Court File No. CV-23-00082142-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL FOLEY, JONATHAN WILLIAMS, WILLIAMS VENTURE CAPITAL INC., and CRYSTAL MATHERSON

Applicants

- and -

DOUGLAS GROZELLE and DOUGLAS GROZELLE O/A GROZELLE ENTERPRISES

Respondents

RESPONDING FACTUM OF THE LENDERS
(Trustee's Clawback Motion returnable September 26, 2025)

September 17, 2025

LONGO LAWYERS 4950 Yonge Street, Suite 401 Toronto, ON M2N 6K1 **Bryan Fromstein** LSO#: 50747F Tel: (416) 800-4232 bryan@longolawyers.ca Lawyers for Ganesh Singh	**NAYMARK LAW** 30 Duncan Street, 5th Floor Toronto, ON M5V 2C3 **Daniel Z. Naymark** LSO#: 56889G Tel: (416) 640-6078 dnaymark@naymarklaw.com **James Gibson** LSO#: 62858O jgibson@naymarklaw.com Lawyers for Robyn Lee and 13877035 Canada Inc.
NECPAL LITIGATION PROFESSIONAL CORPORATION 65 Front Street East, Suite 300 Toronto, ON M5E 1B5 **Justin Necpal** LSO#: 56126J Tel: (416) 294-7505 justin@necpal.com Lawyers for John McMullan and Krista McMullan	**JEFFREY KAUFMAN LAW PROFESSIONAL CORPORATION** 15 Prince Arthur Avenue, Suite 200 Toronto, ON. M5R 1B2 **Jeffrey Kaufman** LSO#: 21717N jeff@kaufman.law **Bradley Adams** LSO#: 64689L brad@kaufman.law Lawyers for QQ21 Fund Inc., 13176100 Canada Ltd., Force One Marketing Corporation, and Chris Chetty Financial Inc.

TO: **MILLER THOMSON LLP**
40 King Street West, Suite 5800
Scotia Plaza P.O. Box 1011
Toronto, ON M5H 3S1

David S. Ward LSO#: 33541W
dward@millerthomson.com
Tel: (416) 595-8625

Erin Craddock LSO#: 62828J
ecraddock@millerthomson.com
Tel: (416) 595-8931

AND TO: The Service List

TABLE OF CONTENTS

I. OVERVIEW **1**

II. FACTS **4**

A. Nature of the loan advances **4**

B. Use of the loan advances **5**

C. Grozelle defaults **6**

D. Grozelle's alleged fraudulent conduct and his insolvency **6**

E. The respondent lenders had no knowledge of Grozelle's insolvency and were not complicit in any wrongdoing **7**

F. The largest net losers were insiders who appear to have participated in the fraud **8**

G. Respondents' use of loan payments and current financial position **8**

H. Position of other lenders uncertain **9**

III. ISSUES **10**

IV. ARGUMENT **11**

A. To succeed, the Trustee must show that its claims do not raise any issue that requires a trial **11**

B. The lenders made a series of loans to Grozelle, which is fundamentally different from an equity investment in an enterprise **13**

C. The Trustee has failed to prove its foundational allegation that Grozelle began operating a Ponzi scheme in November 2020 .... **16**

1. The Trustee has not alleged or proven that the scheme was a fraud ***18***

2. The Trustee has not established the timing of when the enterprise became a fraudulent scheme ***21***

3. The Trustee's argument relies on an unproven allegation of fraud ***22***

D. Legal principles governing voidable transactions generally **25**

E. The loan payments were not fraudulent conveyances **27**

1. Test for a fraudulent conveyance in Ontario *27*

2. Grozelle did not intend to defeat the collection efforts of his creditors by making the loan payments *28*

3. The lenders received the payments for consideration without notice of any fraud *31*

F. The loan payments were not fraudulent preferences because they were payments of debts, made to lenders with no knowledge of the fraud **33**

1. The Trustee has failed to prove that Grozelle was insolvent at the time of the transfers *35*

2. The Trustee has not shown that in making the loan payments, Grozelle intended to prefer the Respondent Lenders over other creditors *37*

3. The Trustee has not alleged that the Respondent Lenders had the required concurrent intent to receive a preference *38*

4. The loan payments are protected under section 5 of the APA because they are payments of money *39*

G. The Respondent Lenders were not unjustly enriched by the loan payments, which were justified by the promissory notes **40**

1. The loan agreements are an established juristic reason that justifies the Respondent Lenders' retention of the loan payments *40*

2. The Trustee has not attacked the legal validity of the loan agreements *41*

3. The Respondent Lenders were not enriched from the loan payments that they flowed through to other lenders *43*

4. Grozelle did not suffer a deprivation from the loan payments because they reduced his liability *43*

5. The Respondent Lenders are protected by a change of position defence because they received many of the loan payments on behalf of others and remitted those amounts back to them *44*

H. *Martel* involved a capital investment by investors and does not stand for the proposition that all payments to Ponzi creditors are automatically clawed back **44**

I. The Trustee's clawback claims are time-barred **47**

1. The Trustee's anticipated response to the limitations defence *49*

2. The Respondent Lenders require discovery on their limitation period defence *51*

J. The Trustee's claims are barred by the *in pari delicto* defence because the Respondent Lenders are no more culpable than Grozelle or the other lenders ... 52

V. ORDER SOUGHT ... 53

SCHEDULE "A" – LIST OF AUTHORITIES ... I

SCHEDULE "B" – LEGISLATIVE PROVISIONS ... IV

SCHEDULE "C" – TRUSTEE'S RESPONSE TO INFORMATION REQUESTS ... I

SCHEDULE "D" – EXAMPLE PROMISSORY NOTE ... I

> The principle that fraud is only prejudicial to him who participates in it is also recognized by the statute [governing fraudulent conveyances]. The proviso protects all interests and estates lawfully conveyed or assured upon good consideration and bona fide to a person who, at the time of such conveyance or assurance, has no manner of notice or knowledge of the covin, fraud or collusion. These terms are broad and extensive. They apply to any conveyance, whether from the fraudulent grantor or fraudulent grantee. They are meant to protect a bona fide purchaser for a valuable consideration without notice of the fraud from the operation of the statute. This is manifest as well from the internal evidence of the proviso as from the plainest maxims of equity and justice.
>
> - *Bank of Montreal v. i Trade Finance Inc*, 2009 ONCA 615, at para. 21, citing *A treatise upon conveyances made by debtors to defraud creditors*

I. OVERVIEW

1. The bankrupt Douglas Grozelle (**Grozelle**) borrowed money from numerous lenders in the years before his bankruptcy. He serviced the debt at high interest rates for years before defaulting in or around Fall 2022. Grozelle's trustee in bankruptcy (the **Trustee**) now alleges that he operated a fraudulent Ponzi scheme for a two-year period and seeks to "claw back" loan payments he made to his lenders that exceed the principal they advanced. There have been no previous findings or admissions of fraud by Grozelle, and the Trustee does not seek to prove that his enterprise was fraudulent before any particular payments it seeks to claw back.

2. The Trustee's claims should be dismissed. In the alternative, they should be pursued via action or actions with discovery rights and a full trial record, including *viva voce* evidence.

3. In most bankruptcies, some creditors are fully paid before the bankruptcy and creditors who remain unpaid at the time of bankruptcy suffer losses. Bankruptcy's default rule is that creditor losses lie where they fall, unless there is a transaction that can be set aside under a statutory provision governing voidable transactions.

4. These voidable transaction statutes aim to remedy improper transactions that diminish the assets available to creditors. But they also seek to protect the certainty and finality of commercial transactions by protecting good faith purchasers for value. And in this case, the Trustee resorts to claims under provincial statutes that assiduously protect the payment of money to discharge a debt owing to a creditor.

5. The Trustee claims that once a Ponzi scheme is established, any payment beyond the amount initially advanced is a voidable transaction that can be clawed back and redistributed to creditors under provincial clawback legislation or in equity under the cause of action of unjust enrichment. The Trustee's theory of liability is simple: Ponzi scheme + excess payment = liability. While that may sometimes be true for distributions of fictitious profits to equity investors, it does not apply to loan payments made to lenders. A cardinal rule of the provincial statutes and of unjust enrichment jurisprudence is that loan payments made to discharge a debt are made for good consideration and cannot be voided absent nefarious intent by the lender receiving them.

6. In this case, the lenders' advances were indisputably loans that gave rise to debts, not an equity investment of capital in the enterprise. And the Trustee has not attempted to show that the lenders knew about the fraud or that the loan agreements were legally unenforceable. As such, the Trustee's claims must fail.

7. The Trustee's claims fail for several additional, independent reasons. These include that the Trustee served its claim out of time, having waited more than two years to commence it, the defence of *in pari delicto*, and several reasons specific to causes of action asserted by the Trustee:

(a) **No proof of insolvency.** The Trustee has not shown that Grozelle was personally insolvent before any particular payments. Unlike the authorities the Trustee relies on, Grozelle operated the enterprise in his own name rather than through a corporation and had assets unrelated to his allegedly fraudulent enterprise. This, on its own, is fatal to the Trustee's statutory preference claim;

(b) **No intent to prefer by Grozelle.** The Trustee has not shown that Grozelle intended to prefer the 'net winners' over other creditors or to evade his creditors generally by making loan payments to them. To the contrary, the record shows that Grozelle generally made payments when due and did not prefer the 'net winners'. This, on its own, is fatal to both the Trustee's statutory preference claim and its statutory fraudulent conveyance claim;

(c) **Protected payments of money.** Ontario's preference statute does not apply to payments of money, as opposed to transfers of property in other forms. This, on its own, is fatal to the Trustee's statutory preference claim;

(d) **Flowed-through loan payments.** Several of the 'net winners' received payments not on behalf of themselves but as intermediaries for other lenders with whom they had pooled loans, with payments flowing through their accounts to the principal lenders' accounts. This is fatal to the Trustee's unjust enrichment claim with respect to those payments; and

(e) **Change of position.** The 'net winners' changed their position before learning of any issues with the payments they received, and no longer have those funds. This is a defence to the Trustee's unjust enrichment claim with respect to the funds in question.

8. Finally, while the Trustee relies heavily on the British Columbia Supreme Court's decision *Martel (Re)*, that case had materially different facts as it was found to involve capital investments, not loans. In any event, that case cannot override the well-settled principles of Ontario law that apply to preclude the Trustee's claims in this case.[1]

II. FACTS

9. The respondent lenders who jointly deliver this factum (the **Respondent Lenders**) rely on the facts set out in their joint factum on their motion for directions. The following facts are particularly relevant to their response to the clawback motion. Additional facts specific to issues on this motion are addressed issue-by-issue in the argument section below.

A. Nature of the loan advances

10. Many lenders, including the Respondent Lenders, loaned funds to Grozelle. Grozelle obtained a large number of loans over a period from at least the first half of 2019 until late 2022. The loans were reflected in promissory notes supplied by Grozelle, which provided for fixed payments of interest, generally at high rates, and fixed maturity dates.[2]

11. There is no record of any person making equity investments with Grozelle or advancing him funds other than as a loan. None of the Respondent Lenders made such investments. Their entitlement to loan payments was not dependent or contingent upon the profitability of Grozelle's business.[3]

---

[1] *My Mortgage Auction Corp. and Martel (Re)*, 2015 BCSC 1520 [***Martel***]
[2] *Infra*, section IV(B). First Report of the Trustee dated November 29, 2024 [**Trustee's First Report**], ¶37, ¶108-111; Motion Record of the Trustee [**Trustee's Record**], Tab 2
[3] *Infra*, section IV(B). Trustee's First Report, ¶37, ¶108-111

B. Use of the loan advances

12. Grozelle used some loan advances to make legitimate, if ill-advised, investments in start-up enterprises.

13. Based on the Trustee's flow of funds analysis, Grozelle carried out investment activities through two channels.[4] First, Grozelle invested approximately $1.9 million directly from his accounts, through eight separate investments.[5]

14. Second, Grozelle invested indirectly by flowing funds through K&M Venture Capital Group Inc. (**K&M**). K&M was established to serve as an investment vehicle for Grozelle, who made all investment decisions.[6] Grozelle transferred approximately $4.4 million to K&M, which then invested approximately $1.5 million in thirteen investments.[7]

15. In total, the Trustee identified approximately $3.4 million in total investments.[8] As well, there are approximately $5.5 million in unidentified transfers, which could include investments.[9] At one point, K&M internally estimated the value of Grozelle's investments to be as high as $15.9 million.[10] In the end, however, Grozelle's investments were almost entirely lost.

16. Most loan payments were financed from the loan advances of other lenders; materially more money went to repay expiring loans than to new investments.[11]

---

[4] Trustee's First Report, Appendix "I" (Flow of Funds Analysis); Trustee's Record, Tab 2

[5] Trustee's First Report, ¶86(f) and Appendix "V" (Investment Table) ; Trustee's Record, Tab 2

[6] Affidavit of John McMullan sworn August 20, 2025 [**McMullan Affidavit**], ¶9, 12; Motion Record of the Respondent Lenders dated August 22, 2025 [**Lenders' Record**], Volume 3, Tab 5

[7] Trustee's First, Report, ¶86(b), (g). K&M commingled $4.4 million in transfers from Grozelle and $2.2 million in direct transfers from investors. Trustee's First Report, ¶86(b); Trustee's Record, Tab 2

[8] Trustee's First Report, ¶86 and 229; Trustee's Record, Tab 2

[9] Trustee's First Report, Appendix "DD", referencing "unallocated" transfers; Trustee's Record, Tab 2

[10] McMullan Affidavit, ¶15; Lenders' Record, Volume 3, Tab 5

[11] Trustee's First Report, ¶86; Trustee's Record, Tab 2

17. The Trustee's conclusions from its flow of funds analysis does not identify any amounts transferred to Grozelle, suggesting that he did not personally receive a significant share of the loan advances.[12]

C. Grozelle defaults

18. Grozelle initially made payments to lenders. Grozelle began to default on the loans, however, and had ceased making loan payments when they came due by November 2022.[13]

D. Grozelle's alleged fraudulent conduct and his insolvency

19. The Trustee alleges that Grozelle's enterprise became a fraudulent scheme beginning in November 2020.[14] This is a strongly contested allegation, which is addressed further below.

