

CANADA / JUDGMENT

Poonian v. British Columbia (Securities Commission)

2022 BCCA 274

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 274 Poonian v. British Columbia (Securities Commission)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Poonian v. British Columbia (Securities Commission),

2022 BCCA 274

Date: 20220805

Docket: CA47364

Between:

Thalbinder Singh Poonian and Shailu Poonian

Appellants

And

British Columbia Securities Commission

Respondent

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated
March 26, 2021 (Poonian (Re), 2021 BCSC 555, Vancouver Docket B180757).

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Place and Date of Hearing:

Vancouver, British Columbia

May 2, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 5, 2022

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

Summary:

The British Columbia Securities Commission obtained an order declaring that the amounts owed by the appellants pursuant to a Commission decision are debts that will not be released by an order of discharge under the Bankruptcy and Insolvency Act. The appellants challenge the judge's interpretation of the Bankruptcy and Insolvency Act. The appellants argue that the judge erred in adopting *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, which was reversed by the Alberta Court of Appeal after the trial judgment was issued. Held: Appeal dismissed. The jurisprudence does not support the view of the chambers judge or the Court in *Hennig QB* that a decision of a tribunal registered as a judgment of a superior court may be a fine, penalty or restitution order imposed by a court under s. 178(1)(a) of the Securities Act. However, the chambers judge did not err in finding that both the fines and disgorgement orders in this case fell within the exemption defined in s. 178(1)(e) of the Securities Act. The debts arise from obtaining property or services by false pretenses or fraudulent misrepresentation. The fact the

misrepresentation was not made to the creditor--in this case, the Commission--does not preclude the Commission from relying on the exemption.

Table of Contents

Paragraph Range

Introduction

[1] - [3]

Background

[4] - [13]

The Judgment Under Appeal

[14] - [26]

Grounds of Appeal

[27] - [29]

Discussion and Analysis

[30] - [90]

Section 178(1)(a): Fines, Penalties and Restitution Orders Imposed by a Court

[33] - [49]

Section 178(1)(e) Obtaining Property by Fraudulent Misrepresentation

[50] - [82]

The Finding of Fraudulent Misrepresentation

[57] - [60]

Obtaining Property

[61] - [62]

Consideration of the Pleadings

[63] - [66]

Direct Link Between the Debt and the Fraudulent Conduct

[68] - [82]

Morally Reprehensible Conduct and Res Judicata

[83] - [86]

Breaches of Natural Justice

[87] - [87]

Arbitrariness

[88] - [90]

Disposition

[91] - [91]

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] The British Columbia Securities Commission (the "Commission") has obtained an order declaring that the amounts owing by Thalbinder Singh Poonian and Shailu Poonian (the "Poonians") pursuant to a Commission decision are debts falling within s. 178 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] and, for that reason, will not be released by an order of discharge. The order was granted for reasons indexed at 2021 BCSC 555. The Poonians appeal, challenging the judge's interpretation of the BIA.
- [2] In particular, the appellants say the trial judge erred in adopting and following the rationale of the trial court in *Alberta Securities Commission v. Hennig*, 2020 ABQB 48 [Hennig QB], rev'd 2021 ABCA 411 [Hennig CA]. In the interval between the issuance of the judgment and the hearing of this appeal, that decision was reversed by the Alberta Court of Appeal, which comprehensively addressed the task of statutory interpretation after noting:
- [15] Whether an administrative penalty and costs order imposed by a securities commission and registered as a judgment with a superior court can survive discharge of a bankrupt debtor has not been addressed by a Canadian appellate court.

[Footnote omitted.]

- [3] The principal issue on this appeal is whether we should adopt the approach to this question taken in *Hennig* and, to the extent we do so, whether the facts here can be distinguished from the facts in that case.

Background

- [4] The Commission found the Poonians had breached s. 57(a) of the Securities Act, R.S.B.C. 1996, c. 418 [Act], by engaging in conduct that resulted in the misleading appearance of trading activity in, or an artificial price for, OSE Corp.'s shares: 2014 BCSECCOM 318 (the "Liability Decision").^[1] It then imposed sanctions against the Poonians in 2015 BCSECCOM 96, (the "Sanctions Decision"), including the following monetary sanctions:

- a) Thalbinder Singh Poonian and Shailu Poonian, along with three others, were found jointly and severally liable to pay a disgorgement order of \$7,332,936 to the Commission;
 - b) Thalbinder Singh Poonian was ordered to pay an administrative penalty of \$10 million; and
 - c) Shailu Poonian was ordered to pay an administrative penalty of \$3.5 million.
- [5] On March 23, 2015 the sanctions were registered with the Supreme Court of British Columbia pursuant to s. 163 of the Act, which provides:
- (1) If the commission has made a decision under section 161 [an enforcement order, including a disgorgement order] or 162 [an administrative penalty], or if the executive director has made a decision under section 161, the commission or the executive director, as applicable, may file the decision at any time in a Supreme Court registry by filing a certified copy of the decision.
 - (2) On being filed under subsection (1) , the decision has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.
- [6] This Court thereafter ordered the matter to be remitted to the Commission for reassessment of the disgorgement orders, because the Commission had not sufficiently addressed the extent to which each of the sanctioned parties (including the appellants) had directly or indirectly received payment as a result of the contraventions found to have occurred: 2017 BCCA 207.
- [7] The disgorgement orders were reassessed and new disgorgement orders were made in 2018 BCSECCOM 160, (the "Reassessment Decision"), requiring:
- a) the Poonians, jointly and severally, to pay the Commission \$1,126,260;
 - b) Shailu Poonian to pay the Commission \$3,149,935; and
 - c) Thalbinder Singh Poonian to pay the Commission \$1,319,167.
- [8] The Reassessment Decision was registered with the Supreme Court on June 5, 2018.
- [9] The Poonians applied for an absolute discharge from bankruptcy in February 2020. The master dismissed the application for discharge: 2020 BCSC 547.
- [10] The Commission then sought the now-impugned order, relying upon s. 178(1) of the BIA, which provides that an order of discharge does not release the bankrupt from:
- (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, ;
 - ...
 - (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, ...; or

