In the Court of Appeal of Alberta

Citation: Alberta Securities Commission v Hennig, 2021 ABCA 411

Date: 20211214
Docket: 2001-0018AC
Registry: Calgary

Between:

Alberta Securities Commission

Respondent
(Applicant)

- and -

Theodor Hennig

Appellant
(Respondent)

The Court:

The Honourable Justice Jack Watson
The Honourable Justice Ritu Khullar
The Honourable Justice Dawn Pentelechuk

Reasons for Judgment Reserved of The Honourable Justice Khullar
Concurred in by The Honourable Justice Watson

Reasons for Judgment Reserved of The Honourable Justice Pentelechuk
Concurring in the Result

Appeal from the Order by
The Honourable Justice B.E. Romaine
Dated the 17th day of January, 2020
Filed the 21st day of February, 2020
(2020 ABQB 48, Docket: 0801-16295)

Reasons for Judgment Reserved

The Majority:

I. Introduction

[1] One of the fundamental objectives of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) is to give bankrupt debtors a fresh start by releasing pre-existing debts, but the *BIA* also provides that some debts can continue after discharge of the bankrupt in certain circumstances. In this appeal, a Panel of the Alberta Securities Commission (ASC) imposed, among other things, an administrative penalty and costs order against Mr Hennig, which was filed with the Court of Queen's Bench becoming enforceable as a judgment debt. The question is whether the ASC's debt falls within one of the exceptions contained in s 178(1) of the *BIA* and therefore survives discharge of the bankrupt. Specifically, the issues are whether the debt amounts to "a fine, penalty or restitution order imposed by a court in respect of an offence" (s 178(1)(a)) or whether it is a debt or liability "resulting from obtaining property by false pretences or fraudulent misrepresentation" (ss 178(1)(e)).

[2] For the reasons below, I find that the ASC's debt does not fall within either exception. Accordingly, the debt was released upon discharge, and the appeal is allowed.

II. Background

[3] This appeal arises from allegations against Mr Hennig who was the CFO of various corporations, another individual Mr Workum who was the president, and the various corporations with which both were involved: Proprietary Industries Inc (PPI), Cheshire Capital Inc, Lexington Capital Corp, Strategic Investment Funds and Ashland Holdings Corp.

[4] The allegations relate to misrepresentations and other defects in PPI's financial statements and disclosure for the years 1998-2000, failure to disclose secret commissions, market manipulation, failure to file reports of insider trading between 1995-2002 and misrepresentations to ASC staff in the course of their investigation of Mr Hennig and others.

[5] After 38 hearing days and 24 witnesses, an ASC Panel concluded that Mr Hennig and Mr Workum had contravened Alberta securities laws or acted contrary to the public interest or both:

- the Individual Respondents contravened Alberta securities laws, or acted contrary to the public interest, or both:
    - through their involvement in and responsibility for:
        - the issuance of PPI's 1998, 1999 and 2000 Financial Statements that were not prepared in accordance with

Canadian generally accepted accounting principles ("GAAP") and contained misrepresentations; and

- related misrepresentations in other PPI disclosure;

- through their involvement in and responsibility for PPl's failure to disclose the Individual Respondents' receipt of financial benefits from commission payments made by PPI;

- by engaging in a course of conduct that, directly or indirectly, created or might have resulted in an artificial price for securities of Newmex Minerals Inc. ("Newmex");

- by failing to file required insider trade reports; and

- by making misrepresentations to Staff; and

- Strategic and Cheshire contravened the Securities Act, R.S.A. 2000, c. S-4 and its predecessor in force until 1 January 2002 (the "Act") and acted contrary to the public interest by engaging in a course of conduct that, directly or indirectly, created or might have resulted in an artificial price for securities of Newmex.

Workum and Hennig, Re, 2008 ABASC 363 at para 6 (Merits Decision).

[6] The ASC Panel issued its decision on sanction later that year, *Workum and Hennig, Re*, 2008 ABASC 719 (Sanctions Decision), and imposed on Mr Hennig a permanent ban from serving as a director and/or officer of any issuer; a 20-year cease trade and denial of exemptions order; and required payment of an administrative penalty of $400,000 and hearing costs of $175,000.

[7] On December 29, 2008, the ASC filed certified copies of the Merits Decision and the Sanctions Decision at the Court of Queen's Bench pursuant to s 200(1) of the *Securities Act*, RSA 2000, c S-4 which provides that upon filing the Decisions have "the same force and effect as if [they] were a judgment of the Court of Queen's Bench". In this case, because the sanction includes an administrative penalty, s 200(2) applies: "the administrative penalty may be collected as a judgment of the Court of Queen's Bench for the recovery of debt". Upon registration, the administrative penalty becomes enforceable as a judgment debt.

[8] The ASC issued a writ against Mr Hennig at the Court and the Personal Property Registry.

[9] Mr Hennig and Mr Workum unsuccessfully appealed the Merits Decision and the Sanctions Decision to this Court: 2010 ABCA 405.

[10] On July 4, 2011, Mr Hennig made an assignment into bankruptcy. On September 6, 2011, the ASC filed a proof of claim in the amount of $601,932.43 and asserted that its claim would survive bankruptcy pursuant to ss 178(1)(a), (d), or (e) of the *BIA*.

[11] On August 19, 2015, Mr Hennig was discharged from bankruptcy. The ASC did not appear, nor did it object to the discharge.

[12] When it came time to renew its judgment three years later, the ASC sought a declaration from the Court of Queen's Bench that its debt arising from the administrative penalty and associated costs survive Mr Hennig's discharge from bankruptcy. The chambers judge granted the ASC's application: *Alberta Securities Commission v Hennig*, 2020 ABQB 48 (QB Decision). Mr Hennig now appeals the QB Decision to this Court.

III. Queen's Bench Decision

[13] The chambers judge took a broad, remedial approach to interpreting the *BIA* and relied on the facts as found in the Merits Decision to conclude that the ASC's debt survived discharge because it is a "debt or liability resulting from obtaining property or services by false preferences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim": s 178(1)(e). Alternatively, the chambers judge held the ASC's debt survived discharge because, in the circumstances of this case, it was a "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). The chambers judge dismissed the argument that the debt survived bankruptcy under s 178(1)(d) and there is no cross-appeal on this issue.

[14] Mr Hennig argues that the chambers judge erred in both conclusions. With respect to s 178(1)(e), he argues that the ASC made no findings of fraud against him, that his allegedly fraudulent statements were not addressed to the ASC, that there is no evidence or finding that anyone transferred property as a result of the allegedly fraudulent statements and that the nature of the ASC's public interest jurisdiction is insufficient to bring its debt within s 178(1)(e). With respect to s 178(1)(a), Mr Henning argues the exemption only applies to fines or penalties imposed by courts in criminal or quasi-criminal proceedings, and not administrative penalties.

[15] Whether an administrative penalty and costs order imposed by a securities commission and registered as a judgment with a superior court can survive discharge of a bankrupt debtor has not been addressed by a Canadian appellate court.[1]

[1] Two trial level decisions, in addition to the decision under appeal, have held that administrative penalties and other orders imposed by a provincial securities commission survive discharge of the bankrupt under s 178(1)(a) and s 178(1)(e): *Smlylski (Re)*, [2020] AJ No 1258 and *Poonian (Re)*, 2021 BSCS 555; leave to appeal to the BCCA granted: 2021 BCCA 224. The reasoning in each was influenced by the reasons of the chambers judge in this case.

