Date: 20250214
Docket: CI 24-01-48295
(Winnipeg Centre)
Indexed as: Stewart v. Auch
Cited as: 2025 MBKB 26

# COURT OF KING'S BENCH OF MANITOBA

APPLICATION UNDER: Sections 178(1)(d) & (e) and 69.4 of ***The Bankruptcy and Insolvency Act*** (R.S.C., 1985, c. B-3)

**B E T W E E N:**

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| HEATHER ANNE STEWART, | ) | Renato Y. Mamucud |
| | ) | for the applicant |
| Applicant, | ) | |
| - and - | ) | |
| | ) | |
| | ) | |
| SUSAN MARGARET AUCH, | ) | Dave G. Hill |
| | ) | Jessie Rock |
| Respondent, | ) | for the respondent |
| | ) | |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | February 14, 2025 |

## MARTIN J.

## INTRODUCTION

[1] In May 2022, Susan Auch was found personally liable for a $600,000 loan, plus interest, that Heather Stewart advanced for a business transaction in 2015 to a corporation (6551450 Manitoba Ltd.) of which Ms. Auch's holding company was the

majority shareholder. Within days, Ms. Auch had the money disbursed for uses different than were represented to Ms. Stewart. The trial judge described Ms. Auch's actions as "akin to fraud". (***Stewart v. 6551450 Manitoba Ltd. et al***, 2022 MBQB 84 (***Stewart 2022***))

[2] After exhausting all appeals, Ms. Auch remained liable for the judgment. Attempts by Ms. Stewart to collect the judgment have proven fruitless. Finally, in August 2024, Ms. Auch made an assignment into bankruptcy under s. 49 of ***The Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3, (***BIA***). One effect is to stay all proceedings against her, including Ms. Stewart's attempt to collect the outstanding judgment, which was noted to be about $1.155 million in the bankruptcy filing. It appears Ms. Stewart is the only creditor significantly disadvantaged by the bankruptcy.

[3] Undeterred, Ms. Stewart filed an application for relief under the ***BIA***, namely s. 69.4, to lift the stay of proceedings, and s. 178(1)(d) or (e) to have her debt survive Ms. Auch's anticipated discharge from bankruptcy. Any of these routes would allow Ms. Stewart to pursue collection of the judgment.

[4] For the reasons that follow, I grant the application further to s. 178(1)(e).

***Preliminary Comments***

[5] Different descriptors may be used in referring to the parties. Specifically, I may refer to Ms. Auch as the debtor, the bankrupt, or the insolvent person. Ms. Stewart may be referred to as the creditor or claiming creditor. The trial resulting in the judgment debt may be referred to simply as the trial or the original case proceeding.

[6] The key players I will refer to are Ms. Auch, her husband Mr. Campbell, Ms. Auch's holding company, and 655 (the corporation that received the $600,000 loan from Ms. Stewart).

[7] Ms. Stewart abandoned her request for relief under s. 178(1)(d). She conceded that section only applies where there is a fiduciary relationship between the debtor and creditor, which did not exist in this situation.

[8] That leaves s. 69.4 and s. 178(1)(e) for consideration. Given the potential interplay of these provisions, I will deal with s. 178(1)(e) first.

[9] Most recently, in ***Poonian v. British Columbia (Securities Commission)***, 2024 SCC 28, the Supreme Court of Canada addressed several provisions of the ***BIA***, notably s. 178(1) and, more specifically, s. 178(1)(e). I will examine that dicta shortly. However, first, for context, it would be a helpful reminder to set out the court's summary of the general purpose of the ***BIA***:

> [1] The … *BIA*, furthers two important purposes: the equitable distribution of a bankrupt's assets among creditors and the bankrupt's financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a "fresh start" when appropriate. The fresh start principle is codified in s. 178(2) of the *BIA*; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, subject to reasonable conditions, the *BIA* permits an honest but unfortunate debtor to be freed from the burdens of indebtedness and to reintegrate into economic life.
>
> [2] Financial rehabilitation operates as the general rule, such that every provable claim is presumptively swept into the bankruptcy. However, it has its limits. Through s. 178(1) of the *BIA*, Parliament has enacted specific exceptions to this general rule. An order of discharge does not release the bankrupt from a claim captured by a s. 178(1) exception. Indeed, where an exception applies, the fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy.