20. The Trustee has not put forward any evidence from Grozelle, compelled or otherwise, about his operation of the enterprise or his intentions. The Trustee acknowledges that Grozelle cooperated in its investigation.[15] Grozelle is a witness within the Trustee's control, both because he is cooperating voluntarily and because the Trustee has the power to compel Grozelle to provide information and records under oath, pursuant to both the orders appointing it receiver and s. 163 of the BIA.

21. Certain respondents asked the Trustee for the information that formed the basis for its allegation that Grozelle's enterprise became a fraud and was insolvent beginning in November

[12] Trustee's First Report, ¶86; Trustee's Record, Tab 2
[13] Trustee's First Report, ¶57; Trustee's Record, Tab 2
[14] Trustee's First Report, ¶36; Trustee's Record, Tab 2
[15] Trustee's First Report, ¶82; Trustee's Record, Tab 2. See also Factum of the Respondent Lenders dated September 10, 2025 (Motion for Directions) [**Lenders' Motion for Directions Factum**], ¶51-53

2020. In its response, the Trustee did not provide any substantive information (reproduced in **Schedule "C"**).[16]

22. There is no allegation or evidence that the loans were made based on affirmative misrepresentations by Grozelle, including about the profitability of the business.[17]

23. The Trustee alleges that Grozelle's enterprise was insolvent between November 2020 and November 2022. This is also contested.

24. The record does not contain meaningful evidence about Grozelle's assets during that period. When asked by the lenders, the Trustee did not disclose any substantive information about Grozelle's assets during the relevant period.[18]

E. The respondent lenders had no knowledge of Grozelle's insolvency and were not complicit in any wrongdoing

25. The Trustee does not allege, nor is there any evidence, that the Respondent Lenders knew about Grozelle's insolvency or were complicit in any wrongdoing.

26. The Trustee does not allege, nor is there any evidence, that Grozelle intentionally preferred the Respondent Lenders or treated them differently from other lenders.

---

[16] Supplementary Affidavit of Robyn Lee sworn September 5, 2025 [**Supp. Lee Affidavit**], Ex. C [**Trustee's Response**], Question 1; Supplementary Motion Record of Robyn Lee dated September 5, 2025 [**Lee Supp. Record**], Tab 1 and **Schedule "C"**
[17] Schedule "C" (Question 3). *Infra*, section IV(C)(2)
[18] Schedule "C" (Question 9). *Infra*, section IV(F)(1)

F. The largest net losers were insiders who appear to have participated in the fraud

27. The two largest net losers appear to have participated in the fraud.

28. The Trustee has identified the two largest net losers as Jonathan Williams (grouped with related parties) ($6.2 million) and Crystal Masterson (grouped with related parties) ($2.9 million).[19] The Williams group and Masterson group jointly comprise 37 percent of the total losses of identified net losers, even after deducting offsetting profits.

29. Williams and Masterson were charged with fraud alongside Grozelle.[20] Williams was described as Grozelle's employee. Masterson, a lawyer, was suspended by the Law Society Tribunal on an interlocutory basis pending a conduct hearing. The Tribunal found evidence that Masterson made false representations (including that there were "zero defaults") to induce others to make loans after she realized that the lending scheme was insolvent.[21]

G. Respondents' use of loan payments and current financial position

30. The Respondent Lenders' uncontradicted evidence is that most of the loan payments to them flowed to, or were used to pay back, other lenders.[22] In some cases, groups of lenders had

---

[19] Trustee's First Report, Appendix "B"; Trustee's Record, Tab 2

[20] Lenders Motion for Directions Factum, ¶59-62

[21] *Law Society of Ontario v Masterson*, 2025 ONLSTH 122, ¶43-47

[22] Affidavit of Anthony Rossi sworn August 16, 2025 [**Rossi Affidavit**], ¶16: "The Lender Companies borrowed money from third parties at high interest rates in order to fund various loans to Grozelle. This created significant liabilities that were directly tied to the loans to Grozelle." Lenders' Record, Volume 1, Tab 2
Affidavit of Ganesh Singh sworn August 15, 2025 [**Singh Affidavit**], ¶13: "Because Grozelle did not pay me back for the October 2022 loans, I had to borrow money against my investment property, my residence, and all of my credit cards in order to repay loans I had taken from others to loan to Grozelle." Lenders' Record, Volume 2, Tab 4
McMullan Affidavit, paras. 69-72; Lenders' Record, Volume 3, Tab 5

pooled their money to make loans jointly through a Respondent Lender.[23] Some of the loan payments were also used to make investments in start-up businesses including ones related to or promoted by Grozelle. Those investments are now worthless.[24]

31. The Respondent Lenders' uncontradicted evidence is that they have limited assets remaining to satisfy any clawback claim and are worse off than when they made the loans.[25]

H. Position of other lenders uncertain

32. There are several calculation issues with the Trustee's assessment of which lenders were 'net losers' and which were 'net winners', as addressed in the Respondent Lenders' factum on the motion for directions. These include, among other issues, the appropriateness of the Trustee: (a) grouping certain investors and calculating their aggregate net position, and (b) departing from the transaction-by-transaction approach considered by the Supreme Court in *Golden Oaks*. The Trustee has proposed a staged approach, deferring quantification issues until after liability is determined. As a result, there is a material chance that lenders who believe they are 'net losers (who stand to gain by the relief the Trustee is seeking) will, in fact, be liable under the proposed relief sought and will only discover this after the liability hearing has already been decided.

---

[23] Affidavit of Robyn Lee sworn August 15, 2025 [**Lee Affidavit**], ¶12: "In most cases, I made these loans jointly with friends, friends of friends, and family members. Some of these friends and family members began lending to Grozelle because I suggested it to them, including my mother" and ¶19: "In many cases where I paid money to and received money from Grozelle directly, I collected some of the advanced funds from co-lenders and disbursed some of the proceeds to co-lenders." Lenders' Record, Volume 2, Tab 3
McMullan Affidavit, paras. 69-72; Lenders' Record, Volume 3, Tab 5

[24] Lee Affidavit, paras. 33-35; Lenders' Record, Volume 2, Tab 3

[25] See, e.g., Rossi Affidavit, ¶40: "QQ21 ceased operations due to the massive debt created by Grozelle's failure to repay agreed principal and interest."; Lenders' Record, Volume 1, Tab 2
Lee Affidavit, ¶38: "... there are essentially no remaining net proceeds. My net worth today is probably lower than what it was when I started investing with Grozelle." Lenders' Record, Volume 2, Tab 3
Singh Affidavit, ¶3: "I have repaid all of the loans made to me with interest. I am now in dire financial difficulty." and ¶26: "I am not in any position to pay any funds to the bankrupt's estate." Lenders' Record, Volume 2, Tab 4

III. ISSUES

33. The Trustee's clawback motion raises the following issues to be decided, which are set out in the list below:

General issues

(a) Were the lenders' advances in substance an equity investment or a loan advance?

(b) Did Grozelle engage in a fraudulent scheme? If so, when did the fraud begin?

For the fraudulent conveyance claim:

(c) Did Grozelle make the loan payments with the intent to defeat his creditors in their collection efforts within the meaning of section 2 of the *FCA*?

(d) Did the lenders provide good consideration for the loan payments they received, such that they are protected by the safe harbour provisions in section 3 of the *FCA*?

For the fraudulent preference claim:

(e) When did Grozelle become insolvent? Was he insolvent at the time he made the payments at issue, or some of them?

(f) Did Grozelle make the loan payments with the intent to prefer the lenders?

(g) Did the lenders also have an intent to be preferred when they received the loan advances?

(h) Were the loan payments a payment of money to a creditor protected by the safe harbour provision under section 5 of the *APA*?

For the unjust enrichment claim:

(i) Were the underlying loans a juristic reason for the loan payments?

(j) Were the lenders enriched by loan payments that they flowed back to other lenders?

(k) Did the loan payments discharging the debts cause a deprivation to Grozelle?

(l) Is a change of defence position available to the lenders?

For the lenders' affirmative defences:

(m) Are the Trustee's claims time-barred?

(n) Are the Trustee's claims barred by an *in parti delicto* defence on the basis that the respondent lenders are not more culpable?

34. In addition to the above issues, there are several issues required to assess which lenders should have to pay back what amounts. The Trustee has not sought a bifurcation order but has declared that it wishes to defer these issues until a future "phase" of this motion and has not addressed them in its factum. As such, they are not addressed here, but they remain an outstanding issue not easily severable from the so-called "liability" issues the Trustee proposes to deal with at the September 26, 2025 return date.

IV. ARGUMENT

A. To succeed, the Trustee must show that its claims do not raise any issue that requires a trial

35. The Trustee invites this Court, on a summary record, to pronounce sweeping declarations that every payment characterized as "profit" to so-called 'net winners' was a fraudulent conveyance, a fraudulent preference and an unjust enrichment. The Respondent Lenders have brought a motion for directions and contend that these issues can only be decided at a trial. In particular, the Trustee's claims require determining contested material issues of fact, including but not limited to whether the Trustee has established:

(a) there was a fraud and, if so, its contours and timing;

(b) that Grozelle was insolvent before any, or alternatively some, of the impugned transfers;

(c) the required intent to prefer or to hinder/defeat creditors;

(d) that payments to the Respondent Lenders were "fictitious profits" rather than the repayment of principal or interest;

(e) whether the Respondent Lenders gave good consideration for the transfers;

(f) whether the recipients should be grouped by related entity;

(g) whether flow-through transactions should be deducted when quantifying an excess payment; and

(h) whether the underlying loan agreements were contrary to the criminal interest provisions under the *Criminal Code*.

36. Even if the Court decides that this matter can be brought by summary motion, the Trustee must still establish that there is no genuine issue requiring a trial.[26] And these are quintessential triable issues. Each of the traditional hallmarks of a matter that must proceed by trial is present: important material facts in dispute, the presence of complex issues requiring expert evidence, the need to exchange pleadings and for discoveries, and the significance and impact of the relief sought, which the Trustee estimates to be over $20 million in clawbacks.[27]

37. As argued in the motion for directions, the findings necessary to ground the relief the Trustee seeks cannot be made fairly and justly on this record. The Trustee seeks declaratory relief

---

[26] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 [***Hryniak***], ¶66.
[27] *Jalilnattajamiri v. Jalilnattajamiri*, 2025 ONSC 1302, ¶49
Glory v. Hagey, 2021 ONSC 6711, ¶14-19

that is discretionary and is not to be used to decide disputed facts or foreclose other parties' rights.[28] The summary process proposed by the Trustee short-circuits and forecloses the individual defences and rights of a large class of 'net winners'. The record contains significant evidentiary gaps, including any evidence from Grozelle. Finally, the Receiver's concerns about costs and delay cannot override the need for a fair adjudication of these issues - for the reasons argued in the Respondent Lenders' motion for directions.

B. The lenders made a series of loans to Grozelle, which is fundamentally different from an equity investment in an enterprise

38. The Trustee seeks to claw back loan payments that Grozelle made to lenders to repay loans evidenced by promissory notes.

39. The nature of a loan transaction is fundamentally different from an investor who makes an equity investment in an enterprise. An equity investor is only legally entitled to share in the net profits of the business, typically when a dividend is declared.[29] A shareholder has the potential for unlimited returns based on the business's profitability but if no profits are made, they have no legal entitlement to any payments and cannot be paid from the business's capital.[30] A lender, however, is entitled to receive the fixed loan payments agreed by the borrower, regardless of the business's profitability.

---

[28] *Bryton Capital Corp. v. CIM Bayview Creek*, 2023 ONCA 363, ¶62-64, ¶70

[29] *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 569 [***US Steel***], ¶183

[30] *US Steel*, ¶183: "The equityholders get what is left after the holders of the debt have been paid in full; if the debtholders can't get paid in full, then the equityholders get nothing." See also *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1992 CanLII 49 (SCC), [1992] 3 SCR 558.

40. Consider *Titan Investments Limited Partnership (Re)*, the first Canadian case to consider clawback claims in a Ponzi scheme.[31] In that case, investors held units in a limited partnership that purportedly traded in futures and equities markets.[32] Investors were entitled to profits earned, which would be returned to them pro rata.[33] The Court found that the investors were cognizant that their investments were not loans to Titan but were equity investments whose net asset value depended on Titan's trading performance.[34] While Titan reported extraordinary profits, in reality, it never generated any profits at all.[35] Investors who redeemed their units received amounts based on a net asset value inflated by fictitious profits and were thus paid with the funds of other investors.[36]

41. Similarly, this Court's decision in *Den Haag* involved investors who held an interest in a partnership that was held out to be a private hedge fund investing in arbitrage opportunities.[37] Investors were issued false reports that the fund had realized extraordinary investment returns and declared their share of profits as taxable personal income.[38]

42. In both *Titan* and *Den Haag*, the defendants were equity investors who were entitled only to a share of profits generated by the business and thus had no contractual entitlement to receive fictitious returns that had not been earned. As explained below, the fact that equity investors received payments of fictitious profits to which they were not legally entitled has a profound effect on clawback claims in a Ponzi scheme.