IV. *Bankruptcy and Insolvency Act* and Interpretive Approach

[16] There are two general goals of the *BIA*: to provide for the equitable distribution of a bankrupt's assets among creditors and to facilitate a bankrupt's financial rehabilitation: *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 32 (*Moloney* SCC); *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para 7, 128 DLR (4th) 1. This appeal is concerned with this second goal. The purpose of s 178 has been described as giving the debtor a fresh start and enabling the debtor to become a contributing and useful member of the community, including the business community.

[17] Section 178 is divided into two sections.[2] Section 178(2) contains the general goal of granting a fresh start: "Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy." This section does not extinguish such claims, rather it renders them unenforceable: *Moloney* SCC at paras 64-66.

[18] Section 178(1) lists a number of exceptions identified by Parliament: claims or debts not released by discharge of the bankrupt. The exceptions cover a wide range of debts and money claims including fines and penalties imposed by a criminal court, judgments for civil damages for sexual assault or wrongful death, judgments ordering payment of spousal support or child support, debts or liabilities arising from breach of fiduciary duty, debts or liabilities arising when property is acquired as a result of false pretences or fraudulent misrepresentations, and certain unpaid student loans.

[19] The group of exceptions as a whole has been described as relating to immoral or dishonest conduct of the bankrupt and some cases say that the purpose of s 178(1) is to make sure that the bankrupt does not benefit from his or her dishonest or otherwise reprehensible conduct. That is true in a loose way of some exceptions in s 178(1). For example, s 178(1)(e) is designed to ensure that a bankrupt is not rewarded for fraudulent conduct, but it says nothing about other reprehensible behaviour: *Jerrard v Peacock*, 1985 CanLII 1148 at paras 44, 61 AR 16. It is more accurate to say s 178(1) reflects a number of disparate policy choices by Parliament reflecting different considerations. There is no master-rationale for all the exceptions. Courts have recognized this for some time: *Jerrard v Peacock* at paras 41-46; Lloyd W Houlden, Geoffrey B Morawetz & Dr Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) (update 2021-3), Part VI, H§63(1), Online.[3]

[20] This Court has observed that people become bankrupt for various reasons, many of them blameworthy in some way: *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68 at para 14, aff'd 2015 SCC 51. By enacting s 178(2), Parliament has decided that most bankrupts are entitled to a fresh start after a discharge, regardless of morally blameworthy conduct that might have led them into bankruptcy in the first place. A bankrupt's "wrongdoing or improper conduct is not itself sufficient to bring a debt within the ambit" of s 178(1): *Korea Data*

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[2] The full text of s 178 is found in Appendix A to these reasons.

[3] Referred to hereafter as Houlden, Morawetz & Sarra.

Systems (USA), Inc v Aamazing Technologies Inc, 2015 ONCA 465 at paras 63-64. A court's view of immoral or dishonest conduct is not a license to provide an exception where it is not clearly stated. Only the debts specifically identified in s 178(1) survive and hinder the debtor's fresh start post-bankruptcy. As the Supreme Court of Canada recognized in *Moloney SCC* at para 79:

> Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate.

[21] So, how should a court approach interpretation of the exceptions in s 178(1) and ss 178(1)(a) and (e) in particular?

[22] The starting point, as always, is the modern approach to statutory interpretation. The "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament": EA Driedger, Construction of Statutes, (2nd ed 1983) at p 87 as cited *in Rizzo & Rizzo Shoes Ltd (Re)*, [1999] 1 SCR 27 at para 21, 154 DLR (4th) 193. Also important is s 12 of the *Interpretation Act*, RSC 1985, c I-12 which deems all federal statutes to be remedial and requires courts to give them such fair, large, and liberal interpretations as best assures attainment of its objects: *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

[23] While the modern approach to interpretation requires attention to context and purpose, the ordinary meaning of the words still anchor the analysis: *R v Garland*, 2021 ABCA 46 at para 51; *Haida Nation v British Columbia (Forests)*, 1997 CanLII 2009 at paras 22-23, 153 DLR (4th) 1 (BCCA).

[24] The legislative purpose of s 178 is to create exceptions to the objective of giving bankrupt debtors a fresh start. When Parliament has chosen language that circumscribes the application of an exception, we must respect the policy choice reflected by that language. We are effectively invited by the Commission to give a 'large and liberal' reading to the exception in s 178(1)(e) of the BIA so as to include within it forms of morally unacceptable conduct beyond the specifically targeted "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation". In *Schreyer v Schreyer*, 2011 SCC 35 at paras 19-20, the Supreme Court addressed the interplay between the fundamental objectives of the *BIA* and statutory exemptions:

> The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice. Such legislation has become part of the legal and economic landscape in modern societies. But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. … Other types of exemptions that seem fair

> or even necessary are set out in the *BIA.* However, the more exemptions there are, the less likely it is that the basic policy objectives of insolvency legislation can be achieved.
>
> As a consequence, the 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*. (emphasis added)

[25] So, the proper approach to interpreting the exemptions in s 178(1) starts from the position that every debt is released on a discharge of the bankrupt unless one or more of s 178(1)'s subsections clearly exempts the debt from release. The exemptions should be construed narrowly and applied only in clear cases: *Korea Data Systems* at paras 62-63; Ruth Sullivan, Halsbury's Laws of Canada (online), HLG, *Legislation* "Determining Legislative Intent, Presumed Intent, Strict and Liberal Construction" (VIII.4.(2).(d)) at HLG-97**.** That approach is justified because the more debts that survive discharge by falling within s 178(1) the more difficult it becomes for a bankrupt debtor to be rehabilitated: *Maloney* SCC at para 79.

[26] The approach articulated here is different than that taken by the chambers judge. She incorrectly identified the purpose of s 178(1) as ensuring that debtors who engage in reprehensible, dishonest, or immoral conduct do not receive the benefit of discharge: QB Decision at para 17. She then found that Mr Hennig's conduct was reprehensible, dishonest or immoral and rationalized the circumstances as falling within the exceptions under s 178(a) and (e) – a bit of reverse engineering. If the focus remains squarely on the financial rehabilitation of the bankrupt, which is the purpose of s 178, then discharge should be granted subject only to very specific exceptions. Section 178(1) does *not* specifically exempt *all* debts arising from reprehensible or dishonest conduct, only those identified in that section. In effect, the chambers judge took a purposive and remedial approach to interpreting only the exceptions in s 178(1)(a) and (e), rather than s 178 as whole, which resulted in shifting the delicate balance achieved by Parliament.

V. *Securities Act*

[27] Before considering whether the ASC's debt falls within ss 178(1)(a) or (e), some background about the *Securities Act*, the ASC proceedings and the ASC Panel's findings against Mr Hennig is necessary.

[28] Broadly speaking, securities law in Canada has two purposes: consumer protection, protecting investors from unfair or improper practices and fostering fair and efficient capital markets which includes maintaining confidence in those markets: *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 41; David Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham, Ont: LexisNexis, 2014) at 3.

[29] The ASC has wide powers to intervene in Alberta capital markets and make orders if it determines it is in the public interest to do so: ss 198(1) and 199 of the *Securities Act*, RSA 2000, c S-4. Under s 198(1), such orders include requiring a person to cease trading, suspending or terminating registration of a person or company, prohibiting a person from acting as a director or officer, prohibiting a person or company from disseminating any type of information, requiring a person or company to pay to the Commission any amounts obtained, or losses avoided as a result of non-compliance with Alberta securities laws. Under s 199, the ASC may order a person who has contravened Alberta securities law to pay an administrative penalty of up to $1 million, if it is in the public interest to do so. Sections 198(1) and 199 are regulatory rather than remedial or punitive in the sense that their purposes are to protect investors and prevent harm to capital markets, not to punish for past wrongdoing: *Committee for Equal Treatment* at para 42.

