

CANADA / JUDGMENT

Poonian v. British Columbia (Securities Commission)

2021 BCCA 417

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 417 Poonian v. British Columbia (Securities Commission)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Poonian v. British Columbia (Securities Commission),

2021 BCCA 417

Date: 20210924

Docket: CA47228

Between:

Thalbinder Singh Poonian and Shailu Poonian

Appellants

(Appellants)

And

British Columbia Securities Commission, Grant Thornton LLP in
its capacity as Trustee of the Estates of Thalbinder Singh Poonian
and Shailu Poonian, Her Majesty the Queen in Right of Canada as
represented by the Minister of National Revenue

Respondents

(Respondents)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated
January 14, 2021 (Poonian (Re), 2021 BCSC 222, Vancouver Docket B180757).

Oral Reasons for Judgment

Counsel for the Appellants:

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Minister of National Revenue:

C.N. Matthews

J. Paoletti

Place and Date of Hearing:

Vancouver, British Columbia

September 24, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 24, 2021

Summary:

The appellants' application for discharge from bankruptcy was refused by the master. Their appeal was dismissed. On this further appeal they content the master erred in determining that they were not rehabilitated; that he erred in refusing discharge where their conduct was not particularly reprehensible; that he failed to give effect to the "fresh start" principle; that he placed inappropriate weight on their pre-bankruptcy conduct; that he erred in giving inappropriate weight to the fact theirs was primarily a debt owed to the Securities Commission; and that the chambers judge applied an inappropriate standard of review. Held: Appeal dismissed. None of the grounds of appeal were made out. The master could not be said to have erred in the exercise

of his discretion.

WILLCOCK J.A.:

Introduction

- [1] Thalbinder Singh Poonian and Shailu Poonian appeal the dismissal of their appeal to a judge of the Supreme Court of British Columbia from a master's decision to refuse to discharge them from bankruptcy.
- [2] The appellants contend the master and the judge erred in finding the appellants were not honest but unfortunate debtors, erred by placing too much weight on debts owed to the British Columbia Securities Commission, and erred by unreasonably refusing the discharge even though the result was unduly onerous. Counsel for the appellants in his submissions today emphasises the last ground of appeal.

Background

- [3] The appellants made a joint assignment in bankruptcy in April 2018. They then had few assets, but debts that amounted to over \$25 million. Those debts consisted primarily of amounts owed to the Securities Commission as administrative penalties and pursuant to disgorgement orders (over \$19 million), and to the Minister of National Revenue in respect of unpaid personal income tax (approximately \$1.5 million owed by Mr. Poonian, and approximately \$2.8 million owed by Ms. Poonian).
- [4] They applied for discharge from bankruptcy on February 13, 2020.
- [5] Section 172 of the discharge provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, provides, in part:
 - (2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
 - (a) refuse the discharge of a bankrupt;
 - (b) suspend the discharge for such period as the court thinks proper; or
 - (c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[Emphasis added.]

- [6] Section 173 provides:

173 (1) The facts referred to in section 172 are [among others]:

- (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;

...

[Emphasis added.]

- [7] The application for discharge was dismissed for reasons indexed as Poonian (Re), 2020 BCSC 547.
- [8] The master found it was "readily apparent" that the value of the Poonians' assets was not equal to fifty cents on the dollar of their unsecured liabilities. Further, he found the Poonians had not met the onus of providing some reasonable explanation for why they should be excused from this situation (the question posed in Montalban (Re), 2013 BCSC 683 at para. 39, citing Re Crowley (1984), 54 C.B.R. (N.S.) 303 at 307; and Touhey v. Barnabe, 1995 CarswellOnt 3495 (C.J. (Gen. Div.) at para. 29).
- [9] He noted the Commission Panel (for reasons indexed at 2014 BCSECCOM 318) on August 29, 2014 (the "Liability Decision") had found the Poonians had sold overpriced shares to unsophisticated investors. They had done so with the assistance of an entity in the business of advising people in debt on how to access funds from their RRSPs and retirement accounts. From October to December 2008, clients of that entity who bought the promoted shares suffered an estimated loss of around \$7 million. The Commission Panel found Mr. Poonian was the mastermind of a market manipulation scheme, and Ms. Poonian was actively and extensively involved in many aspects of the scheme.
- [10] The administrative penalties and disgorgement orders were made for reasons set out in the Commission Panel's sanctions decisions, the first of which is indexed at 2015 BCSECCOM 96 (the "Sanctions Decision").
- [11] The master held:
- [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.
- [12] He described the public interest in the case as follows:
- [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.

[Emphasis added.]