[10] To further these purposes, s. 69 has the effect of staying proceedings against an insolvent person, such as Ms. Auch, where the person made an assignment in

bankruptcy or otherwise has moved into bankruptcy proceedings. Under various provisions, the language of the stay of proceedings is the same or similar to that used in s. 69(1)(a):

> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt

The direct effect of the stay of proceedings provisions is to prevent one creditor from gaining an advantage over another creditor. Critically, this promotes objects of the ***BIA*** to ensure the orderly and fair distribution of a bankrupt's property amongst all creditors on a *pari passu*, or proportional, basis and enhancing the pool of property that may be available for distribution. The ***BIA*** establishes mechanisms for this by requiring a collective proceeding; creditors cannot enforce their provable claims individually.

[11] However, s. 69.4 and s. 178(1)(e) are two of several limited exceptions, which, if the prerequisites are proven, would allow a creditor to proceed against the bankrupt, albeit in different ways consistent with the particular provision.

## Section 178(1)(e)

### *The Law*

[12] As a matter of policy, consistent with the honest but unfortunate insolvent person theory of bankruptcy, s. 178(1) sets a number of non-discretionary bases or circumstances in which a bankrupt will not be relieved of certain debt obligations upon a discharge from bankruptcy. In other words, certain classes or types of debt survive bankruptcy and the bankrupt person remains obligated for the debt.

[13] Specifically, s. 178(1)(e) provides:

> 178(1) An order of discharge does not release the bankrupt from
>
> …
>
> (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

Often, proof that false pretences or a fraudulent misrepresentation were made by the debtor is relatively straightforward; other times it is not. The phrases are not defined in the ***BIA*** but have similar meanings and components such that they are, in effect, often interchangeable. The core of either phrase is a deceitful comment(s) or conduct conveying deceit. Given the issues before me do not turn on any subtle distinction between false pretences or a fraudulent misrepresentation, I will use the phrase fraudulent misrepresentation.

[14] In ***Poonian***, the Supreme Court set out certain principles for applying s. 178(1)(e):

- the exceptions in s. 178(1) must be interpreted narrowly and applied only in clear cases; "it is not a catchall of debts arising from morally objectionable conduct". The benefit of the doubt will go to the bankrupt as to whether a creditor's debt falls within an exception (paras. 26-27). The application is determined on the civil balance of probabilities standard.
- by exempting debts or liabilities that "resulted directly from deceit", s. 178(1)(e) aims to prevent debtors from "profiting as a result of their wrongdoing" (para. 56). If the debt falls within the section, there is no discretion: it is exempted from the bankrupt's discharge.

- to rely on s. 178(1)(e), the claiming creditor must establish three elements (para. 54):

    1. false pretences or fraudulent misrepresentation

        - the essential issue is that the property was obtained by deceit, whether by positive act or failure to disclose material facts;
        - the components are that (i) a representation was made; (ii) the representation was false; (iii) it was made knowingly, without belief in its truth (including willful blindness or recklessness); and (iv) the creditor relied on the representation and turned over property to the debtor (para. 62); and
        - the onus is on the creditor to prove that the debt or liability at issue was obtained by the debtor's false pretence or fraudulent misrepresentation (para. 66). There are different ways to prove this:

> [67] … The most straightforward is via a prior judgment that contains findings of fact to the effect that a debt resulted from false pretences or fraudulent misrepresentation… . Where a claimant has obtained a judgment that contains sufficient findings of fact, "nothing else need be done"… . If a judgment does not make express findings as to the necessary elements, it is open to the bankruptcy court to consider the pleadings that were available to the court that rendered a prior judgment, as well as the proceedings before that other court, in order to determine whether the elements can be established on the basis of those documents. A bankruptcy court can therefore look to the entire context of the proceedings in a previous action to determine whether the judgment debt can be characterized as one falling within the ambit of s. 178(1)(e) … .
>
> [68] However, "even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings", a court must generally make its own findings of fact in applying s. 178(1)(e) of the *BIA* … .

