ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Shaw, 2022 ABASC 148 **Date: 20221107**

Logan Keith Shaw and 1681502 Alberta Ltd.

Panel:	Tom Cotter Karen Kim James Oosterbaan
Representation:	Peter Verschoote Diana Piper Adam Karbani for Commission Staff Logan Keith Shaw for himself
Submissions Completed:	November 16, 2021
Decision:	November 7, 2022

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I. INTRODUCTION

[1] On February 16, 2018, Alberta Securities Commission (the **ASC**) staff (**Staff**) issued a notice of hearing (the **NOH**) against Logan Keith Shaw (**Shaw**) and 1681502 Alberta Ltd. (**168**, and, together with Shaw, the **Respondents**), alleging that the Respondents contravened s. 93(b) of the *Securities Act* (Alberta) (the **Act**) by directly or indirectly engaging or participating in an act, practice, or course of conduct relating to securities that they knew or ought to have known perpetrated a fraud on investors.

[2] A hearing into the merits of the allegations was held intermittently over the period February 1 to May 21, 2021, during which Staff tendered the affidavit evidence of eight witnesses, including documents attached as exhibits to those affidavits. Shaw cross-examined all eight in the presence of the panel. We received written submissions on the merits of the allegations from Staff. The Respondents did not have counsel for the hearing, and elected not to adduce any evidence or file written submissions. As none of the parties expressed an intention to make oral submissions, despite having November 22, 2021 scheduled for that purpose, the panel on November 16, 2021 released the November 22 oral submissions date.

[3] Our findings and analysis in respect of the allegations are set out below. We find that the Respondents engaged in a course of conduct relating to securities that they knew perpetrated a fraud on investors. This proceeding will now move into a second phase for the determination of what, if any, orders ought to be made against the Respondents.

II. HEARING BACKGROUND

[4] Staff's allegations centred on the use of $940,000 from six investments by investors who paid for their subscriptions of common shares of 168 (the **168 Shares**) between September 26 and October 12, 2012. Staff alleged that the Respondents represented to investors that their invested capital would be used for a business in Mexico that involved installing point-of-sale (**POS**) devices in taxi cabs (alternatively referred to in the evidence as the **Mexican Taxi Business** or **Mexicar**). Staff alleged that Shaw instead used most of that capital to fund the purchase of a house in Vernon, British Columbia (the **Vernon Property**) for himself (and his spouse at the time, **SS**). Payments by Shaw relating to the purchase of the Vernon Property were made between September 27 and October 16, 2012. Therefore, the events at issue here occurred in the narrow time span between September 26 and October 16, 2012 (the **Relevant Period**).

[5] The hearing was originally scheduled to begin on November 19, 2018, but was adjourned because of Shaw's health issues. The hearing was twice rescheduled to begin on February 4, 2019 and in September or October, 2019, but was further adjourned for the same reason. A subsequent hearing commencement date of April 14, 2020 was adjourned because of the COVID-19 pandemic.

[6] On October 7, 2019, a panel of the ASC made an interim order (the **Interim Order**, cited as *Re Shaw*, 2019 ABASC 152) that included a number of market-access restrictions against Shaw. That panel dismissed Shaw's cross-application to have Staff's application for the Interim Order "dismissed, permanently stayed, or delayed". The Interim Order remains in effect.

[7] The hearing was eventually set to begin on February 1, 2021. On January 29, 2021, a hearing management panel accepted Staff's proposal that the hearing be conducted in a "hybrid"

fashion, namely that Staff would tender affidavits from their witnesses, then Shaw would be able to cross-examine those witnesses and call his own evidence. On February 1, 2021, the hearing panel adopted a schedule (the **Hearing Schedule**) setting out the following:

- Staff would tender affidavits from their witnesses and deliver a written opening statement by March 12, 2021.

- Shaw was given until April 6, 2021 to object to the admissibility of any evidence tendered by Staff and to elect whether to tender evidence himself, either affidavit or *viva voce* (this date was an error in the Hearing Schedule document, as the panel had set the date as April 2, 2021; however, this error was in Shaw's favour).

