November 7, 2025

Ponzi Scheme Payouts as BIA Preference Payments

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Case Commented On: *My Mortgage Auction Corp (Re)*, 2025 BCSC 1520

When an insolvent debtor pays one creditor over others, it undermines the goal of ensuring a fair and equitable distribution to the bankrupt's creditors, which is one of the goals of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*), and it disrupts the statutory scheme of distribution set out in the *BIA* (see my previous posts on *BIA* preferences here and here).

These payments are typically made by debtors when they are struggling to stay afloat. In these circumstances, debtors could be trying to appease certain creditors or repay loans to key suppliers, often in the hope of avoiding bankruptcy. Under the *BIA*, if such payments are found to prefer certain creditors, they will be clawed back into the debtor's estate unless they fit into the common law exceptions recognized in Canadian jurisprudence.

The case of *My Mortgage Auction Corp (Re)* raises interesting questions about how preference law applies when the debtor is operating an illegitimate business that was insolvent from its formation, and the public policy about clawing back funds paid out under these schemes. In this case, the debtor made payouts to investors while running a Ponzi scheme. None of the investors were aware of the fraud, meaning they were all victims, but the returns they received varied substantially. Due to the structure of a Ponzi scheme, where the perpetrator raises money by defrauding investors and uses the contributions of later investors to pay earlier ones, some investors "profited" significantly while others suffered considerable losses.

The court determined that it is not only possible to characterize these payments as preferences, but it is also not contrary to public policy to claw back these (false) profits from investors.

Facts

My Mortgage Auction Corp (MMAC) was registered as a mortgage broker. Gregory Martel was the sole owner and director of MMAC, and also a registered mortgage broker. As part of its business, MMAC solicited funds from investors for its purported purpose of funding bridge loans for real estate developers who needed short term financing (the Bridge Loans). These Bridge Loans did not in fact, exist. Mr. Martel had promised investors high returns with little risk, which attracted more investors. The documentation showed the hallmarks of a Ponzi scheme, namely that the funds received by investors were not used for legitimate investment activity but primarily to repay other investors

Through this Ponzi scheme, which operated between 2018 and 2023, MMAC raised over $300 million from investors and more than 1200 investors lost money. In May 2023, the court appointed PricewaterhouseCoopers Inc (PwC) as the receiver of MMAC. In June 2023, PwC assigned MMAC into bankruptcy. Mr. Martel was adjudged bankrupt in August 2023.

The investors were categorized into groups including "Net Winners" and "Preference Recipients". The Net Winners had received a return of funds, a profit, in excess of their principal investments by MMAC. The Preference Recipients received a total of over $3.1 million in payments from MMAC in the three months before bankruptcy (the Preference Payments). There were no allegations that any of these investors knew about the Ponzi Scheme.

In May 2025, PwC brought a single application to recover (a) the amounts received by the investors in the scheme that had been paid in excess of the principal these individuals had invested (the Excess Funds) and (b) the Preference Payments pursuant to section 95(1)(a) of the *BIA*.

Decision

The court proceeded on the basis that the scheme perpetrated by MMAC and Mr. Martel was a Ponzi scheme, in that there was no legitimate investment activity, the investors were promised an investment generating high returns with little risks, the focus was on attracting new money, and that significant funds had flowed through Mr. Martel's accounts. It also noted that clawing back funds paid out from a Ponzi scheme was not contrary to public policy.

The court determined that the procedure would proceed as a summary application under the *BIA* and not, as certain Net Winners wanted, as individual actions commenced by the Trustee against each Net Winner. Individual actions would be more expensive and less efficient.

The issues before the court were threefold: first, whether the payments of the Excess Funds by MMAC to the Net Winners were void against the trustee by reason of them having been fraudulent conveyances, unjust enrichment, and money had and received; second, whether the Preference Payments were void against the trustee; and third, assuming the answers to the first two issues were affirmative, what the appropriate remedy would be in the circumstances of the insolvency proceedings.

With regard to *BIA* preferences, the court found that the three-part test set out in the *BIA* had been met. The first principle, that the transferor was insolvent at the time of the transfers, was met by the legal principle that the perpetrators of Ponzi schemes are insolvent from the outset (at para 167). The second principle, that the transfer occurred at the time specified in the legislation, was also met. The third principle, that the transfer was made with the view to giving the creditor a preference, was found. Other investors were due to be repaid when the preferential payments were made, meaning the payments had the effect of giving the recipients a preference (at para 177).

With regard to the other claims, the court found that the payments to the Net Winners of the Excess Funds constituted fraudulent conveyances pursuant to the *Fraudulent Conveyances Act*, RSBC 1996, c 163 (*FCA*), as the transfers (1) constituted dispositions of property, (2) were made with the intent to delay, hinder or defraud MMAC's creditors and others, and (3) had the actual effect

of delaying, hindering and defeating MMAC's creditors. The court also found that the transactions constituted unjust enrichment, as they met the requirements of (1) an enrichment of the recipient, (2) a corresponding deprivation of the claimant, and (3) the absence of a juristic reason for the enrichment.

Finally, money had and received, which is a claim "for the return of money which the defendant has received but which the law says it would be unjust and against conscience to keep" (at para 228), quoting *Boale, Wood & Company Ltd v Whitmore*, 2017 BCSC 1917 (*Whitmore*) at para 113) was also established, as the investors who had received the Excess Funds could not successfully argue that the hardship they would suffer by repaying the false profits would outweigh the hardship suffered by those who experienced loss and no gain.

My Analysis

This analysis will focus on the *BIA* preference claim. Before turning to preferences, however, there are interesting public policy issues in this decision that necessitate comment.

