SUPREME COURT OF CANADA

CITATION: Poonian *v.* British Columbia (Securities Commission), 2024 SCC 28

APPEAL HEARD: December 6, 2023
JUDGMENT RENDERED: July 31, 2024
DOCKET: 40396

BETWEEN:

Thalbinder Singh Poonian and Shailu Poonian
Appellants

and

British Columbia Securities Commission
Respondent

- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Association of Insolvency and Restructuring Professionals, Superintendent of Bankruptcy, Federation of Law Societies of Canada, Alberta Securities Commission, Ontario Securities Commission and Osgoode Investor Protection Clinic
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 116)	Côté J. (Wagner C.J. and Rowe, Jamal and O’Bonsawin JJ. concurring)
REASONS DISSENTING IN PART: (paras. 117 to 142)	Karakatsanis J. (Martin J. concurring)

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Thalbinder Singh Poonian and Shailu Poonian *Appellants*

v.

British Columbia Securities Commission *Respondent*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Association of Insolvency and Restructuring Professionals,
Superintendent of Bankruptcy,
Federation of Law Societies of Canada,
Alberta Securities Commission,
Ontario Securities Commission and
Osgoode Investor Protection Clinic *Interveners*

Indexed as: Poonian *v.* British Columbia (Securities Commission)

2024 SCC 28

File No.: 40396.

2023: December 6; 2024: July 31.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Debts not released by order of discharge — Provincial securities commission imposing administrative penalties and disgorgement orders on bankrupts for breach of securities legislation — Commission applying to prevent release of debts by order of discharge on basis of exceptions set out in federal bankruptcy legislation — Whether commission's administrative penalties and disgorgement orders fall within exceptions provided for in bankruptcy legislation such that they are not released by order of discharge and therefore survive bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(1)(a), (e).

Between 2007 and 2009, the bankrupts engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The British Columbia Securities Commission found that the bankrupts had contravened the province's *Securities Act*. It ordered the bankrupts to pay $13.5 million in administrative penalties; it also ordered them to disgorge approximately $5.6 million, which represented the amounts they obtained as a result of the market manipulation scheme. These sanctions were registered with the Supreme Court of British Columbia pursuant to the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court.

Section 178(1) of the *Bankruptcy and Insolvency Act* sets out a specific list of debts that are not released by an order of discharge and that therefore survive bankruptcy. Relying on some of these exceptions, the Commission applied for a declaration that the amounts owed to it by the bankrupts, who remain undischarged, not be released by any order of discharge. The chambers judge allowed the application, finding that the exceptions in s. 178(1)(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" — and in s. 178(1)(e) — "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" — both applied and that the bankrupts' debts were exempt from and would survive any discharge. The bankrupts appealed. According to the Court of Appeal, the debts were not exempt from discharge pursuant to s. 178(1)(a) because the Commission's decisions could not be said to have been "imposed" by a court as required by the provision. However, the court upheld the chambers judge's conclusion that both the administrative penalties and the disgorgement orders were exempt under s. 178(1)(e). Given that the debts were still exempt, the appeal was dismissed.

Held (Karakatsanis and Martin JJ. dissenting in part): The appeal should be allowed in part.

Per Wagner C.J. and **Côté**, Rowe, Jamal and O'Bonsawin JJ.: Neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a). The words "imposed by a court" in s. 178(1)(a) do not capture orders made by administrative tribunals or regulatory agencies, such as the

Commission, that are subsequently registered as judgments of a court. In addition, the administrative penalties do not come within the exception in s. 178(1)(e), as they did not result directly from the fraudulent scheme; rather, they arose indirectly as a result of the Commission's decision to sanction the bankrupts. The disgorgement orders, however, are captured by the s. 178(1)(e) exception because there is a direct link between them and the bankrupts' fraudulent conduct. Therefore, they will not be released by any possible future order of discharge.

For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence. This provision is not restricted to penalties associated with criminal or quasi-criminal proceedings. However, the word "court" does not capture administrative tribunals or regulatory bodies. If Parliament had wanted fines, penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under this section, it could have said so expressly. Moreover, this provision cannot be read so broadly as to include fines imposed by tribunals that are registered in a court. The registration of a decision with a court does not change the fact that it was made and imposed by an administrative decision maker, nor does it overcome the requirement that the exempt debt be imposed by a court. When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision. In the instant case, the administrative penalties and disgorgement orders were imposed by the Commission, not by a court, and therefore are not captured by s. 178(1)(a).

For a debt or liability to survive bankruptcy under s. 178(1)(e), the creditor must establish three elements: (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. To establish the first requirement, the onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor's false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud, nor can it infer fraud in a cursory manner. When a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express. The evidence tendered to prove fraud or dishonesty must be clear and cogent and courts must be consistent and rigorous in assessing the evidence presented to them in this regard. Even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, a determination of whether the claim falls within one of the categories of non dischargeable claims must be made by a court.

To establish the second requirement, there must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss. Section 178(1)(e) does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt and may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf. What is required is that the fraudulent misrepresentation induced a person to give the property to the bankrupt or someone associated with the bankrupt.

To establish the third requirement, the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation. This requires a direct link whereby only the debt or liability that represents the value of the property or services obtained by false pretences or fraudulent misrepresentation qualifies as non dischargeable. While in most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation, the wording of s. 178(1)(e) does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under this section provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's false pretences or fraudulent misrepresentation.

In the instant case, the first s. 178(1)(e) requirement is met. The market manipulation was characterized as fraudulent by both the Commission and the chambers judge, because the bankrupts falsely and knowingly misrepresented the price of shares in order to turn a profit. The second requirement is also met, as the bankrupts obtained property or services as a result of their fraudulent misrepresentation. While some of the amounts obtained as a result of the market manipulation scheme were obtained indirectly, it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. The property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt.

With respect to the third requirement, it is not met in the case of the administrative penalties, which therefore do not survive a discharge from bankruptcy under s. 178(1)(e). A direct link between the debt or liability and the fraudulent conduct is required and it is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge. The debt represented by the Commission's administrative penalties did not result directly from the bankrupts' fraudulent misrepresentation, but arose indirectly as a result of the Commission's decision to sanction them for having obtained property through deceitful statements to investors. If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation, then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit.

However, the Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge. Where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to it any amount obtained as a result of the failure to comply. The disgorgement orders were made under the *Securities Act* and represent the value of the bankrupts' fraud — the funds that they gained as a result of their market manipulation. There is therefore a direct link between the fraudulent conduct of the bankrupts and the Commission's disgorgement orders.

Per **Karakatsanis** and Martin JJ. (dissenting in part): The appeal should be dismissed. Although there is agreement with the majority that the administrative penalties and the disgorgement orders imposed by the Commission do not survive bankruptcy under s. 178(1)(a), both the disgorgement orders and the administrative penalties properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge. They are both debts that originate from the bankrupts having obtained property by false pretences or fraudulent misrepresentations. Both are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address.

There is disagreement with the majority regarding the scope of the causation requirement contemplated by the words "resulting from" in s. 178(1)(e) and the degree of link required between the debt and the deceitful behaviour. Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the quantum of the debt or liability be limited by the quantum of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful conduct at the source of the debt or liability, not the exact gain derived thereby.

A direct causation requirement does not mean that the debt or liability must be limited to the value of the property obtained; rather it means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge. Where a debt or liability is entirely caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt. The jurisprudence in fact overwhelmingly shows that punitive damages exceeding the value of the property obtained qualify for the exception as long as they directly result from the deceitful conduct targeted by s. 178(1)(e).

In the instant case, the amounts the Commission submits should survive discharge have as their only source or origin the bankrupts' deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. Like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. To exclude administrative penalties on the basis that they have an element of general deterrence amounts to reading in an additional limitation that is found nowhere in the text of the provision, and is inconsistent with the purpose of the exception.

Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. It provided for many exceptions to the fresh start principle, in s. 178(1), that are focused not on the person claiming the exemption but on categories of specific wrongful conduct that give rise to debts that are not released. Section 178(1)(e) should ultimately be interpreted purposively so as to ensure that dishonest debtors do not benefit from their dishonesty. This purpose would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the interests of the public and promoting the integrity of the capital markets.

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317; *Chaytor, Re*, 2006 BCSC 1742, 26 C.B.R. (5th) 574; *Belair v. Gottschlich*, 2008 ABQB 47, 89 Alta. L.R. (4th) 268; *R. v. Manzioros*, 2004 MBQB 121, 183 Man. R. (2d) 279; *Chambre des notaires du Québec v. Dugas*, [2003] R.J.Q. 1; *Simone v. Daley* (1999), 43 O.R. (3d) 511; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 123 O.A.C. 288; *Vancouver (City) v. Alliston*, 2003 BCPC 105, 47 C.B.R. (4th) 142; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 S.C.R. 23; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *J.R.B. v. Jimenez*, 2018 ABQB 847; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82; *Bryant v. Benjamin*, 2023 QCCA 1021; *H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours* (2009), 52 C.B.R (5th) 231; *Derry v. Peek* (1889), 14 App. Cas. 337; *Morris Bureau v. Darde*, 2013 NSCA 121, 335 N.S.R. (2d) 378; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, aff'd 2016 ONCA 875; *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, 6 Alta. L.R. (4th) 223; *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164; *Sharma v. Sandhu*, 2019 MBQB

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APPEAL from a judgment of the British Columbia Court of Appeal (Harris, Willcock and Fenlon JJ.A.), 2022 BCCA 274, 65 B.C.L.R. (6th) 213, 100 C.B.R. (6th) 182, 472 D.L.R. (4th) 115, [2022] 10 W.W.R. 375, [2022] B.C.J. No. 1417 (Lexis), 2022 CarswellBC 2124 (WL), affirming a decision of Crerar J., 2021 BCSC 555, [2021] B.C.J. No. 609 (Lexis), 2021 CarswellBC 888 (WL). Appeal allowed in part, Karakatsanis and Martin JJ. dissenting in part.

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The judgment of Wagner C.J. and Côté, Rowe, Jamal and O'Bonsawin JJ. was delivered by

CÔTÉ J. —

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I. Introduction

[1] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”), furthers two important purposes: the equitable distribution of a bankrupt’s assets among creditors and the bankrupt’s financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a “fresh start” when appropriate. The fresh start principle is codified in s. 178(2) of the *BIA*; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, subject to reasonable conditions, the *BIA* permits an honest but unfortunate debtor to be freed from the burdens of indebtedness and to reintegrate into economic life.