- (e) any debt or liability arising from obtaining property or services by false pretenses or fraudulent misrepresentation, ...
- [11] The Commission relied upon the decision of Chiasson J.A. in *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256, in support of the proposition that the court may look beyond a judgment to its basis in law in order to determine whether a judgment debt survives discharge:
- [88] When a creditor takes judgment, the cause of action arising from its claims is merged in the judgment. To determine whether s.178 of the BIA applies, the court characterizes the judgment. It does so based on the pleadings and proceedings that resulted in the judgment. When they include a claim that property was obtained by false pretences, the judgment may be characterized as within s. 178.
- [12] The Commission argued that the debts in this case arose out of the Poonians' fraudulent or dishonest conduct, and fell within the class of debts described in s. 178(1), as explained in *Martin v. Martin*, 2005 NBCA 32. Writing for the court in that case, Deschênes J.A. noted:
- [10] I agree with the general proposition to the effect that, considering the "new start" object ingrained in the Act, (the discharge provides the "new start" to the bankrupt) the logical interpretation of sections 178(1) and (2) is that the latter creates the general principle (being a release of all debts) with subsection (1) being an exception to that general principle. I also agree that section 178(1) must be viewed in that light.
- [11] But even viewed as an exception to the general principle, and thus as a legislative provision to be interpreted restrictively, the object and clear purpose of the exceptions set out in s. 178 must be respected. The exceptions are based on an overriding social policy that certain claims should be protected against the general discharge obtained by a bankrupt because of the class of claimants involved, in the present case, the victim of an assault causing bodily harm, and because of the reprehensible nature of the bankrupt's conduct. [T]he types of debt which survive bankruptcy are any debts arising out of fraud, dishonesty, or misconduct while acting in a fiduciary capacity. Parliament has clearly made a policy decision that a bankrupt should not be allowed to raise the shield of his or her general discharge against judgment creditors who hold judgments grounded on such reprehensible conduct. As the court in *[Simone v. Daley (1999), 170 D.L.R. (4th) 215 (Ont. C.A.)]* stated, "[t]hose kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability."

[Emphasis added.]

- [13] The Commission also relied upon *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.), in which Master Funduk canvassed the purpose and effect of the exceptions to the rule in s. 178(1), and Hennig QB, arguing that the administrative penalty and costs order imposed by the securities commission and registered as a judgment with the superior court can survive discharge of a bankrupt debtor.

The Judgment Under Appeal

[14] The chambers judge described in detail the nature of the conduct that resulted in the Commission's orders. In short, he noted:

[12] [T]he 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.

[Emphasis original.]

[15] Significantly, he noted that the Commission's disciplinary panel had found that:

- the Poonians had engaged multiple deceptive strategies to manipulate the market and artificially drive up share prices (at para. 18);
- Mr. Poonian had directly, or indirectly through companies he controlled, engaged in deliberate and wrongful conduct relating to OSE shares (at para. 19), and was the "mastermind" orchestrating the scheme (at para. 20);
- Ms. Poonian was "an experienced and sophisticated investor who was deeply involved in the market manipulation" (at para. 22); and
- the Poonians' actions were to be "appropriately compared to cases based in fraud" (at para. 25).

[16] The chambers judge rejected the Poonians' argument that the fact they had been found to have breached s. 57(a) as opposed to s. 57(b) suggested their conduct had not been fraudulent.

[17] Section 57 reads, in part:

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) 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, or

- (c) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a derivative or an underlying interest of a derivative.

[18] The chambers judge quoted the Sanctions Decision, at para. 110:

[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.

[19] He considered the reasoning Hennig QB and *Alberta Securities Commission v. Smylski* (7 October 2020), Calgary 1001-15242 (A.B.Q.B.), [2020] A.J. No. 1258, to be persuasive, holding (at para. 74): "This Court agrees with the reasoning and conclusion of those two decisions and applies them to the present case."

[20] The Poonians had argued that neither the Commission's disgorgement orders nor the administrative penalties were a "fine, penalty, restitution order or other order ... imposed by a court" under s. 178(1)(a) of the Act. First, they argued, that phrase could only refer to fines or penalties imposed in a criminal or quasi-criminal proceeding; second, notwithstanding its registration with a superior court, an order of a tribunal is not a fine, penalty or restitution order "imposed by a court". They relied upon *Air Canada (Re)* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J.), in support of both propositions.

[21] The chambers judge distinguished that case on the ground that while it considered whether the payment order in question (a noise penalty) constituted a "fine" or "penalty", it did not consider the third category of order set out in s. 178(1)(a): "restitution order": at para. 85. He considered the disgorgement order to fall into that class.

[22] The argument that a registered decision of a tribunal is not an order for payment "imposed by a court", because no judicial scrutiny is required for registration, was also rejected. The judge noted that the BIA anticipates registration of tribunal orders pursuant to provincial legislation and the restricted definition of a "court" in the BIA expressly does not apply to s. 178(1)(a): at para. 91.

[23] He concluded that the debts fell within s. 178(1)(a) of the BIA:

[95] [T]he 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).

