

# Poonian v. British Columbia (Securities Commission), 2024 SCC 28

# Orders of the B.C. Securities Commission

- Mr. Poonian pay administrative penalties of \$10 million
- Ms. Poonian pay administrative penalties of \$3.5 million
- Mr. Poonian to disgorge \$1,319,167
- Mr. Poonian disgorge \$1,126,260 jointly and severally with another participant
- Ms. Poonian disgorge \$3,149,935,
- Securities Commission registered with the court, giving them the effect of court judgments.

# Survival After Discharge from Bankruptcy

- 178(1)(a): “any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail”
- 178(1)(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”
- 178(2) “Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.”

*Poonian (Re)*, 2021 BCSC 555, aff'd 2022 BCCA 274.

*Alberta Securities Commission v. Hennig*, 2020 ABQB 48, rev'd 2021 ABCA 411.

- ABQB:
  - 178(1)(a): would not apply but “unique characteristics of this case” bring it within
  - 178(1)(e): applies - bases decision on this point
- BCSC: Refers to ABQB and agrees.
- ABCA:
  - 178(1)(a): does not apply & unique characteristics do not bring the case within
  - 178(1)(e): 3<sup>rd</sup> prong requires the misrepresentation to have been made to the creditor (the Commission), so it does not apply - “direct victim” requirement.
- BCCA:
  - 178(1)(a): does not apply (not a court).
  - 178(1)(e): rejects direct victim requirement - applies.

# *Poonian v. British Columbia (Securities Commission), 2024 SCC 28*

Majority

178(1)(a):

Test Element (“Prong”)	Reason	Result
(1) a fine, penalty, restitution order or other order similar in nature	Not confined to criminal/quasi-criminal offences.	Met (impliedly, not expressly).
(2) imposed by a court	Administrative tribunals are not “courts.” “Court” and “regulatory body” have different definitions under the <i>BIA</i> . Registration with the court does not mean the court “imposes” it.	Not met.
(3) imposed in respect of an offence	Not dealt with.	Not decided.

# *Poonian v. British Columbia (Securities Commission), 2024 SCC 28*

Majority

178(1)(e):

Test Element (“Prong”)	Reason	Result
(1) false pretences or fraudulent misrepresentation	The court must make its own determination and not rely on/take judicial notice from the tribunal decision. Clear and cogent proof required.	Met (impliedly, not expressly).
(2) a passing of property or provision of services	Bankrupt need not be the recipient, as long as the passing/provision was induced by the pretences/misrepresentation.	Met.
(3) a link between the debt or liability and the fraud	“Direct victim” need not be proven. Must be a “direct link” - “obtained directly as a result” (paragraph 77.) Link must be to the <b>value</b> of the property or services which passes.	Fines: Not met.  Disgorgement: met.

# *Poonian v. British Columbia (Securities Commission), 2024 SCC 28*

MINORITY - Karakatsanis and Martin JJ.:

- Disagrees on this last point. 178(1)(e) - 3<sup>rd</sup> prong is met for both fines and disgorgement.
- Statute says “resulting from” - the fines result from the fraud.
- Punitive damages survive bankruptcy, for example.
  - [129] The cases my colleague relies on, as noted above, help show that a weak link is not enough to satisfy the requirements of s. 178(1)(e). An overly broad causation threshold would stray from a narrow reading of s. 178(1)(e). For the threshold to be met, the conduct must be at the source, or origin, of the debt or liability. The deceitful conduct must have directly created it. But none of those cases stand for the proposition that a strict causation test requires the debt or liability to be limited to the value of the property obtained.

*Poonian (Re)*, 2020 BCSC 547 (S.C. (Master)), aff'd 2021 BCSC 222 (S.C.) & 2021 BCCA 417 (C.A.)

69 I have concluded that the circumstances of this case are extreme and that the pre-bankruptcy conduct of the Poonians requires the court to distance itself from their effort to use the bankruptcy process to absolve themselves of the financial consequences of their actions.

70 In my view, a conditional discharge is not appropriate because there is no evidence the Poonians would apply their efforts toward paying an amount to the estate that would have any meaning in the circumstances. A suspended discharge would not adequately respond to the public interest and rehabilitation concerns raised by the Commission and the Minister given the Poonians' refusal to take responsibility for their actions.