[30] The regulatory approach to enforcement of securities law and practice contrasts with other enforcement options under the *Securities Act*: *Committee for Equal Treatment* at para 43. Orders made under s 198(1) and 199 are supposed to restrain future conduct likely to be prejudicial to the public interest in fair and efficient capital markets, sometimes by removing those parties whose past conduct raises concerns about their future conduct. This is in contrast to criminal penalties. It is the role of the courts, typically the Provincial Court in Alberta, to *punish* past misconduct in accordance with s 194 of the *Securities Ac*t, which provides that any person or company that contravenes Alberta securities laws is guilty of an offence and liable to a maximum fine of $5 million and/or a maximum prison term of five years less a day: see *R v Peers*, 2017 SCC 13, affirming 2015 ABCA 407,

[31] Two Notices of Hearing set out the allegations against Mr Workum and Mr Hennig, and the related corporate entities in the ASC proceedings. The first related to "alleged improprieties in certain financial statements of Proprietary Industries Inc (PPI), misrepresentation through further use of that financial statement information and misrepresentations to [ASC] Staff". The second alleged "'Secret Commissions', 'Market Manipulation', failures to file reports of insider trades, and misrepresentations to [ASC] Staff": Sanctions Decision at para 2.

[32] The conclusions of the Merits Decision are briefly summarized in the Sanctions Decision at para 3:

> As discussed below, we found in the Merits Decision that the Individual Respondents bore responsibility for improper financial disclosure and associated misrepresentations by PPI, and for PPI's failure to disclose to the public certain financial benefits received by the Individual Respondents from PPI. Also as elaborated upon below, we found that the Individual Respondents contrived to manipulate the market price of certain shares, which resulted in artificial prices for those shares during two periods in 2000, and that Strategic and Cheshire also bore responsibility for these manipulations. Finally, we concluded that each of the Individual Respondents contravened insider trade reporting requirements and made misrepresentations to Staff.

[33] In the Merits Decision, the ASC Panel made findings in five areas, reproduced in the Sanctions Decision at para 7:

> **A. Financial Disclosure**
>
> We found that PPI's 1998 Financial Statements, 1999 Financial Statements and 2000 Financial Statements – specifically in respect of the reporting of gains attributed to the Newmex, Orion and Azterra Transactions, respectively – were not prepared in accordance with GAAP [generally accepted accounting principles] and thus were contrary to Alberta securities laws. We also found that those financial statements contained misrepresentations.
>
> We further found that in making additional, related inaccurate disclosure in other documents, PPI made further misrepresentations.
>
> The issuance of non-GAAP compliant financial statements, and the making of misrepresentations as described, we found to be conduct contrary to the public interest.
>
> We found that the Individual Respondents each bore responsibility for this improper financial disclosure and the associated misrepresentations. We therefore found that they each contravened Alberta securities laws and acted contrary to the public interest.
>
> **B. Undisclosed Financial Benefit**
>
> We found that the Individual Respondents each obtained financial benefits, from or through the Four Trading Accounts and the Mandolin Offshore Bank Account, which were funded by commission payments made by PPI on private placements and other transactions. Although this was not in itself necessarily improper, the arrangement was not disclosed as required, and this was contrary to the public interest. We found that the Individual Respondents bore responsibility for this and thereby both acted contrary to the public interest.
>
> **C. Market Manipulation**
>
> We found that the Individual Respondents, Strategic and Cheshire each bore responsibility for securities trading that resulted, or could reasonably be expected to have resulted in, an artificial price for such securities. Their conduct we found to have been contrary to Alberta securities laws and to the public interest.
>
> **D. Insider Trade Reporting**
>
> We found that the Individual Respondents contravened the insider trade reporting requirements of Alberta securities laws.

E. Misrepresentations to Staff

> We found that the Individual Respondents each made misrepresentations to Staff, so numerous as to constitute a pattern of conduct. We found that, in so doing, they each acted contrary to the public interest.

[34] At no time did the ASC specifically allege that Mr Henning or the other respondents engaged in fraud. Section 93(1) of the *Securities Act* creates a statutory prohibition of fraud, and counsel for the ASC confirmed during the hearing of this appeal that the ASC could have alleged that Mr Hennig breached this provision at the relevant time. Nor were there any proceedings under s 194 of the *Securities Act*, the quasi-criminal provisions.

[35] Ultimately, the ASC Panel imposed various sanctions on Mr Hennig: a ban on serving as director or officer, a ban on buying and selling securities and using exemptions under the *Securities Act*, a $400,000 administrative penalty and a $175,000 costs order: Sanctions Decision, paras 262-263. The ASC Panel specifically stated that the administrative penalty was imposed to provide specific and general deterrence (and thereby protect the public), not to punish for past misconduct: Sanctions Decision at paras 135, 159. No order for disgorgement of profits was sought or granted.

VI. *Bankruptcy and Insolvency Act,* s 178(1) Exceptions

[36] A preliminary observation about what is not included in the exceptions is warranted. There is no specific provision in s 178(1) addressing regulatory bodies. However, elsewhere the *BIA* expressly addresses the status of a regulatory body in the context of an automatic stay of proceedings granted at different stages of the insolvency process (upon filing a notice of intention (s 69), or filing a proposal (s 69.1)).

[37] Section 69.6 of the *BIA* provides that no stay affects a regulatory body's investigation or any proceeding taken in respect of an insolvent person by or before the regulatory body, except for "the enforcement of a payment ordered by the regulatory body or court": s 69.6(2). A regulatory body is defined as a body that has "powers, duties, functions relating to the enforcement or administration of an Act of Parliament or the legislature of a province": s 69.6(1). This clearly includes the ASC. So, this means that a stay under this section would not impede a regulatory body's investigation or hearing that involved an insolvent person, but would affect its ability to collect on any payment it is owed.

[38] The *BIA* further provides that an insolvent person can apply to court to determine whether a regulatory body is actually seeking to enforce its rights as a creditor to determine if it is stayed under s 69.6(4).

[39] Section 69.6 is significant because it explicitly addresses the rights of provincial regulatory bodies and confirms that a regulatory body seeking enforcement of payments it has ordered is acting as a creditor.

[40] Having identified regulatory bodies and discussed their ability to collect payments owed in s 69.6, the absence of such a discussion under s 178(1) is notable. Arguably, if Parliament had intended that there be any exemptions for payments ordered by regulatory bodes under s 178, it would have said so. This supports the conclusion that such a power not be read into enumerated exemptions in s 178(1), and informs the discussion below.

A. Section 178(1)(a)

[41] The chambers judge dealt with s 178(1)(a) in the alternative, but I address it first. The question on appeal is whether the ASC's debt against Mr Hennig comprising the administrative penalty and the costs order survives Mr Hennig's bankruptcy because it is a

> 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.

[42] This broad issue and the sub-topics contained in it are questions of statutory interpretation, reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

[43] For the ASC's debt to fall within the exemption in s 178(1)(a): (1) it must be "a fine, penalty or restitution order", or an order similar in nature; (2) it must have been "imposed by a court"; and (3) it must have been imposed "in respect of an offence". In my view, the ASC's debt satisfies none of these requirements.

[44] The chambers judge acknowledged that s 178(1)(a) does not cover every monetary charge imposed by a regulatory authority in the public interest but held that, in the unique circumstances of this case, ASC's debt fell within s 178(1)(a) because:

- the penalty was imposed for what she characterized as reprehensible conduct involving fraud, dishonesty and misrepresentation;
- the certified Merits Decision and Sanctions Decision were filed with the Court of Queen's Bench giving them the same effect as a judgment of that Court;
- the decisions of the ASC were upheld by the Court of Appeal; and
- the ASC responded to the bankruptcy from the beginning with a clearly stated position.