- [196] [I]t 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.
- [24] Turning to s. 178(1)(e), he held that the Poonians' market manipulation was "at its core a fraudulent misrepresentation and false pretense: deliberately misleading the public generally and investors as to the true value of the OSE shares, through a deceitful scheme": at para. 103. He held that the Commission's Reassessment Decision made it clear that the Poonians had obtained property as a result of the manipulation.
- [25] He added:
- [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
- [26] Having made those findings, the chambers judge declined to address the Commission's argument (founded upon Hennig QB), that the disgorgement orders should be exempted under s. 178(1)(d): at paras. 113-14.

Grounds of Appeal

- [27] The appellants filed a factum before the appellate decision in Hennig CA. Initially their appeal was founded upon the submission that the chambers judge erred:
- a) in law by misapplying the principles and law pertaining to s. 178(1)(a);
 - b) in law by misapplying the principles and law pertaining to s. 178(1)(e);
 - c) in fact by disregarding the evidence tendered by the appellants contesting the allegation of morally reprehensible conduct;
 - d) in law by finding that the doctrine of res judicata precluded the appellants from contesting certain of the Commission's findings;
 - e) in fact by failing to consider the breaches of the principles of natural justice and procedural fairness in the underlying proceedings; the factum does not elaborate on this bare assertion and it was not mentioned in oral submissions. I consider it to have been abandoned. As I note briefly below, however, it is closely tied up with the res judicata arguments; and

- f) in law by making an order that was "arbitrary, oppressive, overly broad, disproportionate and contrary to section 7 and 12 of the Charter, not in the public interest and contrary to the principles of fundamental justice".
- [28] Following the Court of Appeal's judgment in Hennig CA, the appellants filed a supplemental factum in which they argued that the judgment on appeal in that case "further demonstrates the errors made in Poonian as outlined in the Original Factum." In particular, they contend "the correct approach towards statutory interpretation, considering the plain ordinary meaning of the words in s. 178(1)(a), would not lead to the conclusion that administrative penalties imposed by the Securities Commission are included within that section."
- [29] Further, they say that "for s. 178(1)(e) to apply, the fraudulent statements must have been made to the creditor that is invoking the said section." They submit this is a distinguishing factor in this case, since the fraudulent statements giving rise to orders were not made to the Commission that imposed the penalties and restitution order.

Discussion and Analysis

- [30] The chambers judge in Hennig QB found that the debt owed to the Alberta Securities Commission survived discharge because it fell within s. 178(1)(e), as a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation". Alternatively, the chambers judge held the debt survived discharge because it fell within s. 178(1)(a), as a "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". The chambers judge dismissed the argument that the debt survived bankruptcy under s. 178(1)(d).
- [31] On appeal, Khullar J.A. writing for the Court of Appeal, thoroughly and helpfully addressed many of the issues before us on this appeal. I adopt her description of the approach we should take to the interpretive task, summarized as follows:
- [25] [T]he proper approach to interpreting the exemptions in s 178(1) starts from the position that every debt is released on a discharge of the bankrupt unless one or more of s 178(1)'s subsections clearly exempts the debt from release. The exemptions should be construed narrowly and applied only in clear cases: [Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc., 2015 ONCA 465] at paras. 62-63; Ruth Sullivan, Halsbury's Laws of Canada (online), HLG, Legislation "Determining Legislative Intent, Presumed Intent, Strict and Liberal Construction" (VIII.4.(2).(d)) at HLG-97. That approach is justified because the more debts that survive discharge by falling within s 178(1) the more difficult it becomes for a bankrupt debtor to be rehabilitated: [Moloney] SCC at para. 79.
- [26] Section 178(1) does not specifically exempt all debts arising from reprehensible or dishonest conduct, only those identified in that section. ...

[32] For the reasons that follow, however, I am of the view that analysis leads to a different result in the case at bar. I will deal with each of the appellant's arguments in the order in which they are addressed in the factum.

Section 178(1)(a): Fines, Penalties and Restitution Orders Imposed by a Court

[33] The Appellants contend the chambers judge erred in law in his approach to s. 178(1)(a) in three respects:

- a) He failed to apply the "modern approach" to statutory interpretation when interpreting s. 178(1)(a). The appellants say that approach compels a restrictive, rather than broad and purposive, approach to the interpretation of s. 178(1)(a).
- b) He failed to consider relevant jurisprudence applicable to s. 178(1)(a) because of his reliance on Hennig QB and Smylski rather than a line of cases that restrictively interpret s. 178(1)(a): Bankruptcy of Kenneth Reginald Chaytor, 2006 BCSC 1742; Sidhu (Re), 2008 BCSC 90; Martin v. Martin; B. (S.M.A.) v. H. (J.N.) (1993), [1994] 4 W.W.R. 281 (B.C.S.C.), aff'd [1995] 2 W.W.R. 744 (B.C.C.A.); Economical Mutual Insurance v. Guilbert, 2020 MBQB 179; and now the appellate decision in Hennig CA.
- c) He failed to consider the operational conflict between the federal BIA and provincial Securities Act.

[34] The weight of the authorities does not support the view taken by the chambers judge in this case or the court in Hennig QB, that a decision of a tribunal registered as a judgment of a superior court should be considered to be a fine, penalty or restitution order imposed by a court.

[35] Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, The 2021-2022 Annotated Bankruptcy and Insolvency Act, (Toronto: Thompson Reuters, 2021) note at 998: "The kind of penalty covered by s. 178(1)(a) is one imposed for an offence against the state, in either a criminal or quasi-criminal context". In support of this proposition, the authors cite Buland Empire Development Inc. v. Quinto Shoes Imports Ltd. (1999), 123 O.A.C. 288. That case in turn cites Simone v. Daley (1999), 170 D.L.R. (4th) 215 (Ont. C.A.), and B. (S.M.A.) v. H. (J.N.), all considered judgments to that effect. (This view has recently been reaffirmed in Economical Mutual Insurance v. Guilbert, among other cases.)

