

CANADA / JUDGMENT

Poonian (Re)

2021 BCSC 555

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2021 BCSC 555 Poonian (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Poonian (Re),

2021 BCSC 555

Date: 20210326

Docket: B-180757

Estate Nos.: 11-2369361

Registry: Vancouver

In the Matter of the Bankruptcy of Thalbinder Singh Poonian and

Shailu Poonian

Corrected Judgment: The text of these Reasons for Judgment have been corrected at paragraph 84 and at heading D under section V on August 10, 2022.

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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Shailu Poonian:

Cody Reedman

Place and Date of Hearing:

Vancouver, B.C.

January 22, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2021

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I. INTRODUCTION

- [1] On August 29, 2014, a three-Commissioner panel of British Columbia Securities Commission (the "Commission") found that Thalbinder ("Thal") Singh Poonian and his wife Shailu ("Sharon") Poonian, in conjunction with their friends and relations, Manjit Singh Sihota and Perminder Sihota, and others, had engaged or participated in "conduct relating to securities or exchange contracts [where] the person knows, or reasonably should know, that the conduct results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract", contrary to s 57(a) of the Securities Act, RSBC 1996, c 418 (the "Act")^[1]: Poonian (Re), 2014 BCSECCOM 318 (the "Liability Decision").
- [2] Specifically, the Panel found that the Poonians engaged in market manipulation of OSE Corp., which traded on the TSX Venture Exchange. Through a complex series of trades, using pseudonyms and multiple nominee accounts, they artificially inflated the share price from \$0.10 to \$0.17 per share to a high of near \$2.00. As part of the scheme, the Poonians paid commissions to the Phoenix Group, which in turn encouraged its clients, generally unsophisticated investors seeking to escape personal debt through investment in more high-yield vehicles, to purchase OSE shares at the artificially inflated prices. The Commission described the scheme as "serious misconduct" and as "elaborate, involving layers of deception to conceal the respondents' participation in the manipulation": Re Poonian, 2015 BCSECCOM 96 at para 17 (the "Sanctions Decision"). As a result of the Poonians' market manipulation scheme, the Phoenix clients alone lost \$7,102,902: paras 19, 57.
- [3] In that decision, the Panel ordered administrative penalties against each of Mr Poonian (\$10 million) and Ms Poonian (\$3.5 million). The Panel later issued disgorgement orders, pursuant to s 161(1)(g) of the Act: Mr Poonian (\$1,319,000 and \$1,126,260, jointly and severally with another participant) and Ms Poonian (\$3,149,935): 2018 BCSECCOM 160 at para 85 (the "Reassessment Decision").
- [4] As a result, the Poonians together owe \$19,095,362 (plus interest) to the Commission, exclusive of post-judgment interest. They owe \$4,335,252.60 to their next largest creditor, the Canada Revenue Agency (the "CRA"). The trustee in bankruptcy reports that the proven liability of the Poonians totals \$25,184,693.56.
- [5] The trustee has realized only \$3,189.16 from the Poonians' assets.

- [6] In this application, the Commission applies for an order that the amounts owed by the Poonians to the Commission shall not be released by any order or discharge granted to the Poonians. The Commission relies upon the exceptions to the discharge of debts, set out in s 178(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (the "BIA").

II. PROCEDURAL HISTORY

- [7] This legal saga has been protracted and multi-pronged. The Poonians have vigorously fought the allegations since 2012. The Poonians' actions and defences have been considered in many hearings and decisions, both before the Commission, as well as before this Court and our Court of Appeal.

A. Commission: the Order and preliminary applications

- [8] On August 2, 2012, the executive director of the Commission (the "Director") issued a notice of hearing and temporary order under s 161(2) of the Act against the Poonians, the Sihotas, and Robert Joseph Leyk: 2012 BCSECCOM 306. The hearing of the allegations was scheduled to start on October 28, 2013.
- [9] On September 30, 2013 the Poonians and Sihotas applied to stay the proceedings against them, which application was dismissed on October 11, 2013: 2013 BCSECCOM 436.
- [10] The Poonians and Sihotas sought leave to appeal that decision. On October 25, 2013, Tysoe JA dismissed that application: 2013 BCCA 473.
- [11] On October 16, 2013 the Poonians and Sihotas applied to adjourn the hearing, which application was also dismissed: 2013 BCSECCOM 448.
- [12] Both the Poonians and the Sihotas were represented by experienced commercial counsel in these two Commission applications, as well as in the application for leave to appeal to the Court of Appeal.

B. Commission: 2014 BCSECCOM 318: the Liability Decision

- [13] The proceedings leading to the liability decision occupied nine days, before a three-person Panel.
- [14] Ms Poonian did not appear. Mr Poonian represented himself. He did not testify, but submitted documentary evidence, cross-examined the Director's witnesses, and made oral and written submissions: para 4.
- [15] The Panel noted that the respondents did not dispute most of the evidence adduced by the Director. Rather, they disputed the conclusions drawn by the Director. They provided little or no evidence to support their assertions: para 97.

- [16] The Panel found that the respondents, including the Poonians, had breached s. 57(a) of the Act: specifically, that they engaged in conduct relating to securities contracts that they knew, or reasonably should have known, would result in or contribute to a misleading appearance of trading activity in, or an artificial price for, a security: paras 94,165. The Panel based this conclusion on the "overwhelming", "voluminous detailed evidence", both documentary and oral: paras 98, 131. The reasons spanned 166 paragraphs, and, as set out below, outlined the Poonians' actions with particularity.
- [17] At paras 118 and 132-133, the Panel found that the Poonians had participated in a *prima facie* market manipulation, in multiple ways:
- control over a significant proportion of the securities of a relatively thinly-traded issuer listed on a credible marketplace with securities trading at the outset at a low price
 - the ability to orchestrate trades in those securities that result in a substantial increase in the market price of those securities, through targeted trades in those securities, and maintaining for a significant period of time the price of the securities at or near the highest price attained
 - developing or creating a pool of prospective purchasers at or near the high price and inducing them to buy where the sellers are primarily the alleged market manipulators
 - insofar as possible, the beneficial ownership by the alleged market manipulators is disguised through multiple accounts, multiple nominees or account names and wash trading
 - to the extent that nominees are involved in the disguising of trading activities, their purchases are funded by or through the alleged manipulators.
- [18] The Panel identified several manifestations of deliberately misleading behaviour by the Poonians. Mr Poonian deliberately tried to disguise his involvement by using an alias, "Tim Jenson," in his communications with Phoenix. Further, the Poonians engaged multiple deceptive strategies to manipulate the market and artificially drive up share prices:
- [119] Wash trades - trades in which there is no change in beneficial ownership. We find that Thal Poonian directed the trades in a number of the brokerage accounts of the Respondents and Secondary Participants and orchestrated both the buy and sell sides of trades...
- [120] Trades or orders that led to an artificial price for OSE shares. There was a dramatic increase in the OSE share price between December 20, 2007 and January 9, 2008 (\$0.27 to \$1.50). There were no public announcements by OSE during this period...
- [122] Trading through nominee accounts. Thal Poonian placed orders to trade OSE shares in the accounts of various members of the Respondents and Secondary Participants. In many of these cases, we find that these accounts were funded by the Respondents and that the nominal accountholders had no economic interest in the accounts. Thus, we find there was trading through nominee accounts to give an artificial appearance of market activity in OSE shares.

- [123] Pre-arranged trades. There were pre-arranged trades. According to the Settlement Agreement and the sworn testimony of Rathore, Thal Poonian instructed the Phoenix Group on the timing and price of purchases by Phoenix clients. In many cases, the shares bought by Phoenix clients on the TSX-V were sold by various Respondents and Secondary Participants.
- [124] Market domination and misleading appearance of trading activity. One of the most telling indicators of an artificial volume of trading is market domination. The level of market domination in this case far exceeds the levels found in earlier market manipulation cases such as Siddiqi and other cases referenced there.
- [125] As already noted, the Respondents and Secondary Participants held 88.33% of OSE shares after the two private placements. Between January 10, 2008 and March 31, 2009, the Respondents and Secondary Participants accounted for 65% of the overall purchase volume and 64% of the overall purchase value of OSE shares on the TSX-V during this period. During the same period, they accounted for 89% of the overall sale volume and 90% of the overall sale value. The Respondents and Secondary Participants were on both sides of trades for a total of 11.5 million OSE shares.
- [126] The evidence also revealed that on certain trading days, the Respondents and Secondary Participants' accounts dominated the order book for OSE shares, often with bid offers far in excess of offers from other bidders.
- [127] Uptick trades (a trade at a price that is higher than the price on the immediately preceding trade). Between December 20, 2007 and January 2, 2008, trades by the Respondents and Secondary Participants in OSE shares accounted for seven of 11 uptick trades. On January 9, 2008, their trades accounted for 12 uptick trades during the final hour of the trading day resulting in a \$1.50 closing price for OSE shares, an increase of \$0.50 from the previous day's closing price. Between January 10, 2008 and March 31, 2009, their trades accounted for 208 uptick trades.
- [128] High closing. On three of the five trading days between December 20, 2007 and January 2, 2008, trades by the Respondents and Secondary Participants accounted for purchases of OSE shares during the final 30 minutes of trading. In each case, these trades resulted in a higher closing price .
- ..
- [130] The conduct in this case, including market domination in OSE shares combined with use of nominee accounts, aggressive trading on both sides of trades and uptick, high opening and high closing activity, clearly resulted in both artificial trading activity in, and artificial prices for, OSE shares. Each of the Respondents engaged or participated in various aspects of the conduct in question .