- On April 14, 2021, the panel would hear any arguments in relation to objections to the admissibility of Staff's evidence and mark as exhibits any admissible evidence from Staff. On March 12, 2021, Staff filed eight affidavits – two from Staff investigators, five from investors in four of the six investments at issue (**KE**, **DB**, **BB**, **ST**, and **JB**) and one from an individual who lent money to Shaw (**RC**) (these and certain other individuals are identified by initials to protect their privacy interests). Staff did not directly tender investor evidence relating to the investments at issue made by **MI** and **MF**.

- Five dates were set in May 2021 for Shaw to cross-examine Staff's witnesses, and six dates were set in July 2021 for Shaw to present his case. Dates were also set in September 2021 for Staff to cross-examine Shaw's witnesses. The July and September dates were cancelled because Shaw did not present any evidence.

- Submissions were set for: October 5, 2021 (Staff's written submissions); November 5, 2021 (Shaw's written submissions); November 12 (Staff's reply submissions); and November 22 (oral submissions). Staff made their initial written submissions, but no other submissions were made.

[8] The panel convened on April 14, 2021, and noted that Shaw had not objected to the admissibility of any of Staff's tendered affidavit evidence. Nor had he made an election by the April 6, 2021 deadline as to adducing evidence himself. The panel held that Staff's affidavit evidence was relevant, with no apparent reason to exclude any of it, and therefore admitted the eight affidavits into evidence. Shaw advised the panel that he would be adducing evidence, but had not yet decided in what form. After hearing from Shaw that he would provide that information later that week, the panel extended the deadline to April 16, 2021 for Shaw to provide it. Shaw also informed the panel that he intended to cross-examine all of Staff's witnesses during the five days set aside in May 2021 under the Hearing Schedule. At Shaw's written request later made through the ASC Registrar (the **Registrar**), the panel further extended to April 19, 2021 Shaw's deadline for that information. Shaw did provide some documents by April 19, 2021, but did not ever tender any into evidence.

[9] Staff's witnesses appeared remotely via Zoom for cross-examination on May 14, 17, 18, 20, and 21, 2021. In the course of those hearing dates, Shaw agreed that if he were to call any witnesses to testify during the July 2021 dates scheduled for that purpose, he would provide Staff,

no later than June 15, 2021, with the specific pre-hearing disclosure required by s. 7.2(b) of ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings*. Shaw was also given until July 16, 2021 to deliver any affidavits from witnesses. In the end, Shaw did not provide such pre-hearing disclosure, nor did he call any witnesses or file any affidavit evidence.

III. PRELIMINARY MATTERS

A. Standard of Proof

[10] The standard of proof in ASC enforcement hearings is proof on a balance of probabilities, which requires a determination of "whether it is more likely than not that an alleged event occurred" (*F.H. v. McDougall*, 2008 SCC 53 at para. 49). Evidence must be sufficiently clear, convincing, and cogent to satisfy this standard of proof (*McDougall* at para. 46).

B. Relevant Evidence

[11] Section 29(e) of the Act provides that an ASC hearing panel "shall receive that evidence that is relevant to the matter being heard", and s. 29(f) provides that "the laws of evidence applicable to judicial proceedings do not apply". Therefore, all relevant evidence – including hearsay evidence – is admissible, subject to a panel's discretion and the rules of natural justice and procedural fairness (*Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18; *Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 45; see also *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 9). We also assess the weight to be given to the relevant evidence admitted.

C. Witness Credibility

[12] We generally found all of Staff's eight witnesses to be credible and we attributed any inconsistency or lack of clarity in a witness's recollection primarily to the passage of time.

[13] As mentioned, the witnesses' evidence was given in affidavits, with Shaw cross-examining each in the presence of the panel as part of the hearing. Shaw did not impeach the credibility of the witnesses, although he established in a few instances that a witness had made a statement based on hearsay. In respect of one witness – related to SS – a Staff investigator acknowledged that she believed there was some animus between Shaw and that witness because of the dissolution of Shaw's marriage. Shaw did not explore that subject during cross-examination or otherwise seek to impeach that witness's credibility.

[14] Overall, we accepted the witnesses' affidavits, as they were largely corroborated by reliable and uncontested documentary evidence.