[36] The trial court in Hennig QB departed from that line of authority because the penalty imposed by the securities commission was founded on moral blameworthiness, proven to a high evidentiary standard, and weighed by an appellate court that could have substituted a different penalty. The chambers judge held:

[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.
- [37] However, these conclusions were unnecessary to the trial court's judgment in Hennig QB, and the views expressed in the passages I have cited must be regarded as obiter, inessential commentary:
- [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.
- [38] In the case at bar, Crerar J. expressed similar views with respect to the scope of the s. 178(1)(a) exemption:
- [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 [that registration alone without scrutiny does not make a judgment one imposed by a court] 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.
- [39] In my view, it is open to argue that each or every fine levied and disgorgement order made in this case is "a fine, penalty or restitution order, or an order similar in nature" and that s. 178(1)(a) has occasionally been interpreted too narrowly in that respect.
- [40] The view expressed by Khullar J.A. in Hennig CA with respect to the type of fines, penalties or restitution orders that fall within the exemption is founded upon the view that there is a particular rationale for exempting criminal fines or penalties underlying s. 178(1)(a):
- [49] [T]he main rationale for exempting criminal fines or penalties is respecting the division of labour (and authority) within the legal system. This is what Master Funduk meant when he called s 178(1)(a) an "administration of justice concept": *Jerrard v. Peacock* at para. 42. Exempting criminal fines and penalties from the ordinary operation of bankruptcy proceedings is justified because "as a matter of principle, criminal courts should not be subjected to the control of the civil courts": *R v. Fitzgibbon*, [1990] 1 SCR 1005 at 1117-1118. 75 OR (3d) 673. This section helps maintain the balance between criminal monetary sanctions and the objectives of bankruptcy law. It reflects a policy choice that those subjected to criminal sanction should not be allowed to escape the burden of that sanction through bankruptcy proceedings. It has long been established that courts should avoid generating "the sort of clash between civil and criminal law that is apt to bring the law into disrepute": *British Columbia v. Zastowny* 2008 SCC 4 at para. 25.
- [41] While that is clearly the rationale for excepting criminal fines and penalties from discharge, like the chambers judge in this case, I see no reason why the plain reading of s. 178(1)(a) should be limited to such fines, penalties and restitution orders. In particular, I think Khullar J.A.'s reading of this provision may make the words "other order similar in nature" to a fine, penalty or restitution order surplusage, an outcome that should be avoided. I note that the court in Hennig CA was expressly not dealing with the issue of restitution (as it noted at para. 46), and I do not regard the case as persuasive authority for the argument that

the only restitutionary orders referred to in s. 178(1)(a), in particular, are those made in criminal or quasi-criminal proceedings.

- [42] However, in my view, the conclusion in Hennig that s. 178(1)(a) does not apply to orders made by administrative tribunals, even orders that are registered to become judgments of a court, because such judgments are not "imposed" by a court, is persuasive. In Hennig, as in the case at bar, some emphasis was placed upon the fact that while there is a definition of "court" in s. 2 of the BIA (in most cases the superior court of a province) that definition is not applicable to s. 178(1). This suggests that it was not the intention of Parliament to limit the exclusion in s. 178(1)(a) to fines, penalties or restitutionary orders made by superior courts. Legislation in Alberta provided that the orders of the Securities Commission registered in the Court of Queen's Bench have "the same force and effect as if [they] were a judgment". Our Act, as I have noted at para. 5 above, has a similar provision: s. 163.
- [43] Justice Khullar held that tribunal orders that are simply registered, without judicial scrutiny, may be enforced as if they are judgments of the court, but cannot be said to be "imposed" by courts:
- [52] Section 2 of the BIA defines "court" for most purposes as the superior courts of the Provinces but that definition does not apply to s 178(1). "Court" as it appears in s 178(1) is undefined. When the ASC filed the Decisions with the Court of Queen's Bench, the Court did not take any action apart from putting them on file. Rather, the act of filing enabled the ASC to use civil enforcement methods to enforce the Decisions that it (not the Court of Queen's Bench) had already made. The involvement of the Court of Queen's Bench was passive -- by accepting a filing, a string of collection possibilities opened up to the ASC. Giving the word "impose" its ordinary meaning is consistent with the interpretive approach to s 178(1) urged in these reasons.
- [53] Nor does the dismissal of Mr. Hennig's appeals of the Merits Decision and the Sanctions Decision to this Court bolster the ASC's argument. The dismissal of the appeals confirmed that Mr. Hennig owed a debt to the ASC comprising the administrative penalty and the costs order. It does not mean that this Court "imposed" them. Rather, it upheld the ASC's decision to do so.
- [44] In my opinion, this is a correct reading of the provision, given the necessity of limiting the exception to those debts that are clearly described by the legislation. For that reason, I am the view that the chambers judge in this case erred in concluding that the debts in this case are excepted from discharge pursuant to s. 178(1)(a). The provision is broad enough to include at least fines, penalties and restitution orders imposed by courts other than the superior courts of the provinces, but cannot be read so broadly as to include fines imposed by tribunals that are registered in a court. I accept that it is relevant to the analysis that there are provisions of the BIA referring to administrative tribunals and to debts arising from orders made by such tribunals. I agree with the appellants' submission that if Parliament intended to exempt fines or penalties imposed by tribunals from the rule in s. 178(2), it

would have done so expressly.

