IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
**Citation:** Coyle (Re), 2011 NSSC 238

**Date:** June 20, 2011
**Docket:** B 31647
**Registry**: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 31647
Estate No. 51-1034823

In the Matter of the Bankruptcy of Leslie Coyle

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D E C I S I O N

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**Registrar**: Richard W. Cregan, Q.C.

**Heard:** March 15, 2011

**Counsel:** Andrew Waugh representing Leslie Coyle

Jonathan Shapiro representing the Minister of Human Resources and Skills Development Canada

Tim Hill representing the Superintendent of Bankruptcy

Introduction

[1] The Applicant, Leslie Coyle, made an assignment in bankruptcy on January 31, 2008. She was granted a conditional discharge on February 6, 2009 and an absolute discharge on March 25, 2009. Her Trustee was deemed discharged on December 8, 2009.

[2] Among her liabilities was a debt of $5,689.00, owed to Social Development Canada, representing overpayments made to her by the Canada Employment Insurance Commission (Commission) in 2006 and 2007, and related penalties. This debt consists of three distinct claims. Each was appealed by her to the Board of Referees established under the *Employment Insurance Act*, Stats. Can. 1996, c.23 (*EI Act*) at hearings held, one on February 5, 2008 and the other two on December 17, 2008. Each claim was confirmed by the Board with a finding that she had received benefits by knowingly failing to declare all her earnings. Subsequent to her discharge and that of her trustee, the Commission has been using the remedies provided in the *EI Act* to secure repayment of this debt, taking the position that this debt is not released by her discharge, being a debt referred to in Paragraph 178(1) (e) of

the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA)*, which I quote:

> (e) any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim.

[3] She asks for a declaration that, there not being a judgment from a civil or criminal court that the debt was obtained by fraud, it is not covered by this Paragraph and thus does not survive her discharge from bankruptcy. The underlying issue in this application is whether a decision of a Board of Referees under the *EI Act* is a competent judicial determination of whether the debt is covered by this paragraph.

[4] It is agreed by the Applicant, the Commission and the Office of the Superintendent of Bankruptcy (OSB) that this application is properly before this Court and me as Registrar in Bankruptcy.

Legislative Background

[5] Entitlement to Employment Insurance is governed by the *EI Act.* It is administered by the Commission. Its purpose is to provide income to those

who qualify during periods of unemployment. Such persons make application to the Commission which, at the administrative level, determines entitlement to benefits. The *EI Act* gives authority, in Section 38, to the Commission to impose penalties on claimants for various acts or omissions. I quote relevant portions of this Section:

> **38.** (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has
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> (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
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> (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
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> ( c ) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;
>
> (d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

Overpayment of benefits is addressed in Sections 43 and 44 which I quote:

> **43.** A claimant is liable to repay an amount paid by the Commission to the claimant as benefits
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> (a) for any period for which the claimant is disqualified; or
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> (b) to which the claimant is not entitled.
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> **44.** A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay

> return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

[6] Section 111 establishes Boards of Referees. Members of Boards are employers and insured persons or their respective representatives. They sit in three person panels. Decisions of the Commission may be appealed to a Board under Section 114. A Board has the authority to fully review the record of a decision made by the Commission, hear further evidence, and make its own finding respecting a claim.

[7] Decisions of a Board may be appealed to an Umpire appointed under Section 112. Umpires are Federal Court judges or judges or former judges of superior or provincial courts. Such an appeal is as of right, but the grounds are limited to questions of natural justice and errors in law.

[8] There are two provisions in the *BIA* where fraud must be considered in the context of discharge from bankruptcy. One is in Subsection 173(1), specifically Paragraph (k):

> the bankrupt has been guilty of any fraud or fraudulent breach of trust.

This is one of the facts referred to in Subsection 172(2). If proved, it

requires harsher conditions to be imposed on a bankrupt for discharge than is provided in Subsection 172(1). The other is in Subsection 178(1). It provides that discharge from bankruptcy does not release the bankrupt from the various debts listed, including those described in Paragraph 178(1)(e).

