Bankruptcy and Regulatory Sanctions:

Implications of the Supreme Court's Ruling in *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28

Facts

- Between 2007-2009 the Poonians participated in a market manipulation scheme that involved the manipulation of the stock price of a public oil and gas company, contrary to the British Columbia *Securities Act*.
- This scheme caused vulnerable investors to suffer losses of approximately $5.6 million.
- On August 29, 2014, the Commission found that the Poonians, together with a number of relatives, friends and acquaintances, had engaged in market manipulation, contrary to s. 57(a) of the Securities Act.

The British Columbia Securities Commission (the “Commission”)

- In 2014, the British Columbia Securities Commission (the "Commission") ordered the Poonians to pay:
  - $13.5 million in administrative penalties; and
  - $ 5.6 million pursuant to s. 161(1)(g), commonly referred to as disgorgement orders.

- The Commission registered the sanctions with the Supreme Court of British Columbia pursuant to s.163 of the Securities Act, which provides that on being filed with the Court, a decision of the Commission has the same force and effect as if it were a judgment of that court.

History of Bankruptcy

- In 2018, the Poonians filed for bankruptcy.
- In February 2020, the Poonians sought a discharge from bankruptcy.
- The Commission and CRA opposed the discharge application.
- The Commission applied to the Court for a declaration that the debts represented by the administrative penalties and disgorgement orders not be released by any order of discharge, pursuant to s. 178(1)(a), (d) and (e) of the BIA.
- The court refused the Poonians discharge and they remain undischarged bankrupts.

178 (1) An order of discharge does not release the bankrupt from

Section	Type of Debt
178(1)(a)	**Fines, penalties, or restitution orders imposed by a court in respect of an offence**
178(1)(b)	Any award for damages by a court for bodily harm intentionally inflicted, sexual assault, or wrongful death resulting therefrom
178(1)(c)(i)	Debt or liability for obtaining property or services by false pretences or fraudulent misrepresentation
178(1)(c)(ii)	Debt or liability for obtaining property or services through fraudulent breach of trust while acting in a fiduciary capacity
178(1)(d)	Alimony, maintenance or support obligations (includes spousal or child support)
178(1)(e)	**Debt or liability arising under a judicial decision or agreement in respect of the wrongful taking or conversion of property, while acting in a fiduciary capacity**
178(1)(f)	Debt or liability for obtaining credit by fraud or fraudulent misrepresentation
178(1)(g)	Any debt or obligation under a court order or agreement relating to the divorce or separation of a spouse where the court has expressly stated it is not released in bankruptcy
178(1)(h)	Any student loan debt if bankruptcy occurs within 7 years of ceasing to be a full- or part-time student (may be reduced to 5 years under s. 178(1.1))
178(1)(i)	Any debt for interest owed on any of the debts listed above

British Columbia Court of Appeal 2022 BCCA 274

- The Court of Appeal came to the same result as the chambers judge, but for different reasons.
- The Court held that the chambers judge had erred in concluding that the debts were exempt under s. 178(a), but concluded that they were exempt under s.178(1)(e).
- The Court also disagreed that a decision of the Commission that is registered can be considered an order "imposed by a court". Once the decisions are registered they can be enforced as if they were judgments, but they cannot be said to be "imposed" by the court.
- Therefore, orders of administrative tribunals and regulatory bodies are not within the scope of s. 178(1)(a).

Supreme Court of Canada
2024 SCC 28

- Two issues were raised on appeal:
  1. Do the Commission's sanctions constitute debts falling within s. 178(1)(a) of the *BIA*, such that they are not released by an order of discharge and therefore survive bankruptcy?
  2. Do the Commission's sanctions constitute debts or liabilities falling within s. 178(1)(e) of the BIA, such that they are not released by an order of discharge and therefore survive bankruptcy?

General principles applicable to the interpretation of s. 178 of the BIA

1. All claims are carried into the bankruptcy and the bankrupt is released from all claims upon discharge, unless the law clearly provides for an exclusion or exemption.
2. Section 178(2) gives effect to one of the underlying objectives of the BIA regime: the financial rehabilitation of the debtor
3. This rehabilitation has its limits, which are set out in sections 172 and 178(1)
   - Section 172: the court may grant or refuse an order of discharge, subject to any terms or conditions it deems appropriate.
   - Section 178(1): particularizes a number of categories of debts that are not discharged in a bankruptcy.
4. The exceptions provided for in para. 178(1)(a) to (h) must be interpreted restrictively and apply only in clear cases
5. In case of doubt as to the merits of the application – settled in favor of the bankrupt

Section 178(1)(a) of the BIA

The SCC made the following findings with respect to s.178(1)(a):

- “court” does not include regulators, administrative tribunals or securities commissions. Therefore, the penalties imposed by those bodies do not survive bankruptcy.
- the registration of a regulatory or administrative decision with the court does not meet the requirement of being “imposed by a court”.
- “fines, penalties and restitution orders” are not restricted to those imposed in either a criminal or quasi-criminal proceeding.
- “offences” can include those that arise in a regulatory context.

