh start".[2] Initially, the discharge required creditor consent, applied only to persons engaged in trade, and could only be obtained through proceedings initiated by creditors (since there was no voluntary bankruptcy at the time).[3] In the 19th century, bankruptcy laws in England and the U.S. were liberalized by removing these limits and so making discharge more common.[4]

6. The discharge bar was developed to counterbalance the expanded availability of the discharge. In England, the discharge bar was first introduced in 1849. It precluded discharge, in broad terms, for any debts contracted by "any manner of fraud or breach of trust".[5] The *Bankruptcy Act, 1883* slightly narrowed the discharge bar, restricting it to liabilities incurred through "fraud or fraudulent breach of trust" by debtors who were party to the fraud.[6] The 1883 Act also introduced what has become known as the English model of discharge.[7] Under this model, the court is given broad discretion to grant, suspend, or refuse discharge and to attach conditions to the discharge. The statute lists factors to be considered by the court in exercising this discretion, one of which is whether the debtor is "guilty of fraud or fraudulent breach of trust".[8] The 1883 Act underwent technical amendments in the *Bankruptcy Act, 1914*,[9] which still forms the basis for the law in England[10] and Australia today.[11]

---

[1] *HBSY Pty Ltd v Lewis,* [2022] NSWSC 841 at paras 67-95.
[2] C. J. Tabb, "The Historical Evolution of the Bankruptcy Discharge" (1991) 65 Am Bankr LJ 325 at 326-333, IPC Book of Authorities (**"IPC.BOA"**) Tab 1.
[3] *Ibid* at 333-340.
[4] *Ibid* at 344-369; Thomas Telfer, "Reconstructing Bankruptcy Law in Canada: 1867 to 1919", JSD Thesis (University of Toronto, 1999) at 39-48, IPC.BOA Tab 2.
[5] *Bankruptcy Act, 1849* (12 & 13 Vict.), c 106 at s 216, IPC.BOA Tab 3; see also *Bankruptcy Act, 1869*, 32 & 33 Vict, c 71 (Eng.), s 49, IPC.BOA Tab 4.
[6] *Bankruptcy Act, 1883*, 46 & 47 Vict, c 52 (Eng.), s 30, IPC.BOA Tab 5 (emphasis added).
[7] D. G. Boshkoff, "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings " (1982-1983) 131 U Pa L Rev 69 at 71-73, 88-89, IPC.BOA Tab 6.
[8] *Bankruptcy Act, 1883*, 46 & 47 Vict, c 52 (Eng.), s 28, IPC.BOA Tab 5.
[9] *Bankruptcy Act, 1914* (4 & 5 Geo 5, c 59, ss 26, 28, IPC.BOA Tab 7
[10] *Insolvency Act, 1986* (Eng), s 281(3).
[11] *Bankruptcy Act, 1966* (Aus), s 153(2)(b).

7. **United States.** The discharge bar evolved along a slightly different path in the U.S. The *Bankruptcy Act of 1841* introduced voluntary bankruptcy for the first time. The Act prescribed grounds which barred discharge altogether, including “any fraud or wilful concealment of [the debtor’s] property” and debts "created in consequence of a defalcation as a public officer; or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity".[12]

8. The *Bankruptcy Act of 1867* took a different approach. Instead of barring access to discharge outright based on pre-filing misconduct, Congress provided that specific categories of *debts* would be excluded from the discharge. Discharge was barred for debts “created by the fraud or embezzlement of the bankrupt or by defalcation as a public officer, or while acting in a fiduciary capacity”,[13] The U.S. Supreme Court adopted an expansive interpretation of this provision, holding that it applied to any form of “actual fraud” involving “moral turpitude or intentional wrong”, such as a fraudulent conveyance.[14]

9. The *Bankruptcy Act of 1898* was landmark legislation that still defines the American model of bankruptcy discharge. In contrast with the English model, which involves significant judicial discretion, the American model operates as a rules-based system where eligible debtors are automatically entitled to discharge. While the American model makes discharge easier to obtain, it also places greater limits on what debts are discharged.[15] As explained below, the discharge bar for fraud-related debts enacted in ss. 17(2) and (4) of the 1898 Act are the direct ancestors of ss. 178(1)((e) and (d), respectively. Section 17 provided:

> 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity.[16]

10. In *Crawford v. Burke*, the U.S. Supreme Court held that s. 17(4) was limited to fraud committed by a fiduciary. The Court’s reasoned that s. 17(2) already applied to judgment debts for “frauds” and so a broader reading of s. 17(4) would create redundancy.[17] In 1903, Congress amended the 1898 Act by removing from s. 17(2) the phrase “judgments in actions for frauds” and

---

[12] *Bankruptcy Act of 1841*, c 9, 5 Stat 440, ss 1, 4, IPC.BOA Tab 8.
[13] *Bankruptcy Act of 1867*, c 17, s 33, IPC.BOA Tab 9.
[14] *Neal v Clark*, (1877) 95 US 704 at 709 (SCOTUS).
[15] Boshkoff, *supra* at 71-73, 88-89, IPC.BOA Tab 6.
[16] *Bankruptcy Act of 1898*, c 541, 30 Stat 544, s 17, IPC.BOA Tab 10.
[17] *Crawford v Burke*, (1904) 195 US 176 at 188 (SCOTUS).

replacing it with "liabilities", so that the exclusion applied to "liabilities for obtaining money or property by false pretenses or false representations".[18] Congressional records confirm that the purpose of these amendments was to expand the discharge bar to ensure that all fraudulent debts were excluded, regardless of whether they were reduced to judgment.[19] Under the influence of *Crawford v. Burke*, U.S. courts continued to interpret s. 17(4) as applying only to fiduciary fraud.[20] At the same time, however, they adopted an expansive interpretation of fraud under s. 17(2), applying that provision to "actual fraud" whether committed by a fiduciary or not.[21]

11. The *Bankruptcy Act of 1938* (the ***"Chandler Act"****)* introduced technical revisions to the discharge bar.[22] When Congress adopted the *Bankruptcy Code* in 1978, the discharge bar was modelled on the *Chandler Act*. However, the 1978 Congress revised the former s. 17(2), providing that it applied to "actual fraud", so that the exclusion now applied to any debt for obtaining money, property, or services by "false pretenses, a false representation, or actual fraud".[23] This codified the broad judicial interpretation of the former s. 17(2) discussed above.[24] Congress also reworded the former s. 17(4) to clarify that it applied only to fiduciary fraud, namely any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny".[25] These provisions remain substantially unchanged in the current *Bankruptcy Code*.[26]

12. **Canada.** It was not until 1919 that Canada adopted its first modern bankruptcy statute. The discharge provisions in the 1919 Act were based "almost verbatim" on the English *Bankruptcy Act, 1914*.[27] As a result, the 1919 Act barred discharge for debts incurred through "fraud or fraudulent

---

[18] *Bankruptcy Amendment Act of 1903*, s 17, IPC.BOA Tab 11.
[19] H Rpt No 1698, (1902) 57th Congress, 1st Sess at 3, 6, cited in Amicus Brief of Bankruptcy Law Professors, in *Husky Int'l Electronics Inc v Ritz* (SCOTUS File No 15-145) (Dec 28, 2015) at 9 (and see general discussion at 7-17), IPC.BOA Tab 12.
[20] *Grogan v Garner*, (1991) 498 US 279 at 290-291 (SCOTUS); *Brown v Felsen*, (1979) 442 US 127 at 138 (SCOTUS); *Cohen v de la Cruz*, (1998) 523 US 213 at 217-221 (SCOTUS).
[21] *Davis v Aetna Acceptance Co*, 293 US 328 at 332-333 (SCOTUS); *Central Hanover Bank Trust Co v Herbst*, (1937) 93 F 2d 510 at 511-512 (2d Cir), *per* Learned Hand J.
[22] *Bankruptcy Act of 1938* (*Chandler Act*), c 575, 52 Stat 840 (US), s 17, BOA Tab 13.
[23] *Bankruptcy Reform Act of 1978*, s 523(a)(2)(A), IPC.BOA Tab 14.
[24] See 1978 USCCAN 5963, 6453 (95th Cong, 2d Sess), cited in Amicus Brief, *supra* at 13, IPC.BOA Tab 12.
[25] *Bankruptcy Reform Act of 1978*, §523(a)(4), IPC.BOA Tab 14.
[26] *Bankruptcy Code*, 11 US Code §523.
[27] Telfer, *supra* at 369, IPC.BOA Tab 2.