[9] In the first situation, if there has been a finding of fraud by a competent civil court or criminal court, the record of such will be sufficient to prove fraud for the limited purpose of Subsection 172(2). If such is not available, one would think that it could be proved as part of the discharge proceedings as would be done with the other facts in Subsection 173(1). However, as will be shown in cases considered later, there is great reluctance to allow fraud to be proved at discharge hearings. The result may be that the conditions of the bankrupt's discharge shall be based on the less onerous provision of Subsection 172(1), notwithstanding that a fraud on the part of the bankrupt could be proved.

[10] In the other situation, consideration must be given to how a creditor can take advantage of its claim continuing to be enforceable notwithstanding bankruptcy. If there is a judgment to this effect, that is, a finding of fraud

has been made or has been acknowledged in a settlement prior to bankruptcy, it can proceed to collect without any impediments. However, if otherwise, what does it do? It appears that it must bring a civil action alleging fraud in a superior court or possibly in an inferior court or other body given appropriate judicial authority. These proceedings are of course subject to the stay of proceedings provisions in Sections 69 to 69.4 of the *BIA*.

Case Law

[11] In Nova Scotia, *Schnare (Re)* (1991), 15 C.B.R. (3d) 255, a decision of Davison J of this court, has been the primary authority on how fraud under Paragraph 173(1)(k) is to be established. The Registrar had made a finding that a line of credit obtained by the bankrupt from a trust company was obtained as a result of the misrepresentation of the value of his assets and failure to disclose relevant tax liability. He ordered that the balance of the line of credit should survive discharge. In considering the appropriateness of the Registrar's decision, Davison J relied on a passage from L.W. Houlden and C.H. Morawetz, Bankruptcy Law of Canada, 3rd ed, at page 6-65 which I quote:

> In order for an objecting creditor to successfully demonstrate to the Bankruptcy Court that the bankrupt has been guilty of any fraud or fraudulent breach of trust within the meaning of s.173(1)(k), or has incurred any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation within the meaning of s.178(1)(e), the Bankruptcy Court must be presented with a clear finding of those elements by a criminal court or by a judgment in a civil action. The matter of fraud is so serious that it is not one that ought to be examined and inquired into in summary proceedings for discharge of the bankrupt. The issue of fraud, deceit and false pretenses must be fully inquired into in appropriate proceedings by either a civil or criminal court, and a bankruptcy court, on an application for discharge, will only entertain an objection based on those elements if one or more of them have been expressly found by a civil or criminal court.

and a passage from *Re Kemper* [1961] O.W.N. 288(S.C.) at page 291 which I also quote:

> I do not think the Bankruptcy Act contemplates that on an application by the debtor for his discharge an issue might be directed to determine whether he was guilty of fraud. I think there has to be a conviction or a finding by a judgment of the Court in a civil proceeding indicating fraud or fraudulent breach of trust before the bankrupt can be considered to be guilty of fraud or fraudulent breach of trust so as to make s.130(1)(k) applicable on the application for the bankrupt's discharge. Apart from enabling this to be shown, I do not think the Court on such an application should enter upon an inquiry as to whether the bankrupt had been guilty of fraud or fraudulent breach of trust. When a creditor claims his debt or the liability to him arose as a result of fraud, fraudulent misrepresentation or false pretences, the proper procedure in my opinion is to leave the creditor with his ordinary remedy which is reserved to him under s. 135(1)(e).

[12] The overriding concern is the seriousness of fraud and thus the requirement of strict proof in obtaining a judgment in a civil court or conviction in a

criminal court. The summary proceedings which usually characterize discharge proceedings are thought not to provide the safeguards which must be respected in proving fraud.

[13] Davison J ruled that the condition imposed by the Registrar in the discharge proceeding, namely that the bankrupt consent to a judgment in favour of the trustee, was inappropriate simply because these safeguards were not available.

[14] As a result the bankrupt was granted an absolute discharge. This case is then authority that at a discharge hearing a fact under Paragraph 173(1)(k) can only be proved by a judgment of a civil court or a criminal conviction in the nature of fraud or fraudulent breach of trust. If such is not available the bankrupt can obtain an absolute discharge, something he would not have obtained, if the fact could have been proved at the discharge hearing. The creditor is left to pursue its claim outside the bankruptcy proceedings. I am not aware of discussions which would similarly limit proof of the other facts listed in Subsection 173(1). The same concerns apply in determining whether a debt is covered by Paragraph 178(1)(e).

