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Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of Poonian v. British Columbia (Securities Commission) (BCCA)

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Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v. British Columbia (Securities Commission) (BCCA)*

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1. Introduction

The *Bankruptcy and Insolvency Act*[1] ("*BIA*") allows certain debts to be discharged at the end of the bankruptcy process.[2] This discharge achieves one of the *BIA*'s objectives by offering individual debtors a "fresh start" to rehabilitate and become productive members of society.[3] However, the fresh start is not an absolute right. Parliament has enacted a series of exceptions to the discharge in section 178(1) of the *BIA*. As a counterweight to the fresh start principle, these exceptions ensure that debtors who engage in certain wrongful conduct do not benefit from the protections afforded by the bankruptcy regime. Interpreting these exceptions can be challenging, however, as a proper interpretation must necessarily balance the fresh start principle with creditors' rights in order to maintain confidence in the credit system.[4]

This case comment considers an important relationship between the *BIA* objectives and provincial securities law.[5] In *Poonian v. British Columbia (Securities Commission)*,[6] ("*Poonian*") the British Columbia Securities Commission had obtained multimillion dollar disgorgement orders and ordered administrative penalties against the bankrupts, the Poonians, for their market manipulation. The British Columbia Court of Appeal determined that these debts survived a bankruptcy discharge under the section 178(1)(e) exception, which provides that an order of a discharge does not release the bankrupt from "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation….".[7] A similar issue arose in *Alberta Securities Commission v. Hennig*,[8] ("*Hennig*") but the Alberta

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[1] *Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3.
[2] *Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3, s. 178.
[3] *Alberta (Attorney General) v. Moloney*, 2015 SCC 327 (S.C.C.), at para. 36.
[4] *Alberta (Attorney General) v. Moloney*, 2015 SCC 327 (S.C.C.), at para. 37; see also Jassmine Girgis & Thomas G.W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4295, online: <https://canlii.ca/t/7n16r> at note 18.
[5] See Haddon Murray & Heather Fisher, "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4306, online: <https://canlii.ca/t/7n174> at note 31.
[6] 2022 BCCA 274 (B.C.C.A.), leave to appeal to SCC granted 2023WL2732708 (March 30, 2023).
[7] *Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3, s. 178(1)(e).
[8] 2021 ABCA 411 (Alta. C.A.).

Court of Appeal reached the opposite result; it discharged the debt to the Commission after emphasizing the rehabilitation function of bankruptcy.[9] Leave to appeal the *Poonian* decision has been granted.[10] Given the divergent decisions at the provincial courts of appeal on the section 178(1)(e) exception to the bankruptcy discharge,[11] this is an area that could use some clarity from the Supreme Court of Canada[12] though the authors of this paper argue that this matter is best resolved by Parliament in the form of a statutory amendment.

This comment provides an overview of the *Poonian* case and discusses how the court expanded section 178(1)(e) in a way that it is inconsistent with prior case law.

2. *Poonian Decision*

Between 2007 and 2009, Thalbinder Singh Poonian and Shailu Poonian (the "Poonians"), along with friends and associates, were alleged to have done the following: "acquired a dominant share position in OSE [Corp. ("OSE")]…; dominated trading and manipulated OSE's share price… by trading through brokerage accounts [they held]; made approximately $7 million in profit by selling a large number of OSE shares to unsuspecting buyers including sales to clients of Phoenix Credit Risk Management Consulting Inc…; and paid substantial commissions to persons associated with Phoenix for the referral of Phoenix clients to buy OSE shares".[13]

The British Columbia Securities Commission (the "Commission") found that the Poonians had breached section 57(1)(a) of the *Securities Act*,[14] "by engaging in conduct that resulted in the misleading appearance of trading activity in, or an artificial price for, OSE Corp.'s shares".[15] Section 57(1)(a) states that a person must not engage in conduct relating to a security "if 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".[16]

The Commission ordered the Poonians to pay a disgorgement order of $7,332,936 to the Commission, and for Thalbinder Poonian and Shailu Poonian to pay administrative penalties of

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[9] See Chris Simard, Keely Cameron & Adam Williams, "Getting a Seat at the Table: Regulator and Government Actions in Insolvency Proceedings" [2022] Ann. Rev. Insol. L., 2022 CanLIIDocs 4300, online: <https://canlii.ca/t/7n16x> at note 37. *Alberta Securities Commission v. Hennig,* 2021 ABCA 411 (Alta. C.A.) was the first appellate court to consider whether an administrative penalty and cost orders imposed by a securities commission would survive a discharge. See Haddon Murray & Heather Fisher, "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4306, online: <https://canlii.ca/t/7n174> at note 14.

[10] On March 30, 2023, leave to appeal to the Supreme Court of Canada was granted 2023WL2732708.

