

a. Fine and Penalty

Law of Bankruptcy and Insolvency in Canada, Rev. Ed.

Lazar Sarna

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Chapter 9 DISCHARGE

§ 9.5 DEBTS THAT SURVIVE DISCHARGE

a. Fine and Penalty

Fines and penalties survive discharge under the *BIA*.

Section 178(1)(a) *BIA* provides that an order of discharge does not release the bankrupt from 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*. The court determines which portions of the penalties, Appendix B costs and the special costs survive.¹

Section 178(1)(a) of the *BIA* does not refer to fines imposed by a professional disciplinary committee. Such fines, if contained in a final order, arising or likely to be imposed prior to the bankruptcy of the professional, constitute a debt dischargeable by bankruptcy.²

Those debts surviving bankruptcy listed at subs. 178(1)(a) do not only apply to fines or penalties imposed by courts in criminal or quasi-criminal proceedings. Penalties imposed by an administrative body such as a securities commission are not discharged by the effect of bankruptcy.

The award of costs for the offence of contempt may be integrated as the fine and award of costs to reflect all of the circumstances presented. Therefore, costs awarded may become a sanction for the offence of contempt, and exempt from discharge under s. 178(1)(a) of the *BIA*.³

In a matter involving a monetary penalty assessed by a provincial Minister of Transport against Air Canada, Cumming, J. noted that if s. 178 applied, he would find the assessment was not an excluded claim. A “fine” or a “penalty” meant “fines or penalties imposed for offences against the state in either a criminal or quasi-criminal context”; a penalty imposed by the Minister of Transport for a regulatory infraction did not constitute a criminal or quasi-criminal penalty, since regulatory infractions are different from criminal offences in that they attempt to regulate behaviour, while criminal offences punish “morally reprehensible” acts: paras 43–44. Although the assessment had been filed with the Quebec Superior Court, this did not make it a penalty “imposed by a court”. A court filing that made the assessment “as if it were a judgment” of the court was not equivalent to a fine or penalty “imposed” by a court, since the assessment was not scrutinized by the Court when it was filed.⁴

Any fine or monetary penalty that could be imposed on a professional accountant, including an order to pay CPA

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Ontario's reasonable legal costs, deemed to be a fine under all three of the professional accounting statutes that govern the sentencing, would not be released under an order of discharge issued under the *BIA*.⁵

By contrast, where the administration penalties are levied in the context of clear findings of misrepresentation and "morally reprehensible" conduct, are not mandatory; and the court had the opportunity to consider the conduct that led to the penalties, and make its own finding of misrepresentation, the penalty will survive.

In the matter of a contempt proceeding, the court exempted from discharge a fine levied in a contempt application relating to a failure to comply with an order is a matrimonial property division case: the fine was a "penalty for breaching a previous order, and as such is excluded by the legislation".⁶

In the case of *Alberta Securities Commission v. Hennig*, the court noted there is no requirement in the plain language of subs. 178(1)(a) that reprehensible conduct be established, although various judgments have implied that condition by interpreting the subsection in a manner that requires criminal or quasi-criminal proceedings, presumably given the policy considerations that underline the purpose of the s. 178 exceptions. The sanctions principles under securities legislation emphasize the preventative and protective aspects of a proper sanction. There appears to be no good policy reason to restrict the exception to cases involving the standard of proof in a criminal case, which exists because of the risk to an accused's liberty, to the issue of discharge from bankruptcy arising from a finding of a dishonest or reprehensible conduct in civil proceedings.⁷

The failure of the debtor to provide its books and records to the receiver may constitute non-cooperation and a breach of its obligations under s. 245(3) *BIA*.⁸

Footnote(s)

¹ *B (MW) v. B (AR)*, [2014] B.C.J. No. 3019, 2014 BCSC 2309.

² *Chambre de la sécurité financière v. Thibault*, [2016] Q.J. No. 13897, 2016 QCCA 1691.

³ *Mutual Transportation Services Inc. v. Saarloos*, [2020] N.S.J. No. 229, 2020 NSSC 198.

⁴ *Air Canada (Re)*, [2006] O.J. No. 5070, 28 C.B.R. (5th) 317 (S.C.J.) at paras. 43–44; see also *Belair v. Gottschlich*, [2008] A.J. No. 813, 2008 ABQB 47. In *R. v. Manziros*, [2004] M.J. No. 200, 2004 MBQB 121, the defendant was subject to a mandatory payment of retail sales tax and interest in a prosecution under the *Manitoba Retail Sales Tax Act*. After a guilty plea, but before sentencing, the debtor declared bankruptcy. At sentencing, the provincial court Judge refused to make the order of repayment required by the Act. On appeal, the Court upheld the refusal on the basis that the repayment provisions were not a "penalty". In dicta, the Court noted that subs. 178(1)(a) contemplates orders made in the course of sentencing of an accused in a criminal proceeding, and that the manner in which these orders come into existence, in the context of the principles of sentencing, distinguishes them from a mandatory administrative order.

⁵ *Chartered Professional Accountants of Ontario v. Gujral*, [2020] O.J. No. 2934, 2020 ONCJ 307.

⁶ *Gaunt v. Hawes*, [2012] N.S.J. No. 455, 2012 NSSC 305, affd [2013] N.S.J. No. 157, 2013 NSCA 40, leave to appeal to SCC refused [2013] S.C.C.A. No. 504.

⁷ *Alberta Securities Commission v. Hennig*, [2020] A.J. No. 73, 2020 ABQB 48:

[76] There is nothing in the language of subsection 178(1)(e) that requires that the false pretence or fraudulent misrepresentation be made to the party claiming the exception. A purposive interpretation of the subsection in view of the intention of section 178 - 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 interesting public and promoting the integrity of the capital markets, in circumstances that would otherwise fit within the subsection. This case does not involve an unrelated creditor seeking to invoke the subsection, but a

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regulatory authority representing the interests of those affected by the fraudulent misrepresentations and/or false pretences.

[77] I find that the administrative penalty survives Mr. Hennig's discharge after bankruptcy pursuant to the exception set out in section 178(1)(e).

8 *Townsgate Homes Inc. v. Owens Wright LLP*, [2023] O.J. No. 2350, 2023 ONSC 3086.

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