[15] A similar approach was taken by McClung JA in *Canada (Attorney General)* v. *Bourassa (Trustee of)*, 2002 ABCA 205. It concerned a bankrupt against whom the Commission had used its administrative procedures to determine that a debt owed to it arose from fraud. The Commission was not present at the discharge hearing. The discharge was granted, but at the request of the Trustee the order provided that a further court application would have to be made by the Attorney General, if it wished the debt be treated as exempt from discharge under Paragraph 178(1)(e). The understanding before the Registrar and the Appeal Judge was that a court declaration that the debt survives bankruptcy was required and that proceedings under Section 38 of the *EI Act* were inadequate. This situation is well summarized in paragraph 6:

> The case law reflects the various ways in which such orders can be sought. For example, when a pre-bankruptcy judgment does not contain an express finding of fraud, a creditor can either seek a declaration of fraud at the time of the discharge application or he can seek a declaration from the Court of Queen's Bench after the discharge: Berthold v. McLellan (1994), 19 Alta. L.R. (3d) 28 (C.A.). Furthermore, if no judgment exists at the time of the bankruptcy, a creditor may subsequently initiate an action to recover the debt, pleading fraud. If the creditor can prove fraud, the existence of the discharge from bankruptcy will be no defence to the action: Moose Jaw Credit Union Limited v. Kennedy (1981), 13 Sask. R. 252 (Q.B.): Canadian Imperial Bank of Commerce v. Aksoy (1989), 75 C.B.R. (N.S.) 248; [1989] O.J. No. 867 (Ont. Dist. Cr.). On the other hand, when a judgment, which pre-dates

> the bankruptcy, expressly finds fraud, no further court order would be needed before the creditor may pursue collection of its debt: Smith (Re) (1985), 43 Sask. R. 27 (Q.B.), aff'd (1986), 45 Sask. R. 240 (C.A.). The same is true of a consent judgment from which an admission of fraud can be inferred: Beneficial Finance v. Williamson (1971), 16 C.B.R. (N.S.) 30 (Ont. Co. Ct.); Demitor (Re) (1993), 137 A.R. 381 (Master).

[16] McClung JA was satisfied with the submission of the Trustee that the decision of the Commission is not a satisfactory finding of fraud for the purpose of Subsection 178(1). He confirmed the Registrar's order which provided for discharge but with provision that a further court application would be needed to determine whether there was fraud. This decision can only be taken as authority that an administrative determination of fraud by the Commission is not sufficient for purposes of Subsection 178(1). It does not help in the present case because the decision of the Commission was confirmed at the higher level of the Board of Referees.

[17] Fraser C.J.A. in her separate decision, agreed with this disposition, but with some qualification. She also usefully reviewed relevant provisions of the *EI Act*.

[18] She noted that Section 38 of the *EI Act* provides the statutory authority for

the Commission to make determinations as to whether benefits have been obtained by representations known to be false and misleading or by providing information required by the *EI Act*, knowing it to be false or misleading. Of this she said at Paragraph 27:

> It is clear that the common denominator in more than one subsection of s. 38 is that the claimant must have made a representation, claim or declaration which the claimant knew was "false or misleading". While other subsections of s. 38 do not use the words "false or misleading", the proscribed conduct outlined in them could nevertheless arguably bring the resulting debt within the scope of s. 178(1)(e) of the Bankruptcy Act.
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> (underlining added)

[19] She reviewed the extensive remedies given to the Commission to recover such debts, remedies not available to other creditors, as well as, the binding nature of its decisions unless they are appealed. Simply put the impact of the legislative scheme is that the Commission has a procedure to follow in making findings of fraud and enforcing them. They stand unless appealed.

[20] The question then becomes whether a debt for which a penalty is imposed by the Commission under Section 38 is a "debt or liability for obtaining property by false pretenses or fraudulent misrepresentations?"

[21] These two cases, both following *Re Kemper*, simply note the seriousness of fraud, and assert that it is inappropriate to establish it in the summary manner in which discharge applications are usually held. That is all they decide.