> Courts must be "consistent and rigorous in assessing the evidence presented to them in this regard" … . It follows that "the evidence tendered to prove fraud or dishonesty must be 'clear and cogent'"… .
>
> (citations omitted)

2. a passing of property or provision of services. The Court explained:

> [73] Section 178(1)(e) does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt. It may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf … . What is required is that the fraudulent misrepresentation induced a person to give the property to some other person … . That other person may be the bankrupt or someone associated with the bankrupt.
>
> (citations omitted)

3. a link between the debt or liability and the fraud.

As concisely summarized in the case headnote:

> … the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation. This requires a direct link whereby only the debt or liability that represents the value of the property or services obtained by false pretences or fraudulent misrepresentation qualifies as non dischargeable. While in most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation, the wording of s. 178(1)(e) does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under this section provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's false pretences or fraudulent misrepresentation.

- lastly, there is no "direct victim" requirement. In other words, while most often, the person to whom the deceitful statement was made will be the claiming creditor, this is not a requirement of s. 178(1)(e). The creditor need not be the direct recipient of the deceitful statement so long as they relied on the deceitful statement and, as a result, passed or transferred the property comprising the debt or liability. Regardless, s. 178(1)(e) is limited

to the value of the property or services obtained by the false pretences or fraudulent misrepresentation (paras. 86 and 95).

***Analysis***

Issue for s. 178(1)(e)

[15] The task at hand is to properly characterize whether the original case judgment (the $600,000 debt and interest) falls within the ambit of s. 178(1)(e), such that it is an exception to Ms. Auch's ultimate discharge from bankruptcy: i.e. is it a debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation by Ms. Auch?

The Record for the s. 178(1)(e) Analysis

[16] Both parties filed affidavit evidence, albeit of a different nature, and cross-examined on the affidavits.

[17] Ms. Stewart's evidence deposed background information about the $600,000 loan, quoted from the judgment, set out a short exchange from the trial during which Ms. Auch concisely explained the appeals, attempts at a judgment sale, Ms. Auch's assignment into bankruptcy and detailed Ms. Auch's various assets and debts.

[18] Ms. Auch's affidavit explained some brief background of the claim, judgment and appeals. The balance refuted negative assertions by Ms. Stewart and explained her actions leading to the assignment into bankruptcy and her assets and debts. She also filed an affidavit from her Insolvency Trustee.

[19] I was not the trial judge in the trial that resulted in the judgment debt at issue and have no direct knowledge of that proceeding. It is questionable whether this is

the straightforward situation explained in ***Poonian*** (para. 67), where the trial judgment contains sufficient express findings of fact that nothing else need be considered. Thus, I am entitled, indeed compelled, to consider the trial and appeal judgments, pleadings and the entire context of the original case proceedings.

[20] Both, the Supreme Court in ***Poonian*** (para. 67) and the Ontario Court of Appeal in ***Lawyers' Professional Indemnity Company v. Rodriguez***, 2018 ONCA 171 (para. 6 and 33), are plain: I am entitled to review the entire context of the original case proceedings to characterize the debt *vis-a-vis* s. 178(1)(e). At para. 6 of ***Rodriguez***, the Court commented:

> [6] To be clear, in characterizing a judgment debt under s. 178(1)(d), a judge is not confined just to the cause of action pleaded in the action that produced the judgment debt. The issue under s. 178(1)(d) relates to the substance of the judgment debt. The judge can therefore look at the material filed that led to the obtaining of the judgment debt, including the facts pleaded in support of the action that led to the judgment debt, any evidence that was presented at the time to secure that judgment debt, and any reasons that might have been given. A judge cannot, however, consider extraneous evidence not grounded in the process that produced the judgment debt. Among other reasons, it could extend the reach of the section to statute-barred claims, and violate cause of action estoppel rules.

While ***Rodriguez*** dealt with ss. (d), as seen in ***Poonian***, the principles are equally applicable under ss. (e).

[21] To be clear, I was not provided, and did not have access to trial transcripts, exhibits or the record. Only the judgments of trial and the Court of Appeal were provided. Nonetheless, I did check the court trial file to review the pleadings as they were referred to in counsels' briefs (this material should have been provided as part of the record on this application). Further, the Court of Appeal also thoroughly commented about the trial pleadings and other documents when addressing

Ms. Auch's appeal of piercing the corporate veil from which her personal liability flowed.