[11] In addition to *Hennig* and *Poonian*, the decision in *Ste. Rose & District Cattle Feeders Corp. v. Geisel*, 2010 MBCA 52 (Man. C.A.), is also on the s. 178(1)(e) exception and differs from the *Hennig* and *Poonian* decisions.

[12] Chris Simard, Keely Cameron & Adam Williams, "Getting a Seat at the Table: Regulator and Government Actions in Insolvency Proceedings" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4300, online: <https://canlii.ca/t/7n16x> at note 73.

[13] Singh Poonian (Re), 2014 BCSECCOM 318 at para 7.

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

[15] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 1.

[16] *Securities Act*, R.S.B.C. 1996, c. 418, s. 57(1)(a).

$10 million and $3.5 million, respectively. The sanctions were registered with the Supreme Court of British Columbia pursuant to section 163 of the *Securities Act*.[17]

After the Commission proceedings, the Poonians made an assignment in bankruptcy. In separate proceedings, they applied for an absolute discharge from bankruptcy, which was dismissed by the Master.[18] The Poonians appealed the Master's decision and the appeal was dismissed twice.[19] The Poonians' full legal saga is illustrated in the Appendix.

(a) British Columbia Supreme Court

The Commission sought an order that its debt would not be released upon the Poonians' discharge from bankruptcy under sections 178(1)(a) and (e) of the *BIA*. The sections provide:

> 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;
>
> …
>
> (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.[20]

Crerar J. took a purposive approach to the provision, finding that the Poonians' deliberately bad behaviour "fell solidly within the purposeful core of section 178(1)." [21] He concluded that the Poonians' debt would not be discharged under section 178(1)(a), as the fines and penalties of administrative tribunals were captured by the provision.[22] He also found that the requirements for section 178(1)(e) had also been met and that the Poonians' debt to the Commission would not be released by the bankruptcy discharge, as the Poonians' market manipulation was "at its core a fraudulent misrepresentation and false pretence", which had resulted in the Poonians obtaining their property.[23]

(b) British Columbia Court of Appeal[24]

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[17] The court remitted this matter to the Commission for reassessment of the disgorgement orders (2017 BCCA 207 (B.C.C.A.)), the orders were reassessed and new disgorgement orders were made (2018 BCSECCOM 160 (B.C.S.E.C.C.O.M.)). The reassessment decision was registered with the British Columbia Supreme Court on June 5, 2018.

[18] 2020 BCSC 547 (B.C.S.C.).

[19] *Poonian (Re)*, 2021 BCSC 222 (B.C.S.C.); see also *Poonian v. British Columbia (Securities Commission)*, 2021 BCCA 417 (B.C.C.A.).

[20] *Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3, s. 178(1)(e).

[21] *Poonian (Re*), 2021 BCSC 555 (B.C.S.C.), at para. 95.

[22] *Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3, s. 178(1)(a).

[23] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 24.

[24] For further discussion of *Poonian* see Chris Simard, Keely Cameron & Adam Williams, "Getting a Seat at the Table: Regulator and Government Actions in Insolvency Proceedings" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4300, online: <https://canlii.ca/t/7n16x>; see also Haddon Murray & Heather Fisher, "You're Hot

(i) General Approach

The BCCA started from the position that every debt is dischargeable unless it is specifically exempted from release under one of the exceptions in section 178(1). In that way, "[t]he exemptions should be… applied only in clear cases… that approach is justified because the more debts that survive discharge by falling within section 178(1) the more difficult it becomes for a bankrupt debtor to be rehabilitated".[25]

(ii) Section 178(1)(a)

Willcock J.A., speaking for the court, disagreed with Crerar J's interpretation of section 178(1)(a). The legislation requires that an order must be "imposed by the court" in order to survive an order of discharge. To meet this requirement the court found that an order need not be criminal or quasi-criminal in nature, nor is it limited to orders made by superior courts that are listed in s 183 of the *BIA*. It did not find, however, that the requirement encompassed fines or penalties imposed by the Commission and ruled that section 178(1)(a) did not apply.[26] Specifically, Willcock J.A. maintained, "[t]he 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."[27] Willcock J.A. concluded that **"**if Parliament intended to exempt fines or penalties imposed by tribunals from the rule in section 178(2), it would have done so expressly."[28] Willcock J.A. then turned to consider section 178(1)(e).

(iii) Section 178(1)(e)

A. Administrative Tribunal Finding

The Court of Appeal upheld the chambers judge's finding that the fines and disgorgement orders would not be discharged, as they fell within the section 178(1)(e) exemption. In other words, the Court found that "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".[29]

On the issue of whether an administrative tribunal's decision can be enforced as if it were a judgment of the court, the Court relied on Fraser CJA's concurring judgment in *Canada (AG) v. Bourassa (Trustees of),*[30] where she said that administrative tribunal decisions, in that case, the

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and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4306, online: <https://canlii.ca/t/7n174>.