[22] Paragraph H§ 54 (4) of *Houlden, Morawetz and Sarra*: Bankruptcy and Insolvency Law of Canada, Fourth Edition, beginning at page 6-220 reviews these cases and is in substantial agreement with the view that discharge hearings are not a proper forum for making findings of fraud. However, it acknowledges that there may be cases where it is so clear that the bankrupt has committed fraud that it may be appropriate to so decide at the discharge hearing. I quote this following paragraph beginning at page 6-221:

> An excellent summary, it is submitted, of when the court should make a finding of fraud on an application or discharge and when it should not make such a finding but should refer the matter to be determined in other proceedings is contained in the judgment of Forsyth J. In *Re Herdman (1982)*, 10 C.B.R. (3d) 33, 128 A.R. 127, 1992 CarswellAlta 278 (Alta. Q.B.) where the learned judge said:
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> > ...I am not satisfied that the Bankruptcy Court could never find that the bankrupt was "guilty of any fraud or fraudulent breach of trust", for the purpose of s. 173(1)(k), without proof of a judgment or conviction for fraud or fraudulent breach of trust. Where the question of fraud by the bankrupt has been dealt with by a court, then it would seem inappropriate for the Bankruptcy court to enquire

> further into the matter or second guess the decision of that other court. But where fraud is first alleged against the Bankrupt at the Discharge Application, it would seem that in an appropriate case, where the evidence of fraud was clear and unequivocal, the Bankruptcy judge could determine the matter on the evidence for the purposes of s. 173(1)(k). Alternatively, if necessary the judge could direct the issue to be tried, and thus not tie up the discharge application procedure with an in-depth evidentiary inquiry.

[23] In *Re Gushue,* 2004 NSSC 64 I followed this commentary in deciding at the discharge hearing that it was appropriate to make a finding of fraud. Also I would observe that the scope of discharge hearings can be expanded, using the Rules of Civil Procedure to assure proper treatment of fraud, if such is convenient.

[24] *Manitoba Securities Commission* v. *Werbeniuk*, 2009 MBQB 57 (Scurfield, J.) contains a number of useful observations regarding the competency of inferior courts and quasi judicial boards. It considered proceedings before the Manitoba Securities Commission where it was alleged that a person committed a breach under the *Securities Act*, namely trading in securities without being registered. This was clearly within the statutory jurisdiction of this Commission. As well it considered whether findings of this Commission could be used to determine whether the obligations in question

survive bankruptcy under Subsection 178 (1).

[25] Speaking of the caution which must be exercised by courts while dealing with fraud, as expressed in *Re Bourassa,* the following was said:

> 28 That caution surely extends to a process where the issue is not squarely engaged because of the limited jurisdiction of the entity that is adjudicating the issue. Thus, although a finding of fraud by a court or statutory tribunal removes the necessity of any further proceeding to determine the issue, I am satisfied that the issue must have been squarely presented to the judicial entity in a manner that give notice to both sides that the issue will be adjudicated. Proof of a form of fraud must be at the heart of the factual determination that the court, board or commission is obliged to make, or at least it must be logically and predictably incidental to it.
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> 29 Although the majority of the court in *Bourassa, supra* takes the position that there must be a "court order declaring fraud", Fraser C.J.A., in dissent, suggests that an independent statutory tribunal that has the jurisdiction to make a fact-finding that is akin to fraud could also make a ruling that permits a creditor to rely on the section 178(1) exemptions.
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> 30 My view of the majority decision in *Bourassa* leads me to conclude that they did not really turn their minds to the effect of a finding of fraud by a properly constituted independent board or commission. That is because in *Bourassa*, they found that the employment insurance commission was not functioning in an independent fashion. It was in essence both creditor and adjudicator. Consequently, they did not have to decide the effect of a ruling by an independent statutory tribunal.
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> 31 In contrast, a claim before the Commission is being advanced by an independent claimant. In some instances, the Commission is obliged to adjudicate offences where there is an allegation that funds were obtained from the claimant as a result of knowingly false statements being made to the claimant. If, after a hearing into such an allegation, the Commission makes a finding that the person charged with this offence has acted in a fraudulent manner,

