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Disgorgement Orders as Non-Dischargeable Debt

By: Jassmine Girgis

Case Commented On: *Williams (Re)*, 2025 BCSC 1128 (CanLII)

Re Williams, 2025 BCSC 1128, deals with a debtor who, prior to his bankruptcy, was found by the British Columbia Securities Commission (the Commission) to have masterminded a Ponzi scheme. The Commission imposed a penalty on Mr. Williams and ordered him to disgorge a sum of $6.8 million, an obligation from which he later sought release upon applying for a bankruptcy discharge. The issue in this case was whether the Commission's debt fell into one of the categories of non-dischargeable debts, namely those arising from obtaining property or service by fraudulent misrepresentation or false pretences (s 178(1)(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*)).

The question of whether a Commission's orders can fall into this category of non-dischargeable debt was recently addressed in *Poonian v British Columbia (Securities Commission)*, 2024 SCC 28 (*Poonian*) (see my earlier post on *Poonian*). In *Poonian*, the Supreme Court drew a distinction between an administrative penalty imposed by the Commission – which does not fall within s 178(1)(e) – and a disgorgement order, which can. The Court in *Re Williams* applied the SCC's reasoning in *Poonian*, concluding that the Commission's disgorgement order would not be discharged in the bankruptcy.

Facts

Thomas Williams was the principal and sole directing mind of a group of companies known as the Global Group of Companies or the Global Entities. Between February 2007 and April 2010, Mr. Williams and his associates induced 123 investors to invest approximately $11.7 million into the Global Entities by promising them a low-risk, high reward investment.

Mr. Williams was in fact engaged in a Ponzi scheme, where he used the money of later investors to pay the returns of the earlier investors. There were in fact no investments at all. Of the $11.7 million that was invested into the scheme, $4.9 million was returned to some of the investors and $6.8 million remained outstanding.

The Commission found that Mr. Williams had deliberately and knowingly deceived the investors. It imposed permanent market prohibitions on Mr. Williams and ordered him to, among other things, disgorge the sum of $6.8 million under s 161(1)(g) of the *Securities Act*, RSBC 1996, c 418. Mr. Williams did not pay that amount, and made an assignment in bankruptcy in May 2021. He applied for a discharge in May 2023, and both the Commission and the Trustee opposed it.

Decision of the Supreme Court of British Columbia

Under s 178(1)(e) of the BIA, a debt or liability arising from obtaining property or services by false pretences or fraudulent misrepresentation will not be discharged. To invoke this exception, the creditor must satisfy the established three-art test by showing that: (1) the bankrupt was engaged in false pretences or fraudulent misrepresentation, (2) there was a passing of property or provision of services, and (3) there was a link between the debt or liability and the fraud.

The Court relied the Commission's findings of fact, then assessed whether those facts satisfied the legal test for false pretences or fraud. It determined that the Commission, as creditor, met each element of the test. First, Mr. Williams had obtained $11.7 million from investors by false pretences or fraudulent misrepresentation or both, and that his conduct constituted fraud. Second, Mr. Williams' conduct resulted in a loss in the form of a transfer of property, and a debt or liability corresponding to that loss. Third, there was a link between the debt or liability and the fraud because the disgorgement order was created because of Mr. Williams' fraud, and it represented the value of the property obtained as a result of that fraud.

My Commentary

One of the goals of the *BIA* is to provide a "fresh start" to the honest but unfortunate debtor. The *BIA* achieves this by allowing bankrupts to be discharged from bankruptcy, thereby releasing them from personal liability for the debts that led to their bankruptcy. In *Alberta (Attorney General) v Moloney*, 2015 SCC 51 (CanLII), the Supreme Court provided that the discharge provides a debtor with the opportunity "to reintegrate into economic life so he or she can become a productive member of society" (at para 36).

However, this discharge is not automatic in every case. Debtors who have acted dishonestly may face a delayed or conditional discharge. Likewise, certain debts are non-dischargeable, meaning the bankrupt remains personally liable for them even after being discharged from bankruptcy. These non-dischargeable debts, ranging from court-imposed fines and penalties resulting from certain offences, to fraud, to student loans, are generally excluded from the debtor's discharge due to public policy reasons, as they tend to arise from morally blameworthy conduct.