D. Investigative Interviews

[15] The affidavit of each investor witness and the lender witness included the transcript and exhibits from that respective deponent's interview conducted by Staff during their investigation. All of the investor witnesses deposed in their respective affidavits that they had reviewed their interview transcripts, they believed to the best of their knowledge that they were accurate transcriptions of the questions asked and answers given, and their answers were and remained accurate. The affidavit of one Staff investigator included the transcript and exhibits from each interview of Shaw conducted by Staff during their investigation (July 26, 2016 and March 6, 2017). There was also an investigative interview in evidence for the investor in the fifth investment (who did not testify), but not for the investor in the sixth investment (who also did not testify).

[16] Staff are entitled to adduce evidence collected under ss. 40 and 42 of the Act during their investigation, and often seek to enter into evidence transcripts of interviews they conducted (*Arbour* at para. 49). Shaw did not object to the admissibility of any of the affidavit evidence tendered by Staff, including the transcripts of investigative interviews, and we admitted all of the affidavits into evidence.

[17] However, as Shaw was not represented by counsel at the hearing, we carefully considered the weight to be given to the transcripts, particularly those of Shaw's investigative interviews. In assessing that weight, we considered available indicators of reliability, including whether the witness was either sworn or affirmed, whether the witness was represented by legal counsel, and whether the evidence was corroborated by other evidence (*Arbour* at paras. 46 and 53-54; see also *Re TransCap Corp.*, 2013 ABASC 201 at para. 65 and *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 34 (aff'g. *Re Capital Alternatives Inc.*, 2007 ABASC 79)).

[18] In *Re Kapusta*, 2011 ABASC 322, the hearing panel stated (at para. 10):

> The nature of the Investigative Interviews leads us to handle them with caution. Such evidence will generally be given less weight than direct evidence in the form of sworn or affirmed hearing testimony. Unlike testimony, transcripts of interviews conducted outside a hearing do not enable a hearing panel to observe interviewees as they give their interview evidence, or allow for testing or clarification of the interviewees' evidence (such as seemingly inconsistent statements) through cross-examination by other parties or panel questioning. The circumstances of the interviews must also be considered.

[19] The interviewees in that case had each been sworn or affirmed before giving their interview evidence, which the panel said was "an indicator of seriousness that we consider would have been appreciated by the interviewees as they were interviewed" (*Kapusta* at para. 11). Further, the interviewees testified at the hearing and were available for cross-examination on their interview evidence. Where their interview evidence was not tested and was inconsistent with other evidence, the panel said that it gave that evidence "little or no weight", and it did "not rely exclusively on any Investigative Interview content in reaching [its] conclusions or making [its] findings" (*ibid.*).

[20] Similarly, we gave little weight to the transcripts of Shaw's investigative interviews. Even though Shaw was affirmed before the interviews and was represented by counsel at his second interview, his interview statements were not tested and there were other indicators of unreliability. However, where his interview evidence concerned uncontroversial matters or was corroborated by other reliable evidence, we accepted his answers as truthful. For Staff's eight witnesses (who were also sworn or affirmed), we generally accepted the transcripts as reliable, particularly as the most pertinent aspects of their interviews were corroborated by uncontested and reliable documentary evidence. Further, as noted, Shaw was able to cross-examine those witnesses and that testing of their evidence did not expose any inconsistencies in their evidence or otherwise impeach their credibility.

IV. FACTUAL BACKGROUND

A. Respondents

[21] Shaw is a former resident of Grande Prairie, Alberta who moved to Vernon, British Columbia in or about the fall of 2012. He held approximately 45% of 168's voting shares

personally and through Loshaw Enterprises Inc., of which he was the sole director and shareholder. Shaw had sole signing authority for 168's bank account at Toronto-Dominion Bank (respectively, the **168 Account** and the **TD Bank**). Shaw was a signatory of a personal bank account at TD Bank (the **Shaw Account**).

[22] 168 was an Alberta corporation, incorporated on May 31, 2012 and struck on November 2, 2018. 168 sold 168 Shares to approximately 40 investors in Alberta and British Columbia between September 2012 and November 2013. Staff's allegations related to six of those investments, which together accounted for $940,000 invested in 168 during the Relevant Period. Funds from five of those investments were deposited directly to the 168 Account. In the case of investor KE, his share subscription funds were first deposited to a trust account of a lawyer retained by Shaw or 168, following which most of those funds were transferred to the 168 Account.

