Alert

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British Columbia Court of Appeal Rules that Bankruptcy Does Not Erase Monetary Securities Penalties

Canada's insolvency regime provides a "fresh start" policy for honest but unfortunate debtors. The policy relieves Canadians from excessive debts through bankruptcy, except in certain instances such as where a debt arises from the bankrupt's deceitful or dishonest conduct.

In *Poonian v British Columbia (Securities Commission)*, the British Columbia Court of Appeal (BCCA) ruled that the fresh start policy does not extinguish fraud-related securities penalties in British Columbia (BC).

This decision strengthens the BC Securities Commission's (the Commission) recently enhanced enforcement and collection powers.

Background

The Commission imposed disgorgement orders totaling over $7 million against Thalbinder Singh Poonian and Shailu Poonian after finding the couple had engaged in market manipulation contrary to s. 57(a) of the BC *Securities Act* (the *Securities Act*). The Poonians had purposefully inflated the share price of an oil and gas company called OSE Corp through a series of "wash trades" and other nefarious trading strategies. They then proceeded to "dump" their OSE shares, causing the share price to plunge from $2.00 to $0.08. Unsuspecting investors incurred a loss totaling around $7.1 million.[1]

The Poonians made a joint assignment into bankruptcy in April 2018 in accordance with Canada's *Bankruptcy and Insolvency Act* (the *BIA*).

In May 2021, a BC Supreme Court (BCSC) chambers judge found that bankruptcy did not extinguish the amounts owed by the Poonians to the Commission. It found the penalties were excluded from the fresh start principle by section 178(1) of the *BIA*, which provides that certain debts are not released from a discharge in bankruptcy. In the BCSC's view, the Poonians' penalties were:

1. a restitution order imposed by a court in respect of an offence (*BIA* s.178(1)(a)); and
2. a debt arising from obtaining property by false pretences or fraudulent misrepresentation (*BIA* s. 178(1)(e)).

The Appeal Decision

The BCCA upheld the BCSC decision. It held that the penalties did not survive bankruptcy under s.178(1)(a) but *did* survive under 178(1)(e) — the Poonians had obtained millions of dollars through "deceitful conduct", which "at its core [constituted] a fraudulent misrepresentation and [a] false pretence." As a result, the Poonians remain in debt to the Commission for over $7 million despite their joint discharge in bankruptcy.

Respecting s.178(1)(a), the BCCA held that tribunal orders that are registered by courts without judicial scrutiny (such as those imposed by the Commission) are not imposed by courts and accordingly fall outside the scope of the exemption.

Respecting s.178(1)(e), the court rejected the Poonians' argument that, for the exemption to apply, they must have made fraudulent statements to the Commission. In the court's view, the purpose of the *BIA*'s exemptions is to ensure that purposeful wrongdoers cannot take unjustified advantage of the fresh start principle. In light of that purpose, it held that "the plain language of s.178(1)(e) does not restrict [the] exemption to only those claims where the bankrupt made a deceitful statement to

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the creditor."

Conclusion and Notes

British Columbia and the Commission will welcome the decision in *Poonian.*

The *Poonian* decision comes in the wake of an Alberta Court of Appeal ruling that similar market manipulation penalties were *not* exempt from bankruptcy's fresh start principle (*Alberta Securities Commission v. Hennig,* 2021 ABCA 411 [*Hennig*]). After carefully examining the *Hennig* decision, however, the BCCA expressly declined to adopt the Alberta Court's reasoning. Specifically, the BCCA disagreed with *Hennig*'s position that a securities penalty only survives bankruptcy under the s.178(1)(e) exemption if (1) a court makes its own finding of fraudulent conduct, separate from that of the Commission and (2) the debtor made its fraudulent representation to the Commission.

The BCCA's departure from *Hennig* is undoubtedly a relief to the Commission. The province recently made substantial amendments to the *Securities Act* that enhanced the Commission's enforcement and collection powers. In addition, BC's Finance Minister had called for the Canadian government to add language to the *BIA* expressly exempting securities penalties from bankruptcy's fresh start principle. Had the BCCA followed *Hennig* in making its decision in *Poonian*, it would have significantly blunted the Commission's newly acquired powers.

Instead, however, *Poonian* serves to strengthen those powers and adds weight to the Finance Minister's declaration that the Commission "has the strongest enforcement and collection tools in [Canada]."

[1] All monetary amounts are $CAD.