Requirements for s.178(1)(e)

- The SCC confirmed that a creditor must establish the following 3 elements for s.178(1)(e) to apply:
  1. false pretences or fraudulent misrepresentation;
  2. a passing of property or provision of services; and
  3. a link between the debt or liability and the fraud.

Section178 (1)(e) of the BIA

The SCC made the following findings with respect to s.178(1)(e):

- Restitution or disgorgement orders that arise from “obtaining property or service by false pretences or fraudulent misrepresentation” are not released in a bankruptcy.
- The “creditor” who seeks to invoke this subsection of the BIA need not necessarily be the victim of the fraud or the recipient of the false pretences as the source of the debt. A third party, like the Commission, has standing to invoke this subsection.
- The words “resulting from” in the subsection requires a direct connection between the debt at issue and the false pretence or fraudulent misrepresentations.

Judicial history

Supreme Court of British Columbia

- 178(1)(a) - ☑
- 178(1)(e) - ☑

Court of Appeal of British Columbia

- 178(1)(a) - ☒
- 178(1)(e) - ☑

Supreme Court of Canada

- 178(1)(a) - ☒
- 178(1)(e)
  - Surrender orders - ☑
  - Administrative sanctions - ☒

LIT Perspective

Impact of Poonian decision on industry and Trustee practices

S. 178 – Is it as Clear as We Think?

- Season of S.178 - *Piekut Decision (2025)* – Student loans, Kochhar v. McCall & Co.court rulings
- Seems “clear to me”…
- Wording issues between French and English versions

1. Section 178(1)(a): "Imposed by a Court"

• **English Version**: “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.”

- **French Version**: “toute amende, pénalité, ordonnance de dédommagement ou autre ordonnance de même nature, imposée par un tribunal relativement à une infraction.”
- **Issue**: The term “court” in English and “tribunal” in French raised questions about whether administrative bodies like the British Columbia Securities Commission (BCSC) qualify.
- **SCC Conclusion**: The Court determined that “court” refers to judicial

- **2. Section 178(1)(e): "Resulting From"**
- **English Version**: “any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation.”
- **French Version**: “toute dette ou obligation résultant de l’obtention de biens ou de services au moyen de fausses représentations ou de manœuvres frauduleuses.”
- **Issue**: The phrase “resulting from” in English and “résultant de” in French necessitated a determination of the causal link required between the fraudulent act and the debt.
- **SCC Conclusion**: The Court emphasized a strict causation requirement, meaning the debt must directly result from the fraudulent conduct. Disgorgement orders met this criterion, administrative penalties, being punitive and not directly linked to the fraud, did not

Intent of S.178

- What debts should s.178 capture and what should it not. – should debtors pay for the rest of their lives.
- Key concept of the BIA – rehabilitation vs not allowing abuse of the system
- Is 178 intended to enrich third parties by way of administrative penalty.?

- What should trustees be doing when deciding to accept an engagement
- Certainly, for every one complex matter with clearly identifiable issues that come along there will be 100 less clear and undefinable cases that must be addressed by LITs.
- Common examples that Trustees may encounter in their day to day assessments could include:

CRA Penalty for Tax Evasion

Situation:

A self-employed contractor comes in with $80,000 in CRA debt. Of that, $20,000 is a gross negligence penalty for failing to report income for several years.

LIT Implication:

Regular tax debt is generally dischargeable. But the gross negligence penalty may fall under s. 178(1)(e) as a fine or penalty, especially if CRA can tie it to fraud or intentional wrongdoing.

WCB/WSIB Compliance Order

Situation:

A former construction business owner has debts owing to WorkSafeBC for unpaid premiums and a compliance penalty for failing to maintain mandatory safety certifications.

LIT Implication:

The unpaid premiums may be dischargeable. But the compliance penalty could be punitive, and might survive bankruptcy if it was issued to penalize conduct, not recover loss.

Court-Imposed Restitution to Victims

Situation:

A debtor was convicted of a fraud-related offence years ago and ordered to pay $50,000 in restitution to victims. They're now insolvent and seeking bankruptcy.

LIT Implication:

Under s. 178(1)(a), court-ordered restitution related to an offence is not dischargeable. This debt will remain even after a discharge is granted.

Misuse of Government Grants

Situation:

A small business took federal pandemic support grants but later was found to have misrepresented eligibility. The government demanded repayment plus a sanction fee under administrative review.

