

CANADA / JUDGMENT

Poonian (Re)

2020 BCSC 547

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Supreme Court of British Columbia

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2020 BCSC 547 Poonian (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Poonian (Re),

2020 BCSC 547

Date: 20200408

Docket: B180757

Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Thalbinder Singh Poonian and Shailu Poonian

in the City of Surrey, in the Province of British Columbia

Before: Master Elwood

(In Chambers)

Reasons for Judgment

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Appearing for the Trustee in Bankruptcy, Grant Thornton Limited:

M. Wentzell

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C. Matthews

Place and Date of Hearing:

Vancouver, B.C.

February 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2020

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I. INTRODUCTION

- [1] The applicants seek an absolute, or alternatively, a suspended discharge from bankruptcy under s. 172 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA").
- [2] The applicants, who are husband and wife, made a joint assignment into bankruptcy on April 20, 2018. This is their first bankruptcy. Their combined debts are more than \$25 million. Their biggest creditors are the British Columbia Securities Commission (the "Commission") and the Minister of National Revenue (the "Minister").

- [3] The applicants' liability to the Commission results from payment orders and administrative penalties imposed on them by the Commission following its finding that they had engaged in a large scale market manipulation scheme. The applicants' liability to the Minister results from tax arrears, interest and penalties following an audit of their income tax returns.
- [4] The applicants submit they are "honest but unfortunate debtors". Their bankruptcy arose, they argue, from a convergence of factors resulting in a business failure and a significant reduction in their combined income. They say they have complied with their obligations under the BIA, made full disclosure of their assets and have no ability to pay their debts.
- [5] The applicants seek an absolute discharge, which they submit is consistent with the "fresh start" principle and the rehabilitation objective of the BIA. If an absolute discharge is refused, the applicants seek a suspended discharge with a three to six month suspension period.
- [6] A discharge is opposed by the Commission and the Minister. They argue that the applicants are unrepentant market manipulators and tax cheats. They submit that a discharge in this case is contrary to the public interest and a misuse of the bankruptcy provisions of the BIA.

II. FACTS

A. Liability to the Commission

- [7] Thalbinder ("Thal") Poonian is 53 years old. He is married to Shailu ("Sharon") Poonian. Mr. Poonian describes himself as a self-made business owner and investor. He has owned, operated and promoted various private and public companies. Ms. Poonian participated with Mr. Poonian in these ventures as an investor and co-owner. The Poonians raised capital for their ventures, initially from family and friends, and later from investment banks and private placements.
- [8] In a lengthy written decision issued on August 29, 2014, the Commission found that, in the 2007-2009 timeframe, the Poonians engaged in market manipulation contrary to s. 57(a) of the Securities Act, R.S.B.C. 1996, c. 418.
- [9] The Commission found that, together with a number of relatives, friends and acquaintances, the Poonians acquired a majority position in an oil and gas company called OSE Corp. ("OSE"), and then increased the price of the shares of OSE by various manipulations, including trades between themselves. As a result, OSE's share price increased from \$0.29 in November 2007 to \$2.00 at the end of January 2008. Nothing else occurred around that time, the Commission found, to explain the price increase.
- [10] The Commission found that the Poonians and their allies sold the overpriced OSE shares to unsophisticated investors with the assistance of an entity called the Phoenix Group. The Phoenix Group was in the business of advising people in debt on how to access funds from their RRSPs and retirement accounts in hopes of a higher rate of return.

