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 and others participated in a market manipulation scheme that involved the manipulation of the stock price of a public oil and gas company, contrary to B.C.'s *Securities Act*.

- They marketed and sold artificially overvalued shares to investors who suffered losses of approximately $5.6 million.

The British Columbia Securities Commission (the "Commission")

- In 2014 the Commission ordered the Poonians to pay:
  - $13.5 million in administrative penalties; and
  - $ 5.6 million in a disgorgement order.

- Pursuant to s.163 of the *BC Securities Act,* the Commission registered its decision with the Supreme Court of British Columbia, and by doing so, its decision had the same force and effect as if it were a judgment of the court.

History of Bankruptcy

- In 2018, the Poonians filed for bankruptcy.
- In February 2020, the Poonians sought a discharge from bankruptcy; both the Commission and CRA opposed the discharge application.
- Following the refusal of the discharge, the Commission sought an order that the debts – both the Administrative penalties & the Disgorgement Order - were not dischargeable pursuant to s.178(1)(a), (d) or (e) of the BIA.

BIA s.178(1)(a), (d) and (e)

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

(Note: originally the Commission also relied on s.178(1)(d) but then abandoned that position at the BCCA and SCC court levels, so no determination was made with respect to that subsection.)

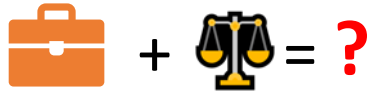
British Columbia Supreme Court Decision 2021 BCSC 555

- Justice Crerar decided that a “purposive approach” was appropriate in interpreting s. 178(1) “to ensure that dishonest debtors do not benefit from their dishonesty”.
- He held that the Commission’s orders, which were predicated on findings of repeated fraudulent and dishonest conduct, perfectly matched the “purposive core” of s.178(1)(a) of the BIA.
- He found that the debts fell within s.178(1)(e).

British Columbia Court of Appeal 2022 BCCA 274

- Regarding s.178(1)(e), the Court of Appeal came to the same result as the BC Supreme Court, but for different reasons.
- Held that the filing of the Commission's decision with the Supreme Court of British Columbia did not have the effect of transforming it "*into an order imposed by a court*." Therefore, orders of administrative tribunals and regulatory bodies are **not** within the scope of s. 178(1)(a).

The appeal raised two issues:



1. Do the Commission's administrative penalties and disgorgement orders against the Poonians 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 administrative penalties and disgorgement orders against the Poonians 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?

S 178 - General principles confirmed:

- The exceptions in s.178(a) to (h) must be interpreted narrowly;
- Where there is doubt as to whether a debt falls within an exception, the benefit should go to the bankrupt; and
- The onus of proving that the claim falls within one of the exceptions belongs to the creditor.

BIA s.178(1)(a)

 +  = included in bankruptcy

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…..

- *"fines, penalties and restitution orders" not restricted to only criminal/quasi-criminal*
- *"court" does not include regulators, administrative tribunals or securities commissions*
- *Registration of the Securities Commissions judgment in court does not = "imposed by a court"*
- *"offences" includes those that arise in a regulatory context; French does not contain this clause*

BIA s.178(1)(e)

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

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation….

3 elements necessary for the section to apply:

1. a link between the debt/liability and the fraud (*"resulting from"*).
2. a passing of property or provision of services; and
3. false pretences or fraudulent misrepresentation;

s.178(1)(e) - considered in this case:

- The “creditor” need not necessarily be the victim of the fraud. A third party (ie. The Commission) can invoke this subsection.
- The words “resulting from” requires a direct connection between debt & the false pretense or fraudulent misrepresentation.
- Gain derived as a result of deceitful conduct is morally wrong, and those who participate should face consequences.

 = included in bankruptcy

 = exempted by s 178(1)(e)

Applying the Poonian Case in Practice

LIT's deal with s.178 routinely:

Manitoba:

- Stewart v. Auch, 2025 MBKB 26
- Neufeld v Manitoba (Securities Commission), 2024 MBCA 97

SCC:

- Aquino v. Bondfield Construction Co., 2024 SCC 31
- Scott v. Golden Oaks Enterprises Inc., 2024 SCC 32
- Piekut v. Canada (National Revenue), 2025 SCC 13

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RISK MANAGEMENT AND CRISIS RESPONSE BLOG

Supreme Court of Canada decision impacts Securities Commissions' ability to collect from bankrupt transgressors

AUGUST 1, 2024 • 9 MIN READ

Statement by the Superintendent of Bankruptcy on the Supreme Court of Canada decision in *Poonian v. BCSC*

September 20, 2024 – Ottawa, Ontario

On July 31, 2024, the Supreme Court of Canada (SCC) delivered its decision in the case of *Poonian v. British Columbia (Securities Commission)*. The SCC's decision garnered significant media attention and has led to calls for amendments to the *Bankruptcy and Insolvency Act* (BIA) based on alleged gaps in the legislation and the suggestion that fraudsters can use bankruptcy to avoid paying significant amounts imposed upon them by administrative tribunals.