[2] Financial rehabilitation operates as the general rule, such that every provable claim is presumptively swept into the bankruptcy. However, it has its limits. Through s. 178(1) of the *BIA*, Parliament has enacted specific exceptions to this general rule. An order of discharge does not release the bankrupt from a claim captured by a s. 178(1) exception. Indeed, where an exception applies, the fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy.

[3] This appeal requires our Court to interpret two of these exceptions, codified in s. 178(1)(a) and (e) of the *BIA*. It arises in the context of the application of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418. Our Court must determine whether the administrative financial penalties and/or the disgorgement orders imposed

by the respondent, the British Columbia Securities Commission ("Commission"), survive a discharge from bankruptcy under one of these exceptions.

[4] The appellants, Thalbinder Singh Poonian and Shailu Poonian, are undischarged bankrupts. Between 2007 and 2009, the Poonians engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The Commission found that the Poonians had contravened s. 57(a) (now s. 57(1)(a)) of the *Securities Act*. It ordered the payment of administrative penalties by both Mr. Poonian ($10 million) and Ms. Poonian ($3.5 million). The Commission also issued orders pursuant to s. 161(1)(g) of the *Securities Act* requiring Mr. Poonian to disgorge $1,319,167 as well as $1,126,260 jointly and severally with another participant, and requiring Ms. Poonian to disgorge $3,149,935. The disgorgement orders represent the amounts the Poonians obtained as a result of the market manipulation scheme.

[5] Relying on the exceptions set out in s. 178(1) of the *BIA*, the Commission applied for a declaration that the amounts owed to it by the Poonians not be released by any order of discharge. The question before our Court is whether the administrative penalties and/or the disgorgement orders imposed by the Commission can be characterized as either "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" (s. 178(1)(a)) or "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"

(s. 178(1)(e)). If so, they will not be released by any order of discharge and will survive bankruptcy.

[6] For the reasons I explain below, I conclude that the administrative penalties imposed by the Commission do not fall within the exceptions set out in either s. 178(1)(a) or (e) and therefore do not survive a discharge from bankruptcy on those bases. I also conclude that the disgorgement orders imposed by the Commission do not fall within the s. 178(1)(a) exception and do not survive a discharge from bankruptcy on that basis. However, they are captured by s. 178(1)(e) and therefore will not be released by any possible future order of discharge.

II. Facts

[7] 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 Poonians had acquired a majority position in a public oil and gas company called OSE Corp. ("OSE") and had then increased the price of OSE's shares by various manipulations, including trades between themselves. Using pseudonyms and multiple nominee accounts, they had artificially inflated the share price from $0.10 to $0.17 per share to a high of near $2.00.

[8] The Commission found that the Poonians, and those working with them in this scheme, had sold the overpriced OSE shares to investors with the assistance of an entity called the Phoenix Group. The Poonians had paid commissions to the Phoenix

Group, which had in turn encouraged its clients, generally unsophisticated investors seeking to escape personal debt through investment in higher-yield vehicles, to purchase OSE shares at the artificially inflated prices.

[9] The Commission described the scheme as "serious misconduct" and as "elaborate, involving layers of deception to conceal the . . . participation [of the Poonians and their associates] in the manipulation" (2015 BCSECCOM 96 ("Sanctions Decision"), at para. 17 (CanLII)). The Commission ordered the payment of administrative penalties by Mr. Poonian ($10 million) and Ms. Poonian ($3.5 million) (para. 96). The Commission later issued orders pursuant to s. 161(1)(g) of the *Securities Act*, which are commonly referred to as disgorgement orders. Mr. Poonian was ordered to disgorge $1,319,167 to the Commission and an additional $1,126,260 on a joint and several basis with another participant in the scheme, and Ms. Poonian was ordered to disgorge $3,149,935 (2018 BCSECCOM 160 ("Reassessment Decision"), at para. 85 (CanLII)). As a result, the Poonians together owe $19,095,362 (plus interest) to the Commission. These sanctions were registered with the Supreme Court of British Columbia pursuant to s. 163 of the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court. The Poonians owe $4,335,252.60 to their next largest creditor, the Canada Revenue Agency.

[10] On April 20, 2018, the Poonians made a voluntary assignment in bankruptcy. On February 13, 2020, they applied for discharge from bankruptcy, which the Commission and the Canada Revenue Agency opposed. The Supreme Court of British Columbia dismissed the Poonians' application on April 8, 2020, and they remain undischarged bankrupts.

III. Judicial History

A. *Supreme Court of British Columbia, 2021 BCSC 555 (Crerar J.)*

[11] The Commission applied to the Supreme Court of British Columbia 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 chambers judge allowed the Commission's application, finding that the debts were exempt from and would survive any discharge. While only one exception had to apply for the debts not to be released, the chambers judge found that the exceptions in s. 178(1)(a) and (e) both applied.

[12] With respect to s. 178(1)(a), the chambers judge rejected the Poonians' argument that it applies only to fines, penalties or restitution orders imposed in criminal or quasi-criminal proceedings. He noted that the inclusion of the words "restitution order" in s. 178(1)(a) implies that the scope of this provision extends beyond monetary orders imposed in a criminal or quasi-criminal context. The chambers judge also rejected the Poonians' argument that an order of the Commission that is subsequently

registered with a court is not an order “imposed by a court”, as required by s. 178(1)(a). According to the chambers judge, both the administrative penalties and the disgorgement orders could be characterized as fines, penalties, restitution orders or other orders similar in nature that had been imposed by a court in respect of an offence. On this basis, he ordered that they not be released on discharge from bankruptcy.

[13] As for s. 178(1)(e), the chambers judge agreed with the Commission that the Poonians’ market manipulation, particularly the multi-party elaborate scheme they had orchestrated, was at its core a fraudulent misrepresentation and false pretence. He held that, through that scheme, the Poonians had “obtained property” in the form of millions of dollars and that, in doing so, they had engaged in deceitful conduct, which he deemed “the essence of s 178(1)(e)” (para. 105 (CanLII)). The chambers judge concluded that the Poonians’ market manipulation and knowing exploitation of vulnerable investors, which corrodes public confidence in securities markets, were evidence of the deceit lying at the heart of s. 178(1)(e). As a result, the administrative penalties and disgorgement orders were also exempt from discharge under s. 178(1)(e).

[14] The Commission argued in the alternative that the disgorgement orders (but not the administrative penalties) should be exempt under s. 178(1)(d). However, in light of his conclusion that both the disgorgement orders and the administrative penalties were exempt under s. 178(1)(a) and (e), the chambers judge declined to consider this alternative ground. No further arguments were made in respect of s. 178(1)(d), either before the British Columbia Court of Appeal or before our Court.

B. *British Columbia Court of Appeal, 2022 BCCA 274, 65 B.C.L.R. (6th) 213 (Harris, Willcock and Fenlon JJ.A.)*

[15] The Poonians appealed to the British Columbia Court of Appeal, challenging the chambers judge's interpretation of the *BIA*. They also argued that the chambers judge had erred in adopting and following the rationale in *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, a decision later reversed by the Alberta Court of Appeal (2021 ABCA 411, 34 Alta. L.R. (7th) 219). Justice Willcock, writing for the British Columbia Court of Appeal, held that the chambers judge had erred in concluding that the debts were exempt from discharge pursuant to s. 178(1)(a) of the *BIA*. However, he upheld the chambers judge's conclusion that the debts were exempt under s. 178(1)(e). Given that the debts were exempt, albeit only under s. 178(1)(e), the appeal was dismissed.

[16] Justice Willcock agreed with the chambers judge that s. 178(1)(a) is not limited to monetary orders imposed in criminal or quasi-criminal proceedings. However, he disagreed that a decision of the Commission that is merely registered with the Supreme Court of British Columbia can be considered an order "imposed by a court". Once the Commission's decisions are registered with the court, they can be enforced as if they were judgments of the court, but they cannot be said to be "imposed" by the court. The Commission's penalties and disgorgement orders therefore did not fall within the s. 178(1)(a) exception.

[17] Justice Willcock upheld the chambers judge's conclusion that the Commission's administrative penalties and disgorgement orders came within the s. 178(1)(e) exception. He held that the Poonians' debts had arisen from obtaining property, in the form of millions of dollars, by fraudulent misrepresentation, that is, through their market manipulation.

[18] In *Hennig*, the Alberta Court of Appeal held that "[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 s 178(1)(e)" (para. 78). Under this approach, the Poonians would have had to make their fraudulent misrepresentation to the Commission itself. The s. 178(1)(e) exception would not be applicable, because the Poonians' fraudulent misrepresentation was made not to the Commission but rather to the victim investors.

[19] Justice Willcock rejected the narrow approach adopted by the Alberta Court of Appeal in *Hennig*. Instead, he concluded that s. 178(1)(e) is not restricted to cases in which the bankrupt made a fraudulent statement to the specific creditor relying on this provision. The Commission was therefore permitted to invoke s. 178(1)(e). Justice Willcock concluded that both the administrative penalties and the disgorgement orders imposed by the Commission were non-dischargeable debts under s. 178(1)(e), because they had arisen from the Poonians having obtained property by false pretences or fraudulent misrepresentation.

IV. Issues

[20] This appeal raises 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?

V. Analysis

A. *General Principles Governing the Discharge of a Bankrupt*

[21] The proper interpretation of the *BIA* “requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption” (*Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 20). This general rule is codified in s. 178(2), which states that “[s]ubject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.” The purpose of s. 178(2) “is to give effect to one of the goals underlying the *BIA*

regime — the financial rehabilitation of the debtor — by releasing ‘the bankrupt from all claims provable in bankruptcy’” (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 77). Through discharge, the “honest but unfortunate” debtor is given a fresh start and is provided “with relief from the weight of oppressive indebtedness” (*Moloney*, at para. 77, citing L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf), at p. 1-2.1; J. D. Honsberger and V. W. DaRe, *Honsberger’s Bankruptcy in Canada* (5th ed. 2017), at p. 478). This process also allows “the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society” (*Moloney*, at para. 36).

[22] While financial rehabilitation is an important goal of the *BIA*, it has its limits. These limits are set out in both ss. 172 and 178(1) of the *BIA* (*Moloney*, at para. 37). Section 172 provides that an order of discharge may be granted, refused, its operation may be suspended, or it may be granted subject to conditions. Section 178(1) lists specific debts that are not released by discharge and that survive bankruptcy. “These provisions demonstrate Parliament’s attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy” (*Moloney*, at para. 37, citing R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 273 and 289). Both of these sections play a distinct and crucial role in the discharge process. I address each of them in turn.