Public Policy

In a Ponzi scheme, a perpetrator raises money by defrauding investors then uses the contributions of later investors to pay earlier ones. *Millard v North George Capital Management Ltd*, 2006 CanLII 41287 (ON SC), described a Ponzi scheme as a fraud whereby "the source of distributions to the early investors consist primarily of a return of their own capital or moneys obtained from new investors and with the payments ultimately stopping when there are no further investors," resulting in financial loss to everyone, "except the perpetrators of the fraud" (at para 11).

In this case, the investors entangled were all victims – none of them knew of the fraud – though due to the payout structure of the scheme, some of them profited while others lost a considerable amount of money. The investors who profited raised public policy arguments against the clawing back of these funds. These arguments failed based on case law and equitable principles.

Courts have clawed back funds distributed in Ponzi schemes under different equitable doctrines. In *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637 (*Titan Investments*), a case involving the redemption of payments made to certain investors in a Ponzi scheme, the respondents argued that the equitable defence of change of position or estoppel should apply if the court found the payments to be fraudulent preferences. The equitable defence of change of position or estoppel is defined as follows:

> The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution. (The Restatement of Restitution, cited in *Anderson* at para 178)

The court in *Titan Investments* determined that it would be against public policy to allow the defence to apply as the respondents had received the payments as a result of a fraud (*Titan* at para 47).

In *Whitmore*, the trustee sought to have the defendant disgorge payments he had received as part of a Ponzi scheme. In the discussion about what the law of unjust enrichment requires in relation to the return of Ponzi profits, the court determined that it would be "contrary to public policy to allow a retention of the profits… given that they were not real returns on the defendant's investment but rather artificial transfers from other creditors… designed to further [the perpetrator's] fraud" (at para 111). (See also *Kriegman v Dill*, 2018 BCCA 86, where the BC Court of Appeal noted, in the context of providing a consolidation order as relief after a Ponzi scheme, that the "lucky early investors" ("net winners") are obliged to share with the "unlucky later investors" ("net losers") in the scheme (at para 14)).

Ponzi schemes are fraudulent by design, meaning all money flowing through them is tainted by fraud. The clawback principle seeks to distribute losses fairly among all defrauded investors, including those who happened to profit. Although these investors are innocent, their "returns" are not genuine profits, but funds taken from later investors. Allowing them to keep such funds would give them an unwarranted advantage over others whose only misfortune was to invest later. Under the ***BIA*** preference regime, payments made in a Ponzi scheme may be clawed back if they meet the statutory criteria—the effect of the transaction is what matters. In equity, broader principles of fairness and public policy necessitate the return of such funds to prevent unjust enrichment and ensure equal treatment among victims.

BIA Preferences

A preference payment is one that occurs when an insolvent debtor - a debtor without sufficient assets to satisfy all its creditors - pays one creditor over others. As I wrote in a previous post (here), the debtor can make any payment it likes when it is solvent. These payments are inappropriate, however, when the debtor is insolvent because they undermine the *BIA* goal of a fair and equitable distribution of the bankrupt's assets to its creditors.

Establishing a preferential payment to an arm's length person under s 95(1)(a) the *BIA* requires the transferor to be insolvent at the time of the transfer, the transfer to have occurred within a specific timeframe, and the transfer to have been made to a creditor with a view to giving that creditor a preference over other creditors. These elements were all met in this case.

With regard to whether MMAC was insolvent, there is a legal principle that a company involved in a Ponzi scheme is insolvent from the time it enters into its first investment contract. In *Titan Investments*, the court noted that there were never sufficient funds in the partnership to enable it to pay out its partners at the alleged unit value of the partnership (*Titan Investments* at para 16). The reasoning in *Titan Investments* was adopted in *Whitmore* at para 49. In *Zayed v Cook*, [2009] OJ No 5513, the court said that "[i]t is in the nature of a ponzi scheme that the fraudster is massively insolvent because he has made promises to investors that cannot possibly be honoured." (*Zayed v Cook* at para 10) Accordingly, the court found that MMAC was insolvent from the outset of the scheme, as investors provided the money to fund the Bridge Loans, but the Bridge Loans had never existed (at para 170).

Second, the preference payments had been made "during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of bankruptcy", two time periods defined in the *BIA* under s 2.

Finally, the preference payments must have been made "with a view" to giving the recipients a preference. Intention need not be proven, however, because a presumption of intention to prefer will arise under s 95(2) if a payment has the effect of giving a creditor a preference. If the creditor who received the preference can show, on the balance of probabilities, that the "dominant intent" of the debtor was not to prefer that creditor, the presumption can be rebutted. This can be done by proving that the payment was done in the ordinary course of business, or with the intention of staying in business, two exceptions that have been developed by the courts. (See my earlier blog about the exceptions to *BIA* preferences.)

The court found that the preference payments had the effect of giving the Preference Recipients a preference (at para 176). The investors who lost money had provided the trustee with provable claims in the bankruptcy, leading the court to find that $60.6 million was overdue to investors. It also found that MMAC had made disbursements in the amount of $17.8 million, $14.2 million of which related to repayments to investors, and $3.6 million related to other expenses. As a result, at the time the preference payments had been made, many investors were still due to be repaid, leading the presumption to arise that the payments had been made with the intention to prefer. None of the Preference Recipients attempted to rebut the presumption.

Each of the investors were found to be creditors. They all met the definition of "creditor" in s 2 of the *BIA*, since at the time of the payments, MMAC owed each of them an amount specified in their respective investment agreements.

Conclusion

This case does a good job of laying out the principles applicable when courts claw back funds that have been paid out under a Ponzi scheme, as applicable to preference law and under broader public policy considerations.

This post may be cited as: Jassmine Girgis, "Ponzi Scheme Payouts as BIA Preference Payments" (7 November 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/11/Blog_JG_PonziScheme.pdf

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