Parliament's Intentions at the Messy Intersection of Securities and Bankruptcy Law: A Commentary on Poonian v British Columbia (Securities Commission), 2024 CanLIIDocs 3054

Author(s): Ari Y Sorek

Source(s): ARIL Society Inc.

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Consideration for Consumer Insolvency Practice

What do we do when there is a “hint” of fraud? Pre-Acceptance considerations?

Polling question 1

a) “Not doing it”

b) Lengthy, legal-ease disclaimer, signed by debtor(s)

c) Make the debtor retain a lawyer, or “Not doing it”

d) “Get a big retainer” *(Collin LeGall, 2019)*

Consideration for Consumer Insolvency Practice

How responsible are LIT's for creditor education?

This customer is on a payment plan with SGI for fees owed to our Safe Driver Recognition (SDR) program. The amount owing is $48.96. If payments are made this customer will continue to be able to purchase SGI products (including renewal of their driver's license). However, if any payments are missed or discontinued, the customer will be required to pay their full amount owing if they wish to purchase any SGI products.

SDR fees reflect the actual cost to register and insure a vehicle, these fees are not a provable claim and cannot be discharged in bankruptcy. For more details, please consult *Bankruptcy & Insolvency Act – Section 178(1).*

Polling question 2

a) Agree

b) Disagree

Consideration for Consumer Insolvency Practice

- Can certain debts be compromised? (ie. File a proposal, not bankruptcy)

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Lawyer says bruising legal battle with LSBC worth setting mental health precedent. BCCA sent case back for another hearing set for March, lawyer says he spent $300K in legal fees.

Lawyer says bruising legal battle with LSBC worth setting mental health precedent
canadianlawyermag.com

Polling question 3

a) Agree – possible s 178 debts can be compromised in a proposal

b) Disagree – no, they cannot

Consideration for Corporate Insolvency Practice

What Is Fraud?

- Is “fraud” overused in insolvency?
- Who decides if a claim is fraudulent?
- Has a court already ruled on fraud?
- Who carries the burden of proof?
- Trustee role – seek court direction?

Legal Tests: Deloitte: 4-part vs. **Poonian**: 3-part

Consideration for Corporate Insolvency Practice

Advice to Directors?

Paper highlights:

- Peoples case emphasizes acting in good faith and in the best interests of the corporation.
- Bell case supports deference to informed, rational decisions.
- Taiga highlights exposure on breach or alleged misconduct.

Consideration for Corporate Insolvency Practice

Reporting & Duty of Care:

- s.178(1)(d) links disclosure to attracting debt/equity investment

Creditor Remedies:

- Do fraud claims unlock remedies?
- Explore potential alternative legal paths

Timing of s.178 Decision:

- When should the determination be made?
- Should a stay be lifted first?

"A fundamental principle of the Canadian insolvency system is that an honest but unfortunate debtor can have access to a fresh financial start, on reasonable conditions.

… the system also provides safeguards to detect improper conduct and impose serious consequences for dishonest debtors."

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Rehabilitation vs. Confidence in Insolvency System

Competing Goals of BIA/CCAA:

(i) Rehabilitating debtors / restructuring viable businesses

(ii) Condemning fraud to maintain public confidence

Judicial Discretion in Corporate Insolvency:

- Courts may defer fraud claims & prioritize restructuring (e.g., **SM Group**, SCC)
- Sections 11 & 11.02 of the **CCAA** give courts flexibility to manage/stay claims

Inconsistency in Fraud Treatment?

- Corporate fraud claims may be postponed but fraud claims in Consumer files treated more harshly - raises questions on legislative intent and fairness

“If you can’t win the game, change the rules”

In March 2020, the *British Columbia Securities Act* was amended to expand the pool of parties that they can pursue to recover orders made pursuant to the *Securities Act*.

Revisions included:

s.164.09 confers on the Commission the power to apply to court for an order that a family member who receives an undervalue benefit is jointly and severally liable with the person against whom an order is made under s.161(1)(g) *(Section 160 ITA anyone??)*

s.164.10 the Commission may also apply for forfeiture of property in which a family member has the whole or part of any interest

s.164.13 provides that the court “must” make an order for forfeiture of the property if proceedings are commenced under s.164(10)(1) or (2) unless it is “clearly not in the interests of justice.”

Questions?

Comments?

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Crystal Buhler, C. Buhler & Associates Ltd.
Richard Schwartz, Tapper Cuddy

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