breach of trust".[28] Like the English legislation, the 1919 Act also made "fraud or fraudulent breach of trust" a discretionary ground for refusing or suspending discharge.[29]

13. In 1949, Parliament amended the *Bankruptcy Act* to align it more closely with U.S. bankruptcy legislation.[30] As part of these reforms, Parliament imported the discharge bar from the *Chandler Act* in place of the English discharge bar. However, the 1949 Act retained "fraud or fraudulent breach of trust" as a ground for refusing or suspending discharge, a provision that survives in the *BIA* today.[31] The 1949 Act closely followed the wording of the *Chandler Act* with only minor revisions. Among other things, Parliament dropped the exclusion for debts for "wilful or malicious injuries to the person or property of another" (in s. 17(2) of the *Chandler Act*). This decision is unexplained in the legislative debates. In 1997, it was reversed in part by the enactment of s. 178(1)(a.1), which bars discharge of a judgment debt for damages for intentional assaults. The discharge bar for fraud-related debts enacted in 1949 has since been subject to technical amendments culminating in the current wording of ss. 178(1)(d)-(e). The only notable change since 1949 is the addition in 2007 of a proviso for "equity claims" to the final clause of (e). This was a technical amendment to address the priority ranking of equity claims in bankruptcy proposals, and it has no bearing on the issues in this appeal.[32]

B. Section 178(1)(d) Applies to all Fraud-Related Debts

14. The Respondent argued ss. 178(1)(a), (d), and (e) before the applications judge but did not pursue its argument under (d) at the Court of Appeal.[33] Nevertheless, this appeal still requires this Court to consider the proper interpretation of s. 178(1)(d). This Court cannot undertake a contextual interpretation of s. 178(1)(e) without considering the adjacent subsection dealing with the same

---

[28] *Bankruptcy Act*, SC 1919, c 36, s 61(1)(b), IPC.BOA Tab 15.
[29] *Bankruptcy Act*, SC 1919, c 36, ss 58-59, IPC.BOA Tab 15.
[30] *Bankruptcy Act*, SC 1949, c 7, s 135, IPC.BOA Tab 16. The explanatory note to s 135 of the Bill introducing the 1949 Act states "[t]he corresponding provisions of the *Bankruptcy Act* of the United States have been adopted": see Bill-149, 41st Parl, 1st Sess (1949), IPC.BOA Tab 17.

[31] *Bankruptcy Act, 1949*, ss 129-130, IPC.BOA Tab 16; *BIA*, s 173(1)(k).
[32] Library of Parliament, Legislative Summary for Bill C-12, (December 2007), s A.2.e; Canada, "Bill C-12: Clause by Clause Analysis", see Clause no 54.
[33] *Poonian v British Columbia (Securities Commission)*, 2022 BCCA 274 at para 26; *Poonian (Re)*, 2021 BCSC 555 at paras 113-114.

subject matter. This Court has never considered this issue and this appeal is an opportunity to correct the widespread misinterpretation of s. 178(1)d).[34]

15. Section 178(1)(d) provides that a discharge does not release "any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity". The orthodox view is that s. 178(1)(d) is limited to fraud committed by a fiduciary, i.e. that the phrase "while acting in a fiduciary capacity" should be read as qualifying all of "fraud, embezzlement, misappropriation or defalcation" and not disjunctively as qualifying only "defalcation". [35] The orthodox view is based on superficial analysis that is inconsistent with the modern approach to interpretation based on the statutory text, context, and purpose.

16. **Text.** There is no comma between "defalcation" and "while acting in a fiduciary capacity". The "last antecedent rule" says that "a comma before the qualifying words [ordinarily indicates] that they are meant to apply to all antecedents while the absence of a comma indicates that they are meant to apply to the last antecedent alone".[36] In this case, the last antecedent is "defalcation", therefore it is the only word qualified by "while acting in a fiduciary capacity". Why might Parliament have wanted to qualify or restrict "defalcation" alone? Because it requires disambiguation that is unnecessary for the other words in the series.[37] The word "defalcation" is not in common use. It derives from the Latin *defalcare*, from "de-" ("off, away") + "-*falcem*" (sickle, scythe), hence its original meaning "cut off" or "deduct".[38] *Black's Law Dictionary* offers two further alternative meanings, "fraudulent misappropriation" and "nonfraudulent default".[39] This latter meaning would have extended the discharge bar beyond its intended target, fraud.