QB Decision at paras 30 and 31.

[45] I agree with the chambers judge that s 178(1)(a) does not exempt debts arising from a regulator's imposition of a monetary penalty in the public interest. However, I disagree that there is anything unique about this case that would alter this conclusion.

[46] Interpretation has to begin with the ordinary meaning of the words used in s 178(1)(a) - "fine, penalty, restitution order" or orders similar to those. Several courts have found that the words "fine" and "penalty" in s 178(1)(a) refer to money penalties imposed as punishment for offences against the public or the state, in criminal or quasi-criminal proceedings: *Air Canada*

Re, 2006 CanLII 42583 at paras 42 & 44, 28 CBR (5th) 317 (ONSC); *Belair v Gottschlich*, 2008 ABQB 47 at para 25; *Chaytor Re*, 2006 BCSC 1742 at paras 38-39; *R v Manzioros*, 2004 MBQB 121 at paras 38, 40; *Buland Empire Development Inc v Quinto Shoes Imports Ltd*, 1999 CanLII 1345 (ONCA) at para 19. I agree that this is the ordinary meaning of these words. While the issue of restitution to the victims of the misconduct of the appellant does not arise in this case, an order providing for restitution or compensation is a penalty or sanction authorized on a prosecution under s 194(6) of the *Securities Act*.

[47] It has been suggested that the main reason why fines and penalties imposed in criminal or quasi-criminal proceedings are exempt from release on a discharge, whereas other debts are not, is that the conduct underlying the criminal fines and penalties is more reprehensible than conduct underlying other debts: *Air Canada* at para 44; respondent's factum at para 126. The chambers judge held this view when she distinguished *Air Canada* based on the underlying conduct.

[48] But that is not necessarily true, and framing the rationale of s 178(1)(a) this way can lead to unproductive debates about whether certain conduct sanctioned by regulatory methods or through civil liability is "just as bad" as the conduct underlying criminal fines or penalties: QB Decision at para 29; respondent's factum at para 126. For an example of this kind of unproductive debate, see *Buland Empire Development Inc* at para 17.

[49] In fact, the main rationale for exempting criminal fines or penalties is respecting the division of labour (and authority) within the legal system. This is what Master Funduk meant when he called s 178(1)(a) an "administration of justice concept": *Jerrard v Peacock* at para 42. Exempting criminal fines and penalties from the ordinary operation of bankruptcy proceedings is justified because "as a matter of principle, criminal courts should not be subjected to the control of the civil courts": *R v Fitzgibbon*, [1990] 1 SCR 1005 at 1117-1118. 75 OR (3d) 673. This section helps maintain the balance between criminal monetary sanctions and the objectives of bankruptcy law. It reflects a policy choice that those subjected to criminal sanction should not be allowed to escape the burden of that sanction through bankruptcy proceedings. It has long been established that courts should avoid generating "the sort of clash between civil and criminal law that is apt to bring the law into disrepute": *British Columbia v Zastowny* 2008 SCC 4 at para 25.

[50] There are two further reasons why the administrative penalty and costs order imposed by the ASC is not a "penalty", a "fine" or "similar in nature to a penalty or fine" for the purpose of s 178(1)(a). First, the administrative penalty is neither remedial nor punitive, but preventative: *Cartaway Resources Corp (Re)*, 2004 SCC 26 at paras 55, 60. Second, the ASC filed its Merits Decision and its Sanctions Decision at the Court of Queen's Bench making it enforceable as if it were a judgment of that Court: s 200(1). However, s 200(2) specifically states "the administrative penalty in the amount specified in the decision may be collected as a judgment of the Court of Queen's Bench for recovery of *debt*" (emphasis added). When the ASC filed the decisions at the Court, the *Securities Act* characterized them as a debt for enforcement purposes, and the ordinary civil enforcement mechanisms became available. Based on ordinary statutory interpretation of s 200(2) of the *Securities Act*, the ASC's debt is neither a penalty or a fine, nor is it similar in nature to them.

[51] So, to conclude, "fines", "penalties" and orders similar to them refer to money penalties imposed as punishment for offences against the public or the state in criminal or quasi-criminal proceedings. The ASC did not impose the administrative penalty and the costs order to punish Mr Hennig but to prevent future misconduct, nor did it impose them in criminal or quasi-criminal proceedings. The ASC and the chambers judge characterized Mr Hennig's conduct as morally reprehensible, and I do not disagree. The ASC could have referred the matter to the Crown to lay charges against Mr Hennig for the offence of contravening securities laws under s 194 of the *Securities Act* – a quasi-criminal proceeding – but it chose not to. Instead, it chose the regulatory path.

[52] Further, as noted, s 178(1)(a) only applies to fines or penalties "imposed by a court in respect of an offence". Section 2 of the *BIA* defines "court" for most purposes as the superior courts of the Provinces but that definition does not apply to s 178(1)**.** "Court" as it appears in s 178(1) is undefined. The ASC argues that the administrative penalty and costs order were "imposed by a court" because it filed the Merits Decision and the Sanctions Decision with the Court of Queen's Bench with the result that they have "the same force and effect as if [they] were a judgement" of the court: s 200(2) of the *Securities Act*. I disagree. When the ASC filed the Decisions with the Court of Queen's Bench, the Court did not take any action apart from putting them on file. Rather, the act of filing enabled the ASC to use civil enforcement methods to enforce the Decisions that it (not the Court of Queen's Bench) had already made. The involvement of the Court of Queen's Bench was passive – by accepting a filing, a string of collection possibilities opened up to the ASC. Giving the word "impose" its ordinary meaning is consistent with the interpretive approach to s 178(1) urged in these reasons.

[53] Nor does the dismissal of Mr Hennig's appeals of the Merits Decision and the Sanctions Decision to this Court bolster the ASC's argument. The dismissal of the appeals confirmed that Mr Hennig owed a debt to the ASC comprising the administrative penalty and the costs order. It does not mean that this Court "imposed" them. Rather, it upheld the ASC's decision to do so.

[54] The final issue is the meaning of the word "offence" in s 178(1)(a) of the *BIA*. The word can be used broadly to mean a "breach of the law", but in its ordinary meaning, it refers to a breach of the criminal or quasi-criminal law. This is consistent with the analysis above regarding the meaning of fines and penalties. See also Houlden, Morawetz & Sarra at H§63(2).

[55] In summary, I agree with the chambers judge's assessment that, as a general proposition, administrative penalties and costs orders imposed by the ASC do not come within s 178(1)(a) of the *BIA*. However, I disagree with the chambers judge that the unique characteristics of this case somehow bring it within s 178(1)(a)'s ambit.

B. Section 178(1)(e)

[56] For ease of reference, s 178(1)(e) is repeated:

> 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.

[57] In *McAteer v Billes*, 2007 ABCA 137 at para 16, this Court identified three elements s 178(1)(e): a fraudulent misrepresentation or false pretences, a link between the debt and the fraud, and a passing of property as a result of the fraud. Before addressing these elements, a preliminary comment about terminology is necessary.

[58] It is sometimes said that fraudulent misrepresentation is significantly different from false pretences. Fraudulent misrepresentation is usually identified with the tort of deceit, and the elements of that tort are set out in cases like *Derry v Peak* (1889) 14 App Cas 337 (UKHL) and *The Toronto-Dominion Bank v Merenick*, 2007 BCSC 1261 at para 30. The elements are: (1) a representation (2) that was false (3) made knowingly, without belief in its truth or recklessly indifferent to whether it was true or false (4) the creditor relied on the representation to his detriment. False pretence, as defined in s 361(1) of the *Criminal Code*, does not require detrimental reliance. Nevertheless, the language of s 178(1)(e) requires a transfer of property as a result of the fraudulent misrepresentation or false pretences, and often this will mean that there is no practical difference between a fraudulent misrepresentation and a false pretence under s 178(1)(e). While the section requires only one of false pretence *or* fraudulent misrepresentation, practically it does not matter which is engaged in this case. For the sake of simplicity in what follows, I will use "fraudulent statement" to refer to both "false misrepresentation" and "false pretence".