[19] With respect to the specific actions of Mr Poonian, the Panel found, at para 99, that he directly, or indirectly through companies he controlled, engaged in the following conduct relating to OSE shares:

- arranging the acquisition of control of OSE through private purchases of a control block of OSE by certain Respondents and Secondary Participants;
- arranging two private placements of OSE that resulted in the Respondents and Secondary Participants acquiring most of the issued shares in OSE;
- funding private placement purchases of OSE shares by other Respondents and Secondary Participants, through JCP, a company over which he had bank account signing authority;
- between September 2007 and March 2009, trading in OSE shares (buying 1,124,200 shares and selling 1,354,100 shares of which 636,200 were sold to Phoenix clients);
- receiving from Secondary Participants transfers of 1,200,000 OSE shares;
- trading OSE shares in the brokerage accounts of other Respondents and Secondary Participants (LN, RB, GVP, BM, DS, MB, SP, AP, RG (KEI) and Perminder Sihota);
- funding accounts in the names of Secondary Participants, Leyk and the Sihotas to cover trading in those accounts, and receiving payments from Leyk Co. and from the Sihotas' joint account to fund OSE share purchases; and
- entering into an agreement with Phoenix Group members to pay commissions for inducing Phoenix clients to purchase OSE shares.

[20] The Panel described Thal Poonian as the "mastermind" orchestrating the scheme:

[149] Thal Poonian was the mastermind. He was the person who found OSE and acquired control of its shares and board, nominating Leyk, Manjit Sihota and RB2 as directors. He was the one who set up the arrangement with the Phoenix Group. He was the one who traded OSE shares through nominees. The Secondary Participants and Phoenix Group members who were interviewed by Commission staff all pointed to him as the person who set up the scheme. He tried to disguise his involvement by using the "Tim Jenson" alias in communications with the Phoenix Group.

[21] The Panel further noted that:

[150] Thal Poonian was an experienced market participant and investor, a corporate executive and a former registered salesperson. He was not ignorant of how the market operated. He and his wife were the common connection among all the other Respondents and the Secondary Participants, which he exploited to implement a sophisticated market manipulation of OSE shares.

- [151] The inescapable conclusion from his direct involvement in these extensive and repeated activities is, and we find, that Thal Poonian knew, or reasonably should have known, that his conduct in relation to OSE shares resulted in or contributed to a misleading appearance of trading activity in OSE shares and an artificial price for OSE shares.
- [22] The Panel found that Ms Poonian was also an experienced and sophisticated investor who was deeply involved in the market manipulation:
- [152] Sharon Poonian was actively and extensively involved in many aspects of the market manipulation. She acquired OSE shares in both private placements, traded OSE shares in her own accounts, received transfers of OSE shares from various Secondary Participants, filled out cheques signed in blank by various Secondary Participants, made payments to accounts of various Secondary Participants to fund purchases of OSE shares or to eliminate debit balances in accounts arising in whole or in part from purchases of OSE shares, and made and received numerous payments of funds used to fuel the manipulation.
- [153] Sharon Poonian was an experienced investor, a corporate officer and worked in the Vantage Way premises.
- [154] The inescapable conclusion from her direct involvement in these extensive and repeated activities is, and we find, that Sharon Poonian knew, or reasonably should have known, that her conduct in relation to OSE shares resulted in or contributed to a misleading appearance of trading activity in OSE shares and an artificial price for OSE shares.

C. Commission: 2015 BCSECCOM 96: the Sanctions Decision

- [23] On March 13, 2015, the Commission Panel issued its Sanctions Decision, imposing administrative penalties and disgorgement orders on the Poonians. The Panel also imposed a series of permanent prohibitions on the respondents trading in, purchasing, or promoting securities, or serving as officers or directors of listed companies, as well as other sanctions.
- [24] Again, the decision was lengthy and particularized. Over 96 paragraphs, it considered the appropriate sanctions for the Poonians' actions. The Sanctions Decision further described the actions of the Poonians and their associates, and their effect on the investing public and on the integrity of the capital markets in the province:
- [15] Market manipulation compromises the integrity of the entire market. Its impact extends beyond the victims who lost money to the investing public as a whole. In *De Gouveia, Re*, 2013 ABASC 249 the Alberta Securities Commission concluded that manipulative trading "undermines the integrity of the capital market. It is unfair to investors, and jeopardizes the confidence in the capital market on which legitimate investor interest and capital formation depend".
- [16] The respondents' manipulation of the market for OSE shares was sophisticated and extensive. As well as involving all five respondents, the scheme used 17 secondary participants, the Phoenix Group who facilitated creation of the pool of victim investors and a

number of brokerage firms to carry out the manipulation. During the relevant period, the respondents and secondary participants as a group purchased on the Toronto Stock Exchange - Venture (TSX-V) over 12 million shares of OSE (more than 64% of overall buy volume) at a cost of more than \$17 million and sold on the TSX-V over 17 million shares of OSE (more than 88% of overall sale volume) for gross proceeds of more than \$25 million.

- [17] The scheme was elaborate, involving layers of deception to conceal the respondents' participation in the manipulation. This included: funding OSE private placement share purchases; directing trading of OSE shares in secondary participants' brokerage accounts and funding purchases of OSE shares in those accounts; transferring shares among the respondents and secondary participants; and arranging for and paying commissions to the Phoenix Group for advising its clients to invest in OSE shares.
- [18] A breach of section 57(a) of the Act is serious misconduct that causes damage to the integrity of capital markets and harms investors. The scale of this manipulation places it at the most serious level. The arrangements with the Phoenix Group ensured a large victim investor pool of generally unsophisticated investors facing financial distress who were advised to unlock their locked-in RRSPs or retirement accounts and invest in OSE, making this manipulation even more egregious.

[emphasis added]

- [25] The Panel noted that the Poonians' actions were appropriately compared to cases based in fraud:
- [60] The Poonians object to the use of fraud cases because they do not concern a contravention of section 57(a) of the Act dealing with market manipulation, but rather fraud under section 57(b). However, we agree with the executive director that contraventions of either of sections 57(a) or (b) of the Act can be similarly serious. Each involves some form of deception, which in the case of market manipulation is the misleading appearance of trading activity in, or an artificial price for, a security. Consideration of previous orders in fraud cases is therefore appropriate.
- [26] On March 23, 2015, the Director registered a certified copy of the Sanctions Decision with this Court, under s 163 of the Act ("Enforcement of commission orders").
- [27] The Decision thereby became of "the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court": s 163(2).

D. Court of Appeal proceedings

1. Leave application

- [28] The Poonians applied for leave to appeal both the Liability Decision and the Sanctions Decision, pursuant to s 167 of the Act. In a separate filing, the Sihotas also sought leave.

- [29] The Poonians sought leave on no fewer than ten grounds of appeal. Those grounds were later grouped into seven.
- [30] On March 4, 2016, Fenlon JA, in unpublished reasons, granted leave to appeal solely on the issue of the disgorgement orders in the Sanctions Decision: Poonian (Re), (04 March 2016), Vancouver 42714 (BCCA).
- [31] In her companion reasons concerning the Sihota application for leave (Sihota (Re) (04 March 2015), Vancouver 42715 (BCCA)), Fenlon JA considered and recited the facts of the scheme and the liability findings of the Commission Panel. This recitation and consideration included the following:
- [2] The Commission Panel found the appellants guilty of contravening s. 57(a) of the Act by orchestrating a complex, predatory and highly deceptive market manipulation scheme that targeted unsophisticated investors. The Panel found that the appellants manipulated the market for OSE Corp. ("OSE") shares in a sophisticated and extensive way. In addition to the appellants and other respondents, the scheme involved 17 secondary participants, as well as the Phoenix Group, to facilitate the creation of the pool of victim investors and a number of brokerage firms to carry out the manipulation.
- [3] The Panel found that the Phoenix clients who purchased OSE shares were generally unsophisticated and vulnerable investors facing financial difficulty. Many were referred to Phoenix by collection agencies or creditors for debt management advice. Phoenix arranged for them to unlock their locked-in retirement accounts and put the money into self-directed investment accounts to generate higher returns on their investments. Phoenix advised many clients to invest in OSE shares. The appellants were found to have paid large commissions (as high as 28%) to the Phoenix Group each time they arranged for a Phoenix client to buy OSE shares. By the conclusion of the manipulation, Phoenix investors had suffered losses of at least \$7.1 million.
- [4] The Panel found that the market manipulation scheme orchestrated by the appellants had three distinct phases:
- 1) the initial share accumulation phase between May and December 2007, whereby the appellants acquired control of the OSE board and a dominant share position in OSE at \$0.10 to \$0.17 per share through two private placements of OSE shares and warrants;
 - 3) the price increase and maintenance phase between December 2007 and January 2008, whereby the appellants dominated trading and manipulated OSE's share price to a high near \$1.50 by trading through brokerage accounts held by them or various secondary participants and other respondents; and