B. Other Parties

[23] 1582378 Alberta Ltd. (**158**) is an Alberta corporation, incorporated in 2011. Shaw and SS were its directors during the Relevant Period. 158 raised capital for a purpose unrelated to the allegations in the NOH, although some of that money was transferred to 168 from the TD Bank account of 158 (the **158 Account**). Shaw and SS were both listed as having signing authority for the 158 Account, although Shaw stated during his March 6, 2017 interview that SS never used that account.

[24] Tony Charly Fatal (**Fatal**), an Edmonton resident, solicited investors for 168 and communicated with some investors before and after they invested. Fatal's holding company held approximately 6.7% of 168's voting shares.

[25] Mexicar Inc. was incorporated in Alberta on July 3, 2013, and Shaw was its sole director and shareholder. It did not appear to carry on any business, nor did it have a bank account. Shaw described it as a "nothing company" and a company that was intended to hold and operate the Mexicar business. He also said that Mexicar was a name that "just sort of caught on and we just started using it commonly".

C. Capital Raising

[26] The affidavit evidence, corroborated by the 168 Account records and investor subscription agreements, established that during the Relevant Period 168 received an aggregate of $940,000 by selling 168 Shares to the six investors specified by Staff (in one case a company, through which the 168 Shares were held beneficially by three individuals and, in another case, a married couple).

[27] The subject subscriptions were solicited by Shaw or his associate Fatal, and in at least one case both of them jointly. We received affidavits, documentary evidence, or both for those six investments, as discussed below. We had interview transcripts relating to five of the six investments – those investors were all told by Shaw or Fatal that their invested capital would be used for the Mexicar business, including purchasing POS equipment, building infrastructure, hiring personnel, or obtaining office space in Mexico.

[28] KE was the investor who subscribed for the most significant number of 168 Shares during the Relevant Period. KE received some documents from Shaw during a presentation by him. Those documents disclosed some financial projections (presumably for 168), a general description of the

business, the project's management team, and some risk factors. The other investors interviewed by Staff either denied receiving an offering document or could not recall receiving such a document before they invested.

[29] In evidence were 168 Share subscription agreements for most of the six investments pointed to by Staff. There were two types of subscription agreement in evidence. One type was used for DB's and KE's investments. The second type was used for the other investments at issue (and there was also a subscription agreement of the second type for DB which perhaps was intended as a single replacement for DB's first two subscription agreements). Most of the terms and conditions significant for the allegations here were materially identical in both types of subscription agreement, although the price per 168 Share varied. The first type also contained a "Risk Acknowledgement Form", but the second type did not.

[30] When cross-examining the two Staff investigators, Shaw drew their attention to a few terms of the subscription agreements, the pertinent parts of which provided:

> 7. The Subscriber (on its own behalf and, if applicable, on behalf of each person on whose behalf the Subscriber is contracting) represents, warrants and covenants to [168] (and acknowledges that [168] and its counsel, are relying thereon), both at the date hereof and at the Closing Date that:
>
> (a) the Subscriber has been independently advised as to restrictions with respect to trading in the Shares imposed by applicable securities legislation, confirms that no representation has been made to it by or on behalf of [168] with respect thereto, . . .
>
> . . .
>
> 17. This Subscription Agreement represents the entire agreement of the parties hereto relating to the subject matter hereof and there are no representations, covenants or other agreements relating to the subject matter hereof except as stated or referred to herein.

[31] The significance of these subscription agreement terms is discussed later in this decision.

D. Use of Proceeds

[32] Staff adduced documentary evidence showing that of the $940,000 proceeds received during the Relevant Period from the six sales of 168 Shares at issue, Shaw used approximately $807,780 directly or indirectly to purchase the Vernon Property. We were able to draw conclusions using only approximate amounts, because Shaw was evidently using the 168 Account for other personal expenses as well. There were debits of over $17,600 for credit card payments as well as other more minor debits in the 168 Account during the Relevant Period, the purpose of which was not obvious. However we were satisfied from the documentary evidence, in particular the relevant bank records, that our approximations were very close to the actual use of funds. We set out here a more detailed chronology of the source and use of funds from that evidence (all amounts are rounded to the nearest dollar).