- [11] From October to December 2008, the price of OSE shares declined to \$1.50, and then plunged to close on March 31, 2009, at \$0.08. The Phoenix Group clients who bought shares in OSE suffered an estimated total book loss of around \$7.1 million.
- [12] The Commission found that Mr. Poonian was the mastermind of the market manipulation scheme. He arranged the private placements to obtain control of a majority of OSE's shares, funded those purchases through various accounts, traded those shares in various accounts, and entered agreements with the Phoenix Group members to pay them commissions for selling the shares.
- [13] The Commission found that Ms. Poonian was actively and extensively involved in many aspects of the scheme. She acquired OSE shares, sold OSE shares to Phoenix clients, made and received payments to other participants in the scheme, and paid commissions to the Phoenix Group.
- [14] In a sanctions decision issued on March 13, 2015, the Commission ordered that the Poonians and their co-respondents be permanently barred from:
- a) trading or purchasing securities and exchange contracts;
 - b) becoming or acting as a director or officer of any issuer;
 - c) becoming or acting as a registrant or promoter; and
 - d) acting in a management or consultative capacity in connection with activities in the securities market.
- [15] The Commission also ordered the respondents to disgorge approximately \$7.3 million on a joint and several basis, and to pay administrative penalties, which the Commission assessed at \$10 million as against Mr. Poonian and \$3.5 million as against Ms. Poonian.
- [16] The Poonians and other respondents sought leave to appeal the sanctions decision to the Court of Appeal. The Court granted leave to appeal the joint and several order only. The Poonians did not appeal the liability decision.
- [17] In reasons for judgment indexed at 2017 BCCA 207, the Court of Appeal set aside the disgorgement order and remitted the matter to the Commission to assess the evidence and make the necessary findings as to whether an order should be made against each of the individuals against whom liability had been found. All other sanctions imposed by the Commission were not before the Court of Appeal and remained undisturbed.
- [18] On May 16, 2018, the Commission ordered that, in addition to the administrative penalties assessed under its first decision, Ms. Poonian must pay the Commission approximately \$3.1 million and Mr. Poonian must pay the Commission approximately \$1.3 million individually and approximately \$1.1 million on a joint and several basis with another individual.

- [19] On June 5, 2018, the Commission registered its decision as if it was a judgment of the B.C. Supreme Court.
- [20] The amount owing by the Poonians to the Commission is \$19,095,362, exclusive of post-judgment interest. The Poonians have not made any payments to the Commission.

B. CRA Audit and Reassessments

- [21] The Canada Revenue Agency ("CRA") commenced an extensive audit of the Poonians in 2012. The audit findings were set out in an audit report dated July 17, 2014. Among other findings, the audit found that share dispositions by the Poonians were on account of income and not capital as they had reported in their tax returns. The audit also found significant discrepancies in the gains/losses reported by the Poonians in their 2008 and 2009 income tax returns, and that they had grossly underreported their actual gains from stock trading.
- [22] The CRA reassessed the Poonians' tax returns for 2008 and 2009 in accordance with the audit findings. In addition, the CRA reassessed the Poonians for unpaid taxes in subsequent years. In total, Ms. Poonian's pre-bankruptcy tax liability relates to 11 years of underpaid taxes; Mr. Poonian's tax liability relates to five years of underpaid taxes.
- [23] The Poonians filed objections to the reassessments. Following submissions, the Minister confirmed the reassessments. The Poonians commenced an appeal to the Tax Court of Canada, but withdrew the appeal after they made the joint assignment into bankruptcy.
- [24] As of the date of bankruptcy, the total tax liability of the Poonians was:

Sharon Poonian

\$2,804,536.24

Thal Poonian

\$1,530,716.36

Total

\$4,335,252.60

- [25] The tax debts account for approximately 61% of Mr. Poonian's total debt, and 57% of Ms. Poonian's total debt. The Poonians have not made any voluntary payments on account of their tax debts.

C. The Trustee's Report

- [26] The trustee in bankruptcy reports that the proven liability of the Poonians is \$25,184,693.56. The trustee realized just \$3,189.15 from their assets.

- [27] The trustee reports that the available monthly income of the Poonians on the date of bankruptcy was \$3,280, and that there has been no surplus income from which they have been required to make payments to the estate.
- [28] The trustee further reports that the Poonians have generally performed their obligations under the BIA.
- [29] The trustee is opposed to a discharge from bankruptcy of the Poonians primarily on the ground their assets are not 50 cents on the dollar of the unsecured liabilities (s. 173(1)(a) of the BIA), and on the basis their conduct as found by the Commission, although not fraud under s. 57(b) of the Securities Act, was nonetheless conduct for which the trustee submits an absolute discharge should be denied.

D. Current Circumstances

- [30] Following the events in issue before the Commission, Mr. Poonian began driving a truck. He and Ms. Poonian started a private company called TSP Transport Inc. The Commission's order of March 2015 prohibited the Poonians from acting as officers or directors of the company. They asked a friend to serve as a director, but the friend found the risk of personal exposure unacceptable and stepped down. The Poonians subsequently wound up the company.
- [31] Ms. Poonian is now working as a consultant with a home building company owned by her aunt. She invoices the company \$4,000 per month from which she takes a salary of \$3,200. Her reported net income in the years 2014 to 2018 ranged from approximately \$50,000 to approximately \$34,000.
- [32] Mr. Poonian has been unemployed since 2016. He continues to manage the couple's court cases and assists his wife with her consulting work, but he is not engaged in any remunerative work. His reported net income in the years 2014 to 2018 was zero.
- [33] The Poonians say they are living within their means. Given the sanctions imposed by the Commission, they are unable to return to their previous means of earning a livelihood. They are both in their 50s now, with limited prospects for starting new careers. They complain that the Commission's findings have damaged their reputations and pose a barrier to their re-entry into the workforce. They depose that they have no ability to pay their debts.
- [34] The Minister notes that between 2001 and 2009, Ms. Poonian made RRSP contributions totalling \$92,985, and Mr. Poonian made RRSP contributions totalling \$79,416. The Minister states that neither Ms. Poonian nor Mr. Poonian has filed any tax slip reporting any withdrawal from their RRSPs since 2000, suggesting that these assets were available when the Poonians declared bankruptcy and were not disclosed to the trustee.