- [45] In the recent decision of this Court in *British Columbia (Employment Standards) v. Kwok*, 2022 BCCA 196, a question similar to that which arises in this case was considered: whether a determination made by the Director under the Employment Standards Act, RSBC 1996, c 113, filed in the Supreme Court of British Columbia, pursuant to which a certificate of judgment in favour of the Director was entered, was a "judgment, order or award of the Supreme Court of British Columbia"; a "government claim" as defined in the Financial Administration Act, RSBC 1996, c.138; or neither a "judgment, order or award of the Supreme Court of British Columbia" nor a "government claim" under the FAA. It was necessary to address the issue in order to determine what limitation period applied to the claim to enforce the determination.
- [46] The Employment Standards Act, like the Securities Act, contains an enforcement provision (s. 91(2)): "Unless varied, cancelled or suspended under section 86, 113, 115, 116 or 119, a filed determination is enforceable in the same manner as a judgment of the Supreme Court in favour of the Director for the recovery of a debt in the amount stated in the determination."
- [47] Grauer J.A. writing for this Court, held that a determination that has been filed and certified in the Supreme Court is a "local judgment" (as that term is defined in the Limitation Act) and so is enforceable in the same manner as a judgment of the Supreme Court. Clearly, however, the question before the court in that case was whether the determination was "enforceable" as a judgment of the court, not whether the judgment debt was "imposed by" a court. Grauer J.A. noted:
- [37] Contextually, section 7 of the Limitation Act is all about enforcement. It refers specifically to the time for commencing "a court proceeding to enforce a judgment for the payment of money" (emphasis added). In this way, it differs from section 6, which sets out the basic limitation period of two years for commencing "a court proceeding in respect of a claim".
- [38] What the judge did not consider is this: the legislature's intention when it used the words "judgment" and "local judgment" in section 7 of the Limitation Act must be construed in the context of the enforcement process and its clear intention that, upon filing, a determination is to be enforced in the same manner as a judgment of the Supreme Court.
- [39] This approach gives proper weight to the legislative context of enforceability, and the legislative intent and objects of both statutes, all as informed by the principle of coherence among statutes and the dictates of the Interpretation Act.
- [48] I would not accede to the Commission's argument in the case at bar that the fines and disgorgement orders are imposed by a court because s. 163 of the Act requires that the filed decision be treated, for all proceedings, as if it were a judgment of the Supreme Court. The Commission rightly notes that the provision considered in *Hennig* (s. 200(1) of the Alberta Securities Act, R.S.A. 2000, c. S-4) differs from our Act because it does not contain a

provision specifying that "all proceedings may be taken on [a filed Commission decision]". In my view, it is clear that the effect of registration is to make all enforcement proceedings available to the Commission that would be available if an order had been imposed. It does not overcome the BIA's requirement that the exempted debt must arise from an order "imposed" by a court.

- [49] It is therefore unnecessary for me to address the argument that there is operational conflict between s. 163 of the Act and s. 178(1)(a) of the BIA.

Section 178(1)(e) Obtaining Property by Fraudulent Misrepresentation

- [50] The Court of Appeal in Hennig CA held that there must be a judicial determination that the debtor comes within any of the exemptions established by s. 178 and in the case of the fraud exemption, s. 178(1)(e):
- [62] With respect to s 178(1)(e) specifically, if there is a prior judicial finding of fraud in underlying litigation related to the debt then the task for the application judge under the BIA will likely be straightforward. If it is not clear what a court determined in the prior judicial proceedings, courts in Alberta and elsewhere have long recognized that the application judge can look to the judgment recognizing the debt (if any), the pleadings and context to determine if there were fraudulent statements for the purpose of 178(1)(e). The early cases adopted this approach when it was not clear from the record whether a debtor had made fraudulent statements. In *Morgan v Demers*, 1986 ABCA 100, all this Court had to go on was the formal judgment. There were no written reasons and no transcript of the oral reasons. So, this Court assessed the preamble of the formal judgment, which referred to an affidavit and questioning on the affidavit, to determine if there had been an admission of fraudulent misrepresentation for the purpose of s 178(1)(e). Similarly, in *Berthold v. McLellan*, 1994 ABCA 122, this Court had to look to pleadings and evidence to make sense of a brief bench judgment to decide whether the judgment debt fell within s 178(1)(d); see also *Covey (Re)*, 2012 ABQB 565 at para. 11; *HY Louie Co Limited v Bowick*, 2015 BCCA 256 at paras. 57, 60-61, 88.
- [51] It is settled law that a court may examine the "contextual facts" of a claim to determine whether it falls within the provision, regardless of whether it raised fraud as a cause of action. However, I would not adopt the view expressed in the succeeding paragraph of the judgment in Hennig CA:
- [63] In the case of a debt resulting from a finding by an administrative tribunal, even if there is a finding of fraudulent statements, an application judge must make his or her own determination based on a review of the record whether the debt falls within the exemption: *Canada (Attorney General) v Bourassa (Trustees of)*, 2002 ABCA 205 at paras. 5-9.