---

[31] *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637 [***Titan***], ¶2-3
[32] *Titan*, ¶1
[33] *Titan*, ¶1
[34] *Titan*, ¶4
[35] *Titan*, ¶5, ¶9
[36] *Titan*, ¶10
[37] *Den Haag Capital, LLC v. Correia*, 2010 ONSC 5339 [***Den Haag***], ¶9
[38] *Den Haag*, ¶15, ¶39, ¶42, ¶44

43. In some cases, it is unclear whether a party's interest is debt or equity. Under the BIA and at common law, the court may review the characteristics of the party's interest and determine whether it is a "capital investment" (equity) or whether it is a loan (debt).[39]

44. But the lenders' interest here is clearly debt, not equity. The Trustee admits that there is no dispute on the record that all parties who advanced funds to Grozelle did so on the express basis that they were lending money, not making equity investments, and that payments they received from Grozelle were interest and principal payments on those loans rather than dividends or profit distributions.

45. The nature of the loan agreement is described in the promissory notes issued by Grozelle, an example of which is attached as **Schedule "D"**.[40] Under the promissory note, Grozelle promised to pay the debtor for a "personal loan, together with interest thereon". The note set out the principal, the interest rate and the maturity date. Grozelle acknowledged that he gave the note in exchange "for value received". While the parties agree that the promissory notes do not reflect an accurate accounting of the loan advances and repayments, the notes reflect the essential structure and terms of the loan transactions, and all parties agree that every 'net winner' and 'net loser' who advanced funds to and received funds from Grozelle did so by way of loans.

46. The promissory notes and the lenders' unanimous evidence make clear that the advances were made as loans. The governing terms reflect the fundamental terms of a loan transaction, in

---

[39] *YG Limited Partnership (Re)*, 2021 ONSC 4178, ¶41 (capital contributions styled as shareholder advances found to be equity claims)
0731431 B.C. Ltd. v Panorama Parkview Homes Ltd., 2021 BCSC 607 (CanLII), ¶532-538 (capital contributions subordinated to debt claims at common law)
[40] Trustee's First Report, Appendix "Q"; Trustee's Record, Tab 2

which a lender receives a contractually agreed set of cash flows, typically through periodic interest payments and one or more principal repayments, the last of which occurs on the maturity date.[41] There are no terms to support a conclusion that the money was advanced as an investment whose value depended on or was contingent on the profitability of any business.[42]

47. The Trustee has commented that the loans were at high interest rates. That is true. But critically for the analysis on this motion, the Trustee does not argue in its factum, nor has it demonstrated on the record, that the interest rates were so high that the agreements were invalidated. This is further addressed in section G(2) below.

C. The Trustee has failed to prove its foundational allegation that Grozelle began operating a Ponzi scheme in November 2020

48. For each of its claims, the Trustee relies upon a foundational allegation: that Grozelle began operating a Ponzi scheme in November 2020. Based on this allegation, the Trustee asserts that lenders who received payments after that date should have to repay them. The Trustee's core allegation in its factum is that lenders who received "profits" did so "only by reason of Grozelle raising those funds by perpetrating fraud on later investors".[43]

49. Importantly, and in contrast to the cases on which the Trustee relies, this motion comes without any prior findings of fraud. As such, the proof of both fraud and the start date of the alleged fraud are critical to the success of the Trustee's claims, as well as its determination of whether a Respondent Lender received excess payments.

---

[41] *US Steel*, ¶183
[42] *US Steel*, ¶160
[43] Factum of the Trustee dated September 10, 2025 [**Trustee's Factum**], ¶9

50. As reviewed below, Grozelle was not operating a "pure" Ponzi scheme in which he was misrepresenting investment or business activity while simply diverting investor funds to himself and repaying investors with each other's money. He was, in fact, using borrowed funds to make investments and appears to have paid himself relatively little. To the extent Grozelle was simply making investments funded by loans and refinancing that debt with other loans, without lying to lenders to induce them to advance funds, that, on its own, was not fraud. It does not become fraud simply because the interest rates on the loans were high, or because Grozelle's business model was high-risk or misguided, or because the business ultimately failed.

51. Rather, to be civil fraud, Grozelle must have made knowing misrepresentations intended to induce reliance and the recipients of those representations must have relied on those representations to their detriment.[44] The fact that loan payments were financed by other loans that went into default is not, on its own, grounds to claw back payments to lenders. Likewise, if Grozelle started lying to lenders partway through the enterprise such that it turned fraudulent at that point, a different analytical framework would apply to payments before and after that date.

52. In all of the cases on which the Trustee relies, the Court ordered clawbacks based on underlying factual findings of fraud, based either on admissions by the fraudster, agreement of the parties, or an extensive evidentiary record.[45] But on the record before the Court on this motion, the Trustee has not met its burden of establishing that Grozelle fraudulently induced lenders to advance loans starting in November 2020 or any other particular start date from which the Court

[44] *Hryniak*, ¶87

[45] For example: in *Den Haag*, the fraudster had pleaded guilty to criminal charges and the fraud was uncontested. In *Boale, Wood & Company Ltd. v Whitmore*, 2017 BCSC 1917 [***Whitmore***], the Court made findings of fraud, noting they were "uncontroversial" (¶2 and 11). In *Martel*, the Court made findings of fraud based on an extensive record consisting of eight reports and multiple affidavits.

might consider clawing back payments to lenders. To the contrary, the Trustee has not only failed to lead evidence of the elements of fraud (knowing misrepresentation, intention to induce, detrimental reliance), but it has expressly refused specific written interrogatories asking it to particularize its fraud allegations and provide its supporting evidence.

1. The Trustee has not alleged or proven that the scheme was a fraud

53. First, the Trustee has failed to establish the alleged fraudulent nature of Grozelle's borrowing transactions. The Trustee indicates that Grozelle had defaulted on his loans by November 2022. But a borrower's failure to pay his debts and his use of loan advances to pay other creditors does not establish that he was perpetrating a Ponzi-style investment fraud, particularly when there is some legitimate investment activity present.

54. The Trustee concedes that the advances that Grozelle received were usually characterized as borrowings, documented (if haphazardly) through hundreds of promissory notes issued by Grozelle.[46] But this understates the evidence in the record. The Respondent Lenders' evidence confirms that they understand their advances to be loans. Even the Trustee's witness characterized the advances as loans, which resulted in the payment of interest.[47]

55. There is <u>no</u> evidence from "investors" that they were told that they would earn returns based on the underlying profitability of Grozelle's business. Unlike *Titan* and *Den Haag*, Grozelle did not issue account statements falsely reporting the fictitious profits necessary to justify the payments that were made. The fact that Grozelle paid lenders interest when due was not an implied representation that his business was profitable. And it is immaterial that the interest was primarily

[46] Trustee's First Report, ¶4; Trustee's Record, Tab 2
[47] Affidavit of Justin Kavanagh sworn November 28, 2024, ¶9, 12, 15, 16; Trustee's Record, Tab 3

paid from funds Grozelle borrowed from other lenders, just as any person might borrow from a second source to repay his or her first source. Simply put, Grozelle's widespread failure to pay his creditors does not, on its own, offer a basis to claw back funds from the Respondent Lenders or establish an inherently fraudulent arrangement.

56. Contrary to the Trustee's claims, too, there was legitimate investment activity by Grozelle, as ill-advised as it may have been.[48] The investments that Grozelle made, either directly or through K&M, may very well have been extremely risky and unproductive, but they occurred nonetheless.[49] One of the essential elements of a Ponzi scheme is that there is no legitimate business activity. Grozelle's enterprise does not meet this requirement.

57. As far as the Respondent Lenders have identified, the Trustee's reports allege only two specific misrepresentations by Grozelle, both occurring after he had defaulted – on November 15, 2022[50] and on May 4, 2023.[51] Even the scant evidence of the Trustee's affiants – including insiders such as Michael Foley and Jonathan Williams, now charged with fraud alongside Grozelle – does not indicate any clear or common misrepresentations made to lenders.

58. The Respondent Lenders gave the Trustee an express opportunity to address this deficiency in its record, so that the evidence of fraud could be before the Court on these motions. They notified the Trustee that it would need to prove fraud ("To avoid any misapprehension going forward, the Net Winners do not admit that Mr. Grozelle operated a Ponzi scheme as of any particular date. This is a contested issue on the motions.") and asked open-ended written interrogatories that gave

---

[48] *Infra*, section II(B)
[49] Trustee's First Report, ¶77; Trustee's Record, Tab 2
[50] Trustee's First Report, ¶222-223; Trustee's Record, Tab 2
[51] Trustee's First Report, ¶247-257; Trustee's Record, Tab 2

the Trustee an opportunity to particularize its fraud allegations and include its supporting evidence in the record. The Trustee declined to do so.[52]

59. Specifically, the Respondent Lenders first asked the Trustee:

> Please provide particulars of the fraudulent misrepresentations the Trustee alleges Mr. Grozelle made (contents, to whom made, when made), other than those reviewed at paragraphs 222-223 and 247-257 of the Trustee's First Report [ie, the two post-default representations reviewed above]. What evidence does the trustee have to support the elements of deceit in respect of those representations, namely (a) that Mr. Grozelle made the representations, (b) that they were false, (c) that Mr. Grozelle intended to induce the persons to whom he made those representations to rely on them, and (d) that those individuals in fact relied on them to their detriment."[53]

60. Instead of taking the opportunity to fill this gap in its record, the Trustee *refused* to answer this question ("The relief sought by the Trustee on the Clawback Motion... does not turn upon proof of particular fraudulent misrepresentations").[54]

61. While the Trustee has relied on selective hearsay evidence from Grozelle, who it acknowledges is cooperating with it, it has offered the Court no evidence from Grozelle on the foundational issue of whether he was engaged in fraudulent activity. That evidence is within the Trustee's control, given that Grozelle has cooperated with the Trustee and can be compelled by it to provide information under oath under s. 163 of the BIA.

62. The Respondent Lenders also asked the Trustee, via written interrogatories, whether Grozelle had admitted that he committed fraud or operated a Ponzi scheme, and for production of

---

[52] Supp. Lee Affidavit, Tab 1, ¶4-7 and Exs. B, C, and D; Supp. Lee Record, Tab 1
[53] Letter to Trustee's counsel dated September 2, 2025, Ex. B to Supplementary Lee Affidavit; Table of Trustee's responses to written questions, Ex. C to Supplementary Lee Affidavit; Supp. Lee Record, Tab 1
[54] Letter from Trustee's counsel dated September 4, 2025, Ex. C to Supplementary Lee Affidavit; Table of Trustee's responses to written questions, Ex. D to Supplementary Lee Affidavit; Supp. Lee Record, Tab 1

the transcripts of the Trustee's discussions with Grozelle.[55] The Trustee responded that it has no transcripts but effectively conceded that Grozelle has not admitted anything. (It did not answer the question directly but stated only that Grozelle had not filed any evidence to contest the Trustee's conclusions – not surprisingly given that the Trustee has not raised the issue in any proceeding to which Grozelle is a respondent).

2. The Trustee has not established the timing of when the enterprise became a fraudulent scheme

63. Even if the Trustee had established that Grozelle committed fraud, it has not adduced any evidence to establish that the enterprise became a fraud in November 2020 - the date it asserts as the relevant start date for clawbacks - nor any particular other date for that matter.

64. The Trustee's only 'evidence' on its selection of that start date is its own hearsay assertion that Grozelle told it that he "may have started [making investments] in November 2020".[56] Yet at the same time, the Trustee found that 99 percent of the financial activity in Grozelle's bank accounts occurred after February 2021, several months after November 2020. The Ontario Provincial Police laid charges against Grozelle, Masterson and Williams alleging yet another fraud date: August 1, 2021.

65. For their part, the Respondent Lenders' evidence is that their own lending transactions with Grozelle began in 2019, 2020, and 2021. They received loan payments without issue until the latter months of 2022, without any evidence that they were repaid with fraudulently obtained funds.

---

[55] Schedule "C"; Question 4

[56] Trustee's First Report, ¶77; Trustee's Record, Tab 2

There is, therefore, virtually no evidentiary support for the allegation that a fraudulent scheme began in November 2020, as asserted by the Trustee.

66. As with the question of whether there was fraud, the Respondent Lenders requested information from the Trustee on its asserted November 2020 start date, giving it a fair opportunity to supplement its evidence. But in response, the Trustee simply responded that its conclusion about the November 2020 date was based on "*the entirety of the record*", "*most particularly*" its discussions with Grozelle and McMullan (which it did not disclose). It also referred to paragraphs 70 to 77 of its Third Report for "further details regarding the rationale for the Trustee's determination." Those paragraphs refer variously to December 2019, February 2021, and June 2020, as dates the Trustee examined, without even *referring* to November 2020, let alone offering a rationale for selecting that start date.

3. The Trustee's argument relies on an unproven allegation of fraud

67. The Trustee baldly asserts that it "has presented clear evidence, that the Scheme was a Ponzi scheme" in its reports.[57] But as reviewed above, it has failed to lead evidence on a foundational point: that Grozelle committed fraud and had done so by its asserted start date of November 2020.

68. Instead, the Trustee advocates for the description of what it refers to as "hallmarks" of a Ponzi scheme used in certain British Columbia cases, such as lack of legitimate investment activity, promises of high returns, and focus on attracting new money, and reviews in its factum how it says those characteristics are present here. This approach is misguided for three reasons.