71 The application for a discharge from bankruptcy is dismissed.



# Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418

129 (1) Every person or company who

(a) makes a statement in any material, evidence or information submitted or given under Nova Scotia securities laws to the Commission, its representative, the Director or any person appointed to make an investigation or audit under this Act that, at the time and in the light of the circumstances under which it is made, is a misrepresentation;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, offering memorandum, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed, sent, delivered or furnished under Nova Scotia securities laws that, at the time and in the light of the circumstances under which it is made, is a misrepresentation;

(c) contravenes Nova Scotia securities laws; or

(d) fails to observe or to comply with any direction, decision, ruling, order or other requirement made under Nova Scotia securities laws,

is guilty of an offence and is liable to a ***fine*** of not more than ***five million dollars*** or to imprisonment for a term of not more than ***five years less a day***, or to both.

# Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418

133 (1) The Commission may apply to the Supreme Court of Nova Scotia for a declaration that a person or company has not complied with or is not complying with Nova Scotia securities laws.

...

(1C) Where the court makes a declaration under subsection (1), ***the court may***, notwithstanding the imposition of any other penalty on the person or company and notwithstanding any order made by the Commission, ***make any order that the court*** considers appropriate against the person or company, including, without limiting the generality of the foregoing, one or more of the following orders:

...

13. An order requiring the person or company to compensate or make ***restitution*** to an aggrieved person or company....

15. An order requiring the person or company to ***disgorge*** to the Minister any amounts obtained as a result of the non-compliance with Nova Scotia securities laws.

# Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418

134 (1) Where the Commission considers it to be in the public interest, ***the Commission***, after a hearing, ***may order***

...

(da) where a person or company has not complied with Nova Scotia securities laws, that the person or company ***disgorge to the Commission*** any amounts obtained as a result of the non-compliance;

# Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418

135 Where the Commission, after a hearing,

(a) determines that

(i) a person or company has contravened or failed to comply with any provision of Nova Scotia securities laws, or

(ii) a director or officer of a person or company or a person other than an individual authorized, permitted or acquiesced in a contravention or failure to comply with any provision of Nova Scotia securities laws by the person or company; and

(b) considers it to be in the public interest to make the order, the Commission may order the person or company to pay an ***administrative penalty*** of not more than one million dollars for each contravention or failure to comply.

# Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418

22 (1) Any decision or order made by the Commission may be made a rule or order of the Supreme Court of Nova Scotia, and shall be enforced in like manner as any rule, order, decree or judgment of that Court.

- Thal Poonian was the person who “found” OSE, acquired control of its shares and board and nominated business associates and family members as directors. He was the one who set up the arrangement with the **Phoenix Group** and he was the one who traded OSE shares through nominees
- Thal Poonian tried to disguise his involvement by using a “Tim Jenson” alias in communications with the Phoenix Group
- Thal Poonian was an experienced market participant and investor, a corporate executive and a former registered salesperson
- The Poonians declared \$3,189.00 in assets on their Statement of Affairs
- The Poonians characterized themselves as “honest but unfortunate debtors” whose debts were beyond their ability to pay at their discharge hearing

# Who were the Poonians' victims?

Clients who purchased OSE shares were generally unsophisticated investors facing financial duress, often living paycheck to paycheck

They were mainly referred to Phoenix Credit Risk Management Risk Consulting Inc. (an Ontario company) by collection agencies or creditors and Phoenix gave them debt management advice

Phoenix arranged for them to unlock their locked-in RRSPs or retirement accounts, and put the money into self-directed RRSP accounts to invest and generate much needed returns

## What happened to the Phoenix Group corporate executives, Vince Patrozza (left) and Jawad Rathore ?



Phoenix clients invested approximately \$16.5 million in the shares, according to the Ontario Securities Commission Settlement Agreement

In 2013, Patrozza and Rathore repaid (forfeited) \$3-million to the Ontario Securities Commission as part of the Agreement, then went on to find investors for Winnipeg's proposed **SkyCity** condo tower through **Fortress Real Developments**

Rathore stated that, "There was no findings of guilt or wrongdoing or anything else like that, so we are happy to have made a settlement on that non-related business."