[22] Otherwise, Ms. Auch's counsel submits it is impermissible in a s. 178(1)(e) analysis to rely on extraneous evidence, such as the affidavit evidence and cross-examinations. I agree.

[23] The Manitoba Court of Appeal in ***Sharma v. Sandhu***, 2019 MBQB 160, adopted reasoning set out in ***Rodriguez.*** At para. 34(e), the Court stated that "[e]xtraneous evidence is not admissible on an application to declare that a judgment debt falls within s. 178 of the ***BIA*** … given that it is the judgment debt that has to be characterized".

[24] Of note, at Ms. Stewart's November 2024 cross-examination on her affidavit, she testified both Ms. Auch and Mr. Campbell were present together and told her what the loan would be used for, i.e. both directly made the false representations. I do not know if this is consistent with her 2022 trial testimony. Except for one finding at para. 59 of the trial judgment, it does not align with the trial judge's comments on the trial evidence.

[25] Regardless, the jurisprudence is clear that, for good policy reasons, in an application such as this, the court is not to retry the original case that declared the debt or expand its scope or context by looking at evidence extraneous to the original case proceedings. This is distinct from examining the entire context of the original case, from pleading to judgment. I therefore disregard the affidavit evidence and

related cross-examinations. To be clear, the affidavits and other evidence filed in this proceeding may nonetheless be relevant to the s. 69.4 aspect of the application.

The Live Issue

[26] The only live issue is the first of the three elements to be proven under this section: whether Ms. Auch "made" a false representation to Ms. Stewart. The other two elements are well proven, and not seriously contested regardless. Thus, given the trial judgment, in considering the test for s. 178(1)(e), there is no issue in fact or law that:

- Ms. Auch's husband, her business partner in the venture, directly made a false representation, which he knew to be false, to Ms. Stewart - - to have her advance a loan to 655 to fund the business venture's dealings in obtaining a local municipality's approval;
- Ms. Stewart acted on that representation and forwarded $600,000 as a loan to 655 for the stated business purposes; and
- Ms. Auch, almost immediately, through her holding company, which was the majority shareholder in 655, wrongly had the $600,000 disbursed for her personal matters such as family debts. It is not contested that the whole of the $600,000 was exploited by Ms. Auch.

Thus, in order for the debt to fall within the ambit of s. 178(1)(e), the applicable information considered in this hearing must be clear and cogent, on a balance of probabilities, that the debtor, Ms. Auch, made the false representation (as part of a fraudulent misrepresentation).

[27] Ms. Auch's main contentions on this application are that:

- it was her husband who made the representation to Ms. Stewart while, according to counsel's view of the jurisprudence, Ms. Auch specifically must have made the representation herself;
- the Statement of Claim did not allege fraud, and case was not about fraud; it was a contract claim; and
- the trial judge's finding, that Ms. Auch's conduct was "akin to fraud", is distinct from a finding of fraud.

[28] In reaching my conclusion, I have considered, weighed and balanced the following points.

[29] First, the Statement of Claim did not plead Ms. Auch made any false pretence or fraudulent misrepresentation per se, nor was the claim framed in fraud. It was essentially a contract claim. In fact, it was not contested, as pointed out by Ms. Auch's counsel, that at one point in pre-trial proceedings, Ms. Stewart expressed an intention to amend the Statement of Claim to expressly incorporate allegations of fraud or false pretences, including that any judgment survive bankruptcy. Yet, Ms. Stewart did not carry through with this; the claim was not amended. However, that is not the end of the matter.

[30] A statement of claim need not specifically plead fraud or a fraudulent misrepresentation for a s. 178(1)(e) application to succeed. In other words, the absence of such pleading is not fatal to this application. The pleading is just one of various considerations. For example, it would be enough that the issue was live at

trial, and the judge made sufficient findings relating to it. The Ontario Court of Appeal, at para. 35, in ***Rodriguez***, quoted from *Lehamn (Re)*, a British Columbia case:

> Given the above authorities, the fact that the creditor did not plead misappropriation or a fiduciary relationship in the Judgment is not fatal to his application pursuant to s. 178(1)(d) of the *BIA*. At the same time, it is not my role to make new findings of fact.