[33] At the beginning of the Relevant Period, the 168 Account and the Shaw Account had balances of $7,484 and $1,037, respectively. On September 26, 2012, share subscription proceeds of $60,000 from DB were deposited to the 168 Account, and on the same day loan proceeds of $600,000 from lender RC were deposited to the Shaw Account.

[34] The next day, September 27, 2012, share subscription proceeds of $175,000 (from ST, JB, and **TT**) were deposited to the 168 Account. On the same day, $199,780 was transferred from the 168 Account to the Shaw Account, and $11,459 was also transferred from the 158 Account to the Shaw Account (there was no indication in the evidence that the money from the 158 Account had come from 168 investors). Later that day, $810,866 was transferred from the Shaw Account to the trust account of a Vancouver law firm for the purchase of the Vernon Property, representing almost all of the $815,000 purchase price.

[35] On October 9, 2012, share subscription proceeds of $500,000 from KE were deposited in a different law firm's trust account, of which $455,185 was later transferred to the 168 Account on October 11 and 12, 2012. In the meantime, on October 9, 2012, share subscription proceeds totalling $105,000 ($90,000 from MI and $15,000 from MF) were deposited to the 168 Account. The last deposit of share subscription proceeds to the 168 Account during the Relevant Period was made on October 12, 2012 – $100,000 from BB.

[36] On October 15 and 16, 2012, a total of $608,000 was transferred from the 168 Account to RC, repaying the loan principal of $600,000 plus interest of $8,000. That transfer left a balance in the 168 Account of $45,859. Therefore, the balance in the 168 Account was $7,484 at the start of the Relevant Period and $45,859 at the end of the Relevant Period. The only deposits during that time were the $895,185 in 168 investor subscription funds.

[37] In short, the evidence was clear that, during the Relevant Period, $940,000 of 168 Share subscription proceeds were paid to 168 (including $44,815 retained in Shaw's lawyer's trust account), and $807,780 of the money transferred from the 168 Account to the Shaw Account and to RC during that period was attributable to Shaw's purchase of the Vernon Property.

E. Investors' Evidence

1. KE

[38] KE is a Calgary businessperson. Through his family's holding company, KE paid $500,000 for 168 Shares priced at $10.00 per share, pursuant to a subscription agreement, parts of which were dated October 8, 2012. In about July 2012, KE learned of the investment opportunity through a business network of which he was a member, and shortly after that, he and his company's chief financial officer, **CB**, met with Shaw in KE's office. Shaw gave a PowerPoint presentation, described the Mexican Taxi Business, and asked KE to invest. Following that meeting with Shaw, CB was responsible for most of the due diligence work before KE decided to invest. KE understood that his invested capital would be used to purchase POS systems for taxis. KE also understood that revenues would be derived from fees charged to taxi customers for using a credit card, and that approximately 50% of those fees would be available for distribution to 168 shareholders after paying the Mexican taxi drivers and local unions. He thought returns would start being generated in about 18 months.

[39] Shaw told KE that Verifone was involved. KE worked with that large and well-known payment systems company in his own business and confirmed with one of his senior contacts at Verifone that the company was in communication with Shaw and that it was "in the process of getting PIN pads operational in and built for Mexico". KE was satisfied with CB's due diligence work and believed that Shaw was "sound". KE seemed to derive considerable comfort from

Verifone's involvement with Shaw's business, believing that "helped put some validity behind the deal."

[40] After investing, KE "let it go" for about a year before he started asking for updates. Shaw sent him emails assuring him that the business was "moving along great". However, around that time KE discovered that Verifone had backed out and that Shaw was trying to secure another taxi software company for a payment system. Some time later, KE met with Shaw and others, at which meeting Shaw advised that he planned to develop his own POS system and asked KE for a further investment, which KE refused. KE had concluded at that point that "this thing was done". Eventually, Shaw stopped responding to KE's enquiries.