- [35] In response, the Poonians provided the court with an affidavit attaching their RRSP account statements for 2009 which they say demonstrate that the RRSP investments were valueless on the date of bankruptcy. The account statements are inconclusive in my view. In any event, given the conclusion I have come to on these applications, the value of the RRSPs, or lack thereof, is immaterial for the present purposes.

III. ANALYSIS

A. Bankruptcy Provisions of the BIA

- [36] In *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, the Supreme Court of Canada described the purpose of the BIA as two-fold: first, an equitable and efficient distribution of a bankrupt's assets to his or her creditors; and second, a financial rehabilitation of the debtor through a discharge of debts.

- [37] Madam Justice Fitzpatrick provided a useful review of the bankruptcy provisions of the BIA in *Re. Montalban*, 2013 BCSC 683:

- [13] Fundamentally, the BIA is social policy legislation in a commercial context. It allows an insolvent debtor who is overburdened by debt to employ a process by which he or she can shed those debts and obtain a "fresh start". A debtor may voluntarily assign himself into bankruptcy, as Mr. Montalban did in this case. In other cases, the bankruptcy is involuntary and arises where a creditor or creditors obtain an order from the bankruptcy court placing that debtor into bankruptcy. Even in the latter case, the policy aspects of the BIA remain, in that it is the overarching purpose of the legislation to allow the debtor/bankrupt to seek a discharge so as to obtain that same "fresh start".

...

- [17] The clear and fundamental policy objective of the BIA is that the bankruptcy process may not be used by a debtor simply for the purpose of clearing off his or her debts. As has been colourfully said in the past, it is not intended to be a "fiscal car wash". This sentiment was adopted in *Patterson v. Royal Bank of Canada* (1984), 59 B.C.L.R. 234 at 239 (C.A.), quoting *Dennistoun J.A. in Re Lobel* (1929), 38 Man. R. 48, 1 D.L.R. 986 as follows:
- [20] ...The success or non-success of any bankruptcy system must to a large extent depend on the administration of the discharge provisions of the Act. In considering the question of the bankrupt's discharge, the Court must have regard to the interests of the public and of commercial morality, as well as to the interests of the creditors, and of the bankrupt but the Bankruptcy Act should not be regarded as clearing house for the liquidation of debts solely, irrespective of the circumstances in which they were incurred.
- [18] Firstly, as the list of duties in s. 158 indicates, during the period between bankruptcy and discharge, the bankrupt is required to assist the trustee in the performance of the trustee's duties relating to gathering in and addressing the assets of the bankrupt. . . .