---

[57] Trustee's Factum, ¶112

69. First, the Trustee overlooks the key foundational element of the B.C. definition – that a Ponzi scheme is a "fraud" that possesses those characteristics. The authority it relies on, *Whitmore*, makes this abundantly clear:

> [45] The United States Securities and Exchange Commission ("SEC") has defined a Ponzi scheme as follows:
>
> > A Ponzi scheme is **an investment fraud that involves** the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.
>
> Kathy Phelps and Steven Rhodes, The Ponzi Book – A Legal Resource for Unraveling Ponzi Schemes (San Francisco: LexisNexis, 2012) at ch. 1.02.
>
> [46] Canadian courts have described Ponzi schemes similarly. In *Titan Investments Ltd. Partnership (Re)*, 2005 ABQB 637, Justice Hawco held:
>
> > [8] Ponzi schemes are **fraudulent investment schemes whereby** individuals are enticed by a conman or fraudster to make investments in an operation promising an unreasonably high rate of return. Once the first few investments are made, subsequent investors are enticed to invest partly through reported gains and partly through the high payouts of earlier investors. Ultimately, the conman either spends or disappears with the remaining money, or the scheme collapses on itself as funds are exhausted by payouts to earlier investors.
>
> [47] In *Millard v. North George Capital Management Ltd.* (2006), 2006 CanLII 41287 (ON SC), 26 B.L.R. (4th) 231 (Ont. S.C.J.), Justice Cumming, at para. 11, 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 payment ultimately stopping when there are no further investors. The result is that everyone loses money except the perpetrators of the fraud. It is clear, and, indeed, conceded by the defendant

> that the Excess monies he received came from the investments made by the Investors. (square brackets in original, **emphasis added**)[58]

70. As this review makes clear, while Ponzi schemes have been described in various ways, and different commentators and judges refer to different "hallmark" characteristics, a core element that everybody agrees makes a Ponzi scheme a Ponzi scheme is *fraud*.

71. The second problem with the Trustee's approach is that it treats the concept of "Ponzi scheme" as a fixed legal category with established criteria and a unique associated legal doctrine, with legal presumptions or automatic remedies applying to facts falling into this category. This is simply wrong. Certain factual inferences – such as insolvency – are sometimes drawn in the cases of Ponzi schemes. But like any factual inferences, these must flow from the facts of the particular case. This is addressed further in the preference/fraudulent conveyance sections of this factum. In advocating that the Court adopt an analytical structure whereby it first classifies Grozelle's enterprise as a Ponzi scheme or not a Ponzi scheme and then applies presumptions or automatic results if it determines it was a Ponzi scheme, the Trustee leads the Court towards committing an error of law.

72. The above two flaws in the Trustee's argument are fundamental. The argument itself is based on a misunderstanding of the law. The third flaw is less fundamental and specific to the contents of the Trustee's argument. That is that the Trustee's assertion that there was no legitimate investment activity is overstated. The Trustee acknowledges that Grozelle invested over $3.4 million.[59] There is significant evidence of his investment activities in the record.[60] The Trustee

[58] *Whitmore*, ¶45-47
[59] Trustee's Flow of Funds Analysis at Exhibit DD to Trustee's First Report; Trustee's Record, Tab 2
[60] *Infra*, section II(B)

alleges that Grozelle lacked an investment strategy, that his financial model was not sustainable, and that his investments generated losses, but that does not mean that he had no investment activities or that his enterprise was fraudulent from the outset.

D. Legal principles governing voidable transactions generally

73. Before insolvency, a debtor may transfer property to another person, reducing assets available to their creditors. The BIA and provincial statutes create a set of claims that void pre-bankruptcy transactions in certain cases. Provincial statutes, as interpreted by case law, vary between provinces.

74. A common principle is that payment of *bona fide* debts is generally permitted absent nefarious intentions, while payments intended to hide assets are more easily voided. For example, transferring cash to one's spouse on the eve of bankruptcy will generally be voided; paying a monthly credit card bill on its due date will generally not be. The general objectives of the statutory provisions governing voidable transactions include preserving the finality of legitimate commercial transactions, an objective that serves as a limit on other objectives of remedying transactions that diminish available assets for distribution and that undermine the statutory scheme of equal distribution of a debtor's assets.[61] This objective is reflected in both the statutory requirements and in safe-harbour provisions of the statute, which offer "certainty and repose to titles honesty acquired" and "[protect] a bona fide purchaser for a valuable consideration without notice of the fraud."[62]

---

[61] Roderick Wood, *Bankruptcy & Insolvency Law* (2nd ed.) [***Wood***] p. 201
[62] *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052, ¶23 (describing the rationale behind the safe harbour provisions of provincial legislation).
Bank of Montreal v. i Trade Finance Inc, 2009 ONCA 615 [***i Trade***], ¶21 (describing bona fide purchaser for value without consideration defence generally)

75. In this case, the Trustee relies on two statutory claims under provincial law: a fraudulent conveyance claim under s. 2 of the *Fraudulent Conveyances Act* (***FCA***) and a fraudulent preference claim under s. 4(1) of the *Assignments and Preferences Act* (***APA***).[63]

76. These provisions impose a higher burden for the Trustee to meet than the clawback provisions of the BIA. That statute empowers trustees to impeach transactions immediately preceding bankruptcy that transfer away a bankrupt's assets without any corresponding value provided ("transfers at undervalue", s. 96) and certain payments of debts in preference to other creditors ("preferences", s. 95).[64] These powers are not available here and so the Trustee must therefore meet the higher burdens that apply to the provincial statute.

77. It is critical to recognize the difference between BIA clawbacks and the provincial remedies sought here. The tests are different. The primary ground for ordering the clawbacks in the *Martel* case, for example, was under s. 95 of the BIA.

78. The law specific to *FCA* and *APA* claims is reviewed below. Critically for this case, *payments to creditors who are not aware of any fraud or intention to defeat other creditors and do not have that intention themselves are not voidable under either statute*. In this case, the Respondent Lenders were all lenders receiving payments on account of their loans, who did not know of a fraud. These claims must therefore fail.

---

[63] *Fraudulent Conveyances Act*, RSO 1990, c F.29 [***FCA***], s. 2
Assignments and Preferences Act, RSO 1990, c A.33 [***APA***], s. 4(1)
[64] BIA, s. 95(1) (BIA preference claim) and s. 96(1) (BIA transfer at undervalue claim)

E. The loan payments were not fraudulent conveyances

79. The first statutory ground on which the Trustee relies is the fraudulent conveyance provisions in Ontario's *FCA*. Generally speaking, these provisions apply only to payments made to non-creditors, generally where the transferor debtor retains some benefit from the transfer. A transfer of property to a creditor will not generally be impeachable as a fraudulent conveyance.[65] As set out below, Grozelle's payments to the Respondent Lenders do not meet the test under that statute.

1. Test for a fraudulent conveyance in Ontario

80. The *FCA* has its roots in the *Fraudulent Conveyances Act* 1571, also known as the *Statute of Elizabeth*, which was consolidated in the 1897 revised statutes of Ontario and then consolidated and re-enacted as the *FCA* in 1911.[66] As the *FCA*'s statutory language mirrors the *Statute of Elizabeth*, Ontario courts have long drawn on interpretations of that statute.

81. To establish a fraudulent conveyance, the Trustee must show: (1) a conveyance of property, (2) made with the intent to defeat, hinder, delay or defraud (3) creditors or others.[67] To satisfy the statute, these elements must be established for each voidable transaction. If shown, the transaction is void as against such creditors, unless the statutory safe harbour provision under section 3 of the *FCA* applies.

82. Section 3 of the *FCA* provides that a transfer is not a fraudulent conveyance if it is made for good consideration and in good faith to a person who did not know of the transferor's intention

---

[65] Wood, p. 216
[66] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Part IV) (1983), p. 126, citing RSO 1897, c. 334 and *Fraudulent Conveyances Act*, (1911) 1 Geo. 5, c. 24
[67] *FCA*, s. 2

to defeat, hinder, delay or defraud other creditors.[68] As Justice D.M. Brown (as he then was) held in *DBDC Spadina Ltd. v. Walton*, by the combined operation of ss. 2 and 3 of the *FCA*, "The presence or absence of "good consideration" in a conveyance... determines whether the court examines only the intention of the transferor, or that of both the transferor and transferee."[69] In that case, Justice Brown dismissed a motion seeking to void a mortgage and debentures given by known fraudsters as fraudulent conveyances under the *FCA*, based on a finding that, "the receipt of the [assets] by 231 was done by it in good faith and without notice of any wrongful intention which the Waltons might have had... whatever the intention of the Waltons might have been, 231 enjoys the protection of *FCA* s. 3."[70]

83. In this case, the Trustee's *FCA* claim fails for two reasons. First, it has not proven that Grozelle made the loan payments with the intent to defeat his creditors within the meaning of the *FCA*. Second, and in any event, the Respondent Lenders fall within the safe harbour provision because they provided good consideration without notice of any fraud.

2. Grozelle did not intend to defeat the collection efforts of his creditors by making the loan payments

84. The Trustee bears the burden of showing that Grozelle's dominant motive for making the loan payments was to defeat his creditors.[71] An actual and express intent by Grozelle must be proved, and mere suspicion is not enough.[72] The Trustee has not met this burden. Unusually, the Trustee has not called any evidence from Grozelle about the transactions, although it admits that

---

[68] Wood, p. 233
[69] *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052 (SCJ) [***Walton***], ¶18
[70] *Walton*, ¶75
[71] *Indcondo v. Sloan*, 2014 ONSC 4018 [***Indcondo***], ¶50
[72] *Ni v. Zheng*, 2010 ONSC 4049, ¶56

he cooperated with its investigation and he is a witness under the Trustee's control due to that cooperation and the Trustee's power to compel his evidence under s. 163 of the *BIA*.

85. To meet the intent requirement, the transferor must have intended to hinder *the collection efforts* of creditors,[73] ordinarily by making a transfer to an entity under their control, under an arrangement in which the property will be returned to them or used by them, or to a friend or relative.[74] The established badges of fraud speak to a retained benefit by the debtor, including where the debtor continues in possession and uses the property as his own, or some benefit is retained under the settlement by the debtor.[75]

86. The Trustee thus bears the burden of proving that Grozelle's dominant intent for the loan payments was to hinder the collection efforts of other creditors, not simply to continue his enterprise. Otherwise, all payments in furtherance of any fraudulent scheme – to employees, banks, credit card companies, professionals – would presumptively be fraudulent conveyances.

87. As such, a transfer of property to a *creditor* will not generally be impeachable as a fraudulent conveyance.[76] Transfers to creditors are generally voidable only if they meet the test for preferences. A payment of money to a creditor is not designed to hinder the collection efforts of creditors, as there is no benefit retained by the debtor. In *Mulcahy v. Archibald*, the Supreme Court held that "the meaning of the statute is that the debtor must not retain a benefit for himself";

---

[73] Wood, p. 216. More specifically, in the language of s. 2 of the *FCA*, the transferor must "...inten[d] to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures."
[74] Wood, p. 216
[75] *Stevens v. Hutchens*, 2022 ONSC 1508 [***Stevens***], ¶37
[76] Wood, p. 216

other cases describe a fraudulent conveyance as a "mere cloak to secure a benefit to the debtor".[77] Justice Sedgewick affirmed that "so long as there is an existing debt and the transfer to him is made for the purpose of securing that debt and he does not directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, he is protected and the transaction cannot be held void."[78] Similarly, the Ontario Court of Appeal in *Hopkinson v. Westerman* affirmed that under the *FCA*, "the existence of a debt due to the preferred creditors… [shows] that there was not an intention to defraud, the mere intention to prefer not being made unlawful by that statute."[79]

88. These principles barring fraudulent conveyance claims against receiving creditors have also been applied in Ponzi clawback cases relied on by the Trustee. In *Titan*, for example, the Alberta court considered this principle and dismissed the bankruptcy trustee's fraudulent conveyance claim. The court found that the principal of the scheme lacked the required intent for a fraudulent conveyance because he did not retain any benefit by making excess payments to overpaid investors.[80] Instead, the court voided the transactions as fraudulent preferences. This Court followed *Titan*'s approach in *Den Haag*, finding that the *APA* was the applicable statute for Ponzi clawback claims.[81]

---

[77] *Mulcahy v. Archibald* (1898), 1898 CanLII 72 (SCC), 28 S.C.R. 523 [***Mulcahy***], p. 592, cited in *Titan*, ¶37. See also *Anderson Lumber Company Ltd. v. Canadian Conifer Ltd.*, 1977 CanLII 1665 (AB CA) (applying *Mulcahy*).
[78] *Mulcahy*, p. 529, cited in *Ni v. Zheng*, 2010 ONSC 4049, ¶58
[79] *Hopkinson v. Westerman*, 1919 CanLII 466 (ON CA) [***Hopkinson***]
[80] *Titan*, ¶38
[81] *Den Haag*, ¶65-67

3. The lenders received the payments for consideration without notice of any fraud

89. The Respondent Lenders are also protected because they fall within the safe harbour provision under section 3 of the *FCA*. As reviewed above, a transfer is not voidable where the recipient provided consideration for it and did not know of fraudulent intent, even if that intent was present.[82]

90. The Respondent Lenders' uncontested evidence is that they did not know of a fraud at the time of the relevant transfers and that they acted in good faith when receiving the payments. The Trustee does not allege otherwise or challenge this evidence.

91. The only issue is whether the loan payments were made for good consideration. Under the meaning of the *FCA*, the defendant only needs to show that valuable consideration was given, which was more than nominal or entirely inadequate.[83] Unlike the more demanding BIA transfer at undervalue provision or U.S. statutes, the defendant does not need to show they gave reasonably equivalent value for the transfer.[84] Once more than nominal consideration is shown, then the plaintiff must also show that the defendant was privy to the fraud.[85]

---

[82] Wood, p. 233

[83] Wood, p. 233.
Bank of Montreal v. Horan et al., 1986 CanLII 2554 (ON SC): "The authorities establish that "good consideration" means simply "valuable consideration" and that the adequacy of consideration, other than nominal consideration, is irrelevant", followed in *Rose v. Pica*, 2011 ONSC 7502, ¶13.

[84] Wood, p. 238. Compare BIA, section 95(1) (requiring a transfer made for "conspicuously less" than fair market value) and *Donnell* (U.S. statutes requiring a transfer to be "reasonably equivalent" in value).