> the claimant ought to be able to rely on this ruling and enforce a compensation order as if it were a judgment of this court. In contrast, if the allegation before the Commission is simply that an individual traded in securities without having been registered to do so, the function of the Commission is simply to determine whether or not that occurred. Simply put, if a form of fraudulent activity is not alleged, the Commission does not have the jurisdiction to make a finding of fraud simply to accommodate the claimant. Its jurisdiction depends on the charge presented to it.
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> 32 The charge against Mr. Werbeniuk is that he traded in securities without having been registered to do so. Mr. Werbeniuk can plead guilty to these charges or defend these charges without anticipating a hearing into an allegation of fraudulent conduct. It is not the Commission's function to enlarge the inquiry simply to accommodate the claimant. In these circumstances, if the claimant wishes to proceed, the claimant should file an action in the civil courts alleging fraud.
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> (underlining added)

[26] What the foregoing in effect says is that a finding, such as fraud, within the jurisdiction of a particular court or quasi judicial body must be respected in other proceedings, if the basis for it is a matter properly before that body.

Position of the Applicant

[27] The Commission administratively found that the Applicant had fraudulently obtained benefits. The Board of Referees heard her appeal, and confirmed this finding. The procedures provided by the *EI Act* were then followed to collect the benefits wrongfully received and the penalties.

[28] The Applicant says that the proceedings before the Board are not sufficient for the finding of fraud. A more authoritative judicial finding of fraud is needed.

[29] The Applicant relies on the line of cases reviewed above which essentially says that there must be a court order or a criminal conviction for a claim to be characterized as fraudulent. The suggestion is that only a superior court is competent to make such a finding in the civil context. Registrars in Bankruptcy, Small Claims Court Adjudicators, and statutory bodies such as a Board of Referees or a Securities Commission and the like lack competency. Nothing is said of inferior courts in criminal matters. The reasoning is that only these courts provide the procedural protection expected when one deals with fraud.

[30] In regard to Boards of Referees, the Applicant notes that the members are not legally trained. They have no subpoena power, nor discovery procedures. The rules of evidence are relaxed. The Applicant also submits that, even though the decision of a Board may be appealed to an Umpire who is a judge, the record from a Board would be faulty. The Umpire can

only deal with matters of law. Without a good record, one with the benefit of the procedural protections found in superior or criminal court proceedings, the Umpire will not be able to address the shortcomings of the Board.

[31] The Applicant also refers to rules of statutory interpretation. In the early paragraphs of Subsection 178(1) reference is made to certain debts like fines, restitution orders, and maintenance orders which are crystalized in actual court orders. The other paragraphs and particularly (e) are silent about orders. The appellant submits that the inclusion of the word "order" is to be implied.

[32] In summary, the Applicant says that fraud on her part has not been competently established. The debt to the Commission is not covered by Paragraph (e) and thus does not survive her discharge from bankruptcy. She seeks a declaration to this effect.

Position of the Commission

[33] The Commission submits that there are two questions to be determined.

Simply expressed, one is whether a judicial finding of fraud from a superior court is required to engage Paragraph 178(1)(e) of the *BIA*. The other is whether, if a superior court judgment is not required, is a finding of a Board of Referees under the *EI Act* sufficiently authoritative to engage this Paragraph.

What it seeks, to quote its counsel's brief, is:

> ...a finding that a debt was incurred by false pretences or fraudulent misrepresentation by an independent statutory tribunal with authority to squarely adjudicate that issue and with the ability to review evidence, question witnesses and make findings of fact is sufficient to engage section 178(1)(e).

Position of the OSB

[34] The OSB raises three issues;

1. Whether the Commission itself is competent to make a finding of fraud so as to engage Paragraph 178(1)(e);

2. If the Commission is not competent, whether the Board of Referees is competent to make a similar finding; and

3. Whether the proceedings of the Board in the present case are of any force or effect having taken place during the period in which all proceedings against the Applicant were stayed by Section 69.3 of the *BIA*, no application for lifting the stay having been made.

[35] As to the first issue, its submission is that the Commission itself, being a

creditor and having a limited process which does not ensure fairness, is not an appropriate body to make a finding. As to the second issue, it submits that a Board of Referees, having jurisdiction over the subject matter and having fair procedures, is an appropriate body.