[59] As noted, the ASC is a creditor. Mr Hennig owes the corresponding debt, and it is not a debt that arises from an equity claim. Therefore, the issues relating to s 178(1)(e) are as follows:

- Did Mr Hennig make fraudulent statements for the purpose of s 178(1)(e)?
- What kind of link is required between the debt and the fraud? Is that link made out in this case?
- Given that property must be transferred as a result of the fraudulent statement, must it be transferred by the creditor relying on s 178(1)(e)? Was there a relevant transfer here?

These reasons address the first two elements and conclude that the ASC has not satisfied either.

[60] For the most part, these issues raise questions of interpretation, reviewable for correctness: *Housen* at para 8. Issues about what the parties to this appeal did are questions of fact, reviewed on a standard of palpable and overriding error.

i. Did Mr Hennig make fraudulent statements?

[61] A preliminary point about process is warranted**.** For a creditor to obtain the benefit of an exemption in s 178(1), there must be a judicial determination made under the *BIA* that the debtor

comes within one of the enumerated exceptions. This might occur on application for discharge, or as here, an entirely separate application.

[62] With respect to s 178(1)(e) specifically, if there is a prior judicial finding of fraud in underlying litigation related to the debt then the task for the application judge under the *BIA* will likely be straightforward. If it is not clear what a court determined in the prior judicial proceedings, courts in Alberta and elsewhere have long recognized that the application judge can look to the judgment recognizing the debt (if any), the pleadings and context to determine if there were fraudulent statements for the purpose of 178(1)(e). The early cases adopted this approach when it was not clear from the record whether a debtor had made fraudulent statements. In *Morgan v Demers*, 1986 ABCA 100, all this Court had to go on was the formal judgment. There were no written reasons and no transcript of the oral reasons. So, this Court assessed the preamble of the formal judgment, which referred to an affidavit and questioning on the affidavit, to determine if there had been an admission of fraudulent misrepresentation for the purpose of s 178(1)(e). Similarly, in *Berthold v McLellan*, 1994 ABCA 122, this Court had to look to pleadings and evidence to make sense of a brief bench judgment to decide whether the judgment debt fell within s 178(1)(d); see also *Covey (Re)*, 2012 ABQB 565 at para 11; *HY Louie Co Limited v Bowick*, 2015 BCCA 256 at paras 57, 60-61, 88.

[63] In the case of a debt resulting from a finding by an administrative tribunal, even if there is a finding of fraudulent statements, an application judge must make his or her own determination based on a review of the record whether the debt falls within the exemption: *Canada (Attorney General) v Bourassa (Trustees of)*, 2002 ABCA 205 at paras 5-9.

[64] So, what are the factors an application judge should consider? A starting point is the pleadings. Some cases have held that the failure to allege fraud in the pleadings may not be fatal to an application for a declaration that a debt falls under s 178(1)(e) – such as when the fraudulent statements might not have come to light until pre-trial proceedings. I don't disagree. The pleadings on their own may not be determinative, depending on how the proceedings evolve. Other important factors relate to the overall context of the proceedings, including:

- the sophistication of the parties;
- nature of the body making the determination;
- the nature of the proceedings, for instance whether they were summary or fulsome;
- whether fraudulent statements could have been raised in the proceedings;
- if allegations of fraudulent statements were raised, whether they were abandoned or dismissed;
- the evidence and the reasons for decision.

[65] An application judge under s 178(1) must make his or her own determination considering the types of factors listed above, keeping in mind the purpose of s 178.

[66] In this case, Mr Hennig was charged with conduct contrary to the public interest and/or breach of Alberta securities laws, but the two Notices of Hearing did not allege fraud.

[67] The ASC Panel made no findings of fraud by Mr Hennig in the Merits Decision or the Sanctions Decision. The ASC's summary of findings in the Merits Decision (see para 3 above) does not mention "fraud". In fact, the only reference to fraud appears in para 742 of the Merits Decision which generally describes the power of the ASC:

> The Commission has a broad public interest authority, which it must exercise in furtherance of its overarching mandate to protect investors from unfair, improper or *fraudulent* practices, and to foster a fair and efficient capital market and investor confidence in that market. The purpose of a hearing under sections 198 and 199 of the Act is to determine, if allegations of misconduct are proved, whether the public interest warrants the issuance of any protective or preventative sanctions. (emphasis added).

[68] The chambers judge concluded that the ASC Panel made findings of fact against Mr Hennig that would fall within the definition of false pretences or fraudulent misrepresentation in s 178(1)(e). Although she did not identify precise parts of the Merits Decision, it seems that she had in mind findings such as paras 722-730, where the ASC Panel found that Mr Hennig was responsible for PPI's "woefully inadequate" and "misleading" financial disclosure and financial statements between 1998 and 2000 in relation to three apparent share sale transactions by PPI. Mr Hennig knew that the financial statements misrepresented PPI's financial position: Merits Decision at para 695. His conduct with respect to the financial statements is described as "deceptive and despicable" done to enable PPI to report non-existent gains. The ASC Panel also found that Mr Hennig concealed the fact that he derived benefits from commissions paid by PPI on the transactions and "lied" to ASC staff who were investigating wrongdoing.

[69] The problem is that the chambers judge only considered the fact findings made by the ASC Panel. Further consideration of the context of the proceedings was necessary before concluding that Mr Hennig made fraudulent statements for the purpose of s 178(1)(e).

[70] The chambers judge did not consider the pleadings, that the ASC made no allegation of fraud. There is no explanation for this on the record. The ASC acknowledged during the oral hearing of this appeal that at the relevant time, it had the ability to allege fraud against Mr Hennig but chose not to do so. It is also clear that the ASC is prepared to allege fraud where it thinks it is appropriate: *Alberta Securities Commission v Brost*, 2008 ABCA 326. As this Court noted in *Bourassa* at para 9, "[f]raud and its proof have their own distinct biosphere. In commercial disputes, allegations of fraud are frequently levelled. But they must be levelled with caution. ... Th[e] sanctions reflect the gravity with which the courts regard an allegation of fraud. Its existence will not be judicially noticed". The choice of the ASC is relevant.

[71] The ASC is a sophisticated regulatory body that operates with the assistance of in-house legal counsel, and conducts many complex hearings. This case lasted 38 hearing days and involved 24 witnesses. The Merits Decision was 1312 paragraphs long. When the pleadings, allegations, evidence and findings are considered, the fact that the ASC did not charge Mr Hennig with fraud, and the ASC Panel made no express findings of fraud against him should have also been considered. Almost two decades after the impugned conduct the ASC is claiming Mr Hennig made fraudulent statements, when it never chose to do so before. This is not a case involving an unclear or confusing record.

[72] In my view these factors weigh against finding that the first part of the test has been met. This conclusion is strengthened when it is recalled that debts imposed by provincial regulatory bodies are not specifically identified in s 178(1). As such, the ASC cannot bring itself within the first element of s 178(1)(e) and does not get the benefit of the exemption.

[73] In conclusion, the chambers judge erred by not considering the full context of the proceedings before concluding that the findings of fact made by the ASC Panel amounted to Mr Hennig making fraudulent statements for the purposes of s 178(1)(e).

ii. What kind of link is required between the debt and the fraudulent behaviour? Is that link made out in this case?