---

[34] In *R v Fitzgibbon*, [1990] 1 SCR 1005 at 1014-1015, this Court stated "[now s 178(1)(d)] provides that the discharge of a bankrupt does not release him from any debt or liability arising out of a fraudulent act committed by him while acting in a fiduciary" but the Court provided no analysis and, importantly, did not opine on whether forms of fraud were caught by the provision.

[35] See e.g., L.W. Holden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed, §7:192, IPC.BOA Tab 18; *Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, 2015 ONCA 465 at paras 60-66; *McAteer v Billes*, 2007 ABCA 137 at para 22; *Simone v Daley* 1999 CanLII 3208 (ONCA); *Berthold v McLellan*, 1994 ABCA 122 at para 2; *Janco v Vereecken*, 1982 CanLII 487 (BCCA) at paras 9-10.

[36] Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham: LexisNexis, 2022) at §14.07, IPC.BOA Tab 19.

[37] *Bullock v Bankchampaign NA*, (2013) 569 US 267 at 271-273 (SCOTUS).

[38] Oxford English Dictionary (Online), "Defalcation"; Etymonline, "Defalcation".

[39] *Black's Law Dictionary*, 11th ed,(St Paul, MN; Thomson Reuters, 2019), IPC.BOA Tab 20.

17. **Context.** The legislative context supports the broader interpretation of s. 178(1)(d). As outlined above, "defalcation while acting in a fiduciary capacity" is a set phrase in U.S. bankruptcy law that has been in use since 1841. Prior to adopting this wording in 1949, the Canadian *Bankruptcy Act* included an unequivocal bar for all debts incurred by "fraud or fraudulent breach of trust". There is nothing in the legislative history of the 1949 amendments suggesting that Parliament intended to dilute the discharge bar. As indicated above, such a change would have been a radical break with existing law in both England and the U.S. It is true that U.S. courts interpreted s. 17(4) of the *Chandler Act* as applying only to fiduciary fraud (while interpreting s. 17(2) broadly to cover "actual fraud"). But as explained above, this arose from quirks of the historical evolution of the U.S. legislation that are not relevant to the *BIA*.

18. The juxtaposition of the wording of s. 178(1)(d)-(e) with the simpler language of "fraud or fraudulent breach of trust" in s. 173(1) is a product of the *BIA*'s peculiar legislative history described above, by which Parliament essentially grafted the American discharge bar from the *Chandler Act* of 1938 onto the discharge mechanism from the English *Bankruptcy Act, 1914*. The legislative design reflects a strict approach to discharge that combines the more extensive American discharge bar with the more restrictive English model of discretionary discharge.

19. It is true that the broader reading creates overlap between s. 178(1)(d) and (e). However, as Sullivan notes, the presumption against redundancy is a weak presumption that is "easily rebutted" where Parliament "intended to use repetition and superfluous words to ensure the clearest and widest possible meaning" to the text.[40] On any reading, there will be significant overlap and redundancy, both within s. 178(1)(d) (is there any "embezzlement" that is not a "fraud"?) and between ss. 178(1)(d) and (e) (a fiduciary may commit fraud by fraudulent misrepresentation). The redundancy originates in the inclusion of two subsections dealing with "fraud" in ss. 17(2) and (4) of the U.S. *Bankruptcy Act of 1898*. The Congressional record does not provide an explanation for why the different formulations were used. It may be that the reference to "property or money obtained by false pretenses or false representations" was intended to address a particular species of fraud common at the time by which a merchant held themselves out as creditworthy to obtain goods or services they could not afford.[41]

---

[40] Ruth Sullivan, *The Construction of Statues*, 7th ed, §8.03, IPC.BOA Tab 19.

[41] E. James, *The Bankruptcy Law of the United States* (New York City: Harper & Bros, 1867), IPC.BOA Tab 21 at 148.