[25] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 31.

[26] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 21.

[27] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 44.

[28] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 44 .

[29] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 56.

[30] 2002 ABCA 205 (Alta. C.A.).

Employment Insurance Commission, can be, and do not require subsequent court affirmation.[31] In conclusion, however, the court in *Poonian* noted that the question need not be resolved in this case because both the Commission and the chambers judge, on his review of the record, had characterized the appellants' conduct as fraudulent.[32]

B. Section 178(1)(e)'s Three Elements: Finding of Fraudulent Misrepresentation, Obtaining Property, and Direct Link Between the Debt and the Fraudulent Conduct

On the finding of fraudulent misrepresentation, the Court of Appeal agreed with the chambers judge that the debtor's impugned behaviour need not satisfy the tort of deceit to fall within the section 178(1)(e) exemption, and that market manipulation qualified under section 178(1)(e).[33]

On the element of obtaining property, the Court of Appeal upheld the chambers judge's finding that the Poonians' market manipulation was "at its core a fraudulent misrepresentation and false pretence: deliberately misleading the public generally and investors… through a deceitful scheme". The Poonians had obtained "property" in the form of millions of dollars.[34]

The final element is the direct link between the debt and the fraudulent conduct. In this case, the Commission relied on section 178(1)(e) even though the misrepresentations were made to investors and not to the Commission. In *Hennig*, when the Alberta Securities Commission attempted to rely on section 178(1)(e) for similar facts, the Alberta Court of Appeal would not allow it, concluding that the exception in section 178(1)(e) did not apply because "[t]he required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on section 178(1)(e)."[35]

In contrast to the *Hennig* court, the *Poonian* court adopted a much broader approach, concluding that a creditor does not need to be "the person 'directly victimized' to claim under section 178(1)(e).[36] The court reasoned that despite the Commission not having been the recipient of the Poonians' misrepresentations, it was not prevented from bringing its claim within the scope of the section 178(1)(e) exception.[37]

Two types of orders arose from the Commission, a disgorgement order and an administrative fine, and although the Court did not distinguish between the two in the outcome of the decision, it did attempt to justify its decision by focusing on the disgorgement order. It reasoned that, through the claims process set up under the *Securities Act*, the Commission "indirectly collected" the proceeds of the disgorgement order to give back to the victims of the misrepresentations. [38]

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[31] *Canada (AG) v. Bourassa (Trustees of*), 2002 ABCA 205 (Alta. C.A.), at para. 37. This is unlike the conclusion in *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 63.
[32] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 54.
[33] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 59.
[34] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 62.
[35] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 78.
[36] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 70.
[37] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 56.
[38] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 80. On the fines, however, the court did not explain its reasoning.

However, it did not explain its reasoning for bringing the administrative fines under section 178(1)(e) as well.

By finding that the Poonians' debt to the Commission would survive a bankruptcy discharge under section 178(1)(e), the *Poonian* court expanded section 178(1)(e) of the *BIA* to include debts arising from claims even where the bankrupt did not make the fraudulent misrepresentation directly to the creditor in question. The rest of this comment explores the case law principles in this area and compares them with the *Hennig* decision. It also makes recommendations as to the best way to achieve the intended public policy goals.

3. Section 178(1)(e)[39] Analysis

(a) What Does Section 178(1)(e) Seek to Accomplish?

Section 178(2) of the *BIA* offers debtors a discharge, or release of debts, at the end of the bankruptcy process. This discharge achieves one of the regime's purposes: it provides a "fresh start" to individual debtors through financial rehabilitation. By removing the burden of the bankrupt's debts, the fresh start provides relief to the bankrupt and their family, allowing them to "reintegrate into economic life so he or she can become a productive member of society".[40]

However, section 178(2) is subject to the exceptions to the discharge found in section 178(1), which allows certain debts to survive discharge, and in doing so, puts the debtor's interests in conflict with those of creditors. These exceptions to discharge arise from social policy – they target morally unacceptable behaviours society has deemed to be undeserving of discharge.[41] However, the interpretation of each exception must be properly balanced, neither detracting from the fresh start goal nor allowing the debtor to get away with the targeted conduct. On one hand, an overly broad interpretation of the exceptions undermines the fresh start principle. For this reason, courts recognize that these exceptions arise from specific types of wrongful conduct and not from all morally unacceptable behaviour. As the court maintained in *Shaver-Kudell*, the exceptions in section 178(1) are not "a catchall of debts arising from morally objectionable

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[39] The Commission also argued that its fine or penalty would survive an order of discharge under s. 178(1)(a). The court disagreed, as the provision requires the order to have been "imposed by a court". The fact of registering these orders means they can be enforced but that does not elevate them to being "imposed" (*Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at paras. 42-43). Rather, the court said "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… if Parliament intended to exempt fines or penalties imposed by tribunals from the rule in s. 178(2), it would have done so expressly" (para. 44).