- 4) the price maintenance and share liquidation phase between January 2008 and March 2009, whereby the appellants liquidated their positions in OSE and made over \$7 million in profits with the other respondents by selling a large number of OSE shares to unsuspecting buyers, including clients of Phoenix.
- [5] The Panel found that Mr. Sihota - who had a long business, personal and family connection to the "mastermind" of the scheme (Mr. Poonian) - was actively and extensively involved in the market manipulation. In particular, the Panel found that he actively contributed to the manipulation by acting as a director and president of OSE, receiving OSE shares and trading them in his personal accounts, signing cheques issued to the Phoenix Group to pay commissions for inducing Phoenix clients to purchase OSE shares, as well as making and receiving numerous payments of funds used to fuel the manipulation.
- [32] In her leave reasons for the Poonian application she cited and relied upon that prior consideration and recitation, and also recited some specific findings of the Panel with respect to the Poonians. She noted again that the Panel found Mr Poonian to be the mastermind of the scheme, and that Ms Poonian was also actively and extensively involved in the manipulation.
- [33] Fenlon JA dismissed the other grounds on which the Poonians sought leave to appeal, including the Poonians' two-pronged application for leave to appeal based on alleged denial of natural justice.
- [34] With respect to the Poonians' first natural justice argument, Fenlon JA considered the transcript of the proceedings before the Commission. She noted that the Commission had provided extensive explanations and cautions to Mr Poonian, an experienced investor and corporate executive.
- [35] With respect to the Poonians' second natural justice argument, she considered each of the 14 documents that the Poonians complained had not been disclosed by the Commission. She found that those documents were irrelevant and would not have offered a defence in any case.
- [36] She concluded that the appellants did not meet the test for leave to appeal on the natural justice grounds, having failed to establish a substantial issue relating to procedural fairness with some prospect of success: para 16.
- [37] In short, Fenlon JA extensively considered the evidence and proceedings before the Panel, scrutinizing the treatment of the Poonians beyond mere argument, and found that there was no merit to an appeal based upon a denial of natural justice.

- [38] Fenlon JA also declined to grant leave to the Poonians' proposed appeal of the administrative penalties: the subject of the fourth, fifth, and seventh proposed grounds of appeal. She noted at para 29 that "[t]he panel has broad discretion in setting administrative penalty which is a matter within its particular expertise. It considered the appropriate factors and, in particular, the magnitude of the stock manipulation and fixing the penalty."
- [39] The Poonians were represented by two different sets of experienced counsel in the preparation of the leave application, and at the hearing of that application. The Sihotas were also represented by experienced counsel.
2. The appeal: 2017 BCCA 207
- [40] Again, the disgorgement orders were the sole ground on which leave to appeal was granted. The Court of Appeal considered and ruled on that issue in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207.
- [41] In those reasons, the Court recited in some detail the underlying allegations against the Poonians that led to the Liability and Sanctions Decisions; as leave had not been granted on the sanction or penalty decision, the Court did not rule on or interfere with those conclusions.
- [42] That said, the Court noted the finding that Mr Poonian's conduct was "the most egregious", and that Ms Poonian's was the next most egregious, and "essential to the scheme." The Court also recounted the finding that her efforts to "cover up for the other respondents" was an aggravating factor: para 18.
- [43] In the focus of the appeal, the Court considered at length the purpose and principles of the disgorgement provisions in s 161(1)(g) of the Act, leading to its summary at para 143:
1. The purpose of s. 161(1)(g) is to deter persons from contravening the Act by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.
 2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the Act, such as the claims process set up under Part 3 of the Securities Regulation or the s. 157 compliance proceedings in the Act.
 3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).
 4. The "amount obtained" must be obtained by that respondent, directly or indirectly, as a result of the failure to comply with or contravention of the Act. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.

5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts indirectly. Non-exhaustive examples include use of a corporate alter ego, use of other persons' accounts, or use of other persons as nominee recipients.
- [44] The Court noted that while the Panel made findings as to the degree of involvement of each of the Poonians and Sihotas, it was required to go one step further, and determine the amounts received by each individual personally, either directly or indirectly: para 148. The Court accordingly sent the issue back to the Panel to review the evidence and determine whether and to what extent each of the four individuals received funds directly, or indirectly, as via an account controlled by that individual: paras 152, 165.
- [45] The Court of Appeal confirmed that as leave to appeal was only granted with respect to the disgorgement orders, "[a]ll other sanctions imposed on the appellants are not before this Court and remain undisturbed": para 166.
- [46] The Poonians (and Sihotas) were represented by experienced counsel on the substantive appeal.

E. Commission: 2018 BCSECCOM 160: the Reassessment Decision

- [47] On February 14, 2018, the Commission heard submissions on the reassessment of the disgorgement orders.
- [48] The Poonians (and Sihotas) were each represented by experienced counsel at the reassessment hearing.
- [49] On April 20, 2018, after the end of submissions and before the decision date, the Poonians filed a joint assignment into bankruptcy.
- [50] On May 16, 2018 the Commission Panel issued its Reassessment Decision. It determined the amount and manner in which each of the Poonians obtained funds through market manipulation. The Panel found that Mr Poonian obtained \$746,676 directly, and \$572,491 indirectly through control of accounts of associates. Mr Poonian also obtained \$1,126,260 indirectly through Ms Sihota's account. Ms Poonian obtained \$3,149,935 directly: paras 77-79.
- [51] At para 85, the Panel found it to be in the public interest to order the following payments to the Commission under s. 161(1)(g) of the Act:
- (a) Ms Poonian: \$3,149,935;
 - (b) Mr Poonian: \$1,319,167; and
 - (c) Mr Poonian and Ms Sihota \$1,126,260 on a joint and several basis.

[52] In considering whether the public interest favoured a disgorgement order, the Commission noted the misconduct of the Poonians both before, and potentially after, the Sanctions Decision:

[82] As the Commission stated in the Sanctions decision at paragraph 18:

A breach of section 57(a) of the Act is serious misconduct that causes damage to the integrity of capital markets and harms investors. The scale of this manipulation places it at the most serious level. The arrangements with the Phoenix Group ensured a large victim investor pool of generally unsophisticated investors facing financial distress who were advised to unlock their locked-in RRSPs or retirement accounts and invest in OSE, making this manipulation even more egregious.

[83] A respondent should not be rewarded for sheltering or spending ill-gotten gains. The fact that the Commission has not yet discovered, or the fact that a respondent may no longer have, any of the money obtained, should not excuse the respondent from an order under section 161(1)(g).

[53] On June 5, 2018, the Reassessment Decision was registered with the Supreme Court of British Columbia, as before, pursuant to s 163 of the Act.

F. Supreme Court proceedings

1. Discharge application: 2020 BCSC 547

[54] On February 13, 2020, the Poonians sought an absolute, or alternatively, a suspended discharge from bankruptcy under s 172 of the BIA. Such an order would relieve the Poonians of substantially all of their debts, including those owed to the Commission.

[55] Master Elwood summarised the Poonians' arguments, in reasons indexed at 2020 BCSC 547 (the "Discharge Application Reasons"):

[4] The applicants submit they are "honest but unfortunate debtors". Their bankruptcy arose, they argue, from a convergence of factors resulting in a business failure and a significant reduction in their combined income. They say they have complied with their obligations under the BIA, made full disclosure of their assets and have no ability to pay their debts.

[5] The applicants seek an absolute discharge, which they submit is consistent with the "fresh start" principle and the rehabilitation objective of the BIA. If an absolute discharge is refused, the applicants seek a suspended discharge with a three to six month suspension period.

[56] The Commission opposed the application. Joining the Commission in opposition was the CRA, the Poonians' second-largest creditor. Master Elwood set out the Poonians' steps to resist collection efforts by the CRA:

B. CRA Audit and Reassessments

- [21] The Canada Revenue Agency ("CRA") commenced an extensive audit of the Poonians in 2012. The audit findings were set out in an audit report dated July 17, 2014. Among other findings, the audit found that share dispositions by the Poonians were on account of income and not capital as they had reported in their tax returns. The audit also found significant discrepancies in the gains/losses reported by the Poonians in their 2008 and 2009 income tax returns, and that they had grossly underreported their actual gains from stock trading.
- [22] The CRA reassessed the Poonians' tax returns for 2008 and 2009 in accordance with the audit findings. In addition, the CRA reassessed the Poonians for unpaid taxes in subsequent years. In total, Ms. Poonian's pre-bankruptcy tax liability relates to 11 years of underpaid taxes; Mr. Poonian's tax liability relates to five years of underpaid taxes.
- [23] The Poonians filed objections to the reassessments. Following submissions, the Minister confirmed the reassessments. The Poonians commenced an appeal to the Tax Court of Canada, but withdrew the appeal after they made the joint assignment into bankruptcy.
- [57] On April 8, 2020, in the Discharge Application Reasons, Master Elwood dismissed the Poonians' application. A discharge would not be in the public interest, given the important role of the Commission in preserving market integrity, and the behavior of the Poonians, both before and after the Sanctions Decision:
- [59] This case involves serious misconduct as found by the Commission. Although there has been no finding of fraud against the Poonians, their conduct in the market manipulation scheme was, in the words of Commission counsel, "fraud adjacent". As the Commission stated at paragraph 18 of the original sanctions decision, and restated at paragraph 82 of the second sanctions decision:

A breach of s. 57(a) of the Act is serious misconduct that causes damage to the integrity of the capital markets and harms investors. The scale of this manipulation places it at the most serious level. The arrangements with the Phoenix Group ensured a large victim investor pool of generally unsophisticated investors facing financial distress who were advised to unlock their locked-in RRSPs or retirement accounts and invest in OSE, making this manipulation even more egregious.