(1) Section 172: Court May Grant or Refuse Discharge

[23] Section 172 of the *BIA* addresses the discharge of a bankrupt. It establishes that, on the hearing of a bankrupt's application for discharge, a bankruptcy court retains broad discretion to grant or refuse an absolute order of discharge, to suspend the operation of such an order for a specified time or to grant a conditional order of discharge. The *BIA* provides no guidance for the exercise of this discretion, aside from stating that a court must refuse an absolute discharge if any fact referred to in s. 173 is proven against the debtor (J. Sarra, G. B. Morawetz and L. W. Houlden, *The 2024 Annotated Bankruptcy and Insolvency Act* (2024), at § 7:69). If a court finds that any fact referred to in s. 173 is proven, the bankrupt's discharge must be refused, suspended or granted conditionally (s. 172(2)). Many of those facts bear directly on the bankrupt's conduct and culpability, while others reflect standards of commercial morality (s. 173(1)(a) to (o); R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 297-98). For example, ss. 172(2) and 173(1)(k) establish that a bankrupt who is guilty of any fraud or fraudulent breach of trust is not entitled to an absolute discharge.

[24] A court has broad discretion under s. 172(1). In exercising that discretion, the court considers three factors: the interests of the creditors in obtaining payment of their claims, the interests of the bankrupt in obtaining relief from his or her financial obligations, and the integrity of the bankruptcy process (F. Bennett, *Bennett on Bankruptcy* (26th ed. 2024), at p. 737, citing *Shakell, Re* (1988), 70 C.B.R. (N.S.) 270 (Ont. S.C.J.); *Phenix, Re* (1989), 76 C.B.R. (N.S.) 82 (Sask. Q.B.)).

(2) Section 178(1): Debts Not Released by Order of Discharge

[25] Section 178(1) sets out a specific list of debts that are not released by an order of discharge and that therefore survive bankruptcy (*Moloney*, at para. 37). These debts are non-discretionary exceptions to the general rule and represent "the kind of claims that society, through Parliament, considers to be of a quality that outweighs any possible benefit in the bankrupt being relieved of them" (Sarra, Morawetz and Houlden, at § 7:185, citing *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.)).

[26] The exceptions in s. 178(1)(a) through (h) must be interpreted narrowly and applied only in clear cases (*Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, at para. 25; *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81, at para. 63). A narrow interpretation is required partly because courts have no discretion respecting their application: ". . . the policy objective protected by the exception must, in all circumstances, trump the discharge of the bankrupt" (H. Murray and H. 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", in J. Corraini and D. B. Nixon, eds., *Annual Review of Insolvency Law 2022* (2023), 569, at p. 618; J. Girgis and T. G. W. Telfer, "Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v. British Columbia (Securities Commission) (BCCA)*" (2023), 67 *Can. Bus. L.J.* 438 ("Girgis and Telfer (2023)"), at pp. 453-54). Section 178(1) is not "a catchall of debts arising from morally objectionable conduct", but rather sets out "categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied" (*Shaver-Kudell Manufacturing*

Inc. v. Knight Manufacturing Inc., 2021 ONCA 925, 160 O.R. (3d) 205, at para. 39; see also A. Nocilla, "Comment on *Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc.*" (2022), 45:2 *Man. L.J.* 177, at p. 187).

[27] The s. 178(1) exceptions must also be interpreted narrowly because of the fact that "the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate" (*Moloney*, at para. 79; see also *Schreyer*, at para. 19; *Martin v. Martin*, 2005 NBCA 32, 282 N.B.R. (2d) 61, at para. 11). As a result, "[w]here there is doubt as to whether a creditor falls within an exemption, the benefit should go to the bankrupt" (Murray and Fisher, at p. 576, citing *Jerrard*, at p. 206).

(3) The Poonians' Application for Discharge Was Refused Under Section 172

[28] In 2020, the Poonians applied for discharge under s. 172 (2020 BCSC 547, 78 C.B.R. (6th) 135 ("Discharge Application reasons"), aff'd 2021 BCSC 222, 86 C.B.R. (6th) 263, aff'd 2021 BCCA 417, 58 B.C.L.R. (6th) 276). Their application was opposed by the Commission and the Minister of National Revenue primarily on the basis that the fact referred to in s. 173(1)(a) was proven: the Poonians' assets were not of a value equal to $0.50 on the dollar of the amount of their unsecured liabilities. The Commission and the Minister alleged that the Poonians' precarious financial situation had arisen from circumstances for which the Poonians could justly be held responsible (para. 29).

[29] The Supreme Court of British Columbia refused the Poonians' application for an absolute discharge and held that it was impossible "to conclude on these facts that the vast disparity between the Poonians' assets and liabilities arose from circumstances for which they cannot justly be held responsible" (Discharge Application reasons, at para. 53). The court also refused the Poonians' application for a suspended discharge on the basis that granting such a discharge "would be contrary to the public interest" (para. 60). The court concluded that the "circumstances of this case are extreme and that the pre-bankruptcy conduct of the Poonians requires the court to distance itself from their efforts to use the bankruptcy process to absolve themselves of the financial consequences of their actions" (para. 69). As of the date of the hearing before our Court, the Poonians remained undischarged bankrupts. As demonstrated by their unsuccessful application for discharge, even if a claim does not fall within a s. 178(1) exception, a bankruptcy court still retains the discretion to refuse an order of discharge under s. 172.

[30] The question before our Court is whether the Commission's administrative penalties and disgorgement orders can be characterized as debts not released by an order of discharge under one of the exceptions in s. 178(1). As the creditor, the Commission bears the onus of proving that its claims fall within one of the listed exceptions (*Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24). While the Poonians' application for discharge under s. 172 failed, if the Commission succeeds in proving that its claims come under a s. 178(1) exception,

this will mean that those claims cannot be released notwithstanding any future order of discharge the Poonians may seek.

B. *Do the Commission's Claims Fall Within the Section 178(1) Exceptions?*

(1) Section 178(1)(a)

[31] For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence:

> **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;

[32] This appeal raises two questions with respect to the proper interpretation of s. 178(1)(a). First, must the fines, penalties and orders referred to in this section be imposed in either a criminal or quasi-criminal context? Second, do the words "imposed by a court" capture orders that are initially imposed by an administrative tribunal but that are subsequently registered as judgments of a superior court?

(a) *Section 178(1)(a) Is Not Limited to Orders Imposed in a Criminal or Quasi-Criminal Context*

[33] It is clear that the terms “fine” and “penalty” in s. 178(1)(a) include at least monetary penalties imposed as punishment for offences in criminal or quasi-criminal proceedings (see *Hennig* (C.A.), at paras. 46-51; *Air Canada, Re* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J.), at para. 42; *Chaytor, Re*, 2006 BCSC 1742, 26 C.B.R. (5th) 574, at para. 38; *Belair v. Gottschlich*, 2008 ABQB 47, 89 Alta. L.R. (4th) 268, at para. 25; *R. v. Manzioros*, 2004 MBQB 121, 183 Man. R. (2d) 279, at para. 40; *Chambre des notaires du Québec v. Dugas*, [2003] R.J.Q. 1, at para. 22; *Simone v. Daley* (1999), 43 O.R. (3d) 511, at p. 522; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 123 O.A.C. 288, at para. 19; D. Brochu, *Précis de la faillite et de l’insolvabilité* (6th ed. 2022), at ¶31-5).

[34] The chambers judge and Willcock J.A. both agreed that penalties imposed in a criminal or quasi-criminal context are clearly captured by s. 178(1)(a), but they found that this section is not limited to fines, penalties and restitution orders imposed in such a context. The chambers judge held that the inclusion of restitution orders, which do not seek to punish but rather to compensate and restore, “implies a broader scope to s 178(1)(a) than criminal or quasi-criminal offences” (para. 85). Justice Willcock agreed, holding that “s. 178(1)(a) has occasionally been interpreted too narrowly in that respect” (para. 39).

[35] Like the chambers judge and Willcock J.A., I am of the view that s. 178(1)(a) is not restricted to penalties associated with criminal or quasi-criminal proceedings. The plain and ordinary meaning of s. 178(1)(a), a comparative reading of

the English and French versions of this section, and the legislative history of the section all support this interpretation. While I have explained that the s. 178(1) exceptions must be interpreted narrowly, this interpretive principle does not have primacy over other principles of statutory interpretation that clearly support a particular meaning.

[36] As a first remark, I note that the plain and ordinary meaning of s. 178(1)(a) quite simply does not limit this section to penalties imposed in a criminal or quasi-criminal context (see *Vancouver (City) v. Alliston*, 2003 BCPC 105, 47 C.B.R. (4th) 142, at paras. 19-20 and 22). In fact, this section employs very broad language. The English version of s. 178(1)(a) merely requires that the fine, penalty, restitution order or other order be "in respect of an offence". The words "in respect of" are of "the widest possible scope" in conveying a link between related subject matters (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 26).

[37] The English and French versions of s. 178(1)(a) are slightly different. Importantly, the words "in respect of an offence" in the English version are absent from the French version. "The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted" (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 203, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 99 et seq., and M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at pp. 32 et seq.). The shared meaning rule

points to a broader reading of s. 178(1)(a) that encompasses any fine, penalty, restitution order or other order that is imposed by a court. Under this interpretation, there is no indication that such an order needs to be imposed in a criminal or quasi-criminal context.

[38] Notwithstanding this difference between the English and French versions of s. 178(1)(a), I note that, in any event, the unqualified term “offence” is not necessarily restricted to a criminal or quasi-criminal context. Offences can also exist in a regulatory context; statutes outside of the criminal or quasi-criminal context frequently deem certain contraventions of their provisions to be offences (J. Swaigen and S. McRory, *Regulatory Offences In Canada: Liability and Defences* (2nd ed. 2018), at p. 9). Indeed, in this case, a contravention of s. 57 of the *Securities Act* is deemed to be an offence under s. 155(1)(b) of that Act.