[74] In addition, the ASC cannot meet the second element of s 178(1)(e) as articulated in *McAteer* at para 16: there must be a "link" between the debt or liability and the fraudulent statement. The need for a link is explicit in the language of s 178(1)(e), which refers to "any debt … resulting from obtaining property … by false pretences or false misrepresentations".[4]

[75] For ease of exposition, and contrary to the finding in the section above, the following section assumes that the first requirement of s 178(1)(e) was met and Mr Hennig did indeed make fraudulent statements.

[76] "Link" is obviously a vague term. What kind of link between the debt and the fraudulent statement is required? The ASC argues that this requirement is minimal. It is made out if there is a causal link between the debt and the fraudulent statement. If the debt would not have existed if the fraudulent statements had not been made, that is enough. The ASC would not have imposed a fine and awarded costs against Mr Hennig but for his conduct. The chambers judge held that this type of link is sufficient for the purpose of s 178(1)(e): QB Decision at para 64. This can be described as a factual link.

[77] Mr Hennig submits that a debt is sufficiently linked to the fraudulent statements only if the debtor made the fraudulent statements to the creditor who is invoking s 178(1)(e) to keep the debt alive. Most of Mr Hennig's fraudulent conduct consisted of him causing PPI to issue misleading

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[4] When *McAteer* was decided, a slightly different version of s 178(1)(e) was in force but the difference is not relevant here.

financial statements and disclosure and failing to disclose that he was receiving commissions on PPI transaction. The statements were not directed *at the ASC*, but potential investors and existing shareholders. Therefore, Mr Hennig argues that the required link between the fraudulent statements and the debt is not made out. However, the ASC Panel also found that Mr Hennig lied to ASC staff during their investigation.

[78] For the reasons given below, I find that a factual link is not enough, although it is necessary. The 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). The rest of this section justifies this requirement and addresses whether it was met by Mr Hennig's fraudulent statements to ASC staff.

a. Must the debtor make the fraudulent statements to the creditor who is invoking s 178(1)(e)?

[79] In my view, there are three reasons why s 178(1)(e) only applies if the debtor makes fraudulent statements to the creditor who invokes that section.

[80] First, as noted above, s 178(1) in general and s 178(1)(e) in particular, set out exceptions to the principle that debtors should be given a fresh start when discharged from bankruptcy. Because s 178(1)(e) is an exception to the general rule, it should be interpreted and applied only in clear cases. Such an interpretation limits the incidence of exemptions from release upon a discharge under s 178(1), furthering the goal of financial rehabilitation of the bankrupt, and is more in tune with the intention of Parliament.

[81] Second, a principal justification for exempting debts under s 178(1)(e) from release on a discharge is that debtors who have engaged in fraud do not deserve the "reward" of release when the bankruptcy process is over. But deservingness goes both ways. Does the creditor whose judgment survives bankruptcy deserve that outcome, compared with the creditors whose judgments are released: *Jerrard v Peacock* at para 47? Why this creditor but not that one? Invoking the principle about not rewarding fraudulent debtors is only part of the story. A creditor should fall within s 178(1)(e) only if he or she has been directly *victimized* by the fraudulent behaviour of the debtor. In other words, the fraudulent statements must have been directed at the creditor. The fact that the creditor is owed a debt that is factually linked to the debtor's fraudulent conduct is not enough.

[82] Third, the view that s 178(1)(e) only applies when the debtor has defrauded the creditor is consistent with the decided cases.

[83] The closest and most on point is *Goldstein (Re)*, 2011 ONSC 561. Goldstein, a lawyer, obtained mortgage funds under false pretences. As a result, the Law Society of Upper Canada revoked his licence to practice law and ordered him to pay costs of $60,000. Goldstein assigned himself into bankruptcy, and the Law Society of Upper Canada sought to exempt its costs order from release under either s 178(1)(d) or (e). Justice Morawetz, as he then was, held that the costs

order was not based on fraud by Goldstein; it arose out of disciplinary hearings. The debt did not arise from a fraud committed by Goldstein against the Law Society of Canada (para 10). The costs award was not sufficiently linked to fraud by Goldstein, and as a result, the debt did not fall into ss 178(1)(d) or (e).

[84] The same analysis was used in *Kurtz (Re)*, [2002] OJ 2151, 35 CBR (4th) 273 (SC), which held that a debt did not survive bankruptcy when the debtor did not make a fraudulent misrepresentation to the creditor. The creditor company had installed an air conditioning system at a home previously owned by the bankrupt. The bankrupt sold the air conditioning unit when he sold the house and, at the same time, stopped making lease payments. The company alleged that the bankrupt had fraudulently misrepresented to the purchasers of his home (not to the company) that he owned the air conditioner system and had the right to sell it. The court found that the creditor's claim did not survive because it was not the addressee of the fraudulent misrepresentation. At most, the creditor had a claim in conversion.

[85] The necessity for the debtor to have defrauded the creditor has also been recognized in other contexts. *Korea Data Systems* dealt with s 178(1)(d), but it supports the interpretation of s 178(1)(e) under discussion. Korea Data Systems sued Mr Chiang. The California court found that Mr Chiang did not owe a fiduciary duty to Korea Data Systems, but he did owe one to a third party, and it was by breaching that duty that he defrauded Korea Data Systems. Mr Chiang filed for bankruptcy in Ontario, and Korea Data Systems sought a declaration that the California judgment debt would survive his discharge under s 178(1)(d). The Ontario Court of Appeal held that s 178(1)(d) did not apply because Mr Chiang had not breached a fiduciary duty to Korea Data Systems. Although the language of s 178(1)(d) says only that there must be a breach of fiduciary duty and does not specify to whom that duty is owed, the Ontario Court of Appeal interpreted s 178(1)(d) requiring the bankrupt to breach a fiduciary duty owed to the creditor. The core of its reasoning was as follows (at para 64):

> [A] bankrupt's wrongdoing or improper conduct is not itself sufficient to bring a debt within the ambit of the section. Rather, the impugned conduct must relate to the fiduciary relationship itself. In other words, it is the relationship between the claiming creditor and the bankrupt, as well as the nature of the bankrupt's conduct, that anchors s. 178(1)(d). The provision protects a creditor that was in a vulnerable position in relation to the bankrupt when its claim arose.

[86] The analogy between the interpretation of s 178(1)(d) adopted in *Korea Data Systems* and the interpretation of s 178(1)(e) offered here is obvious. Section 178(1)(e) does not say to whom the fraudulent statements must be made. If a fraudulent statement that results in a debt is sufficient to bring the debt within the ambit of s 178(1)(e), then it is only the bankrupt's improper statements, not the relationship between the creditor and the bankrupt, that engages the subsection. Section 178(1)(e) protects creditors who are vulnerable in the sense that they were the *target* of the debtor's fraudulent statements, much like s 178(1)(d) protects creditors who are vulnerable to breaches of fiduciary duty.

[87] In this appeal, the ASC argues that two decisions are inconsistent with the interpretation of s 178(1)(e) suggested above, and support the conclusion that a factual link between the fraudulent statement and the debt is sufficient.