This provision needs clarification by Parliament. The definition of "court" in the *BIA*, which includes the superior courts of the provinces, specifically excludes the reference to "court" in s 178(1)(a), leaving "court" undefined in s. 178(1)(a). It should be reworded to clearly denote whether administrative penalties are included.

[40] *Alberta (Attorney General) v. Moloney*, 2015 SCC 327 (S.C.C.), at para. 36.

[41] *Martin v. Martin*, 2005 NBCA 32 (N.B.C.A.), which said, "[t]he exceptions [in section 178(1)] 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" (at para. 11). See also *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.), *Simone v. Daley* (1999), 43 O.R. (3d) 511 (C.A.), and Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), where he maintained, "certain overriding social policy objectives that require that certain claims be protected against the discharge." at 312-313.

conduct" but are "categories of specific wrongful conduct".[42] Similarly, in *Schreyer v Schreyer*,[43] the Supreme Court of Canada maintained that the bankrupt is released from all debts "unless the law sets out a clear exclusion or exemption".[44] On the other hand, an overly narrow interpretation of the exceptions rewards dishonest debtors for their bad behaviour by releasing them from debts obtained by fraud. A narrow interpretation also prevents victimized creditors from qualifying for the protection offered by the provision. The challenge, therefore, is to find an appropriate balance between an overly narrow or broad interpretation, though, as the discussion below shows, this is not an easy task.

(b) Three Elements of Section 178(1)(e)

Case law has recognized three elements in section 178(1)(e): "a fraudulent misrepresentation or false pretences, a link between the debt and the fraud, and a passing of property as a result of the fraud".[45]

Under the first element, the debt must arise from a fraudulent misrepresentation or a false pretence. The terms are not defined in the *BIA*, but deceitful statements are foundational to both.[46] Most cases use the elements for the tort of deceit, established in *Derry v Peek*,[47] to satisfy the requirements of fraudulent misrepresentation: (i) a representation; (ii) made falsely; (iii) without a belief in its truth or reckless indifference as to whether it is true; and (iv) relied on by the creditor to its detriment.[48] The elements are the same for false pretence except that it does not require detrimental reliance.[49] This is not consequential in the context of section 178(1)(e), however, because the provision requires a transfer a property as a result of the fraudulent misrepresentation or false pretence.[50]

The second element requires establishing a causal link between the debt and the fraud. The provision requires "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation"; the link between the debt in question and the creditor

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[42] *Shaver-Kudell Manufacturing Inc v. Knight Manufacturing Inc*, 2021 ONCA 925 (Ont. C.A.), at para. 39.
[43] 2011 SCC 35 (S.C.C.).
[44] *Schreyer v Schreyer*, 2011 SCC 35 (S.C.C.), at para. 20.
[45] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 57. See also *McAteer Re*, 2007 ABCA 137 (Alta. C.A.), at para. 16; and *Morgan v. Demers*, 1986 ABCA 100 (Alta. C.A.). The onus to prove these elements is on the creditor seeking to have the debt or liability survive the discharge. See *Canada Mortgage and Housing Corp v. Gray*, 2014 ONCA 236 (Ont. C.A.); *Montréal (City) v. Deloitte Restructuring Inc*, 2021 SCC 53 (S.C.C.). For further discussion of these three elements see Jassmine Girgis and Thomas G.W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System" 2022 20th Ann. Rev. of Insol. L., 2022 CanLIIDocs 4295, online: <https://canlii.ca/t/7n16r>.
[46] *Buland Empire Development Inc v. Quinto Shoes Imports Ltd*, (1999) 123 O.A.C. 288; *Sharma v. Sandhu*, 2019 MBQB 160 (M.B.Q.B.) at para. 25.
[47] *Derry v. Peek* (1889) L.R. 14 App. Cas. 337 (H.L.).
[48] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 58; *Woolf v. Harrop*, 2003 CanLII 19823 (Ont. S.C.); *Sharma v. Sandhu*, 2019 MBQB 160 (Man. Q.B.), at para. 38.
[49] Courts have looked to the *Criminal Code*, R.S.C., 1985, c. C-46, s. 361(1), for guidance on this definition.
[50] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 58. Also, in, *Shaver-Kudell Manufacturing Inc v. Knight Manufacturing Inc*, 2021 ONCA 925 (Ont. C.A.), the Ontario Court of Appeal said, "[b]ecause s 178(1)(e) requires that a debtor obtained property or services by false pretences, it contemplates that a person actually relied on the statement" (para. 30).