This should also be obvious from ***Poonian*** where the court spoke of different ways of proving a s.178(1)(1)(e) application, including examining the entire context of the original case proceeding.

[31] Further, the Statement of Claim sought to have Ms. Auch personally liable for the debt by piercing the corporate veil *vis-a-vis* instructions she gave to have 655 release the loan funds which she misused. In this way, given the test for piercing a corporate veil, the Statement of Claim asserted improper or fraudulent behavior on her behalf. The Court of Appeal judgment, ***Stewart v. 6551450 Manitoba Ltd. et al***, 2023 MBCA 72 (***Stewart 2023***), at para. 35, noted that Ms. Auch had sufficient notice that allegations she misappropriated the $600,000 were a triable issue as part of the plaintiff's piercing the corporate veil claim.

[32] Second, in discussing the test for piercing the corporate veil by way of fraud, the court, in ***Stewart 2023***, commented:

> [34] The Auch defendants correctly observe that a finding of fraud is a very serious one. Here, since the trial judge did not technically find that fraud had occurred and fraud was not pled, it may have been preferable for him to have limited his findings to improper or wrongful conduct. However, he chose to align his reasons with the language used in the leading cases and he made no error in doing so.

[33] Critically, several paragraphs later, when commenting on the trial judge's

analysis in piercing the corporate veil, the court, in ***Stewart 2023***, concluded:

> [40] … Therefore, the trial judge's decision to pierce the corporate veil must be based on a finding that the loan itself was entered into improperly by Auch and Holdings using 655 as a shield. The trial judge made the necessary factual findings, stating (at paras 58-59):
>
> > Stewart agreed to loan 655 $600,000 for the purpose of obtaining R.M. approval. I accept that this is what she was told by Campbell and it was the basis upon which she advanced the funds. . . .
> >
> > However, when the funds were received by 655's lawyer, Auch, the directing mind of the majority shareholder, directed him to disburse all of the funds to pay off personal debt. . . . Stewart did not lend $600,000 to 655 for that purpose, and I accept that she would not have done so had Campbell and Auch been honest about their intentions.
> >
> > [emphasis added]
>
> [41] The trial judge's findings are amply supported by the evidence, as is his finding that "655 was used by Auch and Holdings to facilitate improper . . . conduct which has caused loss to Stewart" (at para 60). Moreover, the Auch defendants' continuous insistence that the arrangement was not a loan but a way to flow money from the First Nation via Stewart to 655 only supports the trial judge's decision to pierce the corporate veil and find personal liability on the part of Auch and Holdings. As I have explained, there is absolutely no evidence that Stewart knew of the flow-through plan. Indeed, the scheme was pitched to her as a loan for a legitimate purpose that would assist in her goal to sell the Rosser land. The trial judge found as a fact that she would not have participated otherwise. If the sale of the Rosser land to 622 had closed as planned, the reality of this scheme likely never would have seen the light of day.
>
> (emphasis added)

Arguably, these conclusions from the Court of Appeal are determinative of the live issue: Ms. Auch is culpable or liable for the false representation to Ms. Stewart.

[34] Third, read as whole, the trial judgment articulates that Ms. Stewart made the loan to 655, reluctantly, solely to advance business purposes in selling land for a quarry operation. She did so at the behest of Mr. Campbell. There is no explicit reference or finding in either the trial or appeal judgments that Ms. Auch personally, or directly, made any representations as to the use of the money that Ms. Stewart

was asked to advance, or that she was present during those conversations. However, there is the trial judge's finding, as affirmed at para. 40 in ***Stewart 2023***, that Ms. Stewart would not have lent the money "had Campbell and Auch been honest about their intentions" (para. 59 of the trial judgment). I will return to this shortly.

[35] Thus, Ms. Auch's counsel cautioned that I do not impute her husband's actions or representations as her actions or representations. I accept the general proposition, leaving aside any possible exceptions, that a spouse is not at law an agent for their spouse, such that the actions and representations of one are not deemed to be the actions and representations of the other.

[36] I do not interpret s. 178(1)(e) so narrowly that it is only triggered when a debtor herself specifically makes the false representation. This defies common sense. It is not necessary for the integrity of the bankruptcy scheme, particularly the policy of facilitating a fresh start for honest but unfortunate debtors. In determining whether Ms. Auch participated in some fashion that in law would make her culpable for her husband's false representations (fraudulent misrepresentation) to Ms. Stewart, other factors or circumstances may come into play.