[85] *Salna v. Hie*, 2007 CanLII 50285 (ON SC), ¶36, aff'd 2008 ONCA 677: "… the traditional approach to the case law about fraudulent conveyances is to differentiate two classes of cases: (1) cases where the consideration for the conveyance is no consideration or only nominal consideration; and (2) where the consideration for the conveyance is valuable and more than nominal…For the second class of case, where the debtor has conveyed property for good consideration, the plaintiff must also prove a culpable state of mind in the transferee of the property."

92. It is bedrock law that an agreement to loan funds is itself sufficient consideration for a loan payment.[86] The payment of a debt is a payment for good consideration.[87] The payment of a debt results in a dollar-for-dollar reduction of the debtor's liability and does not change the debtor's net assets from a balance sheet perspective.[88]

93. This is one reason why the fact that the lenders were lenders rather than equity investors is important. Grozelle's payments to them were on account of their loans to him, not, for example, fictitious profits paid to equity investors.

94. Although the Trustee relies on *Den Haag* and *Whitmore*, those cases support the Respondent Lenders' position. In *Den Haag*, the Court relied upon *Titan*, which in turn rejected the plaintiff's fraudulent conveyance claims in the context of a Ponzi scheme.[89] In any case, the *Den Haag* investors held units in a partnership, were paid fictitious returns on their equity investment, and were not owed any contractual debt that was reduced by the partnership distributions.[90]

95. The Trustee relies on *Whitmore* to argue that a contract for fictitious profits does not provide valuable consideration for a payment.[91] *Whitmore* supports the Respondent Lenders' position, not the Trustee's. In that case, the Court undertook an analysis to determine the issue of whether the persons who made payments to the fraudster and received payments from him were lenders or equity investors. It specifically found that they were *not* lenders and the payments were

[86] *Bank of Montreal v. Unified Homes*, 1994 CarswellOnt 2218, at ¶38-39
[87] Wood, p. 239.
[88] *Option Industries Inc (Re)*, 2020 ABQB 535, ¶25-31
[89] *Den Haag*, ¶64-67
[90] *Den Haag*, ¶68
[91] Trustee's Factum, ¶153-157

not for loan interest.[92] In that case, there were no loan agreements, the parties never used the word "loan" or "interest", and instead described the arrangement as an "investment", which resulted in payments of a "return" or "fee".[93] The Court concluded that "[a] loan is something very different than what was contemplated and took place in this case", and that investors invested with the expectation of profit as consideration for their investment, but instead received not business profits but the principal of other investors.[94] Not so here, where the Respondent Lenders were engaged in a series of loan transactions evidenced by promissory notes; these were contracts for fixed loan payments, not contracts for business profits arising from the enterprise.

F. The loan payments were not fraudulent preferences because they were payments of debts, made to lenders with no knowledge of the fraud

96. The Trustee also challenges the loan payments under section 4(1) of the *APA*. The statutory language and elements of a claim under section 4(1) of the *APA* are substantially similar to a claim under section 2 of the *FCA*, except that the *APA* additionally requires insolvency and is subject to a more generous safe harbour provision. Such a claim adds nothing to the Trustee's *FCA* claim.

97. The *APA*'s fraudulent preference provisions are contained in section 4(2) of the *APA*, which is not relied on in the Trustee's factum.[95] But as the Trustee's submissions refer to a preference claim, the Respondent Lenders respond to such a claim.

98. To establish a fraudulent preference claim, the Trustee must show: (a) a transfer of property, (b) to a creditor, (c) that the debtor was insolvent at the time of transfer, (d) the transfer

---

92 *Whitmore*, ¶61
93 *Whitmore*, ¶62, ¶69
94 *Whitmore*, ¶68-70
95 The Trustee's Notice of Motion pleads section 4 of the *APA*, without specifying a subsection.

was made by the debtor "with intent to give such creditor an unjust preference over other creditors", and (e) the receiving creditor also intended to receive such a preference, known as a "concurrent intent" requirement.[96]

99. The Trustee ignores the concurrent intent requirement under the *APA* and claims that it does not matter whether the creditor receiving the payment did so with the intention of defeating other creditors. This argument is wrong in law.

100. Ontario courts have consistently held that an essential element of a fraudulent preference claim is that the receiving creditor "intended to receive a preference in priority over other creditors".[97] As noted in *Krates*, "such a requirement has been in place in Ontario since at least 1885".[98] This concurrent intent requirement is confirmed both in Supreme Court of Canada jurisprudence from when the statute was enacted and in the recent decisions of this Court.[99] To establish such a concurrent intent, the plaintiff must generally show that the defendant knew that the debtor was insolvent at the time of the transfer.[100] This is different from other claims, such as BIA preference claims (as in the *Martel* case) that do not contain a concurrent intent requirement. This appears to be a point of confusion for the Trustee.

---

[96] *Krates v. Crate*, 2018 ONSC 2399 [***Krates***], ¶28
[97] *Krates*, ¶28
[98] Wood, p. 228: "The second difficulty [in proving a fraudulent intent to prefer] concerns the concurrent intent doctrine. Despite the fact that the provincial statutes refer only to the intent on the part of the debtor to give a preference, most courts have interpreted this to mean that the creditor who receives the property must also have the intention to receive a preference."
[99] *Benallack v. Bank of British North America* (1905), 1905 CanLII 18 (SCC), 36 S.C.R. 120.
Krates, ¶28, ¶38
Crowe Soberman Inc. v. Noir Property Management Ltd., ¶64-66, applying *Krates*
[100] Wood, p. 228.

101. A failure to prove any one of the above elements is fatal to a claim under the *APA*. In this case, the Trustee has failed to prove *three* of them:

(a) The Trustee has not proven that Grozelle was insolvent at the time he made transfers;

(b) The Trustee has not proven that Grozelle intended to prefer 'net winners' over other creditors, for any of the payments at issue; and

(c) The Trustee has not proven that the Respondent Lenders (or any lenders) intended to be preferred over other creditors, for any of the payments at issue.

1. The Trustee has failed to prove that Grozelle was insolvent at the time of the transfers

102. As a threshold matter, the Trustee has not demonstrated that Grozelle was insolvent at the time of each of the transfers. As Grozelle operated the enterprise personally, his assets were available to satisfy any liabilities to creditors. He appears to have met his obligations as they became due until the latter months of 2022.

103. The record suggests that Grozelle *did* have assets independent of amounts received from lenders. The Trustee's own financial analysis shows that Grozelle often paid out more to lenders than he took in from them during the months from February 2021 to December 2021.[101] He also owned a home.[102]

104. When presented with the opportunity to correct this gap in its record, the Trustee effectively admitted that it does not know Grozelle's overall net worth at any point during the relevant period

[101] Trustee's First Report, ¶49 and Appendix DD; Trustee's Record, Tab 2
[102] Fourth Report of the Trustee at footnote 10; Reply Motion Record of the Trustee, Tab 1

of November 2020 to November 2022.[103] In response to the open-ended written question, “What information does the Trustee have about Grozelle’s personal overall net worth over time, from November 2020... to November 2022,” the Trustee responded that its information is set out in Grozelle’s Statement of Affairs filed in his bankruptcy proceeding dated September 11, 2024. That statement shows Grozelle's net assets as of that 2024 date and contains no information about his assets during the relevant period.

105. When next asked, “On what date does the Trustee allege Grozelle first became personally insolvent within the meaning of the [BIA]? What is the Trustee’s evidence to support that date,” the Trustee responded simply that it had subjectively “concluded” that Grozelle was insolvent from the start of the alleged scheme.[104] It offered no evidence whatsoever to support that conclusion.

106. In light of these responses, the Trustee has not proven that Grozelle was insolvent at the time of all of the transfers at issue.

107. In its factum, the Trustee asserts a “legal presumption” of insolvency from the outset of a Ponzi scheme. As set out above, there is no such legal presumption. Rather, there are cases in which insolvency has been *inferred* from the operation of a Ponzi scheme. Such an inference will be logical in situations involving: (a) “pure” Ponzi schemes with no business or investment activity, that are (b) operated through a corporation with no other assets. No such inference is appropriate in this case for the reasons reviewed above.

[103] Schedule “C” (Question 9)
[104] Schedule “C” (Question 10)

2. The Trustee has not shown that in making the loan payments, Grozelle intended to prefer the Respondent Lenders over other creditors

108. To succeed in its fraudulent preference claim, the Trustee must show that Grozelle made the loan payments with the intent to give such a creditor an unjust preference over other creditors. The intent to prefer must be the dominating intention, rather than some other motive.[105] As held in *Krates*, "the fact that a transfer has the *effect* of preferring one creditor in favour of another is insufficient to satisfy the intention" (emphasis added) – unlike a preference claim under the BIA.[106]

109. A payment made to a creditor in the ordinary course of business does not satisfy the intent requirement. In *Credit Men's Ass'n, Ltd. v. Jenkins*, the Court of Appeal held that " [t]here can be no intention to prefer if the payment is made in the ordinary course of business, such as to meet trade bills as they mature, or in discharge of a previous obligation, *or of a promise to pay on a particular day*…" (emphasis added).[107]

110. The parties agree that until the fall of 2022, the loan payments were made when due.[108] As held in *Jenkins*, the payment of loan obligations when they come due does not satisfy the intent requirement of the *APA*. The Trustee's own evidence is consistent. Its working papers summarizing all transactions, filed as a confidential exhibit, show that Grozelle was consistently paying 'net winners' and 'net losers' over the same time period, without any evident preference for the former over the latter.[109]

[105] *Re Partington*, 1971 CanLII 527 (ON SC), per Houlden J.
[106] *Krates,* ¶33
[107] *Credit Men's Ass'n, Ltd. v. Jenkins*, 1928 CanLII 444 (ON CA), followed in *Orion Industries Ltd. v. Neil's General Contracting Ltd.*, 2013 ABCA 330, ¶11
[108] Trustee's First Report, paras. 41 and 57; Trustee's Record, Tab 2
See, e.g., McMullan Affidavit, ¶29, 33; Lenders' Record, Volume 3, Tab 5
[109] Rossi Affidavit, Exhibit B (not filed due to confidentiality order but will be available at hearing); Lenders' Record, Volume 1, Tab 2

111. The Trustee has adduced no evidence that Grozelle intended to selectively prefer any of the Respondent Lenders or any other lenders during the relevant period – nor indeed any evidence at all from Grozelle about his intentions. When asked for evidence of Grozelle's intent to selectively prefer, the Trustee refused to disclose it and described the handful of communications referenced in its report as "illustrative examples." These communications were made long after November 2022, the end of the Trustee's accounting period. As such, these communications cannot establish Grozelle's intent to prefer any of the transactions attacked by the Trustee months or years earlier. These communications also involve assurances by Grozelle that he will prioritize paying lenders other than the Responding Lenders, despite the fact that the Responding Lenders had outstanding loans to Grozelle at the time. As such, it *certainly* does not reflect Grozelle's intention to prefer the Responding Lenders. If anything, they suggest the opposite.

3. The Trustee has not alleged that the Respondent Lenders had the required concurrent intent to receive a preference

112. The Respondent Lenders' unchallenged evidence on this motion is that they were not aware of any fraud or insolvency at the time they received payments and did not intend to be preferred ahead of other creditors.[110] The Trustee simply ignores the concurrent intent requirement altogether. It does not allege nor offer any evidence that the Respondent Lenders had a concurrent intent to receive a preference or knew about Grozelle's insolvency when they received the payments. Lacking such evidence, the Trustee's fraudulent preference claims must fail. Indeed, in *Whitmore*, the trustee's claims were dismissed on precisely this basis.[111]

[110] See, e.g., Rossi Affidavit, ¶16, ¶24, ¶29. Lee Affidavit, ¶39-43. Singh Affidavit, ¶28. McMullan Affidavit, ¶3; Lenders' Record, Tab 2, 3, 4, 5
[111] *Whitmore*, ¶88

4. The loan payments are protected under section 5 of the APA *because they are payments of money*

113. Finally, the Respondent Lenders are also sheltered by the safe harbour provision under section 5 of the *APA*, which protects certain transactions from being impeached as a fraudulent preference. In *Kisluk v. B.L. Armstrong Co. Ltd.*, this Court affirmed that such transactions include *any* payment to a creditor of money – as opposed to transfers of other forms of property – and that this protection was not modified by the later proviso that "the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor."[112] *Kisluk*, and this Court's later cases applying it, affirm that the safe harbour provision singles out and protects a payment of money to a creditor, over other transactions such as a transfer of goods or a grant of security.[113] As explained in Wood, "[t]he protection of payments of money to creditors constitutes the most significant limitation to the application of the provincial provisions, since it insulates a major form of preference from impeachment. A payment of money can therefore only be impugned by use of the *BIA* preference provisions."[114] The *Kisluk* court noted the "anomaly" of singling out payments of money in this fashion, but it is well-settled that the APA provides broad protections for such payments.[115]

114. For clarity, this is an independent basis to dismiss the preference claim. In any case, Grozelle's payments to the Respondent Lenders were made in exchange for good consideration

---

[112] *Kisluk v. B.L. Armstrong Co. Ltd.*, 1982 CanLII 1931 (ON SC) [***Kisluk***], applying *Canadian Credit Men's Ass'n Ltd. v. Jenkins*, 1928 CanLII 444 (ON CA)
[113] *Herman v. Rathbone*, 1998 CarswellOnt 2347 (OCJ) (Gen Div), ¶3
Tim's & Co. Ltd. v. Mudge Bay Construction Inc., 2004 CanLII 8476 (ON SC) [***Tim's***], ¶52-53
A. Farber & Partners Inc. v. Goldfinger, 2013 ONSC 6635, ¶285
[114] Wood, p. 229
[115] *Tim's*, ¶53

for the reasons set out in section F(3) above: the loan payments were transfers for value because they resulted in a dollar-for-dollar reduction in the outstanding debt owed.