[39] Furthermore, the legislative history of s. 178(1)(a) demonstrates that Parliament’s intention has been to expand the scope of this section, not to restrict it. A previous version of this section, as it appeared from 1985 until 1992, read as follows:

> **178** (1) An order of discharge does not release the bankrupt from
>
> (*a*) any fine or penalty imposed by a court or any debt arising out of a recognizance or bail bond;

[40] In 1992, *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 64, widened the scope of s. 178(1)(a):

> **64. (1) Paragraph 178(1)(*a*) of the said Act is repealed and the following substituted therefor:**
>
> > **(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;

[41] Parliament intentionally added this more expansive language to s. 178(1)(a). Interpreting this broad language as capturing only penalties imposed in a criminal or quasi-criminal context would run counter to Parliament's intent and would also render the words or "other order similar in nature" surplusage (C.A. reasons, at para. 41). It is a well-accepted principle that such an interpretation is to be avoided (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28; see further, R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 8.03).

[42] Ultimately, if Parliament had intended to limit the application of this section to criminal or quasi-criminal proceedings, it could have done so more clearly. The fines, penalties, restitution orders and other orders that it exempts are not restricted to those imposed in a criminal or quasi-criminal context.

(b) *The Words "Imposed by a Court" Do Not Capture Orders Made by Administrative Tribunals That Are Subsequently Registered as Judgments of a Court*

[43] For a debt to survive bankruptcy pursuant to s. 178(1)(a), the creditor must establish that the debt is a fine, penalty, restitution order or other order similar in nature

that was “imposed by a court”. There is some uncertainty about what constitutes a “court” for the purposes of s. 178(1)(a) and about what is meant by the term “imposed”.

[44] The word “court” as it appears in s. 178(1)(a) is undefined. While this word is defined in s. 2 of the *BIA*, the definition specifically excludes s. 178(1)(a):

> **2** In this Act,
>
> . . .
>
> ***court***, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

[45] Subsections 183(1) and (1.1) of the *BIA* refer to the superior courts of each province and territory. The exclusion of s. 178(1)(a) from the definition in s. 2 suggests that Parliament did not intend to limit the application of s. 178(1)(a) to fines, penalties or restitution orders made by superior courts (C.A. reasons, at para. 42). In this way, the s. 2 definition draws a distinction between a court administering the *BIA* process and other courts that may impose fines, penalties or restitution orders for the purposes of s. 178(1)(a) (*J.R.B. v. Jimenez*, 2018 ABQB 847, at para. 23 (CanLII)). Provincial courts, federal courts, appellate courts and this Court all fall within the meaning of “court” for the purposes of s. 178(1)(a) (see Sarra, Morawetz and Houlden, at § 1:26).

[46] However, the word “court” in s. 178(1)(a) does not capture administrative tribunals or regulatory bodies. The term “court” implies that a dispute will be

adjudicated by a judge or judges (*Black's Law Dictionary* (11th ed. 2019), at p. 444). By comparison, an "administrative tribunal" is "[a] court-like decision-making authority that resolves disputes [or] an administrative agency exercising a quasi-judicial function" (p. 1814). A "regulatory agency" can be defined as "[a]n official body, esp. within the government, with the authority to implement and administer particular legislation" (pp. 77-78 and 1538). "Court" refers to the judiciary, whereas administrative bodies are hybrid entities "falling between the judiciary and government departments created to perform as separate bodies functions transferred from both" (L. Sossin, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), at § 2:1).

[47] Moreover, for the purposes of s. 69.6 of the *BIA*, Parliament saw it fit to define the term "regulatory body".[1] While the definition is limited to that section and does not apply to s. 178(1)(a), the decision to set out a specific definition of "regulatory body" further confirms that Parliament intended these different terms — "court" and "regulatory body" — to be understood as having different meanings (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 81; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 53). Thus, the word "court" in s. 178(1)(a) does not include administrative bodies. If Parliament had wanted fines,

[1] Section 69.6(1) of the *BIA* reads as follows:

> **69.6 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under s. 178(1)(a), it could have said so expressly.

[48] Having defined the term “court”, I now consider what it means for a fine, penalty or order to be “imposed by a court”. The Commission argues that this language captures orders that are imposed by an administrative tribunal and that, once registered with a court, are deemed by statute to be enforceable as orders of that court (R.F., at para. 93). It argues that its disgorgement orders and administrative penalties fall within the ambit of s. 178(1)(a) of the *BIA* because, under s. 163(2) of the *Securities Act*, once a decision it has made is filed with the Supreme Court of British Columbia, the decision has the same force and effect as if it were a judgment of that court:

> **163** (1) If the commission has made a decision under section 161 or 162, 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) Upon filing, a decision referred to in subsection (1), (1.1) or (1.2) or a notice, order or decision referred to in subsection (1.01) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

[49] The effect of an administrative decision being registered with a court is that the creditor is able to use civil methods to enforce the decision as if it were a judgment of that court. The registration of the decision does not change the fact that it

was made and imposed by an administrative decision maker, nor does it overcome the *BIA*'s requirement that the exempt debt be imposed by a court (C.A. reasons, at para. 48; *Hennig* (C.A.), at para. 52). When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision (see *Hennig* (C.A.), at para. 52).

[50] Justice Willcock correctly concluded in this case that s. 178(1)(a) "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" (para. 44).

(c) *Application of Section 178(1)(a) to the Commission's Orders*

(i) The Commission's Administrative Penalties Are Not Exempt From Discharge Under Section 178(1)(a)

[51] In light of the foregoing, the Commission's argument that the administrative penalties it imposed on the Poonians are captured by the s. 178(1)(a) exception must fail. While the administrative penalties were imposed in respect of a statutory offence (*Securities Act*, ss. 57(a) and 155(1)(b)), they were not imposed by a court. They were imposed by the Commission — a regulatory agency.

(ii) The Commission's Disgorgement Orders Are Not Exempt From Discharge Under Section 178(1)(a)

[52] In the same way, the Commission's disgorgement orders are not captured by s. 178(1)(a). The disgorgement orders were imposed by the Commission, not by a court.

(2) Section 178(1)(e)

[53] The Commission also relies on the s. 178(1)(e) exception:

> **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, other than a debt or liability that arises from an equity claim;

[54] For a debt or liability to survive bankruptcy pursuant to s. 178(1)(e), the creditor must establish three elements: (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 (*Hennig* (C.A.), at para. 57, citing *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 16).

[55] My colleague Karakatsanis J. and certain courts have held that s. 178(1)(e) embodies a "morality concep[t]" which "ensures that a deceitful wrongdoer will not be able to use the court system and the state's bankruptcy provisions as a mechanism for avoiding the consequence of his or her actions" (*Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; see also *Jerrard*, at p. 206; *Bryant*

v. Benjamin, 2023 QCCA 1021, at para. 42 (CanLII); see Karakatsanis J.'s reasons, at paras. 138-39). While I essentially agree that s. 178(1)(e) targets morally blameworthy conduct, I share the view stated by Professors Girgis and Telfer:

> . . . 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. [Emphasis added.]
>
> ((2023), at p. 452; see also *Shaver-Kudell*, at para. 23.)

[56] The Superintendent of Bankruptcy takes a similar view. Intervening on appeal, the Superintendent explains that s. 178(1)(e) "is aimed at making fraud victims whole, rather than at preserving penalties imposed for deterrence purposes" (I.F., at para. 18). By not releasing debts or liabilities that resulted directly from deceit, s. 178(1)(e) prevents debtors "from profiting as a result of their wrongdoing" (*H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117, at para. 47, per Newbury J.A., dissenting, but not on this point). I therefore disagree with my colleague that the "central focus" of s. 178(1)(e) is "deceitful conduct", not the "gain derived" from that conduct (para. 126 (emphasis deleted)). I am of the view that in the interpretation of s. 178(1)(e), "deceitful conduct" and "gain derived" are two inextricably linked concepts.

[57] Furthermore, it is through s. 172 of the *BIA* that Parliament has entrusted bankruptcy courts with broad discretion to decide whether morally reprehensible

conduct should prevent a bankrupt from being discharged. Bankrupts who are not "honest but unfortunate" are not discharged or only discharged if certain conditions are met. In contrast, the s. 178(1) exceptions are focused on "excluding specific debts from being released by the order of discharge" (*Moloney,* at para. 85). I therefore do not agree with my colleague that s. 178(1)(e)'s "intention [is] to preclude dishonest debtors from benefitting from their dishonesty" (para. 139 (emphasis added)). As I have explained above, the "intention" behind this provision is more nuanced.

[58] In *Deloitte Restructuring,* our Court interpreted s. 19(2)(d) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which "is analogous in every respect to" s. 178(1)(e) of the *BIA* (para. 24; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 74; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 78). Articulating the section's elements in a four-part test, our Court held as follows:

> To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service . . . .
>
> (*Deloitte Restructuring*, at para. 25)

[59] This test applies in determining whether the administrative penalties and disgorgement orders are exempt from discharge under s. 178(1)(e). Prior to applying this test to the Commission's administrative penalties and disgorgement orders, I

provide some guidance on each of s. 178(1)(e)'s three elements, which are reflected in, and form the basis of, the four-part *Deloitte Restructuring* test.

[60] At the outset, I note that the first step of the *Deloitte Restructuring* test may appear to stand for the proposition that only the creditor who was directly victimized by the false pretences or fraudulent misrepresentation may bring a claim under s. 178(1)(e). As I explain below, that is not the case.

(a) *False Pretences or Fraudulent Misrepresentation*

[61] The terms "false pretences" and "fraudulent misrepresentation" are not defined in the *BIA*, but the case law has been unanimous in finding that deceitful statements are at the core of both (*Shaver-Kudell*, at paras. 5 and 42; see also C.A. reasons, at paras. 55 and 58-60; *Hennig* (C.A.), at para. 58; *Cruise Connections*, at para. 13; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at para. 29 (CanLII); *Buland Empire*, at para. 14). For both concepts, the "essential test . . . is that the property was obtained by 'deceit', whether by positive act or failure to disclose material facts" (Sarra, Morawetz and Houlden, at § 7:199; see also *Hennig* (C.A.), at para. 112, per Pentelechuck J.A., concurring; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours* (2009), 52 C.B.R (5th) 231 (Ont. S.C.J.), at para. 18).

[62] To establish "fraudulent misrepresentation" for the purposes of s. 178(1)(e), courts have relied on the classic elements from the House of Lords' decision in *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 374 (Sarra, Morawetz and

Houlden, at § 7:203; Wood, at p. 317; J. Girgis and T. 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", in Corraini and Nixon, eds., *Annual Review of Insolvency Law 2022*, 143 ("Girgis and Telfer (2022)"), at p. 154; *Hennig* (C.A.), at para. 58; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *Morris Bureau v. Darde*, 2013 NSCA 121, 335 N.S.R. (2d) 378; *Woolf v. Harrop* (2003), 50 C.B.R. (4th) 309 (Ont. S.C.J.), at para. 71). These elements are as follows: (i) a representation was made; (ii) the representation was false; (iii) the representation was made knowingly, without belief in its truth (including with willful blindness or recklessness); and (iv) the creditor relied on the representation and turned over property to the debtor.