[37] For example, to follow Ms. Auch's logic, s. 178(1)(e) would not apply if a debtor solicited someone else to make the false representation instead of the debtor making it; or if the debtor was aware that a false representation by a business associate was the basis for the claimant passing the property the debtor wrongly converted. The law is replete with circumstances where a party to an event or another's representations is deemed to have made, or be responsible for making, the false representation.

These include instances where the person reasonably ought to have known of the false representation. Concepts of recklessness or willful blindness as to the false representations might also come into play depending on the facts. The analysis cannot simply rest on a requirement of the fraudulent words coming directly from the debtor's mouth to the victim (claimant).

[38] I also note the following extract from ***Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.***, 2021 ONCA 925, in a discussion about the meaning of false pretences in s. 178(1)(e):

> [30] Reference to the Criminal Code definition underscores that to come within the false pretences branch of s. 178(1)(e), the debt or liability to the creditor must have arisen from the debtor having made, or being responsible for, a representation known to be false, that is, a knowingly false statement, designed to induce another person to act upon it. Because s. 178(1)(e) requires that the debtor obtained property or services by false pretences, it contemplates that a person actually relied upon the false statement.
>
> (emphasis added)

[39] As noted, some situations will be clearer than others. In all situations, on an application such as this, the court must consider all the circumstances, bearing in mind that ultimately the evidence showing the debtor's false statement, or liability for it, must be clear and cogent, as the court makes its own findings of fact. (***Poonian***, para. 68)

[40] Fourth, from the ***Stewart 2022*** trial judgment, is clear that:

- from inception, Ms. Auch and Mr. Campbell were involved in this matter as de facto business partners or associates (I use these terms not in their legal sense but for their ordinary meaning). They participated in the business venture together: they were not just husband and wife.

For instance, as they structured venture, Ms. Auch had the majority stake in 655 through her holding company, while Mr. Campbell was a 655 director. I recognize that Ms. Auch was not a director or an officer of 655, yet clearly, she exercised de facto control over 655. I will comment on this shortly.

- Ms. Auch and Mr. Campbell each denied that Ms. Stewart's loan was in fact a loan. They both testified similarly: it was a "flow-through". The trial judge rejected this evidence. He found:

> [52] … In light of the clear documentary record evidencing a loan, I believe nothing that Campbell and Auch say in contradiction to Stewart. …

Likewise, earlier in the judgment he found:

> [45] The testimony of Campbell and Auch denying the existence of a loan flies in the face of documents which bear the signatures of Campbell and the authorized officers of 655, which unequivocally document a loan of $600,000 from Stewart to 655, guaranteed by Campbell, Larkin and Leuzzi. Their denials are not credible and moreover, disingenuous.

All in, it is clear the trial judge found that despite Ms. Auch denying it was a business loan, she knew the money was not placed in 655 for her personal use. In expressly rejecting the evidence Ms. Auch put forward about a flow-through, there remained no affirmative evidence as to why Ms. Stewart would loan 655 $600,000 that might provide a credible explanation for Ms. Auch to convert the loan to her personal use. Otherwise, again, the corporate veil would not have been pierced.

- The judge also found:

> [59] However, when the funds were received by 655's lawyer, Auch, the directing mind of the majority shareholder, directed him to disburse all of the funds to pay off personal debt. Auch did not produce any corporate documents or bank statements to explain how these payments were tied to obtaining R.M. approval as was the stated purpose. The only documentation Auch produced was a spreadsheet that she prepared after the fact and not supported by original documents. Moreover, the fact that the funds were immediately disbursed supports the conclusion that the funds were not used for the purpose of obtaining R.M. approval, but for clearing off personal debt. Stewart did not lend $600,000 to 655 for that purpose, and I accept that she would not have done so had Campbell and Auch been honest about their intentions.
>
> (emphasis added)

Thus, despite not being a director or an officer of 655, Ms. Auch was able, and did, direct all the money Ms. Stewart loaned to 655 be transferred to Ms. Auch's personal uses within two days of the loan being advanced. This demonstrates a high level of control and knowledge of 655 affairs. Further, as quoted above, the trial judge specifically found that the loan would not have been made had Mr. Campbell *and Ms. Auch* been honest about their intentions. In this way, the trial judge imputed knowledge to Ms. Auch of the representations made to Ms. Stewart.