- [19] Secondly, during that period, the bankrupt is required to act in a certain fashion to protect members of the public from a repeat of the debtor's past financial transgressions and to protect people who might deal with the bankrupt differently if the undischarged bankruptcy status were known. For example, a bankrupt is required to disclose his undischarged status to persons with whom he is about to enter into a business transaction or where he seeks to obtain credit of \$500 or more. Failure to do so is also an offence: s. 199. Further, an undischarged bankrupt is not able to act as a director of a corporation: Business Corporations Act, S.B.C. 2002, c. 57, s. 124(2)(c); Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 105(1)(d). Lastly, the bankrupt is required to take certain steps, such as taking counselling from the trustee to learn from his or her financial mistakes with a view to not repeating them: s. 157.1.
- [20] The discharge process set out in the BIA for individual bankrupts is an integral part of achieving the societal goals intended to be achieved under the BIA: Patterson (quoted above); *Westmore v. McAfee* (1988), 23 B.C.L.R. (2d) 273 at 279-280 (C.A.). In the latter case, the court stated that two principles must be considered on a discharge application: firstly, rehabilitation of the bankrupt and secondly, the integrity of the bankruptcy system. In doing so, the court must consider and balance the interests of the bankrupt, the creditors, and the public. The public interest has been described, per Lobel and Patterson, as an interest in "commercial morality".
- [38] The discharge process is contained in ss. 168.1 to 182 of the BIA. There are four options available to the court:
- a) The court may grant an absolute discharge, which results in a complete discharge of all debts (s. 172(1)(a)), with some limited exceptions (s. 178).
 - b) The court may grant a conditional discharge, which results in a complete discharge of all debts upon satisfaction of those conditions (s. 172(1)(c)). The bankrupt remains obligated to report to the trustee on his earnings and after-acquired property until those conditions are satisfied (s. 176). The most common condition imposed on a discharge is a payment or a schedule of payments by the bankrupt to the trustee for distribution to the creditors.
 - c) The court may suspend the discharge, which results in a complete discharge of all debts at a future point in time (s. 172(1)(b)). The court may both suspend and impose conditions in respect of a discharge (s. 172(4)).
 - d) The court may refuse to grant a discharge, whether absolute, conditional or suspended. This order may or may not be accompanied by a further order that any renewal of the application can be brought only after a certain point in time (s. 172(1)(a)).
- [39] Section 173 of the BIA sets out the grounds on which the trustee or the creditors may object to a discharge or propose terms upon which any discharge may be granted. The primary ground relied on in this case is s. 173(1)(a):

- (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible.
- [40] If the court finds that any of the circumstances in s. 173 are proven, then an absolute discharge may not be granted: s. 172(1).
- [41] Madam Justice Fitzpatrick explained the combined effect of these provisions further in *R. Montalban*:
- [25] Many bankrupts are what can be described as the "honest but unfortunate debtor" who is most certainly entitled to the benefit of the discharge provisions under the BIA. Generally speaking, for a first-time bankrupt whose insolvency arose from circumstances for which he cannot be held responsible and who has complied with his duties under the BIA, the BIA provides for an automatic discharge after nine months, subject to any other objections being raised by the Trustee or the creditors: ss. 168.1 and 168.2.
- [26] For others, such as rogues who are clearly guilty of transgressions before the bankruptcy or who have clearly not complied with their duties under the BIA, their discharge may be refused even when they bother to attempt to have an application heard by the court in the first place. In those cases, the court will be reluctant to release the bankrupt from this "financial purgatory" where either the rehabilitation of the bankrupt and the protection of the public remain issues or where the trustee still requires the bankrupt's assistance in investigating transactions and potential assets. Bankrupts who are guilty of fraudulent activities, either before or after the bankruptcy, or both, certainly fall within this category.
- [27] Somewhere between these two extremes are bankrupts whose actions have attracted the opposition of the trustee, the creditors, or both, arising from a lesser degree of blameworthiness relating to their activities before the bankruptcy or their performance of their duties under the BIA. In that case, a conditional order or a suspended discharge order, or both, may be appropriate: s. 172.
- [42] Master Taylor described the court's discretion in *Re. Gwizd*, 2017 BCSC 1975:
- [24] It is well established, as per *Nelson (Re)*, [1995] S.J. No 384 (Q.B.), subject to the constraints of s.172 of the BIA, that the order crafted by the court at a discharge hearing is a matter of discretion. In exercising that discretion, the court must look at the whole matter before it in "the light of reason, common sense and humanity" and must seek to balance three things:
- (a) The interest of the rehabilitation of the bankrupt;
 - (b) The interest of the creditors in being paid; and
 - (c) The integrity of the bankruptcy process and the public's perception of it.

[43] I turn now to the primary ground on which this discharge application is opposed by the Commission and the Minister.

B. Assets Not Equal to Fifty Cents on the Dollar (s. 173(1)(a))

[44] As stated, s. 173(1)(a) provides that the discharge may be opposed if:

- (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible.

[45] It is readily apparent that the value of the Poonians' assets is not equal to fifty cents on the dollar of their unsecured liabilities. The issue therefore turns to whether this vast shortfall arises from circumstances for which the Poonians cannot be held responsible.

[46] The onus of providing some reasonable explanation for why the bankrupt should be excused from this situation lies on the bankrupt: *Re. Montalban*, at para. 39, citing *Crowley* at 307; *Touhey v. Barnabe*, 1995 CarswellOnt 3495 (C.J. (Gen. Div.)) at para. 29.