The exceptions to discharge must be interpreted narrowly and applied only when the specific wrongdoing can be made out on the facts. This is because they are exceptions to the *BIA* goal of financial rehabilitation, and because courts must apply them if they find the facts to support them. S 178(1)(e) excludes from discharge a debt that is obtained under false pretences or through fraudulent misrepresentation. The creditor seeking to rely on s 178(1)(e) must establish all the elements of a three-part test: a false pretence or fraudulent misrepresentation, a passing of property or provision of services, and a link between the debt or liability and the fraud (*Poonian* at para 54). Under the first part of the test, in order to establish a fraudulent misrepresentation, a creditor must show four elements: the debtor made a representation to a creditor; the representation was false; the debtor knew that the representation was false; and the false representation was made to obtain property or a service (*Poonian* at para 58, adopting the test from *Montreal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 (CanLII) at para 25). These elements must be rigorously proven

in a narrow interpretation (see Jassmine Girgis & Thomas Telfer, "Do Securities' Commissions' Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v British Columbia (Securities Commission)* (BCCA)" (2023) 67:3 Can Bus LJ 438).

When an administrative tribunal finds fraud, a court may rely only on the tribunal's underlying factual findings but it must make its own determination as to whether fraud exists. A court cannot take judicial notice of the fraud because judicial notice allows a judge to accept certain indisputable facts without formal proof; fraud is not a fact but a legal conclusion about intent and deceptive conduct, one that can only be reached through legal analysis. While courts cannot adopt a tribunal's conclusion about whether there was or was not fraud, they may use the tribunal's factual findings as evidence then independently assess whether those facts satisfy the legal test for fraud.

In this case, the court relied on the Commission panel's findings of fact to determine that Mr. Williams had engaged in fraud. These findings were as follows: Mr. Williams was the principal and sole directing mind of the Global Entities, he hired people to persuade investors to lend money to differing global entities pursuant to agreements that promised monthly returns, investors were told their money would be invested and would not be put at risk, and investors' money was never invested (*Re Williams* at para 16).

The second part of the test requires a passing of property or provision of services. The investors provided money to Global Entities as a result of Mr. Williams' or his associates' direction. S 178(1)(e) can be met even if the property did not pass directly to the bankrupt; the property need only pass at the bankrupt's direction or on the bankrupt's behalf (*Poonian* at paras 72-73). The court therefore found that Mr. Williams' conduct resulted in money being transferred, and a debt or liability corresponding to that loss.

The third part of the test requires finding a link between the debt and the fraud. The provision says, "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation", and the words "resulting from" establish a causal connection between the debt and the creditor to whom the debt is owed.

Before the Supreme Court's ruling in *Poonian*, courts were divided on how to construe this wording, and had not settled on the nature of the causal link necessary to connect the debt and the creditor. In *Poonian*, the Supreme Court clarified this issue, holding that "[t]he words 'resulting from' in s 178(1)(e) connote a strict causation requirement" and that s 178(1)(e) therefore requires a "direct link" (*Poonian* at paras 75-76). Importantly, it held that a "direct link" does not require that the claim be brought only by the creditor directly victimized by the fraud (*Poonian* at paras 60, 85, 86, and 95). In most cases, the creditor will be the one directly victimized by the fraudulent conduct, but requiring the creditor to be a "direct victim" would import a limitation not found in the statutory language (*Poonian* at para 95, also see Jassmine Girgis & Thomas Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System" (2022) 20 Ann Rev Insol L).

This brings us to how a direct link can be established between Mr. Williams' fraud and the Commission's disgorgement order, which exists "to compel a wrongdoer to give up any ill-gotten amounts" (s 161(1)(g) of the *Securities Act*) in order to neutralize profit. This is distinguishable

from an administrative penalty, which is a fine imposed for a violation of securities laws, which is not caught under s 178(1)(e).

In *Poonian*, the Supreme Court explained that the Securities Commission may, when issuing a disgorgement order, deduct amounts already returned to the victims, meaning that "the amounts owed under disgorgement orders thus represent the amounts the debtor obtained as a result of his or her wrongful conduct" (*Poonian* at para 112, see also Jassmine Girgis & Thomas Telfer, "*Poonian* and the Treatment of Administrative Penalties and Disgorgement Damages by Securities Commissions in a Bankruptcy Discharge (2025) 41 BFLR 451). Since the Commission had ordered the Poonians to pay the amounts they obtained because of their fraud, the Court concluded that there was a direct link between the Poonians' fraudulent conduct and the Commission's disgorgement orders.

In this case, the Commission ordered Mr. Williams to disgorge $6.8 million, representing the balance of the funds investors had invested in the scheme but never recovered (at paras 6-7). This established a direct link between the disgorgement orders and Mr. Williams' fraudulent conduct, thereby meeting the third part of the test.

Conclusion

This case offers a clear application of the Supreme Court's decision in *Poonian*, showing how s 178(1)(e) should be interpreted and applied in practice.

This post may be cited as: Jassmine Girgis, "Disgorgement Orders as Non-Dischargeable Debt" (20 November 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/11/Blog_JG_Williams(Re).pdf

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