[36] The third issue was only raised by the OSB the day before the hearing. The other parties were not prepared to deal with it. It was agreed that once this decision is issued, there will be a further hearing to allow the OSB to make its submissions and the other parties to respond.

Statutory Interpretation

[37] Counsel for the Commission made submissions regarding the principles of statutory interpretation as applied to how the requirements of Subsection 178(1) are to be interpreted. Simply put in Paragraphs (a) and (a.1) a court's determination, imposition or judgment is necessary before the debt in question is to survive bankruptcy. However, Paragraph (e) does not require any determination by a court to give this status to the debt. If there is a debt arising from fraud, it is not discharged by bankruptcy whether it has been reduced to a judgment or not. A court will enforce it, if it is proved, at any

time. This is in contrast to the debts mentioned in Paragraphs (a) and (a.1). Fines, penalties, etc. do not have existence until they are imposed by a court. They are creatures of statutes, e.g. the Criminal Code. In Paragraph (a.1) the cause of action is specified and the award must have been determined by a court prior to bankruptcy.

[38] Counsel for the Commission submits that this is consistent with the maxim of the statutory interpretation of "implied exclusion" or "expessio unius est exclusion alterius". He refers to the following from Ruth Sullivan: *Sullivan on the Construction of Statutes*, Fifth Edition, at page 244.

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded.
>
> When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.

Applying this maxim it is submitted that, because Parliament does not specify a court judgment that the debt is fraudulent, one is not required.

[39] Counsel for the Applicant argues that the maxim of "implied exclusion"

should be used with caution and suggests that there may be various reasons why the requirement for a court order is used in some situations and not in others.

[40] One should not resort to maxims of statutory interpretation where a clear and reasonable meaning can be given by simply reading the words and giving them their natural meaning. I think Parliament has clearly listed what debts survive bankruptcy. Paragraphs (a) and (a.1) talk about court imposed debts, ones which would not exist, but for court proceedings under certain statutes, and awards of damages by courts under certain causes of action. No mention is made of court orders in Paragraph (e). The obvious meaning is that a debt arising from false pretences or fraudulent misrepresentation is intended by Parliament to survive the discharge of the bankrupt whether or not it has been reduced to a judgment.

[41] Accordingly I do not think that there is any difficulty in interpreting Paragraph (e) to cover debts which may be characterized as fraudulent, regardless of whether or not they have been crystallized in a judgment or conviction. Resort to maxims of statutory interpretation is not needed.

Analysis

[42] There is no dispute that the Applicant obtained benefits to which she was not entitled and received them because she gave information to the Commission which she knew was false. Eventually that is what the Commission administratively determined and the Board of Referees judicially confirmed. What is in dispute is whether this finding is adequate to declare the debt one described in Paragraph 178(1)(e) of the *BIA* so that it survives the Applicant's discharge from bankruptcy.

[43] The Applicant, relying on the *Re Kemper* line of cases, insists that the only acceptable proof of fraud for this purpose is a judgment based on fraud given by a civil court or a criminal conviction. The Commission and the OSB agree with the Applicant that an administrative finding by the Commission is not sufficient. However, the Commission and the OSB submit that a Board of Referees is competent to make such a decision provided the issues involved are an essential part of the decision it is called upon to adjudicate.

[44] I find Chief Justice Fraser's discussion in *Bourassa*, although by way of

*obiter dicta*, helpful. She observes that Section 38 *(EI Act)* comes into play where a claimant has made a representation knowing it to be false or misleading or otherwise such as to bring the claim under Paragraph 178(1)(e) (BIA). Such debts are recoverable under Section 43 (*EI Act*). Parliament has given the Commission a wide range of remedies to enforce collections not available to other creditors, but at the same time there are appeals at three levels, Boards of Referees, Umpires and judicial review before the Federal Court of Canada. Notwithstanding these remedies the burden remains on the Commission throughout to prove the representation was false or misleading.