- [60] As a result of the prohibitions imposed by the Commission, the Poonians may no longer pose a risk to the public in terms of market manipulation. But it would be contrary to the public interest, in my view, to grant them a suspended discharge from bankruptcy. One of the purposes of the Commission's enforcement powers, as found by the Court of Appeal in this case, is deterrence. That purpose would be frustrated if a person having been ordered by the Commission to make a substantial payment could declare bankruptcy and then wait a prescribed period of time and be free of the financial consequences of his or her actions.

- [61] In this regard, the Commission stands in a different position from other creditors. The Commission is not in a position to compromise payments that would ultimately be collected in the public interest and for the benefit of investors.
- [62] It is no answer to these concerns to say the Poonians generally complied with their obligations under the BIA or that they provided full disclosure to the trustee and the receiver. As observed by Madam Justice Fitzpatrick in *Re. Montalban*, the BIA is not intended to be a "fiscal car wash". Nor is the BIA intended to cleanse those who contravene the Securities Act of the fiscal consequences of their actions.
- [63] Likewise, it has been said that "tax cheaters are free riders and should not be absolved of that" through the bankruptcy process. A bankrupt who has gone into debt to the government because he or she did not properly report income is not an honest and unfortunate debtor: *Re Zinikiew*, 2004 BCSC 1831, at para. 58-60; *Re Williams*, 2005 BCSC 289, at para. 25, 29 and 33. In this case, the size of the Poonian's personal tax debt of \$4.3 million, alone, is extreme and difficult to excuse.
- [64] There is also considerable doubt in this case whether the Poonians have been rehabilitated. They say they have learned a "very hard lesson"; however, they attribute their bankruptcy, in Mr. Poonian's words, to an "outlandish fine", "bureaucracy" and a tax reassessment that "makes no sense". Their own evidence demonstrates that the Poonians refuse to take responsibility for their actions or the consequences of those actions for others.
- [65] The Poonians attribute their lack of assets and surplus income to the enforcement action of the Commission. Mr. Poonian deposes that:

I have learned a very hard lesson involving my finances and [sic] endeavour to put my tax and financial affairs in order. Due to the enforcement action by the BC Securities Commission, I am no longer able to act as a director of a private or publically held company due to the sanctions. As well, this has harmed my reputation and has been a significant barrier in re-entering the work force. Due to the sanctions against Sharon and myself, we cannot sit as a director or officer from any public or private companies.

Due to my experience with the BC Securities Commission and [sic] I am limited to working as a sole practitioner or as an employee.

- [66] There is no evidence that, apart from the failed trucking company, Mr. Poonian has even tried to earn an income. There is no evidence that he has sought employment within the limitations of the Commission sanctions, and no reason given why he could not take gainful employment consistent with those limitations. Likewise, there is no evidence that Ms. Poonian is limited to working as a consultant for her aunt's company.
- [67] Although it is unrealistic to expect that the Poonians could have reduced their debts in a significant way relative to the size of those liabilities, some contribution toward the estate would have evidenced some acknowledgment of their responsibilities.

[68] In my view, a suspended discharge would do little to advance the twin principles of rehabilitating the bankrupt and upholding the integrity of the bankruptcy system.

2. The appeal: 2021 BCSC 222

[58] On January 14, 2021, in reasons indexed as 2021 BCSC 222, Thompson J dismissed the Poonians' appeal of Master Elwood's order. In reaching that conclusion, he found:

[17] The Poonians regard themselves as debtors that fall into the "honest but unfortunate" category. The master plainly found each of them occupy the other pole, i.e., "rogues who are clearly guilty of transgressions before the bankruptcy." No error -- manifest, palpable or otherwise -- has been demonstrated in this conclusion of fact. It is amply supported by the evidence.

[59] On January 21, 2021 the Poonians filed a notice of appeal of Thompson J's order: CA47228.

[60] At both Supreme Court hearings, and in the new appeal from those decisions, as well as this present application, the Poonians were represented by experienced counsel.

III. POSITIONS OF THE PARTIES

[61] The Commission submits that three subsections of s 178 apply to exempt from discharge the amounts owed by the Poonians:

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;
- (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;

[62] The Commission argues that the disgorgement orders and administrative penalties imposed on the Poonians arise from the very type of deceitful conduct Parliament intends to exempt from a bankruptcy discharge. The orders arise out of knowingly deceitful conduct designed for financial gain, particularly at the expense of financially vulnerable individuals, such as the clients of the Phoenix Group. The Poonians' deliberate manipulation of and erosion of confidence in public markets fall squarely within the scope of s 178(1)(e): elaborate misrepresentation of true market price to both individual investors and the trading public at large. The public interest in condemning such behaviour also supports the survival of the disgorgement order and administrative penalty debts from discharge. Preserving these debts would promote the Commission's mandate to protect the public from deceptive and predatory conduct: *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3 at

paras 35, 59, 77. It would specifically fulfil the Commission's mandate to protect the public by deterring others from undermining the integrity of the securities market: *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at para 4.

- [63] The overarching response of the Poonians is that the Commission has failed to discharge its persuasive burden of establishing that the debts owed to the Commission fall under the strict wording of ss 178(1)(a), (d), or (e). The specific nuances of that argument will be dealt with below, under each section.

IV. LAW: GENERAL PRINCIPLES

- [64] The parties were in general agreement as to the relevant principles guiding the Court in deciding whether a specific debt should be excepted from a discharge order.
- [65] In *Cruise Connections Canada v. Szeto*, 2015 BCCA 363 at para 14, our Court of Appeal endorses the description of the purpose and principles of the BIA in general and s 178 in particular as set out by Blair J (then serving ad hoc on the Ontario Court of Appeal; later JA) in *Simone v. Daley* (1999), 170 DLR (4th) 215 (ONCA):
- [27] An important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her re-integration into society - subject to reasonable conditions - by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met . . .
- [28] Debts which survive a bankruptcy as a result of the provisions of subsection 178(1), therefore, are exceptions to the overriding principle, and should be addressed accordingly.
- [29] An analysis of the provisions of subsection 178(1) shows that the types of debt which survive a bankruptcy may be divided into four overall categories, namely,
- (1) those which have been imposed by a court in the form of a fine or some other penalty for an offence against the state (paragraph (a));
 - (2) those which reflect the legislative policy decision to protect spouses and children requiring support (paragraphs (b) and (c));
 - (3) those arising out of acts of fraud, dishonesty, or misconduct while acting in a fiduciary capacity (paragraphs (d) and (e)); and finally,
 - (4) those which, if discharged, would undermine the integrity of the bankruptcy process itself (paragraph (f)).
- [30] In *Jerrard v. Peacock* [(1985), 57 C.B.R. (N.S.) 54 (Alta. Q.B.)], Master Funduk--an experienced official in matters of this nature--subjected section 178 to the following analysis, which in my opinion is an accurate one. At pp. 62-63 he said:

Considering the new start object ingrained in the Act, the logical interpretation of the two subsections in question is that subs. (2) creates the general principle (being a release of all debts) with subs. (1) being an exception to the general principle. [Subsection (1)] establishes exceptions, not the principle, and must be viewed in that light.

It is as if the section literally reads that the order of discharge releases the bankrupt from all claims provable in bankruptcy "except the following" and then lists the seven (now six) categories in subs. (1).

...

All of the exceptions in the section are based on what might be classed as an overriding social policy. In other words, they are the kinds of claims which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations.

...

Paragraphs (d) and (e) are morality concepts which look at conduct. These kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability.

[emphasis added]

[66] The intention of Parliament in enacting s 178 is to prevent a bankrupt from using the statutorily-bestowed shield of bankruptcy to avoid the payment of debts arising from intentionally bad conduct: *Martin v. Martin*, 2005 NBCA 32 at para 11; *Mutual Transportation Services Inc. v. Saarloos*, 2020 NSSC 198 at para 14.

[67] Courts accordingly "take a purposive approach to interpreting s. 178(1)(d) and (e) to ensure that debtors do not benefit from their dishonesty": *HY Louie Co. Limited v. Bowick*, 2015 BCCA 256 at para 41 (per Newbury JA, in dissent).