[63] As for "false pretences" in s. 178(1)(e), courts have relied on s. 361(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, for a definition of this term (*Shaver-Kudell*, at paras. 26-28; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 63, aff'd 2016 ONCA 875). Section 361(1) states:

> **361 (1)** A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

[64] Therefore, it appears that the elements of fraudulent misrepresentation and false pretences are substantively the same, except that the definition of "false pretence" in s. 361(1) of the *Criminal Code* does not require detrimental reliance. However, given

that s. 178(1)(e) of the *BIA* requires that property or services be obtained as a result of the fraudulent misrepresentation or false pretences, "that difference is immaterial in this context" (Girgis and Telfer (2022), at p. 154, citing *Hennig* (C.A.), at para. 58).

[65] Justice van Rensburg came to this same conclusion in *Gray*, noting that "[i]rrespective of whether one considers fraudulent misrepresentation or false pretences, s. 178(1)(*e*) requires a finding that the bankrupt 'obtained property by' such conduct" (para. 31; see also *Shaver-Kudell*, at paras. 30 and 35; *Hennig* (C.A.), at para. 58). "Most cases, when discussing s. 178(1)(*e*), treat fraudulent misrepresentation and false pretences as closely connected terms with the same requirements" (*Shaver-Kudell*, at para. 35). As a result, the *Deloitte Restructuring* test does not distinguish between the terms "false pretences" and "fraudulent misrepresentation". The overlap between the two terms ensures that debts or liabilities obtained by deceit that otherwise fulfill the s. 178(1)(e) elements are not discharged.

[66] The onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor's false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud (B. Durnford, "Recent Developments under Section 178(1)(a) and (e) of the *Bankruptcy and Insolvency Act*: A Case Study of *Poonian v. British Columbia (Securities Commission)*" (2023), 12 *J.I.I.C.* 107, at p. 128; see also p. 123, citing *Hennig* (C.A.), at para. 70, citing *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, 6 Alta. L.R. (4th) 223), nor can a court infer fraud in a cursory manner (*Deloitte Restructuring*, at para. 21). A party

cannot simply presume or assume that a claim resulted from a deceitful statement without proving the required elements (*Deloitte Restructuring*, at para. 26).

[67] There are a number of ways in which a claimant can establish false pretences or fraudulent misrepresentation for the purposes of s. 178(1)(e). The most straightforward is via a prior judgment that contains findings of fact to the effect that a debt resulted from false pretences or fraudulent misrepresentation (Wood, at p. 313; *Hennig* (C.A.), at para. 62). Where a claimant has obtained a judgment that contains sufficient findings of fact, "nothing else need be done" (Wood, at p. 313; see also *Bryant*, at para. 69). If a judgment does not make express findings as to the necessary elements, it is open to the bankruptcy court to consider the pleadings that were available to the court that rendered a prior judgment, as well as the proceedings before that other court, in order to determine whether the elements can be established on the basis of those documents. A bankruptcy court can therefore look to the entire context of the proceedings in a previous action to determine whether the judgment debt can be characterized as one falling within the ambit of s. 178(1)(e) (*Cruise Connections*, at para. 29, citing *H.Y. Louie*, at paras. 87-88; see also *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641, at para. 33; *Hennig* (C.A.), at para. 62).

[68] However, "even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings", a court must generally make its own findings of fact in

applying s. 178(1)(e) of the *BIA* (*Deloitte Restructuring*, at para. 29). Courts must be "consistent and rigorous in assessing the evidence presented to them in this regard" (para. 29; see also *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII)). It follows that "the evidence tendered to prove fraud or dishonesty must be 'clear and cogent'" (*Sharma v. Sandhu*, 2019 MBQB 160, at para. 26 (CanLII)).

[69] In the case of a debt or liability resulting from a finding by an administrative tribunal, an application judge must make his or her own determination, based on a review of the record, as to whether the debt or liability falls within a s. 178(1) exception (*Hennig* (C.A.), at para. 63). Thus, even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, "[a] determination of whether the claim falls within one of the categories of non-dischargeable claims must be made by a court" (Wood, at p. 314). In sum, for a creditor to be able to pursue its claim against a bankrupt under s. 178(1)(e), a court order declaring fraud must be obtained, whether "before, during or after a discharge from bankruptcy" (*Bourassa*, at para. 5).

(b) *Passing of Property or Provision of Services*

[70] The second requirement for a debt or liability to survive bankruptcy under s. 178(1)(e) is that there must have been a passing of property or provision of services. This requirement is reflected in the final element of the *Deloitte Restructuring* test, which is that "the false representation was made to obtain property or a service"

(para. 25). There must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss.

[71] The Poonians argue that s. 178(1)(e) should apply only when the debtor, and not a third party, obtains the property or services (A.F., at paras. 72-75). I disagree.

[72] This argument was also made and rejected in *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365. The bankrupt argued that "property must pass to the bankrupt in order for s. 178(1)(e) to apply" (para. 8). The Alberta Court of Appeal held that "s. 178(1)(e) does not require property to pass to the tortfeasor in cases of fraudulent misrepresentation" (para. 7, citing *Morgan v. Demers* (1986), 71 A.R. 244 (C.A.)). I agree. The section does not specify that the "person perpetrating the fraud must be the person who obtained the property" (*Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197, at para. 8).

[73] Section 178(1)(e) does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt. It may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf (*Merenick*, at para. 18). What is required is that the fraudulent misrepresentation induced a person to give the property to some other person (see Wood, at p. 317, citing *McAteer* (2006), and *Merenick*). That other person may be the bankrupt or someone associated with the bankrupt.

(c) *Link Required Between the Debt or Liability and the Fraud*

[74] Section 178(1)(e), in using the expression “resulting from”, requires a causal link between the creation of the debt or liability and the debtor’s deceit. In other words, to come within s. 178(1)(e), the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation (Sarra, Morawetz and Houlden, at § 7:198). Section 178(1)(e) therefore requires detrimental reliance by a person (*Shaver-Kudell*, at para. 30). However, as I explain in the next section, that person need not be the creditor.

[75] The words “resulting from” in s. 178(1)(e) connote a strict causation requirement. This is especially so given that the s. 178(1) exceptions must be interpreted narrowly. It is not sufficient that “the debt or liability ‘arose out of’ a fraudulent scheme’” (*Gray*, at para. 31). Nor is it sufficient for a debt or liability to be “in respect of”, “in connection with” or “in relation to” a fraudulent scheme. Indeed, Parliament’s intention to impose a strict causation requirement by choosing the words “resulting from” becomes clear when s. 178(1)(e) is compared with s. 178(1)(a), which employs the term “in respect of”. As noted by Dickson J. (as he then was), “[t]he phrase ‘in respect of’ is probably the widest of any expression intended to convey some connection between two related subject matters” (*Nowegijick*, at p. 39; *Markevich*, at para. 26; see also Sullivan (7th ed.), at § 4.05). The same cannot be said of the phrase “resulting from”, which requires a causal link: a debt or liability was caused by the

debtor (or someone associated with the debtor) having obtained property or services by false pretences or fraudulent misrepresentation.

[76] Section 178(1)(e) thus requires a "direct link". The direct link approach holds that only the debt or liability that represents the "value of the property [or services] obtained by false pretences or fraudulent misrepresentation" qualifies as non-dischargeable (*Molloy v. Janes & Noseworthy Ltd.* (1998), 164 Nfld. & P.E.I.R. 176 (Nfld. C.A.), at para. 8; see also Sarra, Morawetz and Houlden, at § 7:202). This approach "is more consistent with the fresh start policy underlying bankruptcy law, since it limits the exception to the value obtained by the debtor as a result of her dishonesty" (Wood, at p. 318).

[77] The direct link requirement has been recognized and applied by several courts across Canada. In *Gray*, van Rensburg J.A. held that "[a] causal connection between the bankrupt's wrongdoing and the creation of the debt or liability is required" (para. 31). In *Shaver-Kudell*, Zarnett J.A. held that a deceitful statement by the debtor "must be the source of the debt or liability to the creditor" (para. 35). In *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92, Schwann J.A. held that "there has to be evidence of a causal connection between the alleged fraud and the debt or liability said to have resulted from it" (para. 45). In *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145 (Ont. S.C.J.), Master Mills concluded that "[i]t 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" (para. 9).

In *McAteer* (2007), the Alberta Court of Appeal held that s. 178(1)(e) requires "a finding of fraud, misrepresentation, or other reprehensible conduct that is clearly linked to the bankrupt's debt" (para. 28; see also *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330, at paras. 18-20 (CanLII); *Water Matrix Inc.*, at para. 61; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299, at para. 22).

[78] While the direct link requirement is rooted in ample authority, some courts have applied a less stringent standard. For example, the standard has been described as a "but-for" test: "But for the fraudulent misrepresentation by the [debtor], [the] Corporation would not have loaned him [the money]" (*Woolf*, at para. 72). The requisite link has also been described as "a material connection": "The false statement made by the defendant need only be materially connected to the actions of the plaintiff that resulted in damage" (*Morris Bureau*, at para. 18). Respectfully, I am not convinced that a debt or liability that is not directly linked to a deceitful statement by the debtor, or someone associated with the debtor, can survive a discharge from bankruptcy on the basis of the s. 178(1)(e) exception. The proper scope of s. 178(1)(e) "requires a deceitful statement by which the debtor obtained property or services, causing the debt or liability of the creditor to arise" (*Shaver-Kudell*, at para. 44).

[79] *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296, provides an illustration of the direct link requirement. In that case, a hearing panel of the Law Society of Upper Canada ruled that Mr. Goldstein had participated in dishonest or fraudulent conduct to obtain mortgage funds under false pretences, and it disbarred

him. Mr. Goldstein was ordered to pay the Law Society $60,000 in costs in relation to the disbarment hearing. Mr. Goldstein subsequently made an assignment in bankruptcy. The Law Society sought a declaration under s. 178(1) of the *BIA* that the costs award would not be released by any discharge. Justice Morawetz concluded that the costs award resulted not from the fraud but rather from the Law Society disbarment hearing (para. 10). The costs award was therefore not directly linked to the fraud committed by Mr. Goldstein.