G. The Respondent Lenders were not unjustly enriched by the loan payments, which were justified by the promissory notes

115. Finally, the Trustee asserts an unjust enrichment claim against the Respondent Lenders, which requires it to show: (a) an enrichment of the lender, (b) a corresponding deprivation by Grozelle, and (c) the absence of a juristic reason, meaning there is "no reason in law or justice for the defendant's retention of the benefit".[116] The latter two of these essential elements are not met, and the former is not met in every case.

1. The loan agreements are an established juristic reason that justifies the Respondent Lenders' retention of the loan payments

116. The loan agreements evidenced by the promissory notes are an established juristic reason for the loan payments. In *i Trade*, the Court of Appeal held that "a valid contract leading to a debtor-creditor relationship between the person enriched and another – as was the case here – is sufficient to establish the existence of a juristic reason for an enrichment that can be accounted for on the basis of that contractual relationship."[117] The loan agreements are contracts that justify the loan payments and thus bar any claim for unjust enrichment.

117. Again, the Trustee's reliance on *Titan*, *Den Haag* and *Whitmore* is misplaced. In each of those cases, the payments were made to investors who were found to have made a capital investment in a business. The courts in those cases did not find any loan agreements with the debtor that would justify the challenged payments. They provide no authority to simply ignore loan

[116] *Kerr v. Baranow*, 2011 SCC 10, ¶40
[117] *i Trade (CA)*, ¶39

agreements, which is a full answer to any unjust enrichment claim. The loan agreements are valid contracts unless and until they are set aside on some established legal basis.

2. The Trustee has not attacked the legal validity of the loan agreements

118. To avoid Grozelle's loan obligations being juristic reasons for any enrichment, the Trustee bears the burden of establishing that the underlying agreements are unenforceable for a reason recognized either at law or in equity. Only then can the possibility of a restitutionary claim for the value of benefits conferred be entertained.[118]

119. The Trustee has not attacked the legal validity of the loan agreements under the *Criminal Code* on this motion.[119] Nor could the Trustee do so on this record. As shown in *Golden Oaks*, a loan agreement must be invalidated under the criminal interest rate provisions of the *Criminal Code* on a transaction-by-transaction basis.

120. The Trustee concedes that while many of the promissory notes had a criminal interest rate on their face, many did not.[120] In any event, the parties agree that Grozelle's actual payments do not accurately match the promissory notes. The Trustee has not led the sort of actuarial or accounting evidence one normally expects to see to support allegations of illegal interest. Determining the actual effective interest rate for the loan agreements – based on what principal was advanced and what interest was actually paid – requires examining each lender's evidence individually. Unless actual advances and payments are reviewed, the Trustee cannot show that the loan agreements resulted in criminal interest rates. The record in its current form does not even

---

[118] *Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc.*, 2010 ONSC 4281, ¶18-19
676083 B.C. Ltd. v. Revolution Resource Recovery Inc., 2021 BCCA 85, ¶46
[119] The Trustee's notice of motion alleged, as an alternative ground, that the loan agreements were contrary to the *Criminal Code*. The Trustee did not, however, assert this claim in its written submissions.
[120] Trustee's First Report, ¶124-126; Trustee's Record, Tab 2

permit such calculations. The Trustee has not included in its accounting loan advances made before the period it studied, such as those made by Robyn Lee.[121]

121. Even if some of the loan agreements did exceed the criminal interest provisions, that alone would not necessarily invalidate those contracts. Some of the promissory notes contained severability provisions reflecting the parties' intent that any unenforceable provision would be reduced in scope to the extent necessary to become enforceable. And even if these severability provisions were not given effect, the Court must exercise its own discretion to determine the appropriate remedy and may apply a different rate of interest that complies with the statute through notional severance, particularly in light of the severability provisions.[122]

122. Finally, the Trustee suggests that the loan agreements do not provide a juristic reason because they were not "legitimate contracts" giving rise to a "legitimate creditor-debtor relationship".[123] But a contract cannot be set aside by simply calling the relationship "illegitimate" or alleging that the relationship was founded on fraud or illegality. It is well-settled law that fraud is only prejudicial to those who participate in it and that the law protects good faith purchasers for value.[124] A transaction entered into for an unlawful purpose will only be unenforceable against the fraudster, not the innocent party.[125]

---

[121] Lee Affidavit, ¶8-11, Exhibit E; Lender's Record, Volume 2, Tab 3
[122] *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7
[123] Trustee's Factum, ¶190-191
[124] *i Trade*, ¶21
[125] McCamus, John D., *The Law of Contracts*, 3rd ed. Toronto: Irwin Law, 2020, p. 503
Zimmermann v. Letkeman, 1977 CanLII 196 (SCC), [1978] 1 SCR 1097.

3. The Respondent Lenders were not enriched from the loan payments that they flowed through to other lenders

123. First, the Trustee alleges that the Respondent Lenders were enriched by the loan payments. But that is not true in every case. Some of the Respondent Lenders adduced evidence that they were not enriched by these payments, as the principal had been advanced from a third party and that the loan payments flowed back to that party.[126] In such cases, the parties who were sent and flowed through the payments were not enriched, as they did not keep the payment. They acted only as an intermediary for a principal lender and did not advance or receive funds on their own behalf.

4. Grozelle did not suffer a deprivation from the loan payments because they reduced his liability

124. Although Grozelle made the loan payments to the Respondent Lenders, he did not suffer a corresponding deprivation. The loan payments reduced Grozelle's cash but also his liabilities by an equal amount, as explained in section IV(E)(3) above. Grozelle's net financial position was the same after the payment.

125. This is different from cases in which an equity investor in a Ponzi scheme receives fictitious investments. In that case, there was no liability to pay with those profits, and the payor is correspondingly deprived.

[126] Lee Affidavit, ¶19; Lenders' Record, Volum 2, Tab 3

5. *The Respondent Lenders are protected by a change of position defence because they received many of the loan payments on behalf of others and remitted those amounts back to them*

126. Even if an unjust enrichment claim were established, the Respondent Lenders can avail themselves of a change of position defence. The Supreme Court of Canada has confirmed that "restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned."[127] Such a change of position includes passing on or flowing through payments received.[128]

127. In this case, the Respondent Lenders' affidavit evidence confirms that they changed their position after receiving the loan payments, before learning of any issues. Some Respondent Lenders lost their loan proceeds on other investments, including in start-up enterprises related to or promoted by Grozelle that are now worthless. In some cases, they received the loan payments on behalf of others and remitted those amounts back to them. In others, they borrowed funds to make the loan payments, which were repaid. In each case, the Respondent Lenders changed their position by making payments from the loan proceeds. It would be inequitable to force them to repay those amounts as restitution, having changed their position in reliance on those payments.

H. *Martel* involved a capital investment by investors and does not stand for the proposition that all payments to Ponzi creditors are automatically clawed back

128. Finally, the Trustee places heavy reliance on the British Columbia Supreme Court's recent decision in *Martel*.[129] But the facts found by the *Martel* court are very different from those here.

---

[127] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (CanLII), [2004] 1 SCR 629, ¶ 63
[128] *Ibid.*
[129] *Martel*

129. The debtor in *Martel* was found to have engaged in fraud starting before the transactions at issue, based on an extensive record. He was also found not to have carried out any underlying business. In that case, the bankruptcy trustee could not locate *any* information to substantiate that the debtor had made any bridge loans, which was its purported business.[130] In this case, as reviewed above, the Trustee has not proven fraud as of any particular date, and the Trustee acknowledges that Grozelle carried out an underlying investment business, however poorly conceived.

130. More fundamentally, the *Martel* clawback respondents were found to have made capital investments in the debtor's business, rather than loans to the debtor. Specifically, the investors entered into "investment agreements" with the debtor, in which they were found to have made a "capital investment" used to obtain an interest in bridge mortgage loans arranged by the debtor.[131] In other words, they did not enter into lending agreements or make loans *to the debtor* but instead invested capital *in the debtor*, who purported to make bridge loans to third parties.

131. Characterized as capital investments, *Martel* follows the reasoning that applied to the equity investments at issue in *Titan* and *Den Haag*. An investor with a capital interest in a business has no right to be paid in advance of other creditors. But the facts here involve loan payments, which cannot be clawed back as voidable transactions unless the receiving creditor knows about the fraud.

132. In addition, *Martel* considered a statutory preference claim under s. 95 of the *BIA*, which unlike an *APA* preference claim, does not require concurrent intent and for which debtor intention

---

[130] *Martel*, ¶22
[131] *Martel*, ¶17-18

is statutorily presumed. It also found fraudulent conveyances under BC's governing statute and unjust enrichment, in both cases relying on a finding of capital investments rather than loans.

133. To the extent *Martel* holds otherwise, it contradicts well-settled Ontario law and cannot be followed. The Trustee invokes *Martel* to assert sweeping propositions that are contrary to the basic tenets of this Court's law, as described below:

Trustee's Position	**Ontario Law**
1. The Trustee relies on *Martel* to claim that a payment made to further a Ponzi scheme is necessarily made with an intent to defeat creditors for the purpose of a fraudulent conveyance.[132]	As argued in section E(2) above, Ontario and Alberta law are clear that a debtor's payment of an outstanding debt to a creditor is not made with an intention to defeat the debtor's creditors within the meaning of the *FCA*. See *Hopkinson* and *Titan*.
2. The Trustee cites *Martel* to claim that in the context of a Ponzi scheme, no issues of good faith may shield an investor from having to return sums received in excess of his or her investment, as they do not provide good consideration for the payments.[133]	As argued in section E(3) above, Ontario and Alberta law confirm that *equity* investors do not provide good consideration when they receive fictitious profits, to which they are not entitled. But the payment of a debt owed to a creditor is for good consideration and is specifically protected under provincial statutes (see section F(4) above).
3. The Trustee relies on *Martel* to argue that investors do not receive excess payments for a juristic reason because no legitimate creditor-debtor relationship existed.[134]	To the extent this applies to equity investors, it is consistent with *Den Haag*. But as argued in section G(1) above, a loan is a well-established juristic reason for a loan payment. Such agreements are enforceable unless it is shown that the creditor participated in the fraud.

[132] Trustee's factum, ¶138, citing *Martel*, ¶196
[133] Trustee's factum, ¶176, citing *Martel*, ¶208
[134] Trustee's factum, ¶189-191, citing *Martel*, ¶222-227

134. In short, a bankruptcy trustee may well be able to claw back a Ponzi scheme's distributions of fictitious profits to equity investors, who were never legally entitled to those profits. But lenders to a Ponzi scheme – whether they are individuals, banks, or credit card companies – occupy a fundamentally different position because they are owed a debt, a contractual entitlement to receive fixed interest payments that does not depend on the enterprise's profitability. The provincial voidable transaction statutes protect such payments unless the Trustee can show that the Respondent Lenders knew about the fraud – which has not been alleged here.

I. The Trustee's clawback claims are time-barred

135. The Trustee's clawback claims are statute-barred under the *Limitations Act, 2002*.[135] The Trustee brought its motion – on behalf of Grozelle's personal estate in bankruptcy – on November 29, 2024. This was well over two years after the alleged fraud, which the Trustee alleges began in November 2020 and had ended by November 2022. It was more than two years after Grozelle made the payments the Trustee seeks to claw back, and more than two years after Grozelle had begun defaulting on payments to lenders. The claim is therefore statute-barred.

136. Importantly for this issue, Grozelle did not operate through a corporation. He obtained and repaid the loans at issue personally. This critical fact distinguishes this case from ones, like *Golden Oaks*, in which a fraud was operated through a corporation and carried out by its directing mind. In those circumstances, as the Supreme Court of Canada confirmed in *Golden Oaks*, the knowledge of the fraudster-in-control is not imputed to the corporation for the purposes of starting the limitations clock, as a principle of the corporate attribution doctrine.[136]

---

[135] *Limitations Act, 2002*, SO 2002, c. 24, Sched. B (the ***Limitations Act***), s. 2
[136] *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32 [***Golden Oaks***]

137. Here, there is no interposed corporation and therefore no issue of corporate attribution as in *Golden Oaks*. It is Grozelle's personal knowledge that triggers the running of the limitation period: the Trustee brings this claim on behalf of Grozelle's personal estate in bankruptcy, pursuant to the statutory transfer of Grozelle's assets, including rights of action, to the Trustee upon bankruptcy.[137] In that circumstance, s. 12(1) of the *Limitations Act* provides that the limitation period for a claim runs from the date a bankrupt knew the underlying facts.[138]

138. If Grozelle engaged in fraud or intentionally made improper payments, he knew it at the time, more than two years before this claim was commenced. The claim is therefore out of time.

139. As the Supreme Court has noted, while the strict application of limitation periods may seem harsh, it is a necessary rule because "the other side of the coin" is that limitation periods must be final to effectively serve their policy purposes of promoting accuracy and certainty in the adjudication of claims; providing fairness to persons who might be required to defend against claims based on stale evidence; and to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion.[139] The justice of this approach is evident in this case. This proceeding has had a harsh impact on the 'net winners', innocent parties who have changed their positions in the years between receiving payments and service of this motion, and who no longer have perfect memories of the complex set of transactions at issue that took place in some cases over five years ago, without clear documentation.

---

[137] Grozelle's rights of action are assets that transfer to and vest in his trustee in bankruptcy automatically, together with his other assets. BIA, s. 71.

[138] *Limitations Act*, s. 12(1). This was the Supreme Court's finding in *Golden Oaks* at ¶54-61, in which Jamal J. found that the knowledge of the corporation through which a fraud had operated must be imputed to its trustee in bankruptcy, and that the issue was whether the knowledge of that corporation's principal should not be attributed to the corporation. (In the result, he found that it should not be, a point not at issue in this case as reviewed above.)