[45] If the claimant does not make use of the appeal process, the Commission's finding under Section 38 is *res judicata* as between the claimant and the Commission. I further quote Chief Justice Fraser:

> 41 But whether a Commission decision is binding is not the only issue to be resolved. Its binding effect is one thing; its scope another issue altogether. This takes me therefore to the other key issue, the scope of the Commission's decision. In particular, does the Commission's imposition of a penalty under s.38 necessarily mean that the underlying debt is a "fraudulent" one within the meaning of s.178(1)(e) of the *Bankruptcy Act*? In other words, is a debt in respect of which a penalty has been levied by the Commission under s.38 of the *EI Act* necessarily a "debt or liability for obtaining property by false pretences or fraudulent misrepresentation"?

> 42 To resolve this issue, one would be required to compare the foundational elements of a "fraudulent" debt within the meaning of s.178 (1)(e) of the *Bankruptcy Act* with the foundational elements required for the imposition of a penalty under s.38. The purpose of this analysis would be to determine whether a finding under s.38 of the *EI Act* that a penalty is warranted because of a "false and misleading" EI claim is tantamount to a finding that the underlying debt is a "fraudulent" one within the meaning of s.178(1)(e) of the *Bankruptcy Act*.
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> 43 If the foundational elements were found to be congruent, then it may well be that fraudulent debts under the *EI Act* are subsumed in fraudulent debts under s.178(1)(e) of the *Bankruptcy Act*. In that event, then the Commission decision under s.38 would arguably be conclusive on this point and the subject debt exempt from discharge under s.178(1)(e).

[46] Each adjudicative body must act within the confines of the legislation which created it. Can fraud be properly determined by the Board of Referees and the appeal processes that follows it? Did Parliament intend that, looking at the whole of the *EI Act*, the Board of Referees is to make judgments on such matters?

[47] The procedures laid out in the *EI Act* for the administrative determination of such matters by the Commission and for the judicial review by a Board of Referees, an Umpire and further by the Federal Court, I take to be a clear statement by Parliament that claims under the *EI Act* including those involving fraud are to be competently dealt with as so provided.

[48] I note that findings of fraud have been or have been directed to be made by other inferior courts. In *Graves* v. *Hughes*, 2001 NSSC 68, Moir J considered whether a Small Claims Court Adjudicator could make a finding of fraud which would result in the underlying debt surviving bankruptcy. I quote paragraph 12:

> I see nothing in the *Bankruptcy and Insolvency Act* which confers jurisdiction on the Bankruptcy Court exclusively to determine whether a debt falls within s.178(1)(e). In my opinion, the role of the Bankruptcy Court in this connection is to grant or refuse leave to a creditor who maintains its debt is within s.178(1)(e) where the creditor wants to have that issue determined in the ordinary courts while the bankruptcy is under administration. Once the administration is terminated by discharge of the trustee, the Bankruptcy Court ceases to have a function in this regard because leave is no longer required. Nothing in the *Bankruptcy and Insolvency Act* precludes the ordinary civil courts from deciding, after discharge of the bankrupt and trustee, whether a liability has been extinguished by bankruptcy and particularly, whether a liability is within s. 178(1)(e). While I agree with Registrar Hill that the summary nature of hearings before the Bankruptcy Court is often put forward as a rationale by which that court sometimes defers factual determinations to the ordinary courts, I do not think that rationale differentiates among the various ordinary civil courts. <u>The only question is whether the statutory jurisdiction of the Small Claims Court is broad enough to permit it to determine whether a claim is within s. 178(1)(e) when that issue must be resolved in order to determine a cause before the court</u>. The claim before Adjudicator Beveridge was not within any of the exceptions in s.10 of the *Small Claims Court Act*. The cause was within the subject matter jurisdiction conferred by s.9(a) and it was within the monetary limit to that otherwise broad jurisdiction. The issue of s.178(1)(e) arose on the facts. In my opinion, the learned Adjudicator had the jurisdiction and the obligation to determine that issue.
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> (underlining added)

[49] *Swing Stage Equipment Rentals Ottawa, a Division of 1443760 Ontario Inc.* v. *Element Glass Inc*., 2011 ONSC 1087, acknowledged that a Deputy Judge of the Small Claims Court was competent to make a finding as to whether a debt was covered by Paragraph 178(1)(e). Both of these cases are consistent with the comments in *Werbeniuk* and the comments of Chief Justice Fraser in *Bourassa*.