[80] My colleague would apply a less stringent causal link, one that does not limit the non-dischargeable debt or liability under s. 178(1)(e) to the value of the property or services obtained by deceit (paras. 118 and 125). She cites cases where courts have deemed punitive damages to be non-dischargeable debts under s. 178(1)(e) even though they exceed the value of the property or services obtained by deceit (para. 128). Punitive damages do not represent the value of property or services obtained by false pretences or fraudulent misrepresentation and therefore do not come within the s. 178(1)(e) exception. This does not mean, however, that such a debt will be released by an order of discharge. Punitive damages may be captured by another applicable s. 178(1) exception or by s. 172 of the *BIA*.

[81] I reiterate that s. 178(1) is not a "catchall of debts arising from morally objectionable conduct" (*Shaver-Kudell*, at para. 39). With respect, I disagree with my colleague that s. 178(1)(e) "should ultimately be interpreted purposively" (para. 138). My colleague's use of the word "purposively" is simply inconsistent with our Court's

jurisprudence, which clearly establishes that s. 178(1)(e) “must be interpreted narrowly” (*Deloitte Restructuring*, at paras. 24-25). Through s. 178(1), Parliament “identifies categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied” (*Shaver-Kudell*, at para. 39). “[E]ven though other forms of morally objectionable conduct giving rise to debts can easily be imagined”, s. 178(1)(e) must be interpreted narrowly on the basis of “the specific terms identified” (*ibid.*). A narrow interpretation favours a direct link that limits the non-dischargeable debt or liability to the value of the property or services obtained by deceit.

[82] Thus, for a s. 178(1)(e) claim to succeed, there must be a direct link between the fraudulent statement in issue and the debt or liability the creditor is claiming.

(d) *There Is No “Direct Victim” Requirement*

[83] There is a final point I wish to address before determining whether the Commission’s administrative penalties or disgorgement orders survive a discharge from bankruptcy under the s. 178(1)(e) exception. As I previously mentioned, the first step of the *Deloitte Restructuring* test may appear to stand for the proposition that only the creditor who was the victim of the false pretences or fraudulent misrepresentation may bring a claim under s. 178(1)(e). That is not the case.

[84] In *Hennig*, Khullar J.A. (as she then was) held that "[a] creditor should only fall within s 178(1)(e) if he or she has been directly *victimized* by the fraudulent behaviour of the debtor" (para. 81 (emphasis in original)). Under this approach, "[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 s 178(1)(e)" (para. 78). She held that this is because "creditors deserve the preferential treatment given by s 178(1)(e) only if they are the victims of the debtor's fraudulent behaviour" (para. 92; see also Durnford, at p. 125).

[85] In the Court of Appeal below, Willcock J.A. expressly rejected this direct victim requirement and held 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" (para. 70).

[86] Like Willcock J.A., I am not convinced that s. 178(1)(e) requires that the claiming creditor be the direct recipient of the deceitful statement. That being said, since s. 178(1)(e) requires detrimental reliance, there will always be a person who has been deprived of property or services as a result of a deceitful statement made by the debtor or someone associated with the debtor. More often than not, the person to whom the deceitful statement was made will be the claiming creditor. However, the jurisprudence reveals circumstances in which, even though the claiming creditor was not the direct recipient of the deceitful statement, all of the s. 178(1)(e) elements were met and the debt or liability properly survived bankruptcy.

[87] For example, in *Woolf*, the creditor bank sought a declaration that its judgment debt against the bankrupt, Mr. Harrop, had not been released by the order of discharge granted. The bank was the assignee of a mortgage that Mr. Harrop had originally executed in favour of another company. When Mr. Harrop took out the mortgage, he provided a statutory declaration to the original mortgagee indicating that he did not owe any income tax arrears. That declaration was false, and Mr. Harrop knew it was false. After the original mortgagee assigned the mortgage to the bank, Mr. Harrop defaulted and the bank obtained a judgment against him for the outstanding amount. Mr. Harrop made an assignment in bankruptcy, and following his discharge the bank sought a declaration that its default judgment survived under s. 178(1)(e) because Mr. Harrop had made a fraudulent misrepresentation to the original mortgagee. Mr. Harrop argued that the bank could not rely on s. 178(1)(e) because the fraudulent misrepresentation had been made not to it but rather to the original mortgagee. He also argued that the bank had not relied on his fraudulent misrepresentation.

[88] Justice Trafford rejected Mr. Harrop’s arguments. He found that the bank had acquired all the legal rights and entitlements of the original mortgagee, including the right to sue Mr. Harrop. Further, he inferred that, had the bank known of the fraudulent misrepresentation, it would not have acquired the original mortgagee’s legal interest. The bank’s entitlement to relief under s. 178(1)(e) was no different than what the original mortgagee’s entitlement would have been.

[89] Even though the bank was not the direct victim of Mr. Harrop’s fraudulent misrepresentation, the outstanding debt on the mortgage was the direct result of Mr. Harrop having obtained property by fraudulent misrepresentation. I agree with Trafford J.’s conclusion that the bank’s entitlement to relief under s. 178(1)(e) was no different than that of the original mortgagee (para. 75). The bank was entitled to a declaration that its judgment debt had not been released by the order of discharge, and Mr. Harrop could not protect himself against the legal consequences of his fraudulent misrepresentation on the basis that the bank was not the direct victim (para. 75; Girgis and Telfer (2023), at p. 452; see also *Shaver-Kudell*, at para. 5).

[90] In *Ste. Rose*, the Manitoba Court of Appeal found that a liability had not been released on discharge because it fell within s. 178(1)(e), even though the creditor was not the direct victim of the false pretences. The Ste. Rose & District Cattle Feeders Co-op and the debtor had entered into an agreement providing that Co-op would authorize funding so that the debtor could purchase cattle. The agreement also required the debtor to notify Co-op when the cattle were to be sold and to ensure that the proceeds of that sale were paid directly to Co-op. The debtor and his son devised a plan whereby the son sold the cattle in his own name. The son deceitfully held out to a transport driver and an auctioneer that he owned the cattle. The proceeds of sale were deposited in the son’s credit union account, in accordance with the plan. However, the son was indebted to the credit union. When the funds were deposited in the son’s account, the credit union seized the amount and applied it to his debt. The debtor defaulted on repaying Co-op’s loan, and Co-op suffered a corresponding loss. The

debtor and his son consented to judgment in favour of Co-op. Both the debtor and his son then made assignments in bankruptcy and were later discharged. Co-op filed an application seeking a declaration under s. 178(1)(e) that the liability of the debtor and his son arising from the judgment had not been released by the discharge.

[91] Justice Freedman held that the debtor and his son had obtained “property”, in the form of the proceeds of sale, by false pretences. This had created a liability toward Co-op, which had resulted in the judgment. The debtor had withheld relevant information from Co-op by not telling it that the proceeds of sale would be kept by his son. Co-op had relied on the debtor’s fraudulent misrepresentation to its detriment. Further, by participating in the fraudulent sale of the cattle, the debtor had kept up the false pretence that his son was entitled to the proceeds. On this basis, the debtor’s liability to Co-op survived the discharge from bankruptcy.

[92] With respect to the son’s liability to Co-op, his false statements had been made to the auction house and the truck driver, not to the creditor, Co-op. However, this third-party involvement did not change the fact that Co-op had been deprived of its property because of the son’s false statements. For this reason, the court found under s. 178(1)(e) that the debt had not been discharged.

[93] In most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation. This is especially so given that the creditor bears the onus of proving that a debt or liability falls within one of the listed exceptions.

[94] In fact, it is on this basis that the *Deloitte Restructuring* test appears to endorse the direct victim requirement: “To discharge its burden of proving that its claim relates to a debt ‘resulting from obtaining property or services by false pretences or fraudulent misrepresentation’, a creditor must establish [that] the debtor made a representation to the creditor . . .” (para. 25 (emphasis added)). *Deloitte Restructuring* was a “typical” case in the sense that the City of Montréal was both the victim of the alleged fraud and the creditor invoking s. 19(2)(d) of the *Companies’ Creditors Arrangement Act*. However, the wording of s. 178(1)(e) of the *BIA* does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under s. 178(1)(e) provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor’s false pretences or fraudulent misrepresentation.

[95] I reject a direct victim requirement on the basis that it would read an additional requirement into s. 178(1)(e): that the statements that resulted in a person being deprived of property or services must have been made directly to the creditor, not to a third party (Girgis and Telfer (2022), at p. 183). However, the absence of a direct victim requirement does not change the fact that s. 178(1)(e) is limited to the value of the property or services obtained by false pretences or fraudulent misrepresentation.

(e) *Application of Section 178(1)(e) to the Commission’s Orders*

[96] To discharge its burden of proving that its claims relate to a debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, the Commission must establish that the Poonians knowingly made a false representation in order to obtain property or services (*Deloitte Restructuring*, at para. 25). The debt or liability being claimed must be directly linked to the Poonians' false representation.

[97] In assessing whether the Poonians knowingly made false statements, the chambers judge considered the Commission's decisions. As noted above, when a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express.

[98] On review of the Commission's Reassessment Decision, the chambers judge concluded that because the Poonians' deceitful scheme had deliberately misled the public and investors as to the true value of the OSE shares, it was "at its core a fraudulent misrepresentation and false pretense" (para. 103). In the Reassessment Decision, the Commission held that the Poonians had breached s. 57(a) of the *Securities Act* "by engaging in, or participating in, conduct that they knew, or reasonably should have known, would result in, or contribute to, a misleading appearance of trading activity in, or an artificial price for, shares of OSE Corp." (para. 6). The Poonians'

market manipulation was thus characterized as fraudulent by both the Commission and the chambers judge.

[99] Like Willcock J.A., I see no error in the chambers judge's conclusion that the Poonians' scheme to mislead and exploit investors amounted to fraudulent misrepresentation (para. 56). The Poonians falsely and knowingly misrepresented the price of the OSE shares in order to turn a profit. The first s. 178(1)(e) requirement is therefore met.