[47] The underlying causes of the bankruptcy are relevant to the analysis. The bankrupt's conduct both before and after the bankruptcy may be considered: *Re. Osesky*, 2002 MBQB 45, at para. 8 - 10; *Re. Montalban*, at para. 123, citing *Links v. Robinson* (1970), 16 C.B.R. (N.S.) 180, [1970] A.J. No. 172 (C.A.).

[48] Where the situation arises from an unsatisfied judgment debt and the judgment arose from wilful, wanton, or discreditable misconduct of the bankrupt, the bankrupt's financial predicament cannot be said to have arisen from circumstances for which he cannot justly be held responsible: *Re. Montalban*, at para. 45, citing *Kozack v. Richter*, [1974] S.C.R. 832 at 836.

[49] In this case, a substantial share of the Poonians' liabilities is their very large payment obligations to the Commission. The cause of those obligations is trading activity which the Commission found to be serious misconduct. Essentially, the Commission found that the Poonians pumped up the price of the shares of a publically-traded company and then offloaded those shares at inflated prices to unsophisticated investors with financial problems.

[50] The Poonians do not seem to have fully accepted the judgment of the Commission. For example, Mr. Poonian deposes that:

In my view, the [Commission] panel disregarded every piece of evidence we put forward as I observed that their mind was pre-determined before the process even started .

...

In or about August 29, 2014, the [Commission] found that I. Sharon and three other respondents apparently breached s. 57(a) of the Securities Act (emphasis added)

- [51] The Commission's decisions are, of course, valid and binding except to the extent that they are set aside or varied on appeal. Here, there is no question but that the Commission's findings on liability are binding on me.
- [52] Likewise, the tax reassessments are binding on me. The substantial tax liabilities of the Poonians cannot be attributed to the failure of their trucking company, the reduction in their income earning potential following the Commission sanctions or any economic factor beyond their control. Their very large tax debts result from unreported income.
- [53] It is impossible for me to conclude on these facts that the vast disparity between the Poonians' assets and liabilities arose from circumstances for which they cannot justly be held responsible. Accordingly, the Poonians cannot be granted an absolute discharge.

C. Should a Suspended Discharge Be Granted?

- [54] In *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, the Supreme Court of Canada held that a discharge should only be refused outright in extreme cases or where the conduct of the debtor has been particularly reprehensible, saying at p. 120:

...The purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 [now 172 and 173] plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases. (emphasis added)

- [55] Where neither an absolute discharge nor an outright refusal is appropriate, the courts will usually impose conditional orders requiring payment of a certain sum, which may be substantial: *Re. Montalban*, at para. 126, citing *Kozack*, *In Re Buell* (1954), 35 C.B.R. 53, [1954] O.J. No. 446 (S.C.); *Crowley* at 308 and 311-312.
- [56] The Poonians do not seek a conditional discharge in this case for the simple reason that they are unable to pay an amount of any significance and could not comply with the anticipated conditions of their discharge.
- [57] If the bankrupt has no ability to pay, the court may grant a suspended discharge. Each case must be determined on its own particular facts, however; there is no presumption of a suspended order simply because the bankrupt has not had surplus income and does not have prospects of remunerative employment: *Re Jabs*, 2010 BCSC 1325, at para. 62-63.

- [58] A suspended discharge should only be granted if the order is consistent with the two purposes of the BIA of rehabilitating the bankrupt and upholding the integrity of the bankruptcy system. In *Re. Montalban*, Madam Justice Fitzpatrick found that the bankrupt had refused to cooperate with the trustee, failed to make adequate disclosure and concealed assets. She held:
- [132] The difficulty with a suspended sentence is that it does little to address the twin principles of rehabilitating the bankrupt and upholding the integrity of the bankruptcy system.
- [133] I am sure that Mr. Montalban's interests are well served by obtaining his discharge, so that he may carry on with his life. But it is in considerable doubt that the process to date has resulted in him being rehabilitated. Despite being in bankruptcy for many years, and even after the 2004 hearing, he was and continues to be in breach of his duties to this day, principally relating to the Viral and surplus income matters.
- [134] More importantly, however, a suspended discharge - or even a conditional discharge - as a "sentence" severely challenges the integrity of the bankruptcy system. In this case, Mr. Montalban, as found by Master Tokarek, has been a recalcitrant and uncooperative participant in this bankruptcy process. Since 2004 he has patiently waited while doing little toward addressing the court's concerns. He now renews his application some eight years later. Many creditors in such circumstances, already suffering their initial losses, may choose not to renew their opposition by reason of the passage of time, loss of interest, personnel changes, cost and the like. However, Rubyse and the Berrys have steadfastly maintained their opposition, no doubt at great cost to them. Some might say that they are throwing good money after bad. Still others might say that they are seeking justice in the hopes that the bankruptcy system will adequately respond to Mr. Montalban's shortcomings.
- [135] Generally speaking, that such a bankrupt could simply wait out or wear down the patience of his opposing creditors would offend the public interest concerns that apply here. In short, in these circumstances where there is clear misconduct both before and after the bankruptcy, it offends commercial morality to suggest that a "sentence" can be imposed upon a bankrupt that will simply allow him to be free of these complaints by waiting a further period of time. . . .
- [59] This case involves serious misconduct as found by the Commission. Although there has been no finding of fraud against the Poonians, their conduct in the market manipulation scheme was, in the words of Commission counsel, "fraud adjacent". As the Commission stated at paragraph 18 of the original sanctions decision, and restated at paragraph 82 of the second sanctions decision:

A breach of s. 57(a) of the Act is serious misconduct that causes damage to the integrity of the capital markets and harms investors. The scale of this manipulation places it at the most serious level. The arrangements with the Phoenix Group ensured a large victim investor pool of generally unsophisticated investors facing financial distress who were advised to unlock their locked-in RRSPs or retirement accounts and invest in OSE, making this manipulation even more egregious.

- [60] As a result of the prohibitions imposed by the Commission, the Poonians may no longer pose a risk to the public in terms of market manipulation. But it would be contrary to the public interest, in my view, to grant them a suspended discharge from bankruptcy. One of the purposes of the Commission's enforcement powers, as found by the Court of Appeal in this case, is deterrence. That purpose would be frustrated if a person having been ordered by the Commission to make a substantial payment could declare bankruptcy and then wait a prescribed period of time and be free of the financial consequences of his or her actions.
- [61] In this regard, the Commission stands in a different position from other creditors. The Commission is not in a position to compromise payments that would ultimately be collected in the public interest and for the benefit of investors.
- [62] It is no answer to these concerns to say the Poonians generally complied with their obligations under the BIA or that they provided full disclosure to the trustee and the receiver. As observed by Madam Justice Fitzpatrick in *Re. Montalban*, the BIA is not intended to be a "fiscal car wash". Nor is the BIA intended to cleanse those who contravene the Securities Act of the fiscal consequences of their actions.
- [63] Likewise, it has been said that "tax cheaters are free riders and should not be absolved of that" through the bankruptcy process. A bankrupt who has gone into debt to the government because he or she did not properly report income is not an honest and unfortunate debtor: *Re Zinikiew*, 2004 BCSC 1831, at para. 58-60; *Re Williams*, 2005 BCSC 289, at para. 25, 29 and 33. In this case, the size of the Poonian's personal tax debt of \$4.3 million, alone, is extreme and difficult to excuse.
- [64] There is also considerable doubt in this case whether the Poonians have been rehabilitated. They say they have learned a "very hard lesson"; however, they attribute their bankruptcy, in Mr. Poonian's words, to an "outlandish fine", "bureaucracy" and a tax reassessment that "makes no sense". Their own evidence demonstrates that the Poonians refuse to take responsibility for their actions or the consequences of those actions for others.
- [65] The Poonians attribute their lack of assets and surplus income to the enforcement action of the Commission. Mr. Poonian deposes that:

I have learned a very hard lesson involving my finances and [sic] endeavour to put my tax and financial affairs in order. Due to the enforcement action by the BC Securities Commission, I am no longer able to act as a director of a private or publically held company due to the sanctions. As well, this has harmed my reputation and has been a significant barrier in re-entering the work force. Due to the sanctions against Sharon and myself, we cannot sit as a director or officer from any public or private companies.

Due to my experience with the BC Securities Commission and [sic] I am limited to working as a sole practitioner or as an employee.

[66] There is no evidence that, apart from the failed trucking company, Mr. Poonian has even tried to earn an income. There is no evidence that he has sought employment within the limitations of the Commission sanctions, and no reason given why he could not take gainful employment consistent with those limitations. Likewise, there is no evidence that Ms. Poonian is limited to working as a consultant for her aunt's company.

[67] Although it is unrealistic to expect that the Poonians could have reduced their debts in a significant way relative to the size of those liabilities, some contribution toward the estate would have evidenced some acknowledgment of their responsibilities.

[68] In my view, a suspended discharge would do little to advance the twin principles of rehabilitating the bankrupt and upholding the integrity of the bankruptcy system.

IV. CONCLUSION

[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.

"Master Elwood"

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