- [13] The reference to the Court of Appeal in that passage is to this Court's consideration of the Poonians' application for leave to appeal the Liability and Sanctions Decisions of the Commission Panel (addressed in chambers by Justice Fenlon, whose unreported reasons are indexed as *Poonian v. British Columbia (Securities Commission)*, (04 March 2016), Vancouver Docket CA42714 (B.C.C.A.)), and to the appeal of the Sanctions Decision pursuant to the leave granted (reasons for which are indexed at 2017 BCCA 207).

- [14] Justice Fenlon granted leave to appeal only the disgorgement order in the Sanctions Decision. The arguable issue she recognized on the leave application was whether the Poonians had properly been held to account jointly for monies received by any of the wrongdoers. Leave to appeal the Liability Decision and the administrative penalties had been sought but was denied.

- [15] On the hearing of the substantive appeal, the division held the Commission Panel was required to determine the amounts received by each individual personally, either directly or indirectly. The disgorgement order was set aside and remitted to the Commission Panel to determine to what extent each of the individuals involved in the manipulation received funds directly or indirectly. When it did so, the Court confirmed that leave to appeal had been granted only with respect to the disgorgement orders, and "[a]ll other sanctions imposed on the appellants are not before this Court and remain undisturbed". (At para. 166; emphasis added.)

- [16] The Commission Panel thereupon reconsidered the disgorgement orders and issued a Reassessment Decision, reported at 2018 BCSECCOM 160. The Panel found Mr. Poonian had obtained funds by market manipulation directly and indirectly, and Ms. Poonian obtained funds directly. At para. 85, the Commission Panel found it to be in the public interest to order the following payments to the Commission under s. 161(1)(g) of the Securities Act, R.S.B.C. 1996, c. 418:

- a) Ms. Poonian: \$3,149,935;
- b) Mr. Poonian: \$1,319,167; and
- c) Mr. Poonian and Ms. Sihota (another party to the manipulation): \$1,126,260 on a joint and several basis.

- [17] On June 5, 2018, the Reassessment Decision was registered with the Supreme Court of British Columbia pursuant to s. 163 of the Securities Act.
- [18] As an aside, I note that the nature of the Poonians' wrongdoing has subsequently been assessed and commented upon in detail by Justice Crerar in proceedings commenced by the Commission, in which it obtained an order that the debt to the Commission will survive discharge (Poonian (Re), 2021 BCSC 555). That judgment is itself under appeal in this Court: 2021 BCCA 224.
- [19] Bearing in mind the outcome of the challenge to the Liability Decision and the Sanctions Decision--which clearly establish the Poonians' fault as the basis for the assessment of the penalties and disgorgement orders--the master equated the Poonians' case to that considered in Montalban, noting as follows:
- [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.
- [20] The master also addressed the nature and extent of the debt to Revenue Canada and concluded that the substantial tax liabilities of the Poonians could not be attributed to any economic factor beyond their control.
- [21] An absolute discharge was therefore not available to the Poonians.
- [22] Considering the evidence before him that the Poonians continued to deny misconduct, had made no substantial effort to pay their debts and had no ability to do so, and had made little efforts to maintain suitable employment, the master concluded that no order other than a dismissal of the application for discharge was appropriate:
- [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.
- [23] In doing so, the master accepted the view expressed by Justice Fitzpatrick in Montalban, at para. 20, that the public interest that must be considered on an application for discharge is an interest in "commercial morality".
- [24] The master referred to and clearly considered the leading cases setting out the circumstances in which a discharge may be refused, including, in particular, Industrial Acceptance Corp. v. Lalonde, [1952] 2 S.C.R. 109.

[25] The judgment dismissing the appeal of the master's order to the British Columbia Supreme Court is indexed as Poonian (Re), 2021 BCSC 222. The appeal judge considered arguments summarized by him as follows:

[14] There are three grounds of appeal set out in the Poonians' statement of argument. Having read the statement of argument and heard oral argument, I would divide these grounds into four and restate the issues on appeal as follows:

1. Whether the master erred in concluding that the appellants were not "honest but unfortunate debtors" -- persons of the sort that the BIA was intended to aid;
2. Whether the master treated the debt to the Securities Commission as facts under s. 173(1) of the BIA that justify a refusal of discharge from bankruptcy;
3. Whether the master erred in finding that financial sanctions imposed by the Securities Commission ought not to be discharged or erred in his application of the principles governing rehabilitation of debtors; and
4. Whether the master erred by ordering the application dismissed.

[26] The learned chambers judge dealt with the first of these arguments as follows:

[17] The Poonians regard themselves as debtors that fall into the "honest but unfortunate" category. The master plainly found each of them occupy the other pole, i.e., "rogues who are clearly guilty of transgressions before the bankruptcy." No error -- manifest, palpable or otherwise -- has been demonstrated in this conclusion of fact. It is amply supported by the evidence.