[50] Let me paraphrase the underlined question of Moir, J. In the *Graves v. Hughes:*

> The only question is whether the statutory jurisdiction of the Board of Referees is broad enough to permit it to determine whether a claim is within s.178(1)(e) when that issue must be resolved in order to determine the appeal which is before it.

This is the question which I must answer.

[51] One must carefully look at the finding of the Board of Referees and be satisfied that it actually has made a judicial determination that what happened has all the elements in Paragraph 178(1)(e):

- a debt or liability,
- resulting from obtaining property or services,
- by false pretences or fraudulent misrepresentation,

and this finding was necessary for the disposition of the appeal.

[52] The money in issue is claimed by the Commission. It is acknowledged that the money was owing to the Commission at the time of the Applicant's assignment. It was then a debt or liability. It is listed on her statement of affairs. Property, that is the benefits, was obtained. Again this is not disputed. Did she obtain the money by false pretences or fraudulent misrepresentation? I need only consider the elements of fraudulent misrepresentation.

[53] On the authority of *Derry* v. *Peek* (1889), 14 App. Cas. 337, and several later cases Houlden and Morawetz at page 6-271 says:

> To establish fraudulent misrepresentation, the following must be proved: (I) the making of a representation; (ii) the representation was false; (iii) the representation was made knowingly, without belief in its truth, or recklessly indifferent whether it was true or false; (iv) the creditor relied upon the representation and turned over property to the debtor.

[54] I have reviewed the three decisions of the Board of Referees. It is not for me to review the Board's reasoning or whether it came to the right or wrong determination. It is rather for me to determine whether the Board found that

she had knowingly made a false representation without belief in its truth or with reckless indifference to the truth or falsely of it, and was relied upon by the Commission. This is to be done simply by looking at the text of the concluding paragraphs of each decision. They state that she made representations which led to her receiving benefits. They were false. She had failed to report certain income. Each decision makes it very clear that there was a finding that the claimant either knew or ought to have known that she was making false and misleading statements when she completed her application for benefits. The Commission relied on her representations in providing the benefits.

[55] The imposition of the penalty under Section 38 of the *EI Act* as well confirms the finding that she had:

> (a) in relation to a claim for benefits, made a representation that the claimant knew was false or misleading.

In substance these words mean the same thing as is found in the *Derry* v. *Peek* test. There is thus a decision of the Board that has the effect of declaring that the debt is as described in Paragraph 178(1)(e) and this decision on the part of the Board was necessary for it to carry out the

responsibility assigned to it by the *EI Act*. I think it is for me to adopt the observations of Chief Justice Fraser in *Bourassa* and of Surfield, J. in *Werbeniuk* and conclude that a fair reading of the provisions of the *EI Act* demands the conclusion that Parliament intended the Board of Referees to be able to make findings of fraud in order to deal with the questions before it. My paraphrase of Moir, J's question is answered in the affirmative.

Conclusion

[56] The cases following *Re Kemper* only stand for the proposition that findings of fraud for the purposes of Paragraph 173(1)(k) and Paragraph 178(1)(e) of the BIA are not to be made at discharge hearings. They are too summary in nature to provide the care expected when fraud is alleged. *Re Herdman* holds that this position is not absolute. There may be situations where fraud is so obvious that it may safely be determined in discharge proceedings.

[57] The finding of fraud in the present case was not at a discharge hearing, rather it was first done in an administrative proceeding by the Commission and confirmed judicially by a Board of Referees. I am satisfied that a Board of Referees is equipped by its enacting legislation to competently make

findings of fraud contemplated in Paragraph 178(1)(e). The task before the Board under the authority of the *EI Act* was to determine whether the Applicant must return certain benefits. It was essential to this task that the Board consider whether there was such fraud. I am also satisfied that the fraud found by the Board of Referees has the elements described in Paragraph 178(1)(e). The debt therefore survives the Applicant's discharge, unless the failure of the Commission to obtain a lifting of the stay of proceedings under Section 69.4 of the *BIA* directs otherwise.

[58] Accordingly this application cannot be concluded until I hear the parties on this point. I ask that the parties arrange with the Deputy Registrar a date for this purpose.

R.

Halifax, Nova Scotia
June 20, 2011