to whom the debt is owed arises from the words, "resulting from".[51] The court in *McAteer Re* found that section 178(1)(e) applies "only when there has been a finding of fraud, misrepresentation or other reprehensible conduct that is clearly linked to a bankrupt's debt".[52]

The requirement that the debt must have been incurred through obtaining property by false pretences or fraudulent misrepresentation has typically precluded penalties imposed by administrative tribunals. As identified by the Alberta Court of Appeal in *Hennig,* administrative tribunals are not victims of the debtor's fraud; their debts do not arise from the fraudulent statements but from penalties imposed for that fraud.[53] This can also be seen in *Goldstein (Re),*[54] where the Law Society of Upper Canada ("LSUC") sought a declaration that its costs order would not be released by the bankrupt's discharge. The LSUC ordered the bankrupt to pay its costs after a panel had revoked his license to practice law upon finding that he had knowingly assisted or participated in dishonest or fraudulent conduct. The court found that the costs order did not qualify under subsections 178(1)(d) or (e) because it "arose out of the hearings that resulted in [the bankrupt's] disbarment… while there is a debt owing to the LSUC arising from the costs award… [it] is not part of any fraud committed by [the bankrupt] against the LSUC".[55]

Finally, the third element requires the creditor to have been deprived of property as a result of the fraud.[56] The section is silent on whether the debtor must be the recipient of this property; although case law suggests that the requirements would be met if the property passed to a third person.[57]

(c) The British Columbia Court of Appeal's Rejection of the Three Elements

In *Poonian*, the British Columbia Court of Appeal largely rejected the prior jurisprudence on these three elements.

As noted above, the first element, that the debt must arise from the fraudulent misrepresentation or false pretence, has traditionally been satisfied upon meeting the elements of the tort of deceit. In this case, however, the court took a much broader approach, requiring only that the debtor's conduct be morally objectionable rather than looking to satisfy the specific elements of the tort. [58] It characterized the "'essence' of section 178(1)(e) as 'obtaining property

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[51]*Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3, s. 178(1)(e). See *McAteer v. Billes,* 2006 ABCA 312 (Alta. C.A.), at para. 7; *Morgan v. Demers*, 1986 ABCA 100 (Alta. C.A.), at para. 7.
[52]*McAteer Re*, 2007 ABCA 137 (Alta. C.A.), at para. 28.
[53] The trial court in *Hennig* found that an administrative tribunal could claim under s. 178(1)(e) but the finding was overturned on appeal. *Alberta Securities Commission v. Hennig*, 2020 ABQB 48 rev'd 2021 ABCA 411 (Alta. C.A.).
[54] 2011 ONSC 561 (Ont. S.C.).
[55] *Goldstein (Re)*, 2011 ONSC 561 (Ont. S.C.), at paras. 10-11. In *Korea Data Systems (USA), Inc v. Aamazing Technologies Inc*, 2015 ONCA 465 (Ont. C.A.), the court held, in relation to s. 178(1)(d), that the provision "requires the fiduciary duty in question to have been one that the bankrupt owed directly to the claiming creditor" (para. 4).
[56] *Canada Mortgage and Housing Corp v. Gray*, 2014 ONCA 236 (Ont. C.A.), at para. 31.
[57] *McAteer Re*, 2007 ABCA 137 (Alta. C.A.), at para. 16; *Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261 (B.C.S.C.), at para. 18.
[58] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at paras. 59-60. The court of appeal upheld the chambers judge's characterization that the debtor's behaviour need not satisfy the test for the tort

through deceitful conduct'" and maintained that "a bankrupt who has profited from morally objectionable actions should not be shielded by discharge".[59] The court found that market manipulation is, "at its core a fraudulent misrepresentation and false pretence: deliberately misleading the public generally and investors", and therefore is caught by the provision.[60]

Rejecting the elements of the tort has two effects. First, it allows a creditor who is not the victim of the fraud to qualify under the section 178(1)(e) exemption because it removes the requirement of detrimental reliance.[61] In other words, a creditor does not need to show it relied on the bankrupt's fraud to its detriment in order to claim its debt should survive discharge under section 178(1)(e).[62] The Commission's penalty was imposed on the Poonians because they had defrauded investors; it did not itself arise from the Poonians' fraud.[63]

Second, rejecting the elements of the tort removes a second element from the statutory provision as a whole, one the courts have traditionally required in order to meet section 178(1)(e): a causal link between the debt and the fraud. This link is established upon the creditor showing that the debtor obtained the creditor's property (the debt) through false pretences or fraudulent misrepresentation.[64] As the court said in *Pietrzak (Re)*,

> [a] causal connection between the wrongdoing and the creation of the debt or liability is required. It is not sufficient to show that a fraudulent misrepresentation or false pretence was made unless it is also shown that the property or service was obtained directly as a result thereof.[65]

In this case, the court severed the link between the debt and the fraud and opted for a much broader interpretation. Instead of requiring the debt to arise from the fraud, the *Poonian* court only required the applicant to show that a debt would not have existed if the fraudulent statements had not been made.[66] Therefore, despite the fact that the Commission's debt did not arise from the debtor's fraud, but from the penalty the Commission had imposed on the debtor, the court found that the link had been established. It maintained, "the plain language of section 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."[67]

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of deceit to be caught by s. 178(1)(e). The chambers judge relied on Hennig trial decision, where Romaine J maintained that "there is nothing in the language of s. 178(1)(e) that requires that the false pretence or fraudulent misrepresentation to be made to the party claiming the exception (para. 76).