20. The Appellants argue that s. 178(2), which provides for discharge of debts, is the general rule and must be interpreted broadly, whereas the subsections of s. 178(1) are exceptions and must be interpreted narrowly. But this Court has held that there is no requirement that exceptions must be interpreted more narrowly than a general rule.[42] The modern approach requires that both rules and exceptions be interpreted in light of their purposes and this "does not always result in a restrictive interpretation of an exception".[43] For example, in *Martin v. Martin*, the New Brunswick Court of Appeal rejected an argument that the exception under s. 178(1)(a.1) for damages awarded for intentional assault had to be read narrowly as an exception to s. 178(2).[44]

21. **Purpose.** The diverse categories of undischargeable debts listed in s. 178(1) reflect various legislative objectives. However, there are two general purposes that unite the exceptions: they aim "to protect creditors with claims of special merit against the possibility of abuse of the discharge privilege and to take care of the occasional case in which the debtor fortuitously acquires postpetition wealth".[45] In addition to these more general purposes, the discharge bar for fraud-related debts reflects a more specific purpose of limiting the bankruptcy discharge to its intended role, i.e. to assist honest debtors. As early as 1883, the English Court of Appeal described the purpose of the discharge bar as embodying "the foundation of the bankrupt laws that the bankruptcies to be allowed and protected were only bankruptcies which had been incurred honestly".[46] More recently, in *Grogan v. Garner*, the U.S. Supreme Court rejected an argument that the "fresh start" policy militates in favor of a construction favorable to the debtor. The Court held that it was "unlikely that Congress…would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud."[47]

22. Indeed, ss. 178(1)(d)-(e) must be read alongside s. 178(1)(a.1), which bars discharge for damages for intentional assaults. Together, ss. 178(1)(a.1), (d), and (e) reflect a broader policy of precluding discharge for debts arising from intentional wrongdoing.

23. Further, the orthodox view leads to absurd results. ***First,*** it creates an arbitrary "hierarchy of frauds", where fiduciary fraud and fraudulent misrepresentation are treated more severely than other forms of fraud, such as embezzlement by a non-fiduciary, fraudulent conveyances, or as here,

---

[42] *R v Summers*, 2014 SCC 26 at paras 42-46.
[43] Sullivan, *supra*, at §15.05, IPC.BOA Tab 19.
[44] *Martin v Martin*, 2005 NBCA 32 at para. 18.
[45] Boshkoff, *supra* at 89, IPC.BOA Tab 6.
[46] *Cooper v Prichard*, 11 QBD 351 at 354, IPC.BOA Tab 22.
[47] *Grogan v Garner*, (1991) 498 US 279 at 279-280 (SCOTUS).

market manipulation. There is no reason that Parliament would have chosen to treat different forms of fraud differently. ***Second,*** permitting discharge for some forms of fraud would put Canada at odds with the law in England, Australia, and the U.S., even though Parliament had intended to align Canadian bankruptcy law with these other countries. ***Third,*** the disjunctive reading of s. 178(1)(d) means that "embezzlement" and "misappropriation" (French "detournement" and "concussion") are limited to misappropriation by a fiduciary. This leaves out other forms of misappropriation—most obviously, theft. On the orthodox view, a debtor who obtains money by theft is in a better position than a debtor who obtains the same money by deception.

C. Section 178(1)(e) Applies to Market Manipulation

24. This Court should not follow the appellate authorities limiting the scope of s. 178(1)(e) to the tort of fraudulent misrepresentation.[48] For one thing, the text of the section applies not only to "fraudulent misrepresentation" but also to "false pretences". Parliament's purpose in introducing this language in 1949 was to align the *BIA* with American bankruptcy law. American courts have long taken an expansive interpretation of the analogous language in the U.S. bankruptcy legislation (dealing with "false pretenses or false representations"). As noted above, this expansive judicial interpretation was codified in 1978 by the addition of the words "actual fraud" to the U.S. equivalent of s. 178(1)(e). The U.S. Supreme Court has held that the discharge bar for "actual fraud" is not limited to fraud by misrepresentation but rather "denotes any fraud that involv[es] moral turpitude or intentional wrong", including fraudulent conveyances.[49] In any event, market manipulation is a form of "active concealment" which satisfies the requirement for a "misrepresentation" in civil fraud.[50]