[68] The creditor seeking to have the debt or liability survive the discharge bears the onus of establishing that one of the provisions of s 178(1) apply: *Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261 at para 48; *Gray (Re)*, 2014 ONCA 236 at para 24.

V. DISCUSSION AND DECISION

A. Introduction

[69] This Court is greatly assisted by two recent decisions of the Alberta Court of Queen's Bench, each virtually on all fours with the present application: *Alberta Securities Commission v. Hennig*, 2020 ABQB 48[2] and *Alberta Securities Commission v. Smylski* (7 October 2020), Calgary Action 1001-15242 (ABQB). In each case, the Alberta Securities Commission successfully obtained declarations that penalties levied against individuals for misrepresentations to investors were "excepted claims" under s 178(1).

[70] In Hennig, the Alberta Securities Commission Panel imposed administrative penalties on Mr Hennig for, inter alia, misrepresentations, and market manipulation which artificially inflated the prices of another company, leading to his personal profits, all contrary to the public interest: paras 1, 71, 72. Mr Hennig appealed the Panel decision. In substantive reasons, the appeal was dismissed (sub nom. Alberta (Securities Commission) v. Workum, 2010 ABCA 405): para 5. The Alberta Securities Commission filed the Panel decision with the Alberta Court of Queen's Bench pursuant to the Alberta Securities Act, RSA 2000, c S-4 (the almost identically-worded equivalent to the British Columbia Act, s 163(2)):

200(1) Where the Commission has made a decision after conducting a hearing, the Commission may at any time file a certified copy of that decision with the clerk of the Court of Queen's Bench, and on being filed with the clerk of the Court of Queen's Bench that decision has the same force and effect as if it were a judgment of the Court of Queen's Bench.

[71] The Court exempted the penalty debts from discharge under ss 178(1)(a) and (e), but not under 178(1)(d).[3]

[72] In Smylski, the Alberta Securities Commission Panel (Re Smylski, 2010 ABASC 320) found that Mr Smylski had made various misrepresentations about the risks attached to certain investments, particularly in presentations to vulnerable retirees, and that the misrepresentations had at least jeopardized the financial well-being of individual investors, the integrity of the Alberta Capital Market, and investor confidence generally: para 4. The Alberta Securities Commission also registered the decision with the Alberta Court of Queen's Bench: para 6.

[73] The Smylski Court exempted the penalty debts from discharge under ss 178(1)(a) and (e). The Commission did not argue that s 178(1)(d) applied, perhaps heeding the reasoning in Hennig.

[74] As set out below, this Court agrees with the reasoning and conclusion of those two decisions and applies them to the present case.

B. Subsection 178(1)(a): "fine, penalty, restitution order or other order imposed by a court "

[75] The Poonians argue as a threshold issue that the Commission orders do not fall within the s 178(1)(a) definition of "fine, penalty, restitution order or other order imposed by a court."

[76] Their argument is two-pronged, focusing on each phrase in the section. First, the administrative penalties and disgorgement orders do not constitute a "fine" or "penalty," and s 178(1)(a) only applies to fines or penalties imposed in a criminal or quasi-criminal proceeding. Second, an order of a Commission Panel registered with a court is not a fine, penalty or restitution order "imposed by a court".

[77] There is conflicting jurisprudence as to whether the order or direction of a tribunal, such as the Commission, registered as a judgment of a superior court, constitutes an order "imposed by a court " under s 178(1)(a).

- [78] In Hennig, the Court concluded that an Alberta Securities Commission Panel decision registered as a judgment of the Alberta Court of Queen's Bench, pursuant to the equivalent Alberta section to s 163(2), qualified as an order "imposed by a court" under s 178(1)(a) of the BIA. The Court noted that the Alberta Court of Appeal had scrutinized the penalty, and that the order was filed with the Court with the result that it ""has the same force and effect" as if it were a judgment of the Court": para 30.
- [79] Smylski agreed with and followed Hennig. Neufeld J provides additional analysis at pp.3-4 as to why a Securities Commission Panel order, registered with a superior court, will constitute an order "imposed by a court":

In my view, it is very important in this context to note that section 200 of the Securities Act provides that ASC orders may be converted into a judgment by virtue of filing a certificate with the court recording the decision in question. Thereafter, the order is enforceable as a judgment of this Court.

There is no exercise of discretion involved on the part of the Court in these sorts of orders being translated into a judgment. For the purpose of subsection 178(1)(a), therefore, it seems to me that there is no reason and no logical explanation for treating a penalty decision by the ASC that has been converted into a judgment as being anything other than a penalty imposed by a Court.

This is a practical reality and one that was anticipated, I believe, by Parliament. In that connection, it is noteworthy, as commented upon by Justice Romaine, that while the definition of "court" in section 2 of the Bankruptcy and Insolvency Act describes the Court as being a court of superior jurisdiction, that definition goes on to state that it does not apply to section 178 of the Act, something again which I think makes sense given the practical reality of the conversion of such orders into judgements.

I agree with Justice Romaine that this shows an intention by Parliament that for the purpose of subsection 178(1)(a), the word "court" is to be reinterpreted broadly and would capture a commission such as the ASC that has imposed an administrative penalty, ordered that costs be paid, and thereafter registered the decisions with the court of superior jurisdiction to be translated into a judgment.

[80] Neufeld J refers to the s. 2 definition of "court" in the BIA, which reads:

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; (tribunal)

[emphasis added]

- [81] The Poonians cite *Air Canada (Re)*, (2006) 28 CBR (5th) 317 (ON SC) in support of both prongs of their argument. There, the Court considered whether a \$25,000 fine imposed by the Minister of Transport on Air Canada for exceeding noise regulations at Dorval Airport constituted a "fine" or "penalty" within the meaning of s 178(1)(a). The Court concluded that it did not:
- [42] The jurisprudence and academic commentary have interpreted the meaning of "fine" or "penalty" in s. 178(1)(a) as fines or penalties imposed for offences against the state in either a criminal or quasi-criminal context. See Hon. L.W. Houlden, Hon. G.B. Morawetz and J. Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at 777; *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 at para. 28; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), (ON CA), 11 C.B.R. (4th) 190 at para. 19 (Ont. C.A.) [Buland]; *Simone v. Daley*, *supra* at paras. 29-30.
- [43] In my view, a Monetary Penalty imposed by the Minister of Transport for a regulatory infraction does not constitute a criminal or quasi-criminal fine or penalty.
- [44] Regulatory infractions are different from criminal offences. Regulatory proceedings attempt to regulate behaviour in specific areas of activity, whereas criminal offences seek to punish "morally reprehensible" acts. Canadian Aviation Regulation s. 602.105(c) relates to noise operating criteria and is punishable by a monetary penalty designed to regulate behaviour. Violations of noise abatement regulations relating to air traffic do not involve the morally or socially reprehensible behaviour intrinsic to criminal offences. See *R. v. City of Sault Ste. Marie*, [178] 2 S.C.R.1299 at 1302-1303; *R. v. Wholesale Travel Group Inc.* [1991] 3 S.C.R. 154 at para. 125. By contrast, there are hybrid offences set forth in ss. 7.3 through 7.5 of the *Aeronautics Act* that fall under the subtitle of "Prohibitions, Offences and Punishment". Subsection 7.6(2) of the *Aeronautics Act* provides that the summary conviction procedure is not applicable with respect to the contravention of a "designated provision" such as the noise abatement regulation.
- [82] The Poonians argue that the administrative fines and disgorgement orders do not arise from either a "criminal" or "quasi-criminal" context, but are regulatory infractions akin to those considered in *Air Canada*.
- [83] *Air Canada*, several procedural and factual steps away from the present case, does not dislodge the recent reasoning and application of *Hennig* and *Smylski*, based on nearly identical facts and legislative provisions.
- [84] First, the conduct underlying the fine and tribunal order was altogether different from that in the present case. The \$25,000 noise regulations fine imposed by the Minister of Transport is morally distanced from the actions of the Poonians condemned in the *Liability Decision* and *Sanctions Decision*. The noise penalty would fall far from the legislative purpose of the s 178(1) exceptions, as surveyed above. The Poonians' conduct goes well beyond a "regulatory infraction." Again, it constituted "serious misconduct" based on a scheme that was "elaborate, involving layers of deception to conceal the respondents' participation in the

manipulation": Sanctions Decision at para 17. The phrase used in *Air Canada* at para 42 -- "morally reprehensible" -- would apply to the Poonian scheme. The Poonians' actions also engage three of the four categories of debt excepted by s 178(1) listed in *Cruise Connections* at para 14 and *Simone v. Daley* at para 29, quoted above:

- (1) those which have been imposed by a court in the form of a fine or some other penalty for an offence against the state (paragraph (a));
- (3) those arising out of acts of fraud, dishonesty, or misconduct while acting in a fiduciary capacity (paragraphs (d) and (e)); and finally,
- (4) those which, if discharged, would undermine the integrity of the bankruptcy process itself (paragraph (f)).