[27] He dealt with the second as follows:

[18] The short answer to this argument is that the master did not treat the Commission's financial sanctions as s. 173(1) facts. The master did conclude that s. 173(1)(a) applied, finding that (1) the Poonians' assets were not a value equal to 50 cents on the dollar on the amount of their unsecured liabilities, and (2) this shortfall had not been shown by the Poonians to arise from circumstances for which they cannot justly be held responsible. The master gave cogent reasons for these findings, and his reasons are unassailable.

[28] The third point was addressed as follows:

[21] The argument asserting error by according special significance of the debt to the Securities Commission draws on what the master said at paras. 60-62 of his reasons. The Poonians argue that the master's characterization of the nature of the debt to the Securities Commission overwhelmed his analysis resulting in the failure to properly engage in weighing all of the proper considerations, including the rehabilitation of the bankrupts. The submission is that the proper exercise of discretion was swamped by the master according the Securities Commission special status as a creditor.

[22] I cannot agree. Viewed in isolation, the language used by the master in these three paragraphs appears to support the appellants' argument. However, in the course of his reasons, the master made clear his understanding that the integrity of the bankruptcy system involves the public interest, described in the authorities as including the promotion of "commercial morality." He also understood that the rehabilitation of the bankrupts must be weighed in the balance. I interpret paras. 60-62 of the master's reasons, read in the context of the entirety of his reasons, as saying that an order that would have the effect of cleansing the debt owed to the Securities Commission would be contrary to the public interest and that this is a factor that weighs in the balance against discharge. I do not interpret the master's reasons as concluding that the fact of the debt to the Securities Commission ends the analysis and bars a discharge.

Grounds of Appeal

[29] The grounds of appeal set out in the appellant's factum allege errors in the judgment of the chambers judge and the master, posed in the form of questions which are unclear and confusing:

25. Did the Court err in concluding that the appellants were not honest but misfortunate debtors, which attracts a reasonableness standard, including whether the Commission did not perform tracing the funds that underlie the indebtedness?
26. Did the Court provide too much weight and give deference to the Commission disgorgement orders and administrative fines such that it interfered with the proper analysis and application of s. 172 of the Bankruptcy and Insolvency Act which attracts a correctness standard?
27. Did the Court err by imposing a refusal or dismissal of the discharge as unduly onerous form of discharge, notwithstanding the appellants had received regulatory sanctions from the Commission that would not be dischargeable, which attracts a reasonableness standard?

Argument and Discussion

[30] The argument in the factum does not address these questions squarely but, rather, sets out a series of complaints and assertions with which it is somewhat difficult to grapple. I will attempt to address them as they appear in the factum.

Failure to Consider Rehabilitation

[31] The appellants say the master failed to consider their rehabilitation:

29. ... The Learned Master erred in determining that the appellants were not rehabilitated by their bankruptcy. ...

[32] This is a bare assertion challenging a finding that was clearly open to the master on the evidence of the Poonians' post-bankruptcy conduct, including their continuing defence of their manipulation of the market. There is also evidence the appellants do not recognise their tax liability arose from an audit. There is no basis for saying the master's inference was founded upon a palpable error.

Imposing an Unduly Onerous Order

[33] The appellants say the refusal to grant a discharge was harsh and unduly onerous:

29. ... the learned Registrar did set out the law correctly but erred in applying the principles to the matter at hand including that he imposed terms of discharge that were too harsh and onerous.

...

56. The failure to set aside the order of Master Elwood arises to an order that is oppressive and results in the appellants being so weighed down as to make them incapable of performing the ordinary duties of citizenship. The appellants are weighed down with by being unable to return to work in the capital markets. The appellants have limited career prospects, the appellants are weighed down with liabilities in excess of \$25,000,000 and appellants continue to languish as undischarged bankrupts.

[34] The Bankruptcy and Insolvency Act provides that in circumstances such as the master found to be present, an application for discharge may be refused. The refusal of a discharge may be seen as harsh, and an outcome that is only warranted in cases where the bankrupt's conduct is "particularly reprehensible": Lalonde at 120. The master's decision, however, was founded upon the characterization of the appellants' conduct as egregious. That finding was open to him on the evidence, and was not apparently affected by an error

Failure to Give Effect to the "Fresh Start" Principle

[35] The appellants say the master failed to give effect to the "fresh start" principle:

30. ... more weight should have been given to the fresh start principle which is one of the touchstones of the BIA. ...

[36] This is an argument that the master should have afforded disproportionate weight to one factor in the exercise of his discretion. There is no basis in fact or law for that assertion. As the respondents point out, citing Montalban, at para. 17, and Re Lobel (1929), 38 Man. R. 48, 1 D.L.R. 986 at para. 20, the bankruptcy process should not be a clearing house for the liquidation of debts irrespective of the circumstances in which they were incurred.