[59] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 58.

[60] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 62. The Commission and the BCCA likened the Poonians' conduct to fraud but they weren't charged with fraud under s 57(1)(b) of the Securities Act, but with creating a misleading appearance of trading activity under s 57(1)(a). See 2015 BCSECCOM 96.

[61] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 70.

[62] *Pietrzak (Re)*, 2016 CanLII 63109 (Ont. S.C.), at paras. 13-14.

[63] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 56.

[64] *McAteer v. Billes*, 2006 ABCA 312 (Alta. C.A.), at para. 7; *Morgan v. Demers*, 1986 ABCA 100 (A.B.C.A.), at para. 7.

[65] *Pietrzak (Re)*, 2016 CanLII 63109 (Ont. S.C.), at para. 9. See also *Canada Mortgage and Housing Corp v. Gray*, 2014 ONCA 236 (Ont. C.A.).

[66] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at paras. 68-70.

[67] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 70.

Through its interpretation, the *Poonian* court largely rejected the elements that have traditionally been used to determine whether a creditor is eligible to claim protection under section 178(1)(e), calling these well-established requirements "not tenable".[68]

(d) Poonian in Contrast with Hennig and Ste. Rose

The British Columbia Court of Appeal's interpretation of section 178(1)(e) in *Poonian* has been considered and rejected by other courts.[69] This section of the paper will examine two appellate decisions with similar facts that have raised similar issues: *Ste. Rose & District Cattle Feeders Corp v. Geisel*[70] ("*Ste. Rose*") and *Hennig*.[71] *Hennig* and *Ste. Rose* do not entirely agree with each other on the interpretation of section 178(1)(e), but they both agreed on its core element: for the provision to apply, creditors must be deprived of property as a result of having relied on the debtors' deceitful statements.

In *Ste. Rose*, the debtor and his son devised a scheme to deprive the creditor of its property. Under this scheme, the debtor made misrepresentations to the creditor and his son made false pretences to third parties. The Manitoba Court of Appeal found that the deceitful statements were caught by section 178(1)(e). Despite the son having made the false pretences to third parties and not directly to the creditor, the creditor could qualify for the provision because it had been deprived of property as a result of the statements.[72] The debts owing to the creditor were not released by the discharge.

Hennig's facts were similar to *Poonian*; the debt arose from an administrative penalty imposed by the Alberta Securities Commission for fraudulent behaviour. Although the chambers judge decided that the Alberta Securities Commission could claim its penalty as a debt under section 178(1)(e), the Alberta Court of Appeal overturned the decision. The Court of Appeal found that the requirements of the provision had not been met: the securities commission had not been directly victimized, as in, its debt had not arisen by the debtor's fraud.[73] Thus the debt was released by the discharge.

Hennig and *Ste. Rose* did not come to the same conclusion; in fact, the *Hennig* court declined to follow *Ste. Rose* because one of the requirements it read into section 178(1)(e) was incompatible with the *Ste. Rose* decision: for the creditor to be "directly victimized by the fraudulent behaviour of the debtor", *Hennig* required the debtor to make the fraudulent statements directly to the creditor; fraudulent statements to third parties would not count, even if

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[68] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at paras. 68-70, 82.
[69] For further discussion of *Ste. Rose* and *Hennig*, see also Jassmine Girgis & Thomas G.W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4295, online: <https://canlii.ca/t/7n16r>.
[70] 2010 MBCA 52 (Man. C.A.).
[71] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.).
[72] *Ste. Rose & District Cattle Feeders Corp. v. Geisel*, 2010 MBCA 52 (Man. C.A.), at para. 106. The court reserved judgment on whether a fraudulent misrepresentation needs to be made directly to the creditor who is deprived of property (para. 107).
[73] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 83.

the debtor was responsible for them and they deprived the creditor of property.[74] The authors have argued that the interpretation in *Hennig* was too restrictive, as it is possible for a creditor to be a victim without being the direct recipient of the debtor's statements.[75] However, *Hennig* and *Ste. Rose* agreed on the fundamental requirement of the provision: a creditor must have been deprived of its property by having detrimentally relied on the deceitful statement to be eligible for section 178(1)(e).[76]

The balance between the fresh start and protecting creditors is difficult to achieve. However, the common feature that underlies most cases interpreting section 178(1)(e), though sometimes imperfectly expressed, is the protection of creditors who have been victimized by deceitful statements. The case law in this area interprets this provision to target morally blameworthy conduct that gave rise to debt, not simply morally blameworthy conduct. And on that point, *Poonian* is an outlier; an interpretation of section 178(1)(e) which allows creditors to claim its protection even if their debt did not arise out of a deceitful statement by the debtor is too broad.[77]

(e) How Have these Decisions Impacted the Interpretation of Section 178(1)(e) and what is the Broader Impact of Poonian?