[88] One case is *Woolf v Harrop* (2003), 50 CBR (4th) 309, [2003] OJ No 5215 (CJ), where the creditor bank applied for a declaration that its judgment debt against the bankrupt Harrop was not released by an order of discharge. The bank was the assignee of a mortgage that Harrop had originally granted to another company, the original mortgage. When Harrop entered into the mortgage, he told the original mortgagee he did not owe any income tax arrears. That was false and Harrop knew it was false. After the original mortgagee assigned the mortgage to the bank, Harrop defaulted and the bank obtained a default judgment against him for the outstanding sum. When Harrop made an assignment into bankruptcy, the bank sought a declaration that its default judgment survived a discharge under s 178(1)(e) because Harrop fraudulently misrepresented his income tax situation to the original mortgagee. A question arose whether the bank could rely on s 178(1)(e), given that Harrop had made the fraudulent misrepresentation to the original mortgagee. The court found that it could, holding that the assignment of the mortgage transferred all of the legal rights and entitlements of the original mortgagee to the bank – including the right to sue Harrop for his fraudulent misrepresentation to the original mortgagee. The bank's entitlement to the relief under s 178(1)(e) was no different than the entitlement of the original mortgagee would have been in the absence of the transfer of the mortgage.

[89] There is no denying that the bankrupt in *Woolf v Harrop* did not, in fact, make his fraudulent statements to the creditor bank that relied on s 178(1)(e). One interpretation of the decision is that, as a matter of law, the creditor bank was treated as if it was the victim of the fraudulent misrepresentation because the original mortgagee assigned all its rights to the bank, including its right to sue for fraudulent misrepresentation. This interpretation is consistent with the approach taken in these reasons. Another interpretation is that *Woolf v Harrop* creates a small exception to the rule that s 178(1)(e) applies only if the debtor has made fraudulent statements to the creditor – namely where the creditor has received a full assignment of rights from the person to when the fraudulent statement was originally addressed. Neither interpretation supports the ASC's position in the appeal.

[90] The ASC also argues that *Ste Rose & District Cattle Feeders Co-op v Geisel*, 2010 MBCA 52 supports its position about the kind of link required between the fraud and the debt. A cattle producer's co-op existed to guarantee loans taken by its members to purchase cattle. The co-op guaranteed $75,000 in loans to enable Geisel to buy cattle. The agreement between Geisel and the co-op included a term that ownership of the cattle would remain in the co-op until the cattle were sold. On the strength of the co-op's guarantee, the bank lent $75,000 and Geisel bought 126 cattle. The following year, Geisel's son purported to sell the cattle and received the purchase price into his own account. His bank seized the funds. Then Geisel defaulted on the loan repayments, and the co-op was called on to honour its guarantee. The co-op obtained a default judgment against Geisel and his son, following which both filed assignments into bankruptcy. Each was discharged, and a short time later, the co-op applied for a declaration that its judgments were not released by the discharges, relying on s 178(1)(e), among others.

[91] On appeal, one issue was whether the default judgment against the son fell within s 178(1)(e). The son had falsely represented *to the auction house* that he owned the cattle and that he was entitled to the sale proceeds. But he had not made any false statements to the co-op. The Manitoba Court of Appeal found that although the son had no dealings with the co-op, he nevertheless obtained the cattle proceeds (which should have gone to the co-op) because of his fraudulent statements and that the default judgment was based on that fraud: para 106. That was sufficient to bring the judgment debt within s 178(1)(e). The Court justified this result on the footing that the son acted dishonestly, and the purpose of s 178(1)(e) is to ensure that dishonest debtors do not benefit from their dishonesty.

[92] I decline to follow *Ste Rose* for the reasons already explained above – the exemptions in s 178(1) should be interpreted narrowly, and creditors deserve the preferential treatment given by s 178(1)(e) only if they are the victims of the debtor's fraudulent behaviour.

[93] To conclude, the proper interpretive approach to s 178(1)(e), the policy underlying it and the bulk of the decided cases support the view that the debt is sufficiently linked to the fraud only if the debtor made the fraudulent statements to the creditor who is relying on s 178(1)(e). A regulatory body imposing an administrative penalty for conduct contrary to the public interest will rarely be able to establish such a link, as typically it only becomes involved *after* the impugned conduct has already occurred.

b. Do Mr Hennig's lies to the ASC staff during the investigation satisfy the requirement of a link between the debt and the fraudulent statements?

[94] The Merits Decision deals at length with Mr Hennig's involvement in PPI's issuance of misleading financial statements for the years 1998-2000. These statements were made to existing or potential investors, not to the ASC. It also addresses Mr Hennig's receipt of undisclosed financial benefits from PPI for his services in making private placements of PPI shares and other transactions. Insofar as Mr Hennig's failure to disclose the benefits constitutes a fraudulent misrepresentation or a false pretence, it was addressed to shareholders (to whom the disclosure should have been made), not the ASC.

[95] Twenty-three paragraphs of the 1381-paragraph Merits Decision address allegations that Mr Hennig and others made misrepresentations to ASC staff during the ASC investigation, including by concealing information and lying. Specifically, the ASC alleged that Mr Hennig made false statements to staff during discussion about PPI's release of financial disclosure for the Newmex, Orion and Azterra transactions. One paragraph of the Merits Decision addresses the evidence, and one paragraph expresses the ASC Panel's finding: "the Individual Respondents repeatedly lied to staff". The reasons in the Sanction Decision for setting the administrative penalty at $400,000 do not mention the misrepresentations to the ASC: Sanctions Decision at paras 177-180, 196.

[96] In my view, the fact that Henning lied to ASC staff does not establish the required link between the fraudulent statements and the ASC's debt. Reading the ASC Panel's decisions

realistically, the ASC's debt against Mr Hennig is not *based* on Mr Hennig's lies to ASC staff. It is based on Mr Hennig's misleading statements in the capital markets and other market wrongdoing.

iii. Who must transfer property as a result of the fraudulent statement? Was there a relevant transfer here?

[97] The final element of s 178(1)(e) relates to the transfer of property. It is clear from the language of s 178(1)(e) that the debt must result from "obtaining property" by false pretences or fraudulent misrepresentation. Someone must obtain property due to the fraudulent statements, but the section does not say who. In *McAteer*, this Court held that the language does not require the debtor who made the fraudulent statements to have obtained property as a result but otherwise left the issue open; nor did the Court limit who the transferor must be.

[98] Mr Hennig argues first that s 178(1)(e) requires the creditor invoking s 178(1)(e) to have transferred property as a result of[5] the fraudulent misrepresentation or false pretence. Alternatively, even if s 178(1)(e) requires only that property be transferred by or to *someone* as a result of the fraudulent statements, there was no evidence or findings that property was transferred in this case.

[99] It is unnecessary to address this issue because the conclusions to this point establish neither 178(1)(a) nor (e) apply to the ASC's debt. Since the parties' oral and written submissions did not cover this topic in detail, the wiser course is to leave its determination to another appeal where it would make a difference to the outcome.

VII. Conclusion

[100] The ASC argued that a potential negative impact of allowing the appeal would be to undermine the deterrent effect of an administrative penalty imposed on those who breach securities law. If the penalty does not survive bankruptcy, Mr Hennig, or anyone in his position, need only declare bankruptcy to avoid the consequences of their bad conduct. There are two responses to this concern.

[101] First, the ASC has many remedial options available to it under the *Securities Act*, and as in this case, the administrative penalty was only one of the sanctions imposed. The other non-monetary sanctions survive bankruptcy. There is a permanent ban on Mr Hennig serving as a director and/or officer of any issuer, and a 20-year cease trading in or purchasing any securities or exchange contracts and denial of using any exemption order.

[102] Second, finding that a bankrupt debtor contravened securities legislation and acted contrary to the public interest usually entails morally bad conduct by the debtor. And as has been discussed above, alone that is not enough to bring the debt within s 178(1)(e). It seems that what the ASC is

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[5] The difference, if any, between "in reliance on" (which is used in the traditional formulation of the tort of deceit) and "resulting from" (in the statutory formulation) is not material in this case.

seeking is a general exemption from release upon discharge for the administrative penalties imposed by a securities regulator. This would create a new category of exemption under s 178(1) which falls within the purview of Parliament, not this Court.