LIT Implication:

The base loan or grant might be dischargeable (depending on terms), but the sanction fee or penalty could survive, especially if imposed to punish misrepresentation.

Considerations for Consumer Trustees

- The qualification of the claim can happen at many different parts of the administration:
  - The review or intake/assessment process;
  - The claims review during voting process, dividend preparation, or discharge preparation;
  - The application for discharge through section 172/73.

- Considerations for Trustees through the intake process:
  - Identifying Non-Dischargeable Debts
    - LITs must be extra vigilant in identifying regulatory penalties or disgorgement orders early in the process.
    - These debts may not be discharged, and LITs should advise debtors accordingly.
  - Treatment of Securities Commission Debts
    - LITs can’t automatically assume that all debts to administrative bodies are wiped out in bankruptcy.
    - Disgorgement or penalty orders from securities commissions (and likely other regulatory bodies) must be flagged as potentially non-dischargeable.

- Enhanced Due Diligence
  - This may require LITs to analyze the nature of orders or fines imposed to determine whether they are punitive or compensatory.
  - Trustees may need to consult legal counsel or relevant case law more frequently in complex cases.
- Communications with Debtors and Creditors
  - LITs need to clearly communicate to debtors when certain debts may survive bankruptcy to avoid false expectations.
  - LITs should ensure rights of creditors are understood by Debtor; for example, a lifting of stay of proceedings and opposition by creditors to discharge.
  - LITs should also inform regulatory bodies about how their claims are being treated in the insolvency.

- Other considerations
  - If there is an ability to satisfy a claim, it may be worthwhile exploring a compromise agreement that may be reached before bankruptcy filing to avoid costly court applications post filing.
  - In a perfect world trustees would have all information available to them at the time of filing; this is simply not the reality of most situations, and we must address each file independently.
  - Trustees may now consider many new factors when accepting an engagement and some individuals could struggle to access the insolvency system.

Considerations for Corporate Trustees

- What's the impact of Poonian in a commercial setting?
- How would you advise the board of directors navigating the treacherous waters of insolvency?
    - For example, fiduciary duties and duty of care;
    - Business Judgment Rule Defense?
    - Risk of class action by shareholders?

- Poonian helped to establish a fraud test and clarity around acting as a fiduciary to section 178 1 (d); however, in certain circumstances it cast some inconsistencies with the BIA and CCAA.
  - When considering the Deloitte/SM Group decision; in a commercial setting, unreleasable claims can be subordinated to unsecured claims as they are not releasable debts…
  - Was this the intent of the legislator; subordinating claims that are not based on fraudulent conduct to be paid in priority to claims that are based on fraudulent conduct?

- In the SM Group decision, the SCC confirmed that courts have broad discretion to stay and manage claims, including those related to fraud, under sections 11 and 11.02 of the CCAA.
- In a corporate context, vs personal insolvency, there is (generally) the opportunity for more involvement in the court and courts can prioritize claims that align with the objectives of restructuring, such as maintaining business viability and maximizing returns for all creditors. Fraud claims, while serious, may be subordinated or deferred to allow a successful restructuring process.

- An important note that the courts may consider is that creditors alleging fraud may have access to other opportunity to pursue alternative remedies that other unsecured creditors do not:

  - Seeking court orders to proceed against Directors personally
  - Filing claims under oppression remedy provisions in corporate law
  - Confirming if s. 95 and 96 of the BIA apply – fraudulent conveyance
  - Exploring criminal or other regulatory enforcement actions to hold individual accountable

Takeaway and Discussions

- Are these sanctions necessary to ensure we continue to have faith in our increasing complex financial markets and should fraudsters be held accountant?
- Did the Supreme Court strike the correct balance?
- Should Fraud claims or 178 debts be compromised?
- The insolvency system should not be dominated by exception creditors
- Legislators should continue to clarify the intent of legislation through parliamentary amendments

Panel Discussion

- How does the Court's interpretation of "imposed by a court" under s. 178(1)(a) affect how trustees should assess regulatory debts?
- How has Poonian changed your approach to assessing the dischargeability of penalties or restitution-like orders imposed by securities commissions or other regulators?
- Do you anticipate this decision will create more litigation between bankrupts and regulators over the nature of the debt? If so, what should parties look for in determining dischargeability?
- Is there a risk that regulators may attempt to "recast" administrative penalties as fraud-based to ensure they survive bankruptcy? How should trustees respond?
- Do you believe this decision strikes the right balance between providing a fresh start to honest debtors and protecting the integrity of financial markets?
- How should individuals or professionals facing enforcement orders (e.g., from securities commissions, real estate councils, or professional bodies) approach insolvency planning in light of this case?