[139] *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at ¶57-58.

140. The Trustee could and should have avoided this result by bringing its claim in a more timely fashion. The Court even expressed concern that it was taking too long to do so. The Trustee (then Receiver) indicated as early as September 9, 2024, in its Third Report as Receiver, that it had formed an intention to bring the clawback motion. It could have done so at that time or at any other point before November 29, 2024, either as Receiver or as Trustee (having received the authorization of inspectors on October 2, 2024). The Court noted, in its September 20, 2024 endorsement, that "the receiver wishes to bring a 'Claw Back Motion' as referenced in the Receiver's Reports. The Receiver has yet however to deliver its record. In my view it is now timely that it do so." Despite this caution from the Court, the Trustee chose to wait over two months to serve its materials.

1. The Trustee's anticipated response to the limitations defence

141. The Trustee has not briefed the limitations issue, which illustrates the impracticality of dealing with these claims on an omnibus summary motion without pleadings or examinations for discovery (as addressed in the moving factum on the motion for directions). These respondents must therefore address the argument they anticipate the Trustee *might* raise in response. They reserve the right to file further materials addressing the Trustee's actual argument.

142. These respondents anticipate that the Trustee may argue that it would be inappropriate to start the limitation clock based on Grozelle's knowledge because, although the Trustee technically brings the claim on behalf of Grozelle personally, it is doing so for the benefit of "net losers". In essence, this position is that the limitation period runs from the date of knowledge of a bankrupt claimant's *creditors* rather than the knowledge of the claimant himself.

143. There are two problems with such an argument. First, these respondents know of no legal basis for the assertion of such a principle. It directly contradicts s. 12(1) of the *Limitations Act*, which provides that the limitation period runs from the date a predecessor in title to the claim (such as a bankrupt) learns of it, as the Supreme Court affirmed in *Golden Oaks*.[140] The fact that Grozelle's creditors might *benefit* from the proceeds of litigation the Trustee pursues on Grozelle's behalf does not mean that their knowledge is substituted for Grozelle's. Indeed, for claims of this nature, 'net losers' have at all times been free to advance those claims personally.

144. Even if the limitation period runs based on the net losers' knowledge, it appears in this case that they learned of the claims before November 29, 2022, more than two years before the Trustee served its clawback motion. This is certainly true of insiders such as Williams and Masterson, who were participants in the scheme well before November 29, 2022.[141] Williams explicitly accused Grozelle of operating a Ponzi scheme on October 29, 2022, more than two years before the Trustee served its motion.[142] As these insiders' claims are plainly time-barred, they cannot be enforced as against the Respondent Lenders.

145. The other 'net losers' also appear to have learned about these issues before November 29, 2022. The record suggests that Grozelle was defaulting on payments – the usual trigger for the start of the limitation period for lender claims – materially before that date. The Trustee itself acknowledges that "by late November 2022 [*i.e.*, two years before it commenced its clawback claims], Grozelle was in default with virtually all investors."[143] Similarly, in the statement of claim

[140] *Golden Oaks (SCC)*, ¶54
[141] *Infra*, section II(F)
[142] McMullan Affidavit, ¶117 and Exhibit "HH", Text messages from Williams to Grozelle dated October 29, 2022 and November 4, 2022 ("Lol they're onto you mate. Doug 'Ponzi' Grozelle"; "Hey Mr. Ponzi, when we talking this morning?"); Lenders' Record, Volume 3, Tab 5
[143] Trustee's Factum, ¶49(b)

in the action giving rise to the receivership application, the applicants allege, "By late November 2022, [Williams' corporation] discovered that [Grozelle], contrary to his representations, was in arrears with all of his lenders."[144]

146. The only arm's length 'net loser' lender from whom the Trustee filed an affidavit on this motion states that Grozelle began missing payments "in or around October 2022… which caused me significant concern."[145] That affidavit referred to but did not exhibit the investor's correspondence with Grozelle, illustrating the need for discovery on this point. The Respondent Lenders all describe Grozelle defaulting on loans before November 29, 2022.[146] The vast majority of the promissory notes Grozelle issued had payment deadlines before November 29, 2022.[147] In fact, the record does not contain evidence from or of *any* lenders whose loans Grozelle did not default on before November 29, 2022.

2. The Respondent Lenders require discovery on their limitation period defence

147. For the reasons set out above, this record is sufficient to dismiss the Trustee's claims as statute-barred. If not, and to the extent the Trustee: (a) asserts that the knowledge of creditors is relevant to the start of the limitations clock, and (b) disputes that lenders had the relevant

[144] Statement of Claim at Ex. E to the Affidavit of Michael Foley, Application Record in underlying application found at Ex. D to the affidavit of Anthony Rossi; Lenders' Record, Tab 2, ¶24. A precise date in "late November 2022" is not provided, but evidently the date was more than two years prior to the commencement of the claim on November 29, 2024, because the statement of claim goes on to address steps they took in response to their discovery on November 28, 2024 (¶25).
[145] Affidavit of Justin Kavanagh, ¶19-20; Trustee's Motion Record, Tab 3,
[146] Rossi Affidavit, ¶24. Lee Affidavit, ¶23. Singh Affidavit, ¶10-11 and Statement of Claim of Ganesh Singh at Ex. B thereto, ¶18-18; McMullan Affidavit; Affidavit of Omar Nadim, MRRMR, Tab 8, ¶8-11; Affidavit of Dikran Tokat sworn August 11, 2025 (all exhibited transactions and promissory note deadlines predated November 29, 2022); Lenders' Record, Tabs 2-7
[147] 754 of 818 total identified by the Trustee in its working papers (PM Note - Master File (Working Paper)(FINAL)), Rossi Affidavit, Ex. B [confidential exhibit], Worksheet "Grozelle"; Lenders' Record, Volume 1, Tab 2

knowledge before November 29, 2022, and to the extent the Court accepts that this gives rise to a legitimate issue, then this is an issue requiring discovery as reviewed in the moving factum on the motion for directions. As noted there, Justice Morawetz (as he then was) granted a motion to convert an application to claw back Ponzi scheme profits into an action, partly based on the need for discovery on the knowledge of other investors; because "[a]rgument on the limitation period may depend on" that information.[148]

J. The Trustee's claims are barred by the *in pari delicto* defence because the Respondent Lenders are no more culpable than Grozelle or the other lenders

148. As well, the *in pari delicto, potior est conditio defendentis* defence bars the Trustee's claims because the Respondent Lenders are no more culpable than Grozelle and the other lenders. As affirmed by the Supreme Court in *Golden Oaks*, the rule provides that if the plaintiff and defendant are equally at fault (*in pari delicto*), then the defendant has the stronger position (*potior est conditio defendentis*) and is protected from claims asserted by the plaintiff.[149]

149. The Trustee's unjust enrichment claims seek to remedy deprivations suffered by Grozelle, who was indisputably more culpable than the Respondent Lenders. On bankruptcy, Grozelle's unjust enrichment claims vested in the Trustee, who stands in his shoes. Grozelle's misconduct is imputed to the Trustee because, innocent as it may be, the Trustee asserts Grozelle's claim. Unlike *Golden Oaks*, no issue of corporate attribution arises because Grozelle did not act through a corporation.[150] Because he is an individual, Grozelle's fraudulent intent was his own and thus binds the Trustee.

[148] *A. Farber & Partners Inc. v. The James F. Boughner Foundation*, unreported decision dated October 16, 2023, Court File No. CV-13-9993-00CL; handwritten endorsement and unofficial transcription available at this link.
[149] *Golden Oaks*, ¶116
[150] Compare *Golden Oaks*, ¶119

150. But the *in pari delicto* defence equally applies to any claims asserted on behalf of the net other lenders, including any fraudulent conveyance or preference claims. All of the lenders made essentially the same choices, advancing loans on similar terms. The Respondent Lenders are no more culpable than those other lenders – and are considerably less culpable than the largest net losers, who participated in the scheme. The core of the *in pari delicto* defence provides that in a case of equal fault, the defendant's position is stronger, protecting them from liability.[151]

V. ORDER SOUGHT

151. The Respondent Lenders respectfully request that the Trustee's clawback claims be dismissed. If the Court's decision permits the Trustee's claims to be pursued, the Respondent Lenders seek the directions set out in their motion for direction to govern such a proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2025.

Daniel Z. Naymark / James Gibson
on behalf of the Respondent Lenders

[151] *Golden Oaks*, ¶116

SCHEDULE "A" – LIST OF AUTHORITIES

1. *0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.*, 2021 BCSC 607 (CanLII), at ¶532-538
2. *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85, at ¶46
3. *A. Farber & Partners Inc. v. Goldfinger*, 2013 ONSC 6635, at ¶235
4. *A. Farber & Partners Inc. v. The James F. Boughner Foundation*, unreported decision dated October 16, 2023, Court File No. CV-13-9993-00CL; handwritten endorsement and unofficial transcription available at this link.
5. *Anderson Lumber Company Ltd. v. Canadian Conifer Ltd.*, 1977 CanLII 1665 (AB CA)
6. *Bank of Montreal v. Horan et al.*, 1986 CanLII 2554 (ON SC)
7. *Bank of Montreal v. i Trade Finance Inc*, 2009 ONCA 615, at ¶21, ¶39
8. *Bank of Montreal v. Unified Homes*, 1994 CarswellOnt 2218, at ¶38-39
9. *Benallack v. Bank of British North America* (1905), 1905 CanLII 18 (SCC), 36 S.C.R. 120
10. *Boale, Wood & Company Ltd. v. Whitmore*, 2017 BCSC 1917, ¶45-47, ¶61, ¶62, ¶69, ¶70, ¶88
11. *Bryton Capital Corp. v. CIM Bayview Creek*, 2023 ONCA 363, ¶62-64, ¶70
12. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1992 CanLII 49 (SCC), [1992] 3 SCR 558
13. *Canada v. Canada North Group Inc.*, 2021 SCC 30 (CanLII), [2021] 2 SCR 571, at ¶63
14. *Canadian Credit Men's Ass'n Ltd. v. Jenkins*, 1928 CanLII 444 (ON CA)
15. *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 (CanLII), at ¶57-58.
16. *Credit Men's Ass'n, Ltd. v. Jenkins*, 1928 CanLII 444 (ON CA)
17. *Crowe Soberman Inc. v. Noir Property Management Ltd.,* 2025 ONSC 4954, at ¶64-66
18. *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052, at ¶18, ¶23
19. *Den Haag Capital, LLC v. Correia*, 2010 ONSC 5339, at ¶9, ¶15, ¶39, ¶42, ¶44, ¶64-68
20. *Garland v. Consumers' Gas Co.,* 2004 SCC 25 (CanLII), [2004] 1 SCR 629, at ¶63

21. *Glory v. Hagey*, 2021 ONSC 6711, ¶14-19

22. *Herman v. Rathbone*, 1998 CarswellOnt 2347 (OCJ (Gen Div), at ¶3

23. *Hopkinson v. Westerman*, 1919 CanLII 466 (ON CA)

24. *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, ¶¶66, ¶87

25. *Indcondo v. Sloan*, 2014 ONSC 4018, at ¶50

26. *Jalilnattajamiri v. Jalilnattajamiri*, 2025 ONSC 1302, ¶49

27. *Kerr v. Baranow*, 2011 SCC 10 (CanLii), [2011] 1 SCR 269, at ¶40

28. *Kisluk v. B.L. Armstrong Co. Ltd.*, 1982 CanLII 1931 (ON SC)

29. *Krates v. Crate,* 2018 ONSC 2399 (CanLII), at ¶28, ¶33, ¶38

30. *Law Society of Ontario v Masterson*, 2025 ONLSTH 122, at ¶43-47

31. McCamus, John D., *The Law of Contracts,* 3rd ed. Toronto: Irwin Law, 2020, p. 503

32. *Mulcahy v. Archibald* (1898), 1898 CanLII 72 (SCC), 28 S.C.R. 523

33. *My Mortgage Auction Corp. (Re)*, 2015 BCSC 1520, at ¶17-18, ¶22, ¶196, ¶208, ¶222-227

34. *Ni v. Zheng*, 2010 ONSC 4049, at ¶56, ¶58

35. Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Part IV) (1983), p. 126

36. *Option Industries Inc (Re)*, 2020 ABQB 535, at ¶25-31

37. *Orion Industries Ltd. v. Neil's General Contracting Ltd.*, 2013 ABCA 330, ¶11

38. *Re Partington*, 1971 CanLII 527 (ON SC)

39. *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637, at ¶1-5, ¶9, ¶10, ¶37, ¶38

40. *Rose v. Pica*, 2011 ONSC 7502, at ¶13.

41. *Salna v. Hie*, 2007 CanLII 50285 (ON SC), at ¶36, aff'd 2008 ONCA 677

42. *Stevens v. Hutchens*, 2022 ONSC 1508, ¶37

43. *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32, at ¶54-61, ¶116, ¶119

44. *Tim's & Co. Ltd. v. Mudge Bay Construction Inc.*, 2004 CanLII 8476 (ON SC), at ¶52

45. *Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc.*, 2010 ONSC 4281, at ¶18-19

46. *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 (CanLII)

47. *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 569, at ¶160, ¶183

48. Wood, Roderick, *Bankruptcy & Insolvency Law* (2nd ed.), at pages 201, 216, 228, 233, 238, 239

49. *YG Limited Partnership (Re)*, 2021 ONSC 4178, at ¶41

50. *Zimmermann v. Letkeman*, 1977 CanLII 196 (SCC), [1978] 1 SCR 1097

I certify under rule 4.06.1(2.1) that I am satisfied as to the authenticity of every authority cited in this factum.