25. Contrary to the Appellants' contention, s. 178(1)(e) does not require a "direct link" between the fraud and the creditor asserting a claim in respect of the fraud. On the plain wording of the text, all that is required is a liability "resulting from obtaining property" by false pretences or fraudulent misrepresentation. The U.S. Supreme Court has held that the analogous language in the *Bankruptcy Code* bars discharge of a debt owed by the transferee of a fraudulent conveyance of the debtor's property, despite the fact that there is no direct relationship between the debtor and the transferee.[51]

---

[48] E.g., *Alberta Securities Commission v Hennig*, 2021 ABCA 411 at para 58.
[49] *Husky Int'l Elecs, Inc v Ritz*, (2016) 578 US 356 at 360-364 (SCOTUS), citing *Neal v Clark*, 95 US 704 (1878) (SCOTUS).
[50] *National Bank Financial Ltd v Potter*, 2013 NSSC 248, at para 678-679, rev'd in part but on other grounds *National Bank Financial Ltd v Barthe Estate*, 2015 NSCA 47.
[51] *Husky Int'l Elecs, Inc v Ritz*, (2016) 578 US 356 at 364-366 (SCOTUS).

Of particular relevance to this case, in *Cohen v. de la Cruz*, the U.S. Supreme Court held that the same provision barred discharge for a debt arising from an order of an administrative agency (the local rent control administrator) requiring the debtor to refund excessive rent charged to tenants in violation of state rent control laws. The Court held that the discharge bar applied not only to the restitution order but also to statutory punitive damages.[52]

26. Provincial securities commissions play an important role in protecting the interests of retail investors. The economics of investor loss claims often pose a barrier to access to justice. The claims of individual investors may be too small to justify the legal costs of individual actions, with the result that class actions and securities commission proceedings will be the only effective form of redress.[53] If the debtor is at risk of insolvency, difficulties of enforcing a judgment will dissuade law firms from undertaking the risk of prosecuting a class action. As a result, proceedings by a securities commission will be the only practical route to compensation.

27. In any event, to the extent that a "direct link" is required, the disgorgement orders imposed against the Appellants by the Securities Commission satisfy that requirement. The disgorgement order is intended to compensate the victims; under s. 15.1 of the *Securities Act.*[54] The Respondent is required to establish a claims process to administer funds received in respect of the disgorgement order to victims. The legislation effectively constitutes the Securities Commission as an agent for victims when it receives and administers payment received under a disgorgement order.

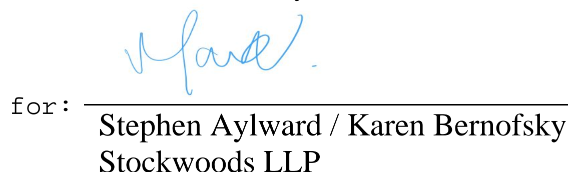
PART IV - SUBMISSIONS CONCERNING COSTS

28. The IPC does not seek costs and asks that no costs be ordered against it.

PART V - ORDER OR ORDERS SOUGHT

29. The IPC requests that this Court consider the above submissions in deciding this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2023.



for: Stephen Aylward / Karen Bernofsky
Stockwoods LLP

[52] *Cohen v de la Cruz*, (1998) 523 US 213 at 213-221 (SCOTUS).
[53] *AIC Limited v Fischer*, 2013 SCC 69 at paras 50-52.
[54] *Securities Act,* RSBC 1996, c 418, s 15.1.