[100] The Poonians obtained property or services as a result of their fraudulent misrepresentation. As the chambers judge noted, "[t]hrough that scheme the Poonians 'obtained property', in the form of millions of dollars" (para. 103). Mr. Poonian obtained $746,676 directly and $572,491 indirectly through the accounts of secondary participants in the scheme. In addition, he obtained $1,126,260 through the account of another participant and was ordered to pay that amount on a joint and several basis. Ms. Poonian obtained $3,149,935 (Reassessment Decision, at paras. 77-79). While Mr. Poonian obtained some amounts indirectly through the accounts of other participants in the scheme, I have concluded that it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. As is the case here, the property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt (Mr. Poonian). The second s. 178(1)(e) requirement is therefore met.

[101] The Commission claims that both its administrative penalties and its disgorgement orders will survive any discharge from bankruptcy by operation of the exception in s. 178(1)(e) because they are debts resulting from the Poonians having obtained millions of dollars because of their fraudulent misrepresentation. To determine whether this is the case, I must consider separately whether the administrative penalties and the disgorgement orders meet the third s. 178(1)(e) requirement.

(i) The Commission's Administrative Penalties Did Not Result From the Fraudulent Scheme

[102] As noted above, a claim under s. 178(1)(e) must result from the debtor (or someone associated with the debtor) having obtained property or services by false pretences or fraudulent misrepresentation. A direct link between the debt or liability and the fraudulent conduct is required. It is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge (*Molloy*, at para. 8). On this basis, the Commission's administrative penalties do not come within the purview of s. 178(1)(e).

[103] The debt represented by the Commission's administrative penalties did not result directly from the Poonians' fraudulent misrepresentation. Rather, it arose indirectly as a result of the Commission's decision to sanction the Poonians for having obtained property through deceitful statements to investors (Girgis and Telfer (2023), at p. 448; Nocilla, at p. 186).

[104] As I explained above, *Goldstein* helps to illustrate the direct link requirement. In that case, Morawetz J. concluded that the costs award at issue resulted not from the bankrupt's fraud but rather from a Law Society disbarment hearing. Even though the Law Society found that Mr. Goldstein "had knowingly assisted or participated in dishonest or fraudulent conduct to obtain mortgage funds under false pretenses", the costs award itself did not result directly from the fraud committed by Mr. Goldstein and therefore did not fall within s. 178(1)(e) (*Goldstein*, at paras. 3 and 10-11). My colleague acknowledges that the "costs award *was* a step removed from and thus not 'directly caused' by the fraudulent conduct" and that the source of the liability was the disbarment hearing, not the deceit (para. 133 (emphasis in original)). However, she distinguishes *Goldstein* on the basis that, in the instant case, the Commission does not claim that the costs of its proceeding against the Poonians are non-dischargeable and that "the purpose of the Commission's hearing was to create such a debt or liability resulting directly from the false pretences" (para. 134). With respect, this distinction is untenable.

[105] Both a costs award and a penalty imposed by a regulator arise indirectly from deceitful conduct. Without the occurrence and sanctioning of that conduct, neither a penalty nor a costs award would exist. Fundamentally, however, both a costs award and an administrative penalty result from the regulator's choice to sanction the impugned conduct. Neither is the *direct result* of the deceit. In other words, but for Mr. Goldstein's fraud, there would have been no costs award. Similarly, but for the Poonians' fraud, there would be no administrative penalty. However, as I have

explained, and as my colleague acknowledges at para. 124 of her reasons, a but-for connection is not the appropriate link under s. 178(1)(e). A direct causal link is required. I therefore respectfully disagree with my colleague that the Commission's administrative penalties "have as their *only* source or origin the Poonians' deceitful conduct" (para. 134 (emphasis in original)). Rather, their only source is the Sanctions Decision: "Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that . . . a) [Thalbinder] Poonian pay to the Commission an administrative penalty of $10 million; b) [Shailu] Poonian pay to the Commission an administrative penalty of $3.5 million" (para. 96).

[106] If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation — regardless of whether the claimant is the direct victim or a party like the Commission — then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit. My colleague relies on Justice Romaine's interpretation of s. 178(1)(e) in *Hennig* (Q.B.) to find that the Commission's administrative penalties are captured by this section (para. 139). That decision was reversed on appeal. Justice Khullar (as she then was) held that Romaine J. had "incorrectly identified the purpose of s 178(1)" and engaged in "a bit of reverse engineering", and that her "purposive and remedial approach . . . resulted in shifting the delicate balance achieved by Parliament" (*Hennig* (C.A.), para. 26). I agree. As professors Girgis and Telfer note, if such other debts or liabilities, including administrative penalties, "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" ((2023), at p. 454; see also Nocilla, at p. 187; *Hennig* (C.A.), at para. 102).

[107] The administrative penalties are not the direct result of the Poonians' fraudulent misrepresentation. They do not survive a discharge from bankruptcy under s. 178(1)(e).

(ii) The Commission's Disgorgement Orders Did Result From the Fraudulent Scheme

[108] While the administrative penalties did not result from the Poonians having obtained property by fraudulent misrepresentation, the situation is different for the disgorgement orders.

[109] The disgorgement orders were made under s. 161(1)(g) of the *Securities Act* and represent the value of the Poonians' fraud — the funds that the Poonians gained as a result of their market manipulation. Section 161(1)(g) states:

> **161** (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
>
> . . .
>
> (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

Thus, where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to the Commission any amount obtained as a result of the failure to comply.

[110] The purpose of this section "is to compel a wrongdoer to give up any ill-gotten amounts" (2017 BCCA 207, 95 B.C.L.R. (5th) 319 ("*Poonian* (2017)"), at para. 81). By taking away the amounts obtained as a result of a contravention of the *Securities Act*, the section "deprives a person who fails to comply of any benefit" (para. 82; see also para. 100).

[111] Sections 15 and 15.1 of the *Securities Act* address what the Commission must do with the funds received from s. 161(1)(g) disgorgement orders. Section 15.1 and the *Securities Regulation*, B.C. Reg. 196/97, set out a notice and claims procedure for persons who have suffered a pecuniary loss as a direct result of misconduct that resulted in an order under s. 161(1)(g). The Commission must publish a notice if it receives money from an order under s. 161(1)(g) (s. 15.1(1)). A person may make a claim to the money by submitting an application (s. 15.1(2)). If the Commission receives such an application, it will administer the claim in accordance with the regulations, and pay to the applicant all or part of the amount claimed (s. 15.1(3)).

[112] As noted by the British Columbia Court of Appeal, s. 161(1)(g) deters persons from contravening the *Securities Act* by removing the incentive to contravene, because it strips them of the benefit of their wrongdoing (*Poonian* (2017), at para. 88). When issuing an order under s. 161(1)(g), the Commission may deduct any amounts

already returned to the victim or victims (para. 143). The amounts owed under disgorgement orders thus represent the amounts the debtor obtained as a result of his or her wrongful conduct. Furthermore, though compensation is not the *purpose* of this section, compensation is a possible effect of a s. 161(1)(g) order, because restitution may occur via the s. 15.1 claims procedure (paras. 75-76).

[113] The amounts that the Poonians have been ordered to pay under s. 161(1)(g) represent the amounts they obtained as a result of their fraudulent market manipulation. There is therefore a direct link between their fraudulent conduct and the Commission's disgorgement orders. While I have concluded that the Commission need not have been directly victimized by the Poonians' conduct in order to claim that the disgorgement orders are non-dischargeable under s. 178(1)(e), the victim investors may very well be the ultimate recipients of the sums of which they were deprived, provided that they submit appropriate claims in accordance with the s. 15.1 procedure.

[114] The Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge.

VI. Conclusion

[115] I would overturn the Court of Appeal's conclusion that the Commission's administrative penalties are debts not released by any order of discharge because they fall within s. 178(1)(e) of the *BIA*. I would affirm the Court of Appeal's conclusion that the Commission's disgorgement orders come within the purview of s. 178(1)(e). The

disgorgement orders thus remain enforceable against the Poonians and survive any order of discharge under the *BIA*. I would also uphold the Court of Appeal's conclusion that neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a).

[116] Therefore, the appeal is allowed in part and the chambers judge's order is set aside in part. The Commission's application for a declaration that the amounts the Poonians owe to the Commission pursuant to the Sanctions Decision (i.e. the administrative penalties) shall not be released by any order of discharge is dismissed. For clarity, the chambers judge's order that the amounts the Poonians owe to the Commission pursuant to the Reassessment Decision (i.e. the disgorgement orders) shall not be released by any order of discharge is upheld. In the particular circumstance of this appeal, I would not award costs.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[117] I agree with Justice Côté, for the reasons she gives, that the administrative penalties and the disgorgement orders imposed by the British Columbia Securities Commission do not survive bankruptcy under s. 178(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

[118] We part company, however, on interpreting the scope of the causation requirement contemplated by the words "resulting from" in s. 178(1)(e) of the *BIA*. I do not accept that "any debt or liability" is limited to the *value* of the property obtained by deceit (s. 178(1)(e)). I conclude, as did the British Columbia Court of Appeal (2022 BCCA 274, 65 B.C.L.R. (6th) 213), that both the disgorgement orders and the administrative penalties fall within s. 178(1)(e) as "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation". Thus, both orders survive bankruptcy. I would dismiss the appeal.

[119] The bankrupts, Thalbinder Singh Poonian and Shailu Poonian, engaged in a "complex, predatory and highly deceptive . . . scheme that targeted unsophisticated investors" facing financial distress (2021 BCSC 555, at para. 31 (CanLII); see also 2015 BCSECCOM 96 (Sanctions Decision), at para. 18 (CanLII)). The Commission found that the bankrupts manipulated the market, contravening s. 57(a) (now s. 57(1)(a)) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, a deemed offence under that Act. Based on this, the Commission sanctioned the Poonians in the public interest, with disgorgement orders under s. 161(1)(g) of the *Securities Act* of about $5.6 million; and administrative penalties under s. 162(1) totalling $13.5 million.

[120] The Poonians' market manipulation scheme satisfied the condition of s. 178(1)(e) of the *BIA* that property be obtained as a result of their false pretences or fraudulent misrepresentations. They obtained about $5.6 million through their scheme

(Côté J.'s reasons, at paras. 99-100; see also 2018 BCSECCOM 160, at paras. 77-79 (CanLII)).

[121] Thus, the only remaining question is whether the debts or liabilities at issue "result from" the Poonians' deceitful conduct. Are the different monetary sanctions the Commission imposed "resulting from" the fact that property was obtained by false pretences or fraudulent misrepresentation?