## **FSRA Imposes Administrative Penalty of \$250,000 on Fortress Real Development Inc.**

**TORONTO, September 10, 2020** – The Financial Services Regulatory Authority of Ontario (FSRA) has entered into a settlement with Fortress Real Developments Inc. (FRDI) under which FRDI will pay \$250,000 in administrative penalties.

Between 2009 and 2018, FRDI and its predecessor (Fortress Real Capital Inc.) assisted borrowers in connecting to mortgage brokers and administrators, which allowed these brokers to raise **over 900 million dollars** in syndicated mortgage loans.

## **APRIL 4, 2025 – CBC NEWS MANITOBA**

**SkyCity** developers intentionally misled investors about value of Winnipeg land, Crown argues at **fraud trial**

By the time the RCMP raided the offices of Fortress Real Developments Inc. on April 13, Mario Narciso and his wife had already started to worry they'd made a bad investment. Four years ago, Mr. Narciso was framing a roof in Toronto when he fell several metres, **breaking his spine and leaving him partially paralyzed**. Confined to a wheelchair and unable to work, the now 58-year-old **received a \$500,000 insurance settlement** to help support himself, Ms. Cortes and their daughter, now five years old.

In 2007, Mr. Rathore and other Phoenix Credit Risk employees started to encourage their clients to use their unlocked retirement funds to buy shares in two tiny oil and gas companies that traded on the TSX Venture Exchange. Both were controlled by B.C.- based investor **Thalbinder Poonian**, who paid Phoenix employees, including Mr. Rathore, **large commissions for each referral** – up to 28 per cent, in some cases.

Within two years, Phoenix clients had **invested \$16.5-million** in the two companies. Mr. Poonian was eventually **fined \$10-million** by the British Columbia Securities Commission.

**Globe and Mail investigative Report - Inside the Fall of Fortress**

JANET MCFARLAND REAL ESTATE REPORTER PUBLISHED DECEMBER 14, 2018 UPDATED DECEMBER 18, 2018

# What does the BCSC do with the administrative penalties it receives ... or, in this case, will not receive?

Under Section 162 of the *Securities Act*, the commission can order an administrative penalty of up to \$1 million for most violations. The amount of the penalty is determined by the seriousness of the violation and the harm done to investors and to the integrity of the investment markets.

- Money received for payment of administrative penalties is allocated to investor education, payments to third parties harmed by the misconduct, and collections activities.

# Practical Aspects for Personal Practice LITs

- Be wary of unknown debt management companies
- Pre-Acceptance considerations - Risk of hidden assets? Multiple court hearings? Ask for a retainer?
- What do we do when there is a “potential” of fraud but no court finding as yet?
- Should compromise be the first consideration? Would a compromise be viable?
- Will such debtors be denied access to the insolvency system post-Poonian?
- Have debtors confirm in writing that they understand that a debt or debts may be subject to s. 178 (see OSB letter)

# Practical Aspects for Commercial Practice LITs

- Poonian clarified the Fraud test BUT the SCC but left open the question of administrative penalties falling under another subsection of s. 178 ...
- Duty of Care (178(1)(d)) acting as a fiduciary – passing of property based on representations
- Increase in class action activism against Board of Directors for companies experiencing financial hardship?
- Reporting requirements enhanced – attracting investment (debt or equity) – both the Poonians and FRDI downplayed risks to investors
- Did Parliament intend to subordinate “fraudulent claims” to regular unsecured claims in the corporate context?

# Rehabilitation vs. Confidence in Insolvency System

- Should moral sanctions form part of the insolvency system? Isn't this part of the "honest but unfortunate debtor" test?
- Should "dishonest" debtors pay for the rest of their lives?
- How do unsophisticated investors have faith in an ever-increasing complex financial market if fraudsters are not punished? Is this the BIA's role?
- Should a debtor's victim(s) be taken into consideration?
- Rehabilitation of the debtor vs. "punishing" abuse of the system vs. deterring further abuse of the system?

# LIT Take-away

- *Poonian* – expanded the fraud test to include third parties but stopped short at “indirect” debts ... according to the majority
- The insolvency system should not be dominated by exceptions, otherwise this opens the door to more exceptions and bankruptcy loses its goal of rehabilitation and the fresh start principle
- The majority Court hinted that administrative penalties may fall under another s. 178 prong
- Legislation is not required to clarify s. 178(1)(e) at this time
- Reprehensible behaviour can be addressed by s. 172