[103] The ASC's debt is neither "a fine, penalty, restitution order or other order similar in nature … imposed by a court in respect of an offence" (s 178(1)(a)) nor a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" (s 178(1)(e)). Accordingly, it was released when Mr Hennig was discharged from bankruptcy.

VIII. Disposition

[104] The appeal is allowed. A declaration shall issue that ASC's debt does not survive Mr Hennig's bankruptcy and is released by the order of discharge.

Appeal heard on May 7, 2021

Reasons filed at Calgary, Alberta
this 14th day of December, 2021

I concur:

Watson J.A.

Khullar J.A.

Appendix A

***Bankruptcy and Insolvency Act*:**

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;

(a.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(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;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the Apprentice Loans Act where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or

(ii) within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

Court may order non-application of subsection (1)

(1.1) At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g) or (g.1) ceases to be a full- or part-time student or an eligible apprentice, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

Claims released

178(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

Pentelechuk J.A. (concurring in the result):

[105] I have had the benefit of reading the decision of my colleagues. I endorse their thorough analysis of why the Alberta Securities Commission's (ASC) claim does not survive under section 178(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[106] I also agree with my colleagues' ultimate conclusion that the ASC's claim does not survive under section 178(1)(e) and that the appeal must be allowed. Given that the exceptions listed in s 178 are to be interpreted narrowly, it is evident that administrative penalties and costs enforced by the ASC are not debts or liabilities *resulting from* Mr Hennig's fraud. The ASC was not enforcing the penalty and costs on behalf of defrauded victims. Nor does the judgment debt represent damages or compensation for losses caused by Mr Hennig's fraud. The ASC concedes there is no direct evidence of harm to investors. The ASC was not, itself, a "victim" of the fraud.

[107] However, I am unable to agree that the ASC failed to satisfy the first part of the test; that is, that it failed to establish that Mr Hennig engaged in fraudulent conduct and that the chambers judge erred in so concluding.

[108] To determine whether section 178 of the *BIA* applies, the Court (whether through bankruptcy proceedings or a separate civil application) must characterize the judgment below. It is entitled to do so based on the pleadings and the proceedings that resulted in the judgment. Regardless of the route taken, a creditor must obtain a court declaration that a debt survives bankruptcy: ***Canada (Attorney General) v Bourassa (Trustee of)***, 2002 ABCA 205 at para 5; ***Shaver-Kudell Manufacturing Inc v Knight Manufacturing Inc***, 2021 ONCA 202 at para 28.

[109] An assessment of whether the evidentiary record can support a finding of fraudulent misrepresentation or false pretences attracts a deferential standard: ***Housen v Nikolaisen***, 2002 SCC 33 at para 36; ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd***, 2017 ABCA 378 at para 63; ***McAteer v Billes***, 2007 ABCA 137 at para 14. In my view, no palpable and overriding error has been demonstrated in the chambers judge's assessment of the facts as found by the ASC, her application of the law to those facts, or her conclusion that "the essence of the misconduct that gave rise to the administrative penalty was fraud": at para 44.

[110] The chambers judge correctly set out the four elements of the test for civil fraud, which encompasses fraudulent misrepresentation:

i. a representation was made;

ii. the representation was false;

iii. the representation was made knowingly, without belief in, or with indifference to its truth; and

iv. the representation was relied on by the creditor: at para 37.

[111] In defining false pretences, she referred to section 361(1) of the *Criminal Code* as:

> 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 by a fraudulent intent: at para 40.

[112] Houlden, Morawetz & Sarra, *Bankruptcy and Insolvency Law of Canada* [*Houlden & Morawetz*] suggest that false pretences and fraudulent misrepresentation are "almost identical": 4th ed (Toronto: Thomson Reuters Canada, 2009) (update October 2021) at §7:204 (online). The essence of each is deceit, whether the deceit is by a positive act or by failing to disclose material facts: ***The Toronto-Dominion Bank v Merenick***, 2007 BCSC 1261 at para 29; ***Iroquois Falls Community Credit Union Ltd v Claude Miljours***, [2009] OJ No 165 at para 18, 52 CBR (5th) 231.

[113] As neatly summarized by Master Funduk in ***Re Nagy (Bankrupt)***, 2003 ABQB 74 at para 17: "Fraud may consist as well in the suppression of what is true as in the representation of what is false": at para 17. Most assuredly, fraud can encompass blameworthy or cunning or strategic silence: *Houlden & Morawetz* at §7:204.

[114] As noted by the chambers judge, the ASC Panel made the following findings regarding Mr Hennig's conduct:

a) that he had been responsible for improper financial disclosure and misrepresentations in the 1998, 1999, and 2000 financial statements of Proprietary Industries Inc. (PPI) and other corporations with which he was involved and related misrepresentations in other PPI disclosure in order to produce a misleading impression of financial positions and results, contrary to Securities Laws;

b) obtained financial benefits from investor funds that were not disclosed to investors as required;

c) participated in market manipulation that resulted, or could reasonably be expected to have resulted, in an artificial price for certain securities; and

d) contravened the insider trading reporting requirements of Alberta Securities Laws.

[115] The ASC Panel described Mr Hennig's actions as "deceptive and dishonourable" and determined that he was guilty of "deception, concealment and manipulation". These factual findings are sufficient to satisfy the essential elements of civil fraud; Mr Hennig made fraudulent misrepresentations to investors by misrepresenting PPI's financial position and results and by failing to disclose commissions he had taken, knowing the information was misleading and inaccurate.

[116] My colleagues suggest the chambers judge erred in considering only the fact findings made by the ASC and that "further consideration of the context of the proceedings was necessary before concluding that Mr Hennig made fraudulent statements for the purpose of s 178(1)(e)": at para 69. More specifically, they highlight that the chambers judge did not consider the pleadings and in particular, that the ASC did not allege fraud against Mr Hennig despite having the option to do so.

[117] If the ASC had specifically pleaded fraud or if the ASC Panel had made express findings of fraud, the chambers judge's task would have been a straightforward exercise. But it does not follow that the failure to plead fraud factors so significantly in the analysis. "In appropriate circumstances, pleadings can inform the interpretation of what has been determined or admitted to create the debt or liability, but they are not necessarily sufficient or determinative": ***Johansen v Wallgren,*** 2021 ABCA 234 at para 21.

[118] The substantive question is whether the findings below fall within the scope of s 178. As an example, this Court in ***Berthold v McLellan***, 1994 ABCA 122 had no difficulty concluding the judgment fell within the scope of s 178(1)(d), despite neither the pleadings specifying nor the trial judge expressly finding that the bankrupt was acting "in a fiduciary capacity".

[119] Civil actions or proceedings by administrative bodies are not pleaded in anticipation of a defendant filing for bankruptcy. It is entirely conceivable that evidence may arise in a proceeding that supports certain findings that in turn fall within the scope of s 178. That is the case here. This was a lengthy hearing spanning 38 days. Mr Hennig was not an "honest but unfortunate bankrupt" who should enjoy the benefit of an artificially circumscribed approach in determining whether his actions constituted fraud for the purpose of s 178(1)(e). That the ASC is a sophisticated body does not alter this central policy consideration.

[120] Despite my conclusion that it was within the chambers judge's purview to find fraud on the part of Mr Hennig and that she made no error in so finding on the record, the appeal must be allowed for the reasons noted.

Appeal heard on May 7, 2021

Memorandum filed at Calgary, Alberta
this 14th day of December, 2021

Pentelechuk J.A.

Appearances:

E.A. Viala
for the Respondent

J. Groia
K. Richard (no appearance)
for the Appellant