NAYMARK LAW
30 Duncan St., 5th Floor
Toronto, ON M5V 2C3

Daniel Z. Naymark LSO#: 56889G
Tel: (416) 640-6078
dnaymark@naymarklaw.com

James Gibson LSO#: 52858O
jgibson@naymarklaw.com

Lawyers for Robyn Lee and 13877035 Canada Inc.

SCHEDULE "B" – LEGISLATIVE PROVISIONS

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Vesting of property in trustee
71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

Preferences
95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, 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 the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Transfer at undervalue
96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

> **(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
> **(ii)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
> **(iii)** the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
(B) the debtor intended to defraud, defeat or delay a creditor.

***Limitations Act, 2002*, SO 2002, c. 24, Sched. B**

Application
2 (1) This Act applies to claims pursued in court proceedings other than,
(a) proceedings to which the *Real Property Limitations Act* applies;
(b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
(c) proceedings under the *Judicial Review Procedure Act*;
(d) proceedings to which the *Provincial Offences Act* applies;
(e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*;
(f) proceedings based on equitable claims by aboriginal peoples against the Crown; and
(g) proceedings to which the Limitation Convention or the Amended Limitation Convention, as defined in the *International Sales Conventions Act*, applies. 2002, c. 24, Sched. B, s. 2 (1); 2017, c. 2, Sched. 8, s. 5.

Successors
12 (1) For the purpose of clause 5 (1) (a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or interest, the person shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:

1. The day the predecessor first knew or ought to have known of those matters.
2. The day the person claiming first knew or ought to have known of them. 2002, c. 24, Sched. B, s. 12 (1).

***Fraudulent Conveyances Act*, R.S.O. 1990, 1. F.29**

Where conveyances void as against creditors

2 Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

Where s. 2 does not apply

3 Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c. F.29, s. 3.

***Assignments and Preferences Act*, RSO 1990, c A.33**

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4 (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced. R.S.O. 1990, c. A.33, s. 4 (1).

Unjust preferences

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed. R.S.O. 1990, c. A.33, s. 4 (2).

When there is presumption of intention if transaction has effect of unjust preference

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure. R.S.O. 1990, c. A.33, s. 4 (3).

Idem

(4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of the creditors, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure. R.S.O. 1990, c. A.33, s. 4 (4); 1993, c. 27, Sched.

"Creditor" for certain purposes to include surety and endorser

(5) The word "creditor" when used in the singular in subsections (2), (3) and (4) includes any surety and the endorser of any promissory note or bill of exchange who would upon paying the debt, promissory note or bill of exchange, in respect of which the suretyship was entered into or the endorsement was given, become a creditor of the person giving the preference within the meaning of those subsections. R.S.O. 1990, c. A.33, s. 4 (5).

Assignments for benefit of creditors and good faith sales, etc., protected

5 (1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor. R.S.O. 1990, c. A.33, s. 5 (1).

SCHEDULE "C" – TRUSTEE'S RESPONSE TO INFORMATION REQUESTS

THIS IS EXHIBIT "**C**" REFERRED TO
IN THE AFFIDAVIT OF ROBYN LEE
SWORN BEFORE ME, THIS 5TH DAY
OF SEPTEMBER, 2025

A Commissioner Etc.
Kristen Nowosad, P19702

Bankruptcy of Douglas Grozelle
Trustee's responses to written questions (motion returnable September 26, 2025)

	Questions for Trustee	**Answers from Trustee**
1.	The Trustee alleges, at paragraphs 2 and 24 of its Notice of Motion and paragraph 1 of its First Report, that Mr. Grozelle's fraud started in November 2020. What is the basis for the Trustee's assertion of this start date?	The Trustee's conclusion that the alleged scheme started in November 2020 is based on the entirety of the record, but most particularly the Trustee's discussions with Douglas Grozelle ("Grozelle") and John McMullan, as well as the Trustee's analysis of Grozelle's bank account records and financial activity. Further details regarding the rationale for the Trustee's determination is found at paragraphs 70 to 77 of the Third Report of the Trustee, dated August 29, 2025.
2.	The information the Crown laid against Mr. Grozelle, Mr. Williams and Ms. Masterson, exhibited to Mr. Lee's affidavit, alleges that the start date of the alleged fraud was August 2021. Does the Trustee know the reason why the Crown alleges that different start date? Does this alternative start date change the Trustee's view of the start date of the alleged fraud?	The Trustee has no information regarding the Crown's selection of time periods for the purposes of the charging document. The charging document does not change the Trustee's conclusions.
3.	Please provide particulars of the fraudulent misrepresentations the Trustee alleges Mr. Grozelle made (contents, to whom made, when made), other than those reviewed at paragraphs 222-223 and 247-257 of the Turstee's First Report. What evidence does the trustee have to support the elements of deceit in respect of those representations, namely (a) that Mr. Grozelle made the representations, (b) that they were false, (c) that Mr. Grozelle intended to induce the persons to whom he made those	The relief sought by the Trustee on the Clawback Motion is premised on the grounds set out in the notice of motion and does not turn upon proof of particular fraudulent misrepresentations.

	representations to rely on them, and (d) that those individuals in fact relied on them to their detriment.	
4.	Does Mr. Grozelle admit that he committed fraud, or that he operated a Ponzi scheme? If so, please provide a copy of the admission.	The Receiver first alleged that Grozelle's scheme was a Ponzi scheme at paragraph 1 of its Third Report to Court, dated September 9, 2024. The Trustee also concluded that the scheme was a Ponzi scheme at paragraph 1 of its First Report to Court, dated November 29, 2024 ("First Report"). Grozelle has been represented by counsel throughout the proceedings (dating back to July 2023) and has not filed any evidence or taken any positions in court to qualify or contest the Trustee's conclusions. Further, the Trustee understands that Grozelle was criminally charged on or about March 28, 2025, and is currently taking advice from criminal counsel.
5.	Please provide any transcripts of the Trustee's discussions with Mr. Grozelle and Mr. McMullan referenced at paragraphs 70 and 71 of the Trustee's Third Report.	There are no transcripts of these discussions.
6.	Please provide a copy of the flow of funds analysis at Tab DD of the Trustee's First Report going back to the alleged start date of the fraud, if the Trustee has that analysis.	The flow of funds analysis at Tab DD of the First Report forms part of the working papers that were produced by the Trustee and uploaded to the Trustee's virtual data room on or about May 20, 2025.
7.	At paragraph 229 of the First Report, the Trustee states, "A total of $3,470,736 in Investor Funds was allocated to Investments (not	As indicated at Appendix "DD" of the First Report, a total of $6,363,244.83 was transferred by Grozelle to investments

	including funds transferred from Grozelle to K&M).” How much was invested *including* amounts invested through K&M?	and to K&M. The Trustee has previously reported that prior to its receivership, K&M was directed by John and Krista McMullan and its finances (including particularly sole signing authority over the BMO bank account) were controlled by them. The Receiver’s analysis of K&M is contained in the First Report of the Receiver, dated January 31, 2024. As indicated, it appears that a portion of investor funds were transferred by Grozelle to K&M. As indicated at Appendix “DD” of the First Report, $1,534,144 of the funds transferred to K&M were used to fund investments.
8.	With respect to the statements from Mr. Grozelle suggesting that he intended to prioritize repayments to certain investors ahead of others, set out at paragraphs 254-261 of the First Report: a. Does the Trustee have a copy of the “list” referenced at paragraph 254? Please produce it if so; b. Please confirm that the Trustee has no communications from Mr. Grozelle like the ones reviewed in this section of the report indicating that he intended to preferentially pay any specific Net Winners other than those named in these paragraphs and the recipients of the emails at Appendix QQ, referenced therein; and c. Please confirm that the Trustee has no communications from Mr. Grozelle like the ones reviewed in this section of the report indicating that he intended to preferentially pay any creditors prior to 2023.	The Trustee has alleged that Grozelle was operating a Ponzi scheme. As noted by the Honourable Justice Fitzpatrick in My Mortgage Auction Corp. (Re) “the very nature of a Ponzi scheme is that certain creditors (earlier investors) are preferred by using the funds of later investors to pay those initial investors…. [A]n intention to defraud creditors may be inferred from the fact that a debtor is operating a Ponzi scheme and no other reasonable inference is possible.” (2025 BCSC 1520 at para 181.) The Trustee does not have the “list” referenced at paragraph 254 of the First Report and referred to by Grozelle in the March 17, 2023 email instruction to Betty M. The emails excerpted in the First Report are presented as examples. They are not intended to be exhaustive of all evidence of

		Grozelle's alleged intent to prefer some creditors over others.
9.	What information does the Trustee have about Grozelle's personal overall net worth over time, from November 2020 (or any other alleged start date of the fraud should the Trustee change its alleged start date) to November 2022?	The Trustee is also Grozelle's personal bankruptcy trustee. The Trustee met with Grozelle in order to understand the circumstances of his (second) personal insolvency. Grozelle's Statement of Affairs, dated September 11, 2025, provides information regarding his financial circumstances, including his net worth.
10.	On what date does the Trustee allege Grozelle first became personally insolvent within the meaning of the *Bankruptcy and Insolvency Act*? What is the Trustee's evidence to support that date?	Based on the entirety of the record in the Clawback Motion, including the answer to question 9 above, the Trustee has concluded that Grozelle was insolvent from the start of the alleged scheme.

SCHEDULE “D” – EXAMPLE PROMISSORY NOTE

Trustee's First Report
Tab Q

PROMISSORY NOTE

THIS PROMISSORY NOTE ("this **Note**") dated this January 1 2023
BETWEEN:

the Note "**Bearer**"

Robyn Lee **OF THE FIRST PART**

AND

Douglas R Grozelle
"the **Promisor**"

OF THE SECOND PART

FOR VALUE RECEIVED, the Promisor hereby promises to pay to the Bearer or to such other party, as BEARER may from time to time designate in writing, the principal sum of $375,000.00 (THREE HUNDRED AND SEVENTY FIVE THOUSAND CANADIAN DOLLARS) (the "**Principal**"), to be paid back on February 1st 2023(the "**Due Date**"), for a personal loan, together with interest thereon, subject to the terms herein:

1. **Principal:** The Principal amount of this Note is $375 000.00

2. **Interest Rate:** The Principal shall bear Interest at the rate of TWENTY Percent (20%) equalling $75,000.00 CAD payable on or before the 30th day approximately February 1 2023

3.
4. **Payment and Term**. The Principal and Interest shall be due February 1 2023 and paid on the Due Date unless rollover option is evoked.

5. **Prepayment**. The Promisor shall have the privilege of prepaying the whole or any part of the Principal amount outstanding at any time without notice, bonus or penalty. Interest will not be re-calculated or re-adjusted and will continue to be calculated on the original Principal amount of $375,000.00

6. **Presentment.** The Promisor hereby waives presentment, demand, protest, notice of protest and notice is dishonour.

7. **Costs.** The Promisor shall be liable for all costs, expenses and expenditures incurred including without limitation, the complete legal costs of the Bearer incurred by enforcing this Note as a result of any default by the Promisor and such costs will be added to the principal then outstanding and shall be due and payable by the Promisor to the Bearer immediately upon demand of the Bearer.

8. **Limitations**. The Promisor agrees that the statutory limitation period under the *Limitations Act,* 2002 (Ontario), or any successor or replacement legislation, during which the Bearer may demand and enforce repayment of this Promissory Note shall be suspended and shall not commence until the receipt by the Bearer of a written demand for repayment of the balance of the Principal and/or Interest due pursuant to this Promissory Note.

9. **Inurement**: This Promissory Note shall be binding upon the respective heirs, executors, administrators, successors and assigns of the Borrower and the Lender. The Borrow waives presentment for payment, notice of non-payment, protest and notice of protest.

10. **Severability.** If any term, covenant, condition, or provision of this Note is held by a court of competent jurisdiction to be invalid, void, or unenforceable, it is the parties' intent that such provision be reduced in scope by the court only to the extent deemed necessary by that court to render the provision reasonable and unenforceable and the remainder of the provisions of this Note will in no way be affected, impaired or invalidated as a result.

10. **Governing Law**. This Note is made pursuant to and shall be governed by and construed in accordance with the laws of the Province of Ontario. If any provision of this Promissory Note shall be held invalid or unenforceable, such invalidity or unenforceability shall attach only to such portion and shall not affect or render invalid or unenforceable any other provisions of this Promissory Note.

THE PROMISOR HEREBY acknowledges and agrees that it has read and understands the terms and conditions of this Promissory Note and that it has had the opportunity to seek, and was not prevented or discouraged by any individual or entity from seeking, any independent legal advice which it considered necessary before the execution and delivery of this Promissory Note and that if it did not avail itself of that opportunity before signing this Promissory Note, it did so voluntarily without any undue pressure, and agrees that its failure to obtain independent legal advice will not be used as a defense to the enforcement of its obligations under this Promissory Note.

IN WITNESS WHEREOF, the Promisor has executed and delivered this Promissory Note to the Lender as of the date below.

Witness for Promisor
Lawyer Iris Fal
Barrister and Solicitor

Promisor: Douglas Grozelle
Print/ Sign
Date : January 1 2023

Note Bearer: Joe Topic
Date: January 1 2023

FOLEY et. al. - and - DOUGLAS GROZELLE et. al.
Applicants Respondents

Court File No. CV-23-00082142-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT HAMILTON

RESPONDING FACTUM OF THE LENDERS
(Trustee's Clawback Motion
returnable September 26, 2025)

NAYMARK LAW
30 Duncan St., 5th Floor
Toronto, ON M5V 2C3

Daniel Z. Naymark LSO#: 56889G
Tel: (416) 640-6078
dnaymark@naymarklaw.com

James Gibson LSO#: 52858O
jgibson@naymarklaw.com

Lawyers for Robyn Lee and 13877035 Canada Inc.