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Bankruptcy and Insolvency Act

Bankruptcy law doesn't exist to protect debtors' fraudulent conduct, judge rules

By **Ian Burns**

(January 30, 2020, 9:37 AM EST) -- A judge has determined a securities penalty imposed against an Alberta man still has to be paid despite his emerging from bankruptcy, a decision the lawyer for the provincial securities commission is calling a first in Canada.

The decision in *Alberta Securities Commission v. Hennig* 2020 ABQB 48 has its genesis in a June 2008 ruling by a panel of the Alberta Securities Commission (ASC), which found Theodor Hennig had violated a number of Alberta securities laws, among them misrepresentation, market manipulation and insider trading. The panel imposed a $400,000 administrative penalty against him and also required payment of $175,000 for costs.

In July 2011, Hennig declared bankruptcy, from which he was discharged in 2015. Under the *Bankruptcy and Insolvency Act*, a bankrupt individual is released from all claims after a discharge, but s. 178(1) of the Act sets out a number of exemptions to that rule, including fines or penalties imposed by a court, or debt or liability arising out of fraud, embezzlement, misappropriation or obtaining property or services by false pretenses or fraudulent misrepresentation.

Hennig argued s. 178(1) only applies to fines or penalties imposed by courts in criminal or quasi-criminal proceedings, and he cited a number of cases that he said backed up this claim (*Air Canada (Re)* [2006] O.J. No. 5070; *Belair v. Gottschlich* 2008 ABQB 47; *R. v. Manzioros* 2004 MBQB 121). The ASC, for its part, argued that its findings did amount to such a penalty as, once the commission's decision is filed it is a judgment of the court. The ASC panel's decision on *Hennig* was later upheld by the Court of Appeal (*Alberta (Securities Commission) v. Workum* 2010 ABCA 405).

And Justice Barbara Romaine of Alberta's Court of Queen's Bench found the exceptions set out in s. 178(1) "exist to ensure that debtors who have been found to have engaged in fraudulent or dishonest conduct are not entitled to a discharge." She added the cases cited by Hennig were decided in circumstances different than the one at bar.

"This case does not involve an unrelated creditor seeking to invoke the subsection, but a regulatory authority representing the interests of those affected by the fraudulent misrepresentations and/or false pretenses," she wrote in her Jan. 18 decision. "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."

Justice Romaine then issued a declaration granting the ASC a new judgment against Hennig for the amounts remaining due and unpaid on the judgment.

Erin Viala of HMC Lawyers LLP, who served as counsel for the ASC, said the decision is a "positive development in the law." She noted the decision is the first time a securities regulator's penalty has been considered with respect to s. 178(1).

"It just affirms the important work the ASC does. It is there to deter the reprehensible conduct which has the effect of undermining public markets for everyone and putting investors at risk," she said. "We are pleased the court agreed the bankruptcy system shouldn't be used to undermine that important work."

Viala said the decision means the categories of judgments that are caught by s. 178(1) are "not closed and the courts will take a purposive approach and look at what the intention was behind the section in determining whether a particular case falls under it."

"Opposing counsel argued the case law is clear on the point that s. 178(1) doesn't apply to this circumstance, and we said, while there might be some case law that seems analogous, it doesn't consider a securities penalty in the context of misconduct in public markets," she said. "The clear implication here is that those who have breached securities laws and have had penalties levied against them are going to have to deal with the securities regulator to address the penalty — they can't simply rely on a bankruptcy."

Counsel for Hennig did not respond to a request for comment.

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