[41] During his October 2, 2017 investigative interview with Staff, KE learned that most of his invested capital had been used to purchase the Vernon Property, although Shaw had not told KE that any of the money would be for Shaw's personal use. Later that month, KE's holding company filed a notice of civil claim and certificate of pending litigation against Shaw and SS in the Supreme Court of British Columbia. The claim alleged that Shaw wrongfully appropriated KE's funds to repay a loan in respect of the purchase of the Vernon Property, and the certificate of pending litigation was registered on the property title. According to KE's affidavit, his holding company received $500,000, plus approximately $24,000 in interest, from Shaw at the end of November 2017, and the certificate of pending litigation registered on title to the Vernon Property was subsequently cancelled.

[42] KE confirmed during cross-examination by Shaw that KE received a certificate for 50,000 168 Shares. KE also confirmed that, during their meeting, Shaw told him that his invested capital would be used to purchase the first tranche of POS systems for taxis in Mexico, but KE acknowledged that this representation may not have been in a document provided by Shaw or 168.

2. DB

[43] DB lives with her spouse in central Alberta and operates a small business. DB paid $45,000, and she and her spouse paid a further $60,000, for 168 Shares priced at $10.00 per share, pursuant to subscription agreements dated August 1, 2012 and September 17, 2012, respectively. Staff's allegations related only to the $60,000 amount. An October 1, 2012 subscription agreement in evidence for 7,000 168 Shares for $105,000 appeared to be a combination of the first two agreements, but at a price of $15 per 168 Share. 168's share register listed DB as having 7,000 168 Shares. This presumed replacement subscription agreement was not important for our purposes, as the salient fact was that DB and her spouse clearly invested a total of $105,000 (not $210,000), $60,000 of which was at issue.

[44] The $60,000 was deposited to the 168 Account on September 26, 2012. DB was introduced to the investment by Fatal, whom she had known most of his life and from whom she had previously bought life insurance. She knew Shaw through Fatal. DB deposed that the investment was Mexicar, which was to sell, rent and install POS terminals in Mexican taxis, and to sell advertising, although she had only a vague understanding of how the business would generate revenue and returns for shareholders. It was clear from DB's interview transcript that the principal reason she invested was her trust in Fatal and her understanding that Fatal and his mother had also invested.

[45] Fatal told DB that her invested capital would be used to hire personnel and obtain office space in Mexico, and to buy POS units for taxis. Fatal did not tell DB that any of her invested capital would be used for management, commissions, paying loans, or personal expenditures. After investing, DB described a series of unsatisfactory communications in which she attempted to ascertain the status of 168's business development, but was sometimes ignored and other times told alternately by Shaw and Fatal that the other was responsible for keeping her informed. DB expressed shock when told during her interview that her $60,000 had been used by Shaw to purchase the Vernon Property.

[46] DB last heard from Shaw on July 25, 2017 and has not received any money from her investment. On cross-examination, DB confirmed that she signed the risk acknowledgement form, incorporated in the August 1, 2012 subscription agreement for $45,000.

3. BB

[47] BB lives near Edmonton. He paid $100,000 on October 11, 2012 (deposited to the 168 Account on October 12) for 168 Shares priced at $30.03 per share pursuant to a subscription agreement dated November 1, 2012. He was introduced to the Mexican Taxi Business in the summer of 2012 through Fatal, whom he described as a casual friend of about three years. Fatal suggested using some money BB had received from life insurance proceeds following the death of his spouse earlier that year. BB attended a presentation in Edmonton in or about August or September 2012, conducted by Shaw and Fatal, whom he understood were partners in the sense of being the major investors in the Mexican Taxi Business.

[48] BB was told that investment proceeds would be used for purchasing POS systems and for hiring staff in Mexico. He thought he would be receiving a percentage of the money earned through the POS system. He was also told that this was a "ground floor" opportunity to "make lots of money", but that he could lose all his money. BB called Shaw in 2014 to ask about the status of the investment, and Shaw told him that there were several problems but that "it's not dead in the water". A short time before BB's interview, Fatal told BB that the project was "still going forward", although BB suspected by then that his money was gone. It was only when he was being interviewed by Staff in October 2017 that BB learned from documents he was shown that Shaw had used BB's money for the Vernon Property purchase. BB stated that he had not seen a return on his investment.