Affording Inordinate Weight to Pre-bankruptcy Conduct

[37] The appellants say inappropriate weight was given to their pre-bankruptcy conduct:

37. ... the fact that serious pre-bankruptcy conduct existed should not alone be a factor to refuse or dismiss a discharge. Each discharge must be taken on its own particular facts. ...
- [38] It is evident from his reasons the master did not refuse the discharge simply because there was "serious pre-bankruptcy conduct". The appellant's pre-bankruptcy conduct was first considered in the master's analysis of whether the facts in s. 173(1)(a) were proven. It was again considered in relation to the public interest in encouraging commercial morality. In that analysis it was, properly, given significant weight. We ought not to reweigh the factors that were considered by the master in the exercise of his discretion.
- [39] As the respondents submit, the evidence of pre-bankruptcy conduct is relevant to the inquiry into whether a discharge is appropriate, but is not controlling and, in this case, it was weighed together with other relevant factors, including the extent to which there was rehabilitation.

Challenges to the Sanctions or the Tax Assessments and Penalties

- [40] The appellants challenge the propriety of the sanctions and contest the amount of their tax debt:
38. ... The Poonians received regulatory sanctions that would not be dischargeable by a discharge from bankruptcy, namely, that they were prohibited from participating in the public markets as a director or officer of publically traded companies and private companies, and as consultants in the capital markets for publically traded companies. This alone is onerous and went to the heart of the Poonians pre-bankruptcy conduct in that they could no longer engage in activities close to participating in capital markets or conduct business through a privately held company.
39. ... the Poonians provided evidence concerning the CRA liabilities, and their efforts to contest the CRA liability by way of both their objections and an appeal to the Tax Court of Canada.
- ...
42. ... there was no evidence by the Commission of tracing of the funds to the appellants on the discharge hearing, and no evidence that the appellants actually profited.
- [41] The argument that no sanctions other than the regulatory sanctions should have been imposed was not advanced on the application for leave to appeal the Sanctions Decision, and is not open to the appellants at this stage. Nor can we hear a collateral attack on the disgorgement order or the assessment of tax liabilities. The existence and amount of the debts proven in the bankruptcy are no longer open to challenge.

Challenge to the Finding of Fault in Relation to the Tax Debt

- [42] The appellants say the tax debt arose from circumstances for which they cannot justly be held responsible:

41. ... the bulk of the CRA liabilities occurred whilst working in and around the capital markets and due to activities stemming from the Commission investigation and regulatory actions.
- [43] The master rejected the argument that the substantial tax liabilities of the appellants, which accumulated over many years, could be attributed to any economic factor beyond their control. There is no basis to suggest that conclusion was founded upon any misapprehension of the evidence.

Challenge to the Weight Afforded to the Debt to the Securities Commission

- [44] The appellants say the master placed inordinate weight upon the debt to the Securities Commission:
44. ... the Court put too much weight on the debts owed to Commission by virtue of the disgorgement orders under section 161 of the Securities Act and its administrative fines as against the Poonains.
- ...
46. ... Had Parliament intended for debts or liabilities owed to provincial regulators, whether it be for example the Commission or the Law Society of British Columbia, Parliament would have carved out an exception that liabilities would be treated differently.
- [45] For substantially the reasons of the appeal judge, I would not accede to the argument that the master gave special significance to the debt to the Securities Commission.

Application of an inappropriate standard of review

- [46] Last, there is some suggestion in the factum, at para. 51, for example, that the chambers judge did not subject the master's decision to appropriate scrutiny. In my view, the appeal judge correctly described his task as follows:
- [5] In applying the discharge provisions of the BIA, a registrar finds facts and is called upon to exercise a discretion based on those facts as found. The parties agree that this appeal from a master sitting as a registrar in bankruptcy is a "true appeal" and not a hearing de novo.
- [6] It is also common ground that deference is owed to the master's findings of fact, and that an appellate court ought not to interfere with the exercise of discretion unless it was based on wrong principles such as importing irrelevant considerations into the analysis or affording no or insufficient weight to relevant considerations.
- [47] This is the well-recognized standard of review cited by the respondent Securities Commission, as described in *Rivers (Re)*, 2014 BCSC 1800 at paras. 11-13; *Schnier v. Canada (Attorney General)*, 2016 ONCA 5 at para. 22; and elsewhere.

Disposition

[48] In my opinion, there is no merit in any of the grounds of appeal identified by the appellants.
I would dismiss the appeal.

[49] NEWBURY J.A.: I agree.

[50] DICKSON J.A.: I agree.

[51] NEWBURY J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Willcock"

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