- [52] In my view, the preferable approach is that described by Fraser C.J.A., concurring in the result, in *Canada (A.G.) v. Bourassa (Trustees of)*, 2002 ABCA 205, on the question of whether decisions of administrative tribunals (in that case the Employment Insurance Commission) can effectively determine that a debt arises from fraud:
- [37] [T]here is no merit to the submission that a Commission decision is nothing more than an internal administrative review which lacks the force of law. Although Commission decisions are made within the scope of the statutory scheme mandated by Parliament, and do not require subsequent court affirmation, this does not mean that they are bereft of any legitimacy in law. To the contrary. The EI Act speaks for itself on this point. Despite the gravity with which courts approach allegations of civil fraud, a Commission decision based on a finding of fraudulent conduct, if not appealed and reversed, can be enforced as if it were a judgment of the Federal Court of Canada on registration of the required certificate under s.126(2). In this regard, Commission decisions are comparable to those made by other administrative tribunals whose decisions may be enforced as judgments of a superior trial court, such as a labour relations board: see for example *Canada Labour Code R.S.C. 1985, c. L-2*, ss. 23(3) and 23.1.
- [38] Further, given the provisions of the EI Act, if a Commission decision is not successfully appealed in the manner prescribed by statute, it follows that the Commission findings under s. 38 are *res judicata* as between the debtor and the Commission. There is no rational legal or policy basis for requiring that these issues be litigated afresh as between the claimant debtor and the Commission either in the course of the bankruptcy proceedings or thereafter. Had the subject Commission decision been registered in the Federal Court of Canada, there could be no argument that this decision did not bind the parties. Does the absence of registration undercut the binding effect of the decision for purposes of the Bankruptcy Act? In my view, it does not.
- [39] Parliament intended that a Commission decision under s. 38 have binding effect in law, subject of course to appeal rights. The fact that any such decision (not appealed or not reversed on appeal) can be enforced as if it were a judgment of the Federal Court confirms that intention. The law is clear that in a bankruptcy, a debtor is not relieved of any finding already made by a court of competent jurisdiction that the debtor has obtained property from a creditor by false pretences or by fraudulent misrepresentation. The judgment is conclusive on this point: *Re Smith* (1985) 43 Sask. R. 27 (Q.B.), *aff'd* (1986) 45 Sask. R. 240 (C.A.); and see also *Berthold v. McLellan*, 1994 Alta. L.R. (3d) 28 (C.A.). The same result follows where an admission of fraud can be inferred from a consent judgment: *Demitor (Re)* (1993) 137 A.R. 381 (Q.B.). A Commission decision not appealed by a claimant debtor is therefore analogous to a decision of a court of competent jurisdiction and should be treated as such.

[53] It does not appear that the approach to decisions of administrative tribunals described in Bourassa has been considered in this province. I note that the approach that should be taken to this question appears to be unsettled. In *Manitoba Securities Commission v. Werbeniuk*, 2009 MBQB 59, Scurfield J. noted:

[30] My review of the majority decision in Bourassa leads me to conclude that they did not really turn their minds to the effect of a finding of fraud by a properly constituted independent board or commission. That is because in Bourassa, they found that the employment insurance commission was not functioning in an independent fashion. It was in essence both creditor and adjudicator. Consequently, they did not have to decide the effect of a ruling by an independent statutory tribunal.

See also: Coyle (Re), 2011 NSSC 238.

[54] To the extent the question may be open, however, it need not be resolved in this case because the conduct of the appellants was characterized as fraudulent by both the Securities Commission and the chambers judge on his review of the record.

[55] The trial judge, relying on *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc. et al.*, 2020 ONSC 7635 at para. 23, rev'd on other grounds 2021 ONCA 925, applied, among others, the following principles:

- a) in reaching a conclusion on the scope of s. 178, the court is to consider the pleadings and the evidentiary proceedings;
- b) 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 s. 178(1);
- c) section 178(1)(e) uses the expressions "false pretences" and "fraudulent misrepresentation" disjunctively; only one basis of liability must be proven to engage this subsection;
- d) the core content of the phrases "false pretences" and "fraudulent misrepresentation" is deceitful statements;
- e) the essential test for both "false pretences" and "fraudulent misrepresentation" is whether the bankrupt was "deceitful" in obtaining the property;
- f) reliance on any representation need not be shown; it must be demonstrated that the debtor obtained its property by pretences which they knew to be false; and
- g) a causal connection between the bankrupt's wrongdoing and the creation of the debt or liability is required.

[56] In my opinion, the chambers judge did not err either in his description of the principles, or in finding that both the fines and the disgorgement orders in this case fell within the exemption defined by s. 178(1)(e). The debts arise from obtaining property or services by false pretenses or fraudulent misrepresentation. The evidence supported the conclusion that the judgment against the Poonians was founded upon the fact they had engaged in

fraudulent misrepresentation and had obtained property as a result. The judge considered the allegations upon which the Commission based its decision. There was a direct relationship between the fraudulent conduct and the fines and disgorgement order. Finally, in my view, the fact that the misrepresentation was not made to the Commission does not preclude it from relying on the exemption.

The Finding of Fraudulent Misrepresentation

[57] The chambers judge cited and adopted (at para. 104) the following passages from the decision of the Alberta Securities Commission in *Workum and Hennig, Re*, 2008 ABASC 363:

- a) the Commission's adoption (at para. 1142) of a passage from its prior decision in *Re Podorieszch*, 2004 LNABASC 151, [2004] A.S.C.D. No. 360:

... 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.

[*Italic emphasis original; emphasis by underlining added by Crerar J.*]

- b) the Commission's own conclusion, at para. 1143:

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 by Crerar J.*]

[58] After describing the "essence" of s. 178(1)(e) as "obtaining property through deceitful conduct", the chambers judge held that its application in this case is "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": at para. 105.

[59] He concluded, following *Hennig QB*, that the debtor's impugned behaviour need not satisfy the test for the tort of deceit, and that market manipulation can fall within s. 178(1)(e): at para. 107.

[60] I see no error in the chambers judge's characterization of the acts giving rise to the underlying judgment, and I would not accede to the appellant's characterization of this as behaviour "adjacent to fraud".

Obtaining Property

- [61] The Poonians had argued that the findings of the Commission panel did not support a finding that they "obtain[ed] property or services by false pretenses or fraudulent misrepresentation". They contended there was no evidence they made direct deceitful statements to any of the investors such as by, for example, issuing false market advertisements.
- [62] The chambers judge held that the market manipulation orchestrated by the Poonians was "at its core a fraudulent misrepresentation and false pretense: deliberately misleading the public generally and investors (such as the Phoenix clients) as to the true value of the OSE shares, through a deceitful scheme": at para. 103. Through that scheme the Poonians had "obtained property", millions of dollars, as found in the Reassessment Decision: paras. 41-45, 78-79.