[emphasis removed]

- [85] Further, while *Air Canada* refers to "fine" or "penalty," it did not consider the third enumerated category of order set out in s 178(1)(a): "restitution order". Such an order does not seek to punish, but rather to compensate and restore. The inclusion of this phrase, in addition to the more punitive terms "fine" and "penalty", implies a broader scope to s 178(1)(a) than criminal or quasi-criminal offences. The present disgorgement orders, focussed on depriving a party of ill-gotten gains, rather than punishment, would fall within the s.178 definition of a "restitution order." As noted by the Court of Appeal in *Poonian* at para 70, "the purpose of s 161(1)(g) is neither punitive nor compensatory."
- [86] Ultimately, as Hennig notes, the passage in *Air Canada* relied upon by the Poonians is obiter dicta. The issue before that Court was whether a noise penalty was a "claim" for the purposes of the Claims Procedure and Sanction Orders issued by that Court under the Companies' Creditors Arrangement Act, RSC 1985, c.C-36 (the "CCAA"). The Attorney General sought a declaration that the penalty was an "excepted claim" under s 178(1) of the BIA. The Court concluded that the BIA did not apply, and that the CCAA did not require the Court to determine whether a given claim is an "excepted claim" under s 178 of the BIA: *Air Canada*, at para 35.
- [87] The second prong of the Poonians' argument focuses on the word "court." Again, they cite *Air Canada*, which further concluded that a ministerial fine, confirmed by a tribunal (not a securities commission but rather the Transportation Appeal Tribunal of Canada), filed in the court registry, did not constitute an order "imposed by a court":
- [47] Section 2 of the BIA defines the word "court", but that definition is not applicable to s. 178(1)(a). No authority for the precise meaning of the word "court" in s. 178(1)(a) was brought to my attention. However, guidance can be taken from the interpretation of "court" in other statutes.
- .

- [50] Both of these decisions support the conclusion that the plain and ordinary meaning of the word "court" in s. 178(1)(a) of the BIA does not include an administrative tribunal such as the TATC and does not encompass the Minister of Transport who imposed the Monetary Penalty in the first instance. This interpretation is bolstered by the general recognition (with the sole exception of the Alliston decision) that fines and penalties imposed by an administrative body for regulatory infractions are different in kind from those imposed by a court for criminal or quasi-criminal offences.
- [51] This would be the end of the matter except for one further argument raised by the Attorney General during oral submissions. It was pointed out that on June 12, 2006 the TATC had issued a certificate, pursuant to s. 7.92 of the Aeronautics Act, in the amount of the Monetary Penalty after Air Canada refused to pay the penalty, and that this certificate was registered with the Quebec Superior Court on August 2, 2006. According to s. 8.2 of the Aeronautics Act, when such a certificate is so registered it "has the same force and effect, and proceedings may be taken in connection with it, as if it were a judgment in that court". The Attorney General submits that this makes the Monetary Penalty one "imposed by a court" for the purposes of s. 178(1)(a).
- [52] I reject this submission. I agree with Air Canada's assertion that a Court-registered certificate that is statutorily treated "as if it were a judgment in that court" is not equivalent to a fine or penalty actually imposed by a court. The Attorney General conceded at the hearing that the Superior Court does not scrutinize a certificate when it is registered. This is in stark contrast to the consideration given by a Court when it is deciding to exercise its power to impose a fine or penalty.
- [88] The Poonians accordingly argue that an order of a tribunal registered in a Court is not "imposed by a court" unless it has been scrutinized by the court, as in an appeal or on its merits.
- [89] This Court rejects this argument for several reasons.
- [90] First, neither the plain wording of the registration provisions in the security acts of British Columbia (s 163(2)) or Alberta (s 200), nor the BIA (s 178(1)(a)), impose a requirement of judicial scrutiny.
- [91] Second, provincial securities acts, among many other statutes, expressly provide for the registration of fines, penalties, restitution orders, and other orders, in the court registry of the superior court of the province, to permit enforcement of those orders as a practical matter. The BIA correspondingly anticipates such registrations, and indeed exempts s 178(1) from application of the BIA definition of "court". The process of registration does not involve scrutiny or judicial discretion: it is a matter of right. In this, I agree with the Smylski analysis of Neufeld J, quoted above.

- [92] Third, given the purpose of s 178(1) -- to avoid rewarding dishonest behaviour -- there is no principled basis to refuse to exempt debts imposed after a hearing before an administrative tribunal such as the Commission Panel. As discussed in the next section, a debt arising from a judgment may be exempted regardless of the strict cause of action in the original pleading: a court will consider whether the bankrupt seeking exemption was an honest but unfortunate debtor, or, rather, fell into liability through reprehensible behaviour. A debt, based in reprehensible behavior, imposed by an administrative body statutorily entrusted to make findings and impose penalties and to which courts grant deference, should be treated equally in our administrative state to a debt arising from a judgment.
- [93] Finally, the Poonians' position would lead to an absurdity. By declining to appeal the decision of a securities commission or other tribunal, a party could immunize himself or herself against the application of s 178(1)(a), and stymie execution proceedings by commission or tribunal through bankruptcy.
- [94] Ultimately, this Court need not make broad pronouncements as to whether all fines, penalties, and orders of securities commissions or tribunals fall under s 178(1)(a), or whether only orders based on morally reprehensible behaviour apply. Romaine J was cautious about making broad conclusions, but noted that the actions leading to the order before her fell into the zone of moral disapprobation, at the purposive core of s 178(1):
- [29] There is no requirement in the plain language of subsection 178(1)(a) that reprehensible conduct be established, but, as discussed, various courts have implied that condition by interpreting the subsection in a manner that requires criminal or quasi-criminal proceedings, presumably given the policy considerations that underline the purpose of the section 178 exceptions. It is noteworthy that in this case, the Commission panel was well-aware of an enhanced responsibility arising from the serious consequences of findings of misrepresentation in public documents, and the sanctions decision reflects that awareness. The sanctions principles emphasize the preventative and protective aspects of a proper sanction. There appears to be no good policy reason to restrict the exception to cases involving the standard of proof in a criminal case, which exists because of the risk to an accused's liberty, to the issue of discharge from bankruptcy arising from a finding of a dishonest or reprehensible conduct in civil proceedings.
- [30] Expanding the interpretation of the subsection in such a way that would encompass any decision of a regulatory authority that involves the public interest, as suggested by the Commission, would give the exception too broad a scope. However, the issue is whether the exception should apply to a penalty imposed by a securities commission arising from fraudulent and dishonest conduct, scrutinized by the Court of Appeal which made its own finding of misrepresentation, and filed with the Court with the result that it "has the same force and effect" as if it were a judgment of the Court.

- [31] In the circumstances, it is not necessary that I find that an administrative penalty levied in the circumstances of this case falls within the requirements that the penalty must be imposed by a court in respect of an offence, but, if I am incorrect in finding that subsection 178(1)(e) applies, I would find that subsection 178(1)(a) applies in this case in the specific circumstances of a penalty imposed for reprehensible conduct involving fraud, dishonesty and misrepresentation, filed in a timely manner with a court under provisions that give it the same effect as a judgment, scrutinized by the Court of Appeal, and under circumstances where the regulatory authority responded appropriately to the bankruptcy with an indication of its position on the issue.
- [95] This Court reaches the same conclusion: the Commission orders, based on expansive and detailed findings of repeated, elaborate, dishonest, and deliberate conduct, through the Poonians' scheme to mislead investors, manipulate the market, and exploit vulnerable investors, fall solidly within the purposive core of s 178(1). The debts flowing from those orders are exempted under s 178(1)(a).
- [96] I also agree with the factual and legal conclusion in Smylski: it is not necessary for a superior court to separately scrutinize and adjudicate the merits of the case against the debtor that was before the tribunal. That said, I am satisfied that both in theory and in practice, the merits of the Poonians' position was in fact scrutinized, and rejected, by a superior court, at the leave application: the Court of Appeal considered whether the Poonians' substantive grounds of appeal presented arguable cases of sufficient merit, and declined leave. Further, as set out above, the Poonians have argued their case now three times before this Court; one further appeal to the Court of Appeal is pending, and these present reasons will no doubt soon join the queue. Each time the Poonians have failed to convince the Court that the Panel's conclusions were unsupported or unwarranted.