The *Poonian* decision expanded the interpretation of section 178(1)(e) when it determined that creditors do not need to be "directly victimized" to make a claim. This interpretation, though possible on a plain reading of the provision, is indefensible in light of statutory interpretation principles, the case law in this area, bankruptcy policy, which requires an appropriate balance between the fresh principle and creditors' rights, and public policy.

Section 178(1)(e) refers to "any debt or liability resulting from obtaining property" by deceitful statements; it does not specifically refer to debt resulting *directly* from obtaining property. The Commission's debt did arise from the fraudulent statements, but not directly; it arose indirectly as a result of the fine and disgorgement orders it imposed on the Poonians for having obtained property through deceitful statements to the investors. It is therefore possible, on its face, to interpret the provision in its broadest possible sense, to capture any debt resulting, directly or indirectly, from the deceitful statements.[78] However, to do so is not only misaligned with the case law in this area and with statutory interpretation principles, which require

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[74] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at paras. 79, 92.

[75] See Jassmine Girgis & Thomas G.W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System"2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4295, online: <https://canlii.ca/t/7n16r>.

[76] A similar conclusion was made in *Shaver-Kudell Manufacturing Inc v. Knight Manufacturing Inc*, 2021 ONCA 925 (Ont. C.A.), where the Ontario Court of Appeal said that the "core concept of making a deceitful statement" applies to both fraudulent misrepresentation and false pretence. It determined that to the extent there may be a difference, it is only that a fraudulent misrepresentation may need to be said directly to a creditor whereas a false pretence may be said by the debtor to a third party, but that both require the creditor to have been deprived of the property to which it was entitled (at para. 35).

[77] See Haddon Murray & Heather Fisher, "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4306, online: <https://canlii.ca/t/7n174> argue at note 191 that the Court of Appeal in *Poonian* was incorrect to hold that "in order to survive a bankruptcy order under s. 178(1)(e) the debt need not arise out of a representation to the creditor claiming."

[78] *Bankruptcy and Insolvency Act*, R.S.C, 1985, c B-3, s. 178(1)(e).

exceptions to legislative schemes to be interpreted narrowly;[79] it is also misaligned with the overall objectives of bankruptcy law:

> The exceptions set out in section 178(1) are binary in nature. If a court determines that a class of debt falls within the enumerated list, the debt is exempt from discharge. The absence of any discretion left to the court militates in favour of a narrow construction because the policy objective protected by the exemption must, in all circumstances, trump the discharge of the bankrupt.[80]

Poonian arguably expanded section 178(1)(e) in a way Parliament did not intend.[81] By failing to distinguish between victimized and non-victimized creditors, this broad interpretation substantially expands the class of creditors holding non-dischargeable debts, thereby veering away from the objectives of bankruptcy law by undermining the fresh start principle.

Finally, and of most concern, the process required for including an exception to discharge in insolvency legislation raises public policy issues. Provincial securities commissions have been lobbying Parliament to amend the *BIA* for years to prevent the discharge of fines they have imposed on debtors who subsequently declare bankruptcy.[82] This decision will allow precisely that outcome, and though a desire to protect defrauded investors may be virtuous, the decision should be accomplished via legislative process, not through the courts, for two reasons.

First, the intrinsic nature of bankruptcy is the deficiency of funds, and decisions about which debts are or are not dischargeable involve public policy trade-offs pitting the debtor's fresh start against creditors' rights. Where we should draw the line between protecting the debtor and determining which debts do not get discharged is neither clear, nor obvious, especially since courts have stated that there is no underlying rationale between all the exemptions.[83] This leaves these types of questions better suited to the democratic process, not the judicial one.[84] If regulators' fines are to survive bankruptcy discharge, it should be through a clear and intentional exemption provided by Parliament, not because of a court's overly broad interpretation of an exception to the discharge.