Consideration of the Pleadings

- [63] The Court of Appeal in Hennig CA concluded that the chambers judge had erred, in circumstances similar to those before us, in failing to engage in an appropriate contextual analysis of the findings of the securities commission. In particular, the Court of Appeal held that the judge erred in failing to consider the pleadings in the commission proceedings, which did not specifically allege fraud. The failure of the commission to allege fraud was considered by Khullar J.A. to have been intentional and significant.
- [64] The chambers judge in the case at bar expressly considered the Poonians' argument that it was "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)": at para. 101. He noted that s. 178(1)(e) was found to apply in *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, even though neither fraudulent misrepresentation nor false pretenses were pleaded in the original proceeding: at para. 108. Similarly, the debt was exempted from discharge in *Shaver-Kudell* despite the fact that fraud had neither been alleged nor found against the bankrupt: at para. 109, rev'd 2021 ONCA 925.
- [65] He noted that the Poonians' conduct had been equated to fraud through numerous proceedings and hearings (at para. 110), and that the Commission panel in the Sanctions Decision concluded:
- [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.

[66] He concluded:

[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).

[67] In my view, it was open to the chambers judge to conclude that the debt in this case arose from fraudulent misrepresentation despite the fact the Securities Commission's proceedings were brought under s. 57(a) of the Act. The chambers judge in the case at bar, unlike the trial judge in Hennig QB, expressly addressed the question of whether the charge giving rise to the underlying judgment was founded upon an allegation of fraudulent conduct.

Direct Link Between the Debt and the Fraudulent Conduct

[68] The Court of Appeal in Hennig CA found the commission could not establish a link between the debt and the fraud. It rejected the commission's argument that a link is made out if the debt would not have existed if the fraudulent statements had not been made, an argument that had been accepted by the chambers judge.

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

[70] I would not interpret s. 178(1)(e) so narrowly as to fail to give effect to the purpose of the exemption, as consistently described in the jurisprudence. In my view, the plain reading of s. 178(1)(e) does not restrict the exemption to cases where the creditor is the person "directly victimized". I agree with the Commission's submission in this case that the plain language of s. 178(1)(e) of the BIA does not restrict this exception to only those claims where the bankrupt made a deceitful statement to the creditor.

[71] I see no basis for importing the requirement of a "deserving" victim and, in any event, the cases recognize that there are "deserving" victims of fraud to whom the misleading statement was not made directly. In my respectful opinion, it is for that reason that the

jurisprudence is not as consistent as the Court of Appeal in Hennig CA suggests. Justice Khullar declined to follow one contrary appellate decision, *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, because "the exemptions in s 178(1) should be interpreted narrowly, and creditors deserve the preferential treatment given by s 178(1)(e) only if they are the victims of the debtor's fraudulent behaviour": at para. 92.

[72] In my view, the very narrow scope of the exemption defined by the Court of Appeal in Hennig CA reflects the view expressed at the outset of the judgment (at paras. 16-19) that while the purpose of s. 178 is clear--"giving the debtor a fresh start"--the rationale for the exceptions is less clear:

[19] [Section] 178(1) reflects a number of disparate policy choices by Parliament reflecting different considerations. There is no master-rationale for all the exceptions. Courts have recognized this for some time: *Jerrard v. Peacock* at paras. 41-46; Lloyd W Houlden, Geoffrey B Morawetz & Dr Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) (update 2021-3), Part VI, H§63(1), Online.

[Emphasis added.]

[73] The "master rationale" for all exceptions is described in the jurisprudence as exempting all classes of debt that fall outside the legitimate objectives of the bankruptcy regime, and the courts have recognized a particular policy objective in the specific provisions before us on this appeal.

[74] In one of the cases cited in support of the starting point for the Court of Appeal's consideration of the ambit of the exceptions in Hennig CA, *Jerrard v. Peacock*, Master Funduk wrote, at 205-6:

Considering the new start object ingrained in the Act, the logical interpretation of the two subsections in question [ss. 178(1) and (2)] is that subs. (2) creates the general principle (being a release of all debts) with subs. (1) being an exception to the general principle. Subsection (2) establishes exceptions, not the principle, and must be viewed in that light.

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

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

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

[Emphasis added.]

[75] In *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68, aff'd *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, the court's discussion of s. 178(2) was brief and ultimately inessential to the conclusion that the challenged provisions of Alberta's Traffic Safety Act, R.S.A. 2000, c. M-22, had the effect of frustrating Parliament's legislative purpose in enacting the BIA. Justice Slatter simply observed:

[15] The Bankruptcy and Insolvency Act provides in s. 178(2) that "an order of discharge releases the bankrupt from all claims provable in bankruptcy". The section provides a few exceptions: family support judgments, judgments arising from fiduciary misappropriations, some student loans, etc. The classes of debt that are not discharged by bankruptcy are those that Parliament has concluded fall outside the legitimate objectives of the bankruptcy regime.

[Emphasis added.]

[76] Justice Gascon writing for the majority in the Supreme Court of Canada, similarly, did not attempt to describe the rationale for the exceptions except to say:

[79] In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: *AbitibiBowater*, at para. 35; *Schreyer*, at para. 19.

[77] In *Korea Data Systems*, the rationale for the exceptions was described by Cronk J.A. as follows:

[2] s. 178(1) of the BIA creates limited exceptions to this general rule [that an order of discharge releases the bankrupt from all claims provable in bankruptcy]. These exceptions are designed to ensure that purposeful wrongdoers cannot take unjustified advantage of the bankruptcy regime's protections. ...