[49] During cross-examination, BB confirmed that he signed the subscription agreement appended to his affidavit, believed at the time he invested in the business plan Shaw presented, and thought that business plan was being executed. BB also confirmed that he received a share certificate.

4. ST

[50] ST, a West Vancouver resident, together with his brother TT and business partner JB, paid $175,000 for 168 Shares on September 27, 2012 by cheque drawn on the account of a company indirectly equally owned by ST and JB. In evidence were subscription agreements for ST and TT dated November 1, 2012 and totalling $125,000, reflecting a share price of $10.00 per 168 Share. ST stated during his interview that the allocation of the subscription price among the three parties was to be $100,000 from ST's and JB's company, $50,000 from ST, and $25,000 from TT. JB stated that ST's subscription agreement would have been for ST's $50,000 and ST's portion of the

company's $100,000, although ST stated that the $100,000 on that subscription agreement was the one for the company. There was no subscription agreement in evidence for the other $50,000 of this $175,000, but we were satisfied that this group had invested $175,000 in total.

[51] Also in evidence were 168 Share certificates dated November 1, 2012 issued to each of the three parties, though not corresponding to the number of shares subscribed for by them, either individually or collectively (except for those issued to ST): 6,600 for ST's and JB's company, 1,660 for TT, and 5,000 for ST. The disparity between the subscription amounts and share certificates was an issue that frustrated ST and JB as it was never satisfactorily resolved, with Shaw blaming others for the problem. Some of these parties had made other investments with Shaw, but those were irrelevant here.

[52] Before investing, ST had known Shaw for approximately 10 years as a friend and as a family relation of JB. Shaw solicited ST's investment by describing Mexicar as an opportunity to install POS systems in about 7,000 taxis in the Playa del Carmen area of Mexico. Shaw explained the business's revenue model and showed ST a picture from a Mexican newspaper of Shaw with a taxi union representative, which ST confirmed was legitimate by searching the internet. ST knew that Shaw regularly travelled to Mexico, and ST visited Mexico where he saw leased facilities in Cancun and Playa del Carmen and a car that had some "trappings" of being outfitted, but the devices had been removed.

[53] ST understood that the $175,000 investment would be used for infrastructure, building a facility and installing POS systems in cars. He was told to expect returns starting in 18 months of 19% to 20% per year. When ST later asked Shaw about the status of the business, Shaw gave him a number of explanations for delays and problems, along with promises of repayment. Eventually, ST concluded that "it was just a big smoke show", and Shaw stopped responding to his enquiries. Neither ST's and JB's company nor ST personally had received any money from their investments, and ST thought that TT had also received nothing. ST was surprised when told during his interview that the $175,000 investment had been used by Shaw for the Vernon Property.

[54] On cross-examination, Shaw established that certain statements ST made to Staff in his interview about Shaw's car and about Shaw continuing to solicit investment funds, including from family, were hearsay statements based on what he learned from JB (although the car and any such solicitations were irrelevant here, as they were not part of the allegations in the NOH). Shaw also sought to confirm that ST was a shareholder of 168, however ST refused to concede that assertion because the share certificates received were, in his view, inaccurate and he thus questioned their validity.

5. JB

[55] JB, a North Vancouver resident, is a business partner of ST and was formerly related to Shaw by marriage. JB's affidavit evidence was very similar to that of ST, and the relevant content of their investigative interview transcripts differed only in some minor respects. JB's description of the intended use of proceeds was consistent with ST's understanding – start-up costs for infrastructure, a shop, and development of POS systems (although JB also stated that he did not know how the money was to be used). JB seemed to have a different understanding than ST about the expected timing and magnitude of returns – he expected returns in a "few years" and that it

could make the investors rich and financially independent, "bringing hundreds of thousands each per year once it goes".

[56] JB thought that Shaw knew what he was doing, as he projected an image of success. After investing, JB began asking Shaw for information about the investment and corrections to the share certificates and was told that Shaw's lawyer or another person was looking after things. JB did not want to "burn any bridges" with Shaw because of the family connection, but over time JB and ST lost faith in the investment, and in 2014 or 2015 they "gave up on the money