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[79] See Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Books, 2016) at 233 [Sullivan, "Statutory Interpretation"]. See also *Montréal (City) v. Deloitte Restructuring Inc*, 2021 SCC 53 (S.C.C.), (The Supreme Court said, in the context of interpreting s. 19(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, [*CCAA*], which is identical to s. 178(1)(e) of the *BIA*, "[t]his exception to the general scheme established by s 19(1) of the *CCAA* must be interpreted narrowly" at para. 25). Section 19(2) of the *CCAA* provides that certain claims may not be dealt with by a compromise or arrangement, including those that arise from fraud. Other cases have said that the *BIA* and *CCAA* must be interpreted harmoniously: see *Century Services Inc v Canada (AG)*, 2010 SCC 60 (S.C.C.). See also *Re Kitchener Frame Limited*, 2012 ONSC 234 (Ont. S.C.), at para. 47.

[80] See Haddon Murray & Heather Fisher, "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy" 2022 20th Ann. Rev. Insol. L., 2022 CanLIIDocs 4306, online: <https://canlii.ca/t/7n174> at note 194.

[81] Alfonso Nocilla, "Comment on Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc." (2022) 45:2 Man. L.J. 177 at p. 186 (broad reading in *Poonian*).

[82] Greg McArthur, "B.C. Finance Minister lobbies Ottawa for amendment to Bankruptcy and Insolvency Act", *The Globe and Mail* (February 4, 2020), online: < https://www.theglobeandmail.com/business/article-bc-finance-minister-lobbies-ottawa-for-amendment-to-bankruptcy-and/>.

[83] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 19. See too Jose Garrido, "The Distributional Question in Insolvency: Comparative Aspects" (1995) 4:1 Int. Insol. Rev. 25 at 34, "The development of legislation is the consequence of the political struggle among social groups…".

[84] *Re Iavco Inc*, 2006 CanLII 34551 (Ont. C.A.), at para. 75.

Second, Parliament is better suited than the courts to make these types of statutory amendments.[85] When Parliament introduces statutory changes, it considers the entire legislative scheme, including the different public policy objectives, definitions, rules, and exceptions. It can amend, add, or remove other provisions as required to ensure compatibility with the whole scheme. On the other hand, when courts introduce statutory changes through judicial decisions, they cannot provide substantial guidance or principles; they can only address the specific part of the statute that is before them, potentially leaving unaddressed issues that require further clarification, creating conflicting policy objectives, or creating problems in other parts of the statute. In other words, when courts introduce these changes, it leaves immense uncertainty in interpreting and applying the law.

For example, Parliament might consider whether a distinction should be drawn between different types of orders from the securities commissions. In *Poonian*, the British Columbia Court of Appeal appeared to be drawing a distinction between disgorgement orders and administrative fines when it maintained that the Commission is required to institute a claims process to make the proceeds of a disgorgement order available to the applicants who have suffered loss as a result of the breach, such that the Commission is indirectly collecting the proceeds for the benefit of the victims of deceit.[86] This would have been a reasonable distinction to draw, as it would have aligned with the case law in this area and the requirements that only victimized creditors can claim under section 178(1)(e). The *Poonian* court, however, did not go on to discuss the distinction in a meaningful way, nor did it distinguish between the two orders in the outcome. Rather, it lumped disgorgement orders and administrative fines together at the end, without further discussion.[87]

Another example of an issue Parliament might consider is whether the seriousness of the fraud and the impact on the public should factor into whether an order might be excluded under section 178(1)(e). One of the stark differences between the two otherwise similar cases of *Poonian* and *Hennig* was the size of the monetary judgments. In *Henning* the claim was for $601,932.43,[88] whereas the Poonians engaged in market manipulation costing millions of dollars and resulting in a disgorgement order of $7 million.[89] Was that the reason the decisions were different? Was the *Poonian* court trying to address a public policy objective? Again, these types of public policy choices and distinctions require clear legislative amendments setting out specific rules and exceptions rather than an expansive judicial decision.

4. Conclusion

The British Columbia Court of Appeal widened the scope of the section 178(1)(e) exception to the discharge to achieve a policy outcome. In addition the decision being contrary to precedent, the policy question of when, if ever, debts owed to securities commissions should be

[85] Alfonso Nocilla, "Comment on Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc." (2022) 45:2 Man. L.J. 177 at p. 187 ("[A]n expansion of any of the exceptions contained in Section 178(1) should be made by Parliament rather than the courts."
[86] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 80.
[87] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at paras. 80-81.
[88] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 10.
[89] *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 (B.C.C.A.), at para. 4.

discharged, is one that should be resolved by Parliament. Indeed, the Alberta Court of Appeal in *Hennig* stated that the Alberta Securities Commission "is seeking… a general exemption from release upon discharge for the administrative penalties imposed by a securities regulator. This would create a new category of exemption under s 178(1) which falls within the purview of Parliament, not this Court."[90]

[90] *Alberta Securities Commission v. Hennig*, 2021 ABCA 411 (Alta. C.A.), at para. 102.

Appendix: Poonian Timeline & Judgments