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, t*he 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.
- The Commission and CRA opposed the discharge application.
- The Commission sought an order that the debts that are the subject of its Decision were not dischargeable pursuant to s.178(1)(a), (d) or (e) of the BIA.
- The court refused the Poonians discharge and they remain undischarged bankrupts.

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 also found that the debts fell within s.178(1)(e).

British Columbia Court of Appeal 2022 BCCA 274

- Came to the same result as the Mr. J. Crerar but for different reasons. The Court held that administrative penalties and disgorgement orders fall within the ambit of s.178(1)(e).
- 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).

Why did the SCC agree to hear the Poonian appeal?

In my view, it was likely, in part, because of conflicting judicial decisions with respect to the interpretation of s.178(1)(e) of the BIA.

Poonian v British Columbia (Securities Commission) 2022 BCCA 274 (which held that the Commission's penalties and disgorgement orders came within s.178(1)(e).

versus

Alberta Securities Commission v Hennig 2021 ABCA 411 (which held s. 178(1)(e) requires a direct link between the fraudulent statement and the debt and that direct link is only established if the debtor makes the fraudulent statement to the creditor. S.178(1)(e) not applicable to the Commission because the fraudulent representation was made not to it but rather to the victim investors.)

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

- The SCC confirmed that:
  - the exceptions in s.178(a) to (h) must be interpreted narrowly and applied only in clear cases;
  - s. 178 is to be narrowly interpreted because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate; and
  - where there is doubt as to whether a creditor falls within an exception, the benefit should go to the debtor

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 services 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.

Be Beware: The Commission takes action

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*.

For example:

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)*

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."

Hope you find this information helpful

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S. 178 – Is it as Clear as We Think?

- Season of S.178 - *Piekut Decision (2025)* – Student loans, Kochhar v. McCall & Co. – court rulings prior to bankruptcy
- 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 bodies, not administrative tribunals. Therefore, orders from the BCSC, even when registered with a court, are not considered as “imposed by a court” under this section.

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, but 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.?
- Should penalties keep professionals from their chosen profession forever?

Consideration for Personal LIT's – personal insolvency considerations

- LIT's deal with s.178 routinely.
- Pre-Acceptance considerations?
- What do we do when there is a "possibility" of fraud – test confirmed by SCC Poonian, -
- Question: Post-assignment – agree to lift the Stay of Proceedings for 178 application? for valuation purposes only?
- Can debts be compromised?

Commercial Context

- Poonian clarified the test of Fraud
- Increase in class action activism against Board of Directors for companies experiencing financial hardship
- Reporting requirements – attracting investment (debt or equity) – Duty of Care (178 (1) (d)) acting as a fiduciary – passing of property based on representations – financial sector
- Did Parliament intend to subordinate fraudulent claims to regular unsecured claims in the corporate context?

Rehabilitation vs. Confidence in Insolvency System – punishing the wrongdoers

- Majority v dissenting opinion in the Poonian decision
- Should moral sanctions form part of the insolvency system?
- How do we continue to have faith in our ever-increasing complex financial markets if fraudsters are not punished?
- Did the SCC strike the correct balance? What do you think?

LIT Take away

- Poonian – proper balance
- Insolvency system not dominated by “exceptions”
- Further education needed for other “exception” creditors
- Amend legislation by Parliament – to clarify intent

Thank you
We are happy to try to answer any questions you may have

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