C. Subsection 178(1)(e): "any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation "

1. Law

- [97] An order pursuant to s 178(1)(e) serves as "a moral sanction against the bankrupt for obtaining property through deceitful means. It ensures that a deceitful wrongdoer will not be able to use the court system and the state's bankruptcy provisions as a mechanism for avoiding the consequences of his or her actions": *Cruise Connections* at para 15.
- [98] In the recent *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc. et al.*, 2020 ONSC 7635 at para 23, Marc Smith J provides a helpful summary of principles derived from the s 178(1)(e) jurisprudence:

- a. The exceptions set out in section 178 of the BIA are types of claims which outweigh any possible benefit to society in the bankrupt being released from those obligations. The exceptions contained in section 178(1)(e) are morality concepts that look at conduct. These types of conduct are not acceptable to society and a bankrupt should not be rewarded with a release of liability: *Simone v. Daley*, 43 O.R. (3d) 511, 170 D.L.R. (4th) 215;
- b. One of the important purposes of bankruptcy is to encourage the rehabilitation of an honest but unfortunate debtor and to permit their re-integration into society: *Simone v. Daley*;
- c. In reaching a conclusion on the scope of section 178, the Court is to consider the pleadings and the evidentiary proceedings at trial: *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641, at paras. 33-35;
- d. The onus is on the creditor who seeks to have the debt or liability survive the discharge to bring it within one of the provisions of section 178(1) of the BIA: *Gray (Re)*, 2014 ONCA 236, 2014 119 O.R. (3d) 710, at para. 24;
- e. Section 178(1)(e) of the BIA uses the expressions "false pretences" and "fraudulent misrepresentation" disjunctively: *McKee (Re)*, (1997), 203 A.R. 283, 47 C.B.R. (3d) 70 (AB QB), at para. 34;
- f. "False pretences" and "fraudulent misrepresentation" are similar concepts but not identical. Only one basis of liability must be proven to engage this subsection: *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 319 D.L.R. (4th) 694, at paras. 98 and 107;
- g. The core content of the phrases "false pretences" and "fraudulent misrepresentation" is deceitful statements: *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.*, (1999) O.J. No. 2807, 11 C.B.R. (4th) 190, at para. 14 (ON CA);
- h. The essential test for both "false pretences" and "fraudulent misrepresentation" under section 178(1)(e) of the BIA has been described as determining whether the bankrupt was "deceitful" in obtaining the property (*Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 388 D.L.R. (4th) 648, at para. 13;
- i. For the "false pretences" portion of section 178(1)(e) of the BIA to be satisfied, reliance on any representation need not be shown. Rather, it must be demonstrated that the debtor obtained its property by pretences which they knew to be false: *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, at para. 106;
- j. There is no such thing as a cause of action called "obtaining property by false pretences". It would be unreasonable to require the plaintiff to plead a case to cover the possibility that the defendant will be filing for bankruptcy at some time in the future: *H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117 at para. 44;
- k. A causal connection between the bankrupt's wrongdoing and the creation of the debt or liability is required (*Re Gray*);

I. The Court may remove a stay of proceedings in a variety of circumstances, including where an action is against a bankrupt for a debt to which a discharge would not be a defence: *Advocate Mines Ltd., Re.*, (1984), 52 C.B.R. (N.S.) 277;

- m. To succeed in lifting a stay of proceedings against a bankrupt, the Court must be satisfied that the creditor is likely to be materially prejudiced by the continuance of the stay. The Court has a wide discretion based upon the particular facts of the case in question: *Fiorito v. Wiggins*, 2017 ONCA 765, at para. 16; and
- n. A material prejudice may be found where the claim against the bankrupt is for a debt that would not be released by an order of discharge: *Olaivar (Re)*, [2009] O.J. No. 4469, 60 C.B.R. (5th) 96, at para. 10.

[emphasis added]

2. The Poonians' position

[99] The Poonians argue that the findings of the Commission Panel do not support a finding that the Poonians "obtain[ed] property or services by false pretenses or fraudulent misrepresentation." They cite the general purpose of s 178(1), as set out in *Simone v. Daley and Cruise Connections*, above, and the specific definition of s 178(1)(e) discussed in *Cruise Connections*:

[13] The essential test for both "false pretences" and "fraudulent misrepresentation" under s. 178(1)(e) has been described simply as determining whether the bankrupt was "deceitful" in obtaining the property: *McKee (Re)* (1997), 203 A.R. 283 (Alb. Q.B. per Registrar Funduk, as he then was), cited with approval in *Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261 at para. 29, per Holmes J.; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours*, (2009), 52 C.B.R. (5th) 231, [2009] O.J. No. 165 at para. 18, (Ont. Sup. Ct. J., per Hennessy J.).

[100] The Poonians argue that there is no evidence that they made direct deceitful statements to any of the investors such as by, for example, issuing false market advertisements.

[101] The Poonians also argue that it is telling that the Director did not seek to expressly hold the Poonians liable for fraud under s 57(b) of the Act but instead relied on the seemingly more benign s 57(a):

Manipulation and fraud

57(1) A person must not, directly or indirectly, engage in or participate in conduct relating to a security, derivative or underlying interest of a derivative if the person knows, or reasonably should know, that the conduct

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

- (b) contributes to a fraud perpetrated by another person, or contributes to another person's attempt to commit a fraud, relating to a security, derivative or underlying interest

[102] The remainder of the Poonians' written argument under this head is effectively an attempt to re-argue the merits of the case before the Commission Panel, leave to appeal of which the Court of Appeal denied.

3. Discussion and decision

[103] I agree with the Commission that market manipulation, particularly in the form of the multi-party elaborate scheme, involving disguise and aliases, orchestrated by the Poonians, is 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. Through that scheme the Poonians "obtained property", in the form of millions of dollars, as found in the Reassessment Decision: paras 41-45, 78-79.

[104] Market manipulation misrepresents the market. As Workum and Hennig, Re, 2008 ABASC 363 states at paras 1141-1143:

Securities laws are designed to protect investors and to foster a fair and efficient capital market, and confidence in that market. These objectives require that those engaged in securities trading act with integrity, and that market participants have access to adequate, reasonably reliable information on which to base trading and investment decisions. Essential to this is that trading activity involve real transactions reflecting genuine supply and demand and genuine assessments of value. Trading that creates a false impression about the price or value of, or level of interest in, a security is fundamentally incompatible with fair and efficient market operation. Alberta securities laws prohibit such deceptive practices.

This Commission discussed "artificial price" in this context in Re Podorieszch, [2004] A.S.C.D. No. 360 at paras. 84-90:

... In our view, the meaning can best be determined by considering it in the context of the Act and the framework of securities regulation established by the Act. ... that framework is designed to protect investors and to foster fair, efficient capital markets and confidence in those markets, all of which turn on the integrity with which the market and market participants operate. Key to that market integrity is that the market be able to operate on real information.

... in this context, an artificial price can be described as a price that differs from the price that would result from the market operating freely and fairly on the basis of information concerning true market supply and demand.

The capital market is the venue in which buyers and sellers come together and trade on the basis of their own investment decisions, assessments and preferences. The accumulation of their interactions makes up market supply and demand and establishes market prices. Any transactions between buyer and seller can affect market price. Normal-course transactions

between buyers and sellers, operating at arm's length, reflect real demand and supply; whatever the effect on price, it can be said to be a genuine market effect. If, however, demand or supply is distorted, then price will likely also be distorted - no longer reflective of real market demand and supply, it will be artificial.

Investors must have confidence that they can trade in a marketplace in which the available information properly reflects genuine trading activity. Investors in the capital market base their behaviour and their investment decisions on posted trading prices. They are entitled to assume that the posted prices reflect bona fide transactions in a market operating free of improper influence. Their own transactions are then reflected in subsequent prices. If any investor makes an investment decision in reliance on a posted price that does not reflect genuine trading activity, that investor may be harmed. Subsequent transactions could also be materially affected by that single instance of a misleading posted price. The result could be harm to investors generally and the undermining of investor confidence in the marketplace.

An individual's trading activity may have the intended effect of raising or lowering the price of a security to a level different than it would be under normal market conditions. Alternatively, the trading activity may maintain a price when it would otherwise have risen or fallen. In our view, both situations create an artificial price because the price is not reflective of the market's unimpeded judgment of the value of the security being traded. Such conduct that is designed to affect artificially the prices on the market is contrary to the public interest because it misleads other buyers and sellers.

Thus, the fact that trading changes a price does not by itself mean that the price is artificial. The test is whether the trading itself was an expression of bona fide investment decisions by both parties to the trade - that is, genuine market demand and supply. If so (and absent some other factor), then the resulting price is not artificial. Artificiality is, rather, essentially the product of intentional misrepresentation of genuine demand or supply.

[emphasis added]

[105] As set out above, the essence of s 178(1)(e) is obtaining property through deceitful conduct. In this, 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.

[106] Accordingly, in order to establish "false pretenses" under this section, the behaviour need not satisfy the Criminal Code definition: Shaver-Kudell at paras 30-31, 35, 41-42.