[122] In answering this question, I share a number of Côté J.'s conclusions, for the reasons she gives. The property need not directly pass to the bankrupt; the "person perpetrating the fraud" need not be the person who obtained the property (para. 72, citing *Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197, at para. 8). It is enough if someone associated with the bankrupt benefits (Côté J.'s reasons, at paras. 71-73). Further, s. 178(1)(e) does not require that the person claiming the exemption be the person who has directly sustained the loss as a result of the false pretences or fraudulent misrepresentation (paras. 83-95).

[123] Rather, what is required is simply that the deceitful conduct be that of the bankrupt, as long as someone associated with them has obtained property or services by pretences that the bankrupt knew to be false. The passing of property or services ensures that abstract fraudulent statements do not trigger the application of the exception when they have not resulted in detrimental reliance (see Côté J.'s reasons, at para. 74, citing *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205, at para. 30).

[124] The more difficult issue, however, is the degree of link required between the debt and the deceitful behaviour. Given the scheme of the *BIA* and its broader purpose of financial rehabilitation, the non-discretionary exception in s. 178(1)(e) must be interpreted narrowly. It is common ground that there must be a direct link between the debt or liability claimed and the fraudulent statement (Côté J.'s reasons, at para. 77, citing *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 31; *Shaver-Kudell*, at para. 35; *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92, at para. 45; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145 (Ont. S.C.J.), at para. 9; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 28; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330, at paras. 18-20 (CanLII); *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 61; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299, at para. 22). I too would reject a weak link such as "in respect of", "in connection with", "in relation to" or "but for" (Côté J.'s reasons, at paras. 75 and 78). A direct causal link between the creation of the debt or liability and the debtor's deceit is required by the language "resulting from", in an exception that must be narrowly construed (paras. 74-75).

[125] But I would not go further and require that there must be a direct correspondence between the *value* of the debt or liability and the *gain* made by the bankrupt or the person associated with the bankrupt. My colleague reasons that because there must be detrimental reliance in the form of a transfer of property or service, the quantum of the non-dischargeable debt or liability must be limited to "only the value"

obtained as a result of the deceit (para. 102; see also para. 76). I disagree. While the exception must be interpreted narrowly, it must be tethered to the provision fashioned by Parliament.

[126] Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the *quantum* of the debt or liability be limited by the *quantum* of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful *conduct* at the source of the debt or liability, not the exact *gain* derived thereby.

[127] Section 178(1)(e) has been applied by courts to permit the exemption of debts or liabilities that exceed the value of the bankrupt's gain. If the quantum of the debt or liability under s. 178(1)(e) was limited to the value of property obtained, neither compensatory damages exceeding the value of the gain nor punitive damages awarded at private law would ever be exempt from discharge under s. 178(1)(e).

[128] Unsurprisingly, it is hard to find a single instance when courts have limited the recovery of punitive damages against a bankrupt, under s. 178(1)(e), on the basis that it would exceed the value of the property obtained by the bankrupt. On the contrary, the jurisprudence overwhelmingly shows that if punitive damages directly result from the deceitful conduct targeted by s. 178(1)(e), they qualify for the exception (see, e.g., *Grewal v. Brar*, 2015 MBQB 3, 313 Man. R. (2d) 94, at para. 30; *Bank of Montreal v.*

1886758 Ontario Inc., 2022 ONSC 4642, 1 C.B.R. (7th) 213, at paras. 38 and 45; *A.J. Lanzarotta Fruits & Vegetables Ltd. v. United Farmers*, 2024 ONSC 1780, 12 C.B.R. (7th) 371, at paras. 79 and 82; *Celanese Canada Inc. v. Murray Demolition Corp.*, 2010 CanLII 29089 (Ont. S.C.J.), at paras. 14 and 22; *Horth v. Lalonde-Rousseau*, 2021 QCCQ 3668, at paras. 102 and 119-21 (CanLII); *Maison des jeunes de Contrecœur v. Bourdon*, 2011 QCCQ 3476, at paras. 103-7 (CanLII); *Vivacqua v. Contino*, 2009 CanLII 14574 (Ont. S.C.J.), at paras. 18-23; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301, at paras. 3 and 24; see also *Dead End Survival*, at paras. 28-30).

[129] The cases my colleague relies on, as noted above, help show that a weak link is not enough to satisfy the requirements of s. 178(1)(e). An overly broad causation threshold would stray from a narrow reading of s. 178(1)(e). For the threshold to be met, the conduct must be at the source, or origin, of the debt or liability. The deceitful conduct must have directly created it. But none of those cases stand for the proposition that a strict causation test requires the debt or liability to be limited to the value of the property obtained.

[130] Instead, as Roderick J. Wood notes, a direct causation requirement means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge (*Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 317-18). Courts can and should undertake an apportionment exercise to determine the part of a debt or liability that can be

attributed to fraudulent conduct. This exercise is “consistent with the fresh start policy underlying bankruptcy law” (p. 318), as it ensures bankrupts can obtain the benefit of a discharge for the part of the total debt that was incurred honestly (*Copper Cliff Community Credit Union Ltd. v. Parker* (1977), 18 O.R. (2d) 49 (C.A.), at p. 54; see also J. Sarra, G. B. Morawetz and L. W. Houlden, *The 2024 Annotated Bankruptcy and Insolvency Act* (2024), at § 7:202).

[131] But where a debt or liability is *entirely* caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt (or someone associated with the bankrupt).

[132] In *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296, a lawyer, Mr. Goldstein, obtained mortgage funds as a result of false pretences. Given this fraudulent conduct, the Law Society of Upper Canada held a hearing to disbar him. The costs award Mr. Goldstein was ordered to pay in relation to the disbarment hearing was found not to “result from” the underlying fraud for the purposes of s. 178(1)(e).

[133] The circumstances in *Goldstein* differ from those in this case. The costs award *was* a step removed from and thus not “directly caused” by the fraudulent conduct. The source or origin of the liability was the disbarment hearing, not the false pretences (paras. 10-11). It cannot be said that the debt resulted from the fraudulent conduct itself. The purpose of a disbarment hearing is not to impose or recover payment on “any debt or liability” envisaged by s. 178(1)(e).

[134] Here, by contrast, the purpose of the Commission's hearing was to create such a debt or liability resulting directly from the false pretences. The amounts the Commission submits should survive discharge (which do not include costs) thus have as their *only* source or origin the Poonians' deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. This is not a step removed. As my colleague notes, the breach of the *Securities Act* is factually based on obtaining property by false pretences or fraudulent misrepresentation within the meaning of s. 178(1)(e) of the *BIA* (paras. 99-100).

[135] Granted, the administrative penalties include an element of general deterrence for the "egregious" nature of the conduct and the magnitude of the scale on which it took place (Sanctions Decision, at paras. 18 and 92). Administrative penalties imposed under the *Securities Act* deter particular conduct and induce compliance (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 59; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672, at paras. 58-62). But like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. Nothing in s. 178(1)(e) excludes a debt or liability that has an element of general deterrence (or compensatory damages that exceed the gain), provided it directly results from obtaining a financial benefit through false pretences or fraudulent misrepresentations. To exclude administrative penalties on that basis amounts to reading in an additional limitation that is found nowhere in the text of the provision.

[136] Limiting the debt or liability based on the value of the gain derived by the bankrupt is not only absent from the text, it is also inconsistent with the purpose of the exception set out in s. 178(1)(e). As this court has acknowledged, the financial rehabilitation of the bankrupt has its limits (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 37). The general availability of a discharge — a fresh start — is limited by the exceptions in s. 178(1), which reflect policy choices that some debts or liabilities should survive bankruptcy. They are "the kind of claims that society, through Parliament, considers to be of a quality that outweighs any possible benefit in the bankrupt being relieved of them" (Sarra, Morawetz and Houlden, at § 7:185; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.), at p. 206).

[137] Many exceptions provided for in s. 178(1) ensure that only "honest but unfortunate" debtors can benefit from a discharge (Sarra, Morawetz and Houlden, at § 7:69). They are based on society's view, reflected by Parliament, that a bankrupt should not be free of some types of debts or liabilities where they are the direct consequences of an undesirable conduct. Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. These exceptions are focused not on the person claiming the exemption but on "categories of specific wrongful conduct that give rise to debts that are not released" (*Shaver-Kudell*, at para. 39). For example, the following all survive bankruptcy because the principle of financial rehabilitation gives way to society's denunciation of these kinds of conduct: fines or penalties imposed by a court in respect of an offence (s. 178(1)(a)); damages awarded in respect of intentional

infliction of bodily harm or sexual assault (s. 178(1)(a.1)); and debts or liabilities arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity (s. 178(1)(d)). The objective is to prevent abuse of the fresh start principle, and the focus is the nature of the wrongful conduct.

[138] A similar objective animates s. 178(1)(e). It is a "moral sanction" aimed at preventing the bankrupt from being rewarded by a release of liability because of their undeserving conduct that has resulted in detrimental reliance (*Shaver-Kudell*, at para. 40; *Simone v. Daley* (1999), 43 O.R. (3d) 511 (C.A.), at pp. 521-22; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45, at paras. 109-16). Section 178(1)(e) should ultimately be interpreted purposively so as to "ensure that dishonest debtors do not benefit from their dishonesty" (*McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365, at para. 10; see also *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, at para. 66, rev'd 2021 ABCA 411, 34 Alta. L.R. (7th) 219).

[139] I agree with Romaine J. in *Hennig* (Q.B.) that an interpretation of s. 178(1)(e) that considers the provision's intention to preclude dishonest debtors from benefitting from their dishonesty "would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the [interests of the] public and promoting the integrity of the capital markets" (para. 76). The Commission is "a regulatory authority representing the interests of those affected by

the fraudulent misrepresentations and/or false pretences” (para. 76) and as a result, its administrative penalties should not be treated as if they were a debt stemming from an unrelated creditor seeking to unduly invoke s. 178(1)(e).

[140] Focusing only on the gain derived in the abstract would circumvent the precise mischief s. 178(1)(e) was meant to address, as it would permit bankrupts to benefit from their dishonesty through a release of liability, even when the debt directly results from the specific misconduct targeted by Parliament. Rehabilitation of the bankrupt is not best served if the bankrupt can obtain a discharge for liabilities directly resulting from fraudulent conduct.

[141] In conclusion, both the disgorgement orders and the administrative penalties are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address. They are both debts that originate from the Poonians having obtained property by false pretences or fraudulent misrepresentations. Accordingly, both properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge.

[142] I would dismiss the appeal.

Appeal allowed in part without costs, KARAKATSANIS *and* MARTIN JJ. *dissenting in part.*

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