PART VI - TABLE OF AUTHORITIES

AUTHORITIES	**Paragraph**
AIC Limited v Fischer, 2013 SCC 69	26
Alberta Securities Commission v Hennig, 2021 ABCA 411	24
Berthold v McLellan, 1994 ABCA 122	15
Brown v Felsen, (1979) 442 US 127 (SCOTUS)	10
Bullock v Bankchampaign NA, (2013) 569 US 267 (SCOTUS)	16
Central Hanover Bank Trust Co v Herbst, (1937) 93 F 2d 510	10
Cohen v de la Cruz, (1998) 523 US 213 (SCOTUS)	10, 25
Cooper v Prichard, 11 QBD 351	21
Crawford v Burke, (1904) 195 US 176 (SCOTUS)	10
Davis v Aetna Acceptance Co, 293 US 328 (SCOTUS)	10
Grogan v Garner, (1991) 498 US 279 (SCOTUS)	10, 21
HBSY Pty Ltd v Lewis, [2022] NSWSC 841	5
Husky Int'l Elecs, Inc v Ritz, (2016) 578 US 356 (SCOTUS)	24, 25
Janco v Vereecken, 1982 CanLII 487 (BCCA)	15
Korea Data Systems (USA), Inc v Aamazing Technologies Inc, 2015 ONCA 465	15
Martin v Martin, 2005 NBCA 32	20
McAteer v Billes, 2007 ABCA 137	15
National Bank Financial Ltd v Barthe Estate, 2015 NSCA 47	24
National Bank Financial Ltd v Potter, 2013 NSSC 248	24
Neal v Clark, (1877) 95 US 704 (SCOTUS)	8
Poonian v British Columbia (Securities Commission), 2022 BCCA 274	14
Poonian (Re), 2021 BCSC 555	14
R v Fitzgibbon, [1990] 1 SCR 1005	14
R v Summers, 2014 SCC 26	20
Simone v Daley 1999 CanLII 3208 (ONCA)	15
SECONDARY SOURCES	
Black's Law Dictionary, 11th ed,(St Paul, MN; Thomson Reuters, 2019)	16
Bill-149, 41st Parl, 1st Sess (1949)	13

D. G. Boshkoff, "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings " (1982-1983) 131 U Pa L Rev 69	6, 9, 21
Canada, "Bill C-12: Clause by Clause Analysis", see Clause no 54	13
L.W. Holden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed.	15
H Rpt No 1698, (1902) 57th Congress, 1st Sess at 3, 6, cited in Amicus Brief of Bankruptcy Law Professors, in *Husky Int'l Electronics Inc v Ritz* (SCOTUS File No 15-145) (Dec 28, 2015)	10
E. James, *The Bankruptcy Law of the United States* (New York City: Harper & Bros, 1867)	19
Library of Parliament, Legislative Summary for Bill C-12, (Dec 2007), s A.2.e	13
Oxford English Dictionary (Online), "Defalcation"; Etymonline, "Defalcation"	16
Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham: LexisNexis, 2022)	16, 19, 20
C. J. Tabb, "The Historical Evolution of the Bankruptcy Discharge" (1991) 65 Am Bankr LJ 325	5
Thomas Telfer, "Reconstructing Bankruptcy Law in Canada: 1867 to 1919", JSD Thesis (University of Toronto, 1999)	5

PART VII - STATUTES AND REGULATIONS

LEGISLATION	**Sections**
Bankruptcy and Insolvency Act, RSC, 1985, c B-3	173(1)(k), 178(1)(d)(e)
Bankruptcy Act of 1841, c 9, 5 Stat 440	1, 4
Bankruptcy Act, 1849 (12 & 13 Vict), c 106	216
Bankruptcy Act of 1867, c 17	33
Bankruptcy Act, 1869, 32 & 33 Vict, c 71 (Eng)	49
Bankruptcy Act, 1883, 46 & 47 Vict, c 52 (Eng)	28, 30
Bankruptcy Act of 1898, c 541, 30 Stat 544	17
Bankruptcy Amendment Act of 1903	17
Bankruptcy Act, 1914 (4 & 5 Geo 5, c 59	26, 28
Bankruptcy Act, SC 1919, c 36	58-59, 61
Bankruptcy Act of 1938 (*Chandler Act*), ch 575, 52 Stat 840 (1938) (US)	17
Bankruptcy Act, SC 1949, c 7	129-130, 135
Bankruptcy Act, 1966 (Aus)	153(2)(b)
Bankruptcy Code (as enacted in 1978)	523(a)(2)(A)
Bankruptcy Reform Act of 1978	§523(a)(4)
Insolvency Act, 1986 (Eng)	281(3)
Bankruptcy Code, 11 US Code	§523
Securities Act, RSBC 1996, c 418	15.1