[107] Similarly, in order to establish fraudulent misrepresentation under this section, the behaviour need not satisfy the test for the tort of deceit. The Court found the market manipulation in Hennig to fall within s 178(1)(e), even where the bankrupt inflicted no direct deceit on the ultimate victims. After reviewing the jurisprudence, Romaine J concluded:

- [76] There is nothing in the language of subsection 178(1)(e) that requires that the false pretence or fraudulent misrepresentation be made to the party claiming the exception. A purposive interpretation of the subsection in view of the intention of section 178 - to preclude dishonest debtors from benefitting from their dishonesty - would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the interesting public and promoting the integrity of the capital markets, in circumstances that would otherwise fit within the subsection. This case does not involve an unrelated creditor seeking to invoke the subsection, but a regulatory authority representing the interests of those affected by the fraudulent misrepresentations and/or false pretences.
- [108] Indeed, in the leading case of *Cruise Connections*, where the Court found s 178(1)(e) to apply, neither fraudulent misrepresentation nor false pretences were pleaded in the original proceeding leading to the debt in question: para 4. The original action was based in breach of contract and the torts of civil conspiracy and conversion: para 2. Nonetheless, the Court of Appeal found that the judgment debt of the individual bankrupt, who acted in concert with joint tortfeasors in a deceitful conspiracy to profit by transferring clients and bookings from their previous employer to a new employer, survived bankruptcy under s 178(1)(e): paras 49-50.
- [109] Similarly, the Court in *Shaver-Kudell* rejected an argument that s 178(1)(e) could not apply, as fraud had neither been alleged nor found against the bankrupt, who had been found liable of misappropriating trade secrets and committing a breach of confidence:
- [35] It is my view that a dishonest bankrupt who has unlawfully obtained property by lying satisfies the requirements of "false pretences" in section 178(1)(e). Such conduct is deceitful and wrong. It is this type of conduct that is morally objectionable to society. If the bankrupt engages in such a behaviour, they should not be shielded by bankruptcy.
- [41] I find that Justice R. Smith's findings against the Defendant Knecht amount to deceitful and dishonest conduct which engages section 178(1)(e) of the BIA. The Defendant Knecht, who was the controlling mind of KM, was able to penetrate a very unique market, within a period of nine months when it took twenty years for the Plaintiff to achieve. Justice R. Smith found that this could only be accomplished by copying (which I infer to mean "stealing") the Plaintiff's tooling and manufacturing process...
- [42] The Defendant Knecht's conduct is precisely the type of conduct that society frowns upon. He is not an "honest but unfortunate debtor". I find that he is a deceitful wrongdoer and he should be precluded from benefitting from his dishonesty. He lied under oath, which adversely affected his credibility. He willingly participated in the scheme to utilize confidential information that was not his to use. He knowingly partnered and/or employed individuals that had unlawful knowledge of trade secrets and he used this confidential information for his own financial gain and to the detriment of the Plaintiff. Manufacturing a sleeve that was copied and then selling it on the market as his own creation is clearly an attempt at making something that is not the case appear to be true.

- [45] In sum, I am satisfied that Justice R. Smith's findings demonstrate that the debts and liabilities arose from the Defendant Knecht's false pretences in accordance with section 178(1)(e) of the BIA. The Plaintiff is therefore entitled to a declaration that upon any discharge from bankruptcy granted to the Defendant Knecht, he is not released against any debts or liabilities arising from the Plaintiff's claims.
- [110] This point also addresses the Poonians' argument that the Commission may not rely on fraudulent representation now when it did not rely on s 57(a) before the Panel. Again, the Poonians have made this argument before the Commission and before past courts. As quoted above, the Panel in the Sanctions Decision responded to those arguments by noting that the Poonians' actions were similar to fraud:
- [60] The Poonians object to the use of fraud cases because they do not concern a contravention of section 57(a) of the Act dealing with market manipulation, but rather fraud under section 57(b). However, we agree with the executive director that contraventions of either of sections 57(a) or (b) of the Act can be similarly serious. Each involves some form of deception, which in the case of market manipulation is the misleading appearance of trading activity in, or an artificial price for, a security. Consideration of previous orders in fraud cases is therefore appropriate.
- [111] As a final measure of culpability, speaking to both s 178(1)(a) and (e), the Poonians' actions could have been prosecuted as a violation of the Criminal Code of Canada, RSC 1985, c C-46:

Fraud

380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
- (b) is guilty
 - (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
 - (ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Minimum punishment

(1.1) When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

Affecting public market

- (2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
- [112] This returns us to the purpose and essence of s 178(1) generally, and s 178(1)(e) specifically. The Court is satisfied that the Poonians' actions were morally unacceptable and harmful to society, such that they should not be rewarded with a release of those debts through the statutory discharge under the BIA. Their orchestrated market manipulation and knowing exploitation of vulnerable investors, with corrosion of public confidence in the securities markets, all evidence the deceit lying at the heart of s 178(1)(e).

D. Subsection 178(1)(d): "any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity "

- [113] The Commission argues in the further alternative that the disgorgement orders (but not the administrative order, presumably based on the authority of Hennig at para 60) should be exempted under s 178(1)(d).
- [114] Given the conclusions above, that both orders are exempted under ss 178(1)(a) and (e), the Court declines to consider or pronounce on this alternative ground.

E. The Poonians' substantive and natural justice arguments

- [115] In their application response, the Poonians advance many of the substantive defences and natural justice arguments that they argued before Fenlon JA in their leave to appeal application, which arguments were rejected:
7. The Poonians continue to deny responsibility for the scheme and say that they did not profit and in fact lost money.
 9. The Poonians by way of their affidavit evidence deny profiting and they say they incurred a \$1.9M loss as a result of the devaluation of the OSE shares that were central to this matter and say that it was a result of market factors, and the 2008 recession.
 10. The Poonians do not appear to have communicated directly with any of the investors, who suffered losses-in the sense that the Poonians did not put out news releases or make representations to investors.
 11. The Poonians say that the actions of the Commission and/or allegations made by CIBC of suspicious trading affected the stock price and volume.
 12. The respondents say that they were not afforded procedural fairness and denied natural justice before the Commission in the liability and sanctions hearings.

13. The Poonians represented themselves at the Commission in the initial liability and sanctions decisions, and were denied leave to appeal on con testing the underlying decision except as for the disgorgement orders.
 14. Moreover, the Poonians say that they were not afforded proper disclosure of documents to defend themselves.
 15. Rightly or wrongly, Mr. Poonian deposes that he relied on the commission panel for assistance in representing himself and Ms. Poonian.
- [116] The Poonians support these arguments in two affidavits, totaling 276 pages. The affidavits were sworn in January 2020, for the purpose of the discharge application heard by Master Elwood. Mr Poonian also provided a second affidavit dated January 20, 2021, totalling 560 pages.
- [117] These arguments have been considered and these issues have been decided, first by the Commission Panel, in multiple decisions, and then by the Court of Appeal. The substantive issues raised again by the Poonians have been squarely decided by the Commission Panel on multiple occasions in the decisions surveyed above. The parties in those administrative proceedings were the same parties before this Court, and the doctrines of issue estoppel and res judicata presumptively apply: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras 24-25, 33; *Workers' Compensation Board v. British Columbia (Human Rights Tribunal)*, 2009 BCSC 377 at para 40, aff'd *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. As Abella J summarises in *Figliola*:
- [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland [v. Consumers' Gas Co.]*, 2004 SCC 25], at para. 72, and *Toronto (City) [v. C.U.P.E., Local 79]*, 2003 SCC 63, at para. 37). Their common underlying principles can be summarized as follows:

It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher [v. Stelco Inc.]*, 2005 SCC 64], at para. 35).

Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)* at paras. 38 and 51).

The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland* at para. 72).

Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (Toronto (City), at paras. 37 and 51).

- [118] The matter is *res judicata*. As the Poonians had multiple opportunities to argue these matters, assisted by counsel, or without counsel by choice, this Court sees no principled basis to exercise its discretion to exempt the usual application of *res judicata*: *Mott v. United Used Auto & Truck Parts Ltd. (Trustee of)*, 2007 BCCA 111 at paras 5-9, leave to appeal ref'd 2007 SCCA No 148. The Poonians raise no principled reason for the Court to exercise its discretion not to apply issue estoppel and *res judicata* and to allow those issues to be re-litigated.
- [119] When the Court raised this point in argument, the Poonians accepted that they could no longer re-argue the natural justice or substantive points earlier determined by the Commission and rejected in the leave application.
- [120] Nonetheless, I have reviewed the Poonians' affidavits. There is nothing contained in those affidavits that would dislodge the conclusions reached above. For the most part, the affidavits appear to repeat the same allegations that were rejected in the leave to appeal application. Indeed, Exhibit A to the January 2021 affidavit is the leave application itself.

VI. CONCLUSION

- [121] The Court confirms that the debts represented by the administrative penalties and disgorgement orders are exempt from and survive any discharge under the BIA, pursuant to ss 178(1)(a) and (e). Specifically, the Court declares that pursuant to ss 178(1)(a) and (e), the amounts owed by Thalbinder Singh Poonian and Shailu Poonian (the "Bankrupts") to the British Columbia Securities Commission pursuant to the decisions dated March 13, 2015 and May 16, 2018, and registered with the Supreme Court of British Columbia in SCBC Action no. L-150104, shall not be released by any order or discharge granted to the Bankrupts.
- [122] The Court thanks Ms Bevan and Mr Reedman for their excellent submissions on behalf of their clients.

"Crerar J"

- [1] The Securities Act was amended effective March 27, 2020. The former s 57(a) is now numbered s 57(1)(a).
- [2] Presently under appeal (2001-0028AC): set to be heard on May 7, 2021.
- [3] As the alleged breach of fiduciary duty was not to the public (the purview of the Commission) but rather to a company for which Mr Hennig served as director: para 60.

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