[41] Finally, in Ms. Auch's Notice of Appeal, she asserted the trial judge erred in "finding that representations were made by Mr. Campbell to [Ms. Stewart] to obtain the alleged loan and then attributing those representations to Susan Auch and to Auch Holdings without any evidence that they were even aware of the alleged representations." She further appealed the trial judge's finding her conduct being "akin to fraud", and his piercing the corporate veil. While I am not aware of the

detailed proceedings in the Court of Appeal, or how these specific matters were argued, the Court upheld all the trial judge's factual and legal findings respecting Ms. Auch's personal liability for the loan.

[42] All in, I am satisfied, on a balance of probabilities, that the claim proven at trial was based on a false representation, a deceitful representation, spoken by Mr. Campbell but with full awareness and indirect participation of Ms. Auch. The inferences from the trial judgment are clear. Such a finding was at the core of at least one live trial issue – piercing the corporate veil, such that Ms. Auch was found personally liable for the wrongful conversion of the loan to her own purposes. The trial judge's findings were affirmed and supported by the Court of Appeal in the ***Stewart 2023*** judgment.

[43] In order to succeed under s. 178(1)(e), I do not find it necessary that the Statement of Claim was required to specifically plead fraud or that fraud was required to be a specific, independent issue at trial. In these circumstances, finding Ms. Auch's behavior was "akin to fraud" is a damning conclusion, especially in the absence of any cogent defence from her at trial on the very issue. The Court of Appeal found the trial judge was entitled to make this finding.

[44] Ultimately, a business partner or co-venturer, who is in the background at a critical moment but directly, or indirectly, aware of false or fraudulent misrepresentations made by another partner, and, defying all logic as to why the debtor made the loan, converts the object of the representations – here a loan advanced to further the business venture - to a different and improper purpose – here

to pay personal debts – is equally as culpable or liable for making the false representation as the person who actually made it.

[45] On a balance of probabilities, I find the trial judge's findings, read in the context of his judgment as a whole, establish that Ms. Auch, by her conduct, falsely misrepresented that the loan would be used for bona fide corporate purposes. Ms. Auch was amply complicit in Mr. Campbell's fraudulent misrepresentation. Ms. Stewart made a loan as a result of the false representation. Aware of this, Ms. Auch nonetheless converted the $600,000 for her personal use.

[46] Properly characterized, I find that the debt at issue falls within the ambit of s. 178(1)(e). The evidence is sufficiently clear and cogent. It does not leave room for any doubt for Ms. Auch's benefit. Her conduct clearly falls outside the honest but unfortunate debtor policy underpinning the ***BIA***.

***Section 69.4***

[47] As to Ms. Stewart's request for relief under section 69.4, I will be very brief.

[48] A creditor, who is affected by a stay of proceedings pursuant to s. 69 to 69.31, may apply to the court for a declaration that the relevant section does not operate respecting that creditor, subject to any qualifications that the court considers proper, if it is satisfied:

> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[49] Given my findings above, I decline to entertain this aspect of the application.

[50] First, I question the applicability of s. 69.4 given judgment was obtained at trial. Ms. Stewart does not ask to prove a claim, but to enforce one. To allow Ms. Stewart to proceed under this section would be contrary to the collective proceeding model. Second, and related, if I had found that the trial judgment was not properly characterized as a debt within the ambit of s. 178(1)(2) then, considering the policy foundations of the ***BIA***, I would not have found it equitable to make the s. 69.4 declaration; on these facts, s. 69.4 is not a backstop if a creditor fails under s. 178(1)(e).

## CONCLUSION

[51] Ms. Stewart's application is granted under s. 178(1)(e) of the ***BIA***. The debt is properly characterized as a result of a fraudulent misrepresentation participated in, or "made" by Ms. Auch. An order of discharge for Ms. Auch will not relieve her of the $600,000 debt and interest.

[52] Ms. Stewart is granted tariff costs on the application.

_____ J.