[Emphasis added.]

[78] The court in that case (at para. 56) adopted the views expressed by Blair J. in *Simone v. Daley* and those of Master Funduk in *Jerrard v. Peacock* that I have cited above. In *Simone*, Blair J. had rejected the broad interpretation of s. 178(1)(d) urged upon him by the appellant, writing:

[52] I am not persuaded that the exception to a release of liability upon a bankruptcy discharge which is provided for in paragraph 178(1)(d) of the BIA should be extended to conduct which does not display at least some element of wrongdoing or improper conduct on the part of the fiduciary in question in the sense of a failure to account properly for monies or property entrusted to the fiduciary in that capacity or inappropriate dealing with such trust property. Had Parliament intended that any innocent breach of an obligation on the part of a fiduciary

would give rise to a debt that would not be released by a discharge from bankruptcy it could very easily have said so, by providing that an order of discharge does not release the bankrupt from any debt or liability arising from a breach of fiduciary obligation. It did not do so. It chose to couch the types of debts or liabilities "while acting in a fiduciary capacity" which would attract the exceptions of s. 178(1), in the context of debts or liabilities arising from fraud, embezzlement or misappropriation, as well as defalcation. While these notions may have slightly different shades or gradations of meaning, I can only conclude that Parliament intended the words "misappropriation" and "defalcation" to bear their plain and ordinary meaning, as the context in which they are used suggests.

[Emphasis added.]

- [79] The interpretation of the exception in that case is narrowed by the recognition of the underlying rationale of ensuring that purposeful wrongdoers do not take unjustified advantage of the bankruptcy regime's protection. In my view, while it is clear that the exceptions must be interpreted narrowly, we must seek to give effect to the intentions of Parliament as embodied in the plain language of the legislation.
- [80] In particular, in this case, it should be borne in mind that s. 15.1 of the Act requires the Commission to establish a claims process to make the proceeds of a disgorgement order available to eligible applicants who have suffered pecuniary loss as a direct result of the contravention. The debt arising from that order is, therefore, indirectly collected by the Commission for the benefit of the victims of the deceit. There was no such order before the court in Hennig. Even if s. 178(1)(e) is read so narrowly as to only exempt debts owed to victims of the misrepresentation that has occurred, it should exempt debts collected by an intermediary on behalf of such victims (in this case the Commission) whose losses resulted in the disgorgement orders.
- [81] The appellants say this is a "weak link" between the Poonians and the victims of their fraud. They ask, under what authority does the Commission step into the victim's shoes? In my view, the Act clearly constitutes the Commission as a body that can act for limited purposes on behalf of the victims.
- [82] Last, they say the fines, at a minimum, do not fall within s. 178(1). In my view, that argument, relying as it does on the argument that we should import into the statute a requirement that the debt in question arise out of a representation to the creditor, is not tenable.

Morally Reprehensible Conduct and Res Judicata

- [83] The appellants say the chambers judge erred in precluding them from contesting certain of the Commission's findings. The chambers judge found that it was not open to the Poonians to challenge findings with respect to the nature of the conduct giving rise to the judgment debts:

[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.

[84] The appellants, relying on *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 159 D.L.R. (4th) 50 (B.C.C.A.), say the judge ought to have considered whether the parties reasonably expected that the prior judgments would finally determine the issue of whether their conduct was morally reprehensible.

[85] In my view, the chambers judge was correct to regard certain factual questions as having been finally determined. As the Commission notes:

The appellants had a full and fair opportunity to advance these arguments at the panel hearing. The Findings and Sanctions Decisions were reviewable by the Court of Appeal. Madam Justice Fenlon refused the appellants' applications for leave to appeal the Findings on the basis of procedural and natural justice concerns. The Findings were therefore left undisturbed and have been recited by this Court in both the leave to appeal decisions and the Sanctions Appeal.

[86] We have been taken to no error in that analysis.

Breaches of Natural Justice

[87] The appellants contend the chambers judge failed to consider breaches of the principles of natural justice and procedural fairness in the underlying proceedings. They identify this as a ground of appeal in their factum, but did not press the argument in oral submissions. In my view, for reasons I have expressed in relation to the *res judicata* argument, all questions of procedural fairness in the underlying proceedings have been previously and finally resolved.

Arbitrariness

[88] The appellants also set out a Charter argument in their factum. They say the chambers judge erred in law by making an order that was "arbitrary, oppressive, overly broad, disproportionate and contrary to section 7 and 12 of the Charter, not in the public interest and contrary to the principles of fundamental justice." They say: "based on a cautious, purposive approach, the interpretation of the Court in *Poonian* is contrary to either s. 7 or 12 of the Charter".

[89] In my respectful view, the respondent is correct to say that the allegation of a Charter breach is "not explained" in the factum. The appellants acknowledge there is a "bare recital" of the Charter provisions. The argument is not vigorously pursued.

[90] The Commission is also correct to say that we should not entertain a Charter issue that was not raised at first instance where, assuming a breach of the Charter were established, factual issues would arise involving the application of s. 1: citing *Farrish v. Delta Hospice*

Society, 2020 BCCA 312 at paras. 105-6, leave to appeal ref'd [2020] S.C.C.A. No. 479; British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc., 2013 BCCA 497 at paras. 24-25, leave to appeal ref'd [2014] S.C.C.A. No. 19; and Pemberton Waterfront Projects Group Inc. v. North Vancouver (District), [1987] B.C.J. No. 1925 (Macfarlane J.A. in Chambers). It is not open to the appellants now to raise a Charter issue in this Court.

Disposition

[91] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

[1] The Securities Act was amended effective March 27, 2020. The former s. 57(a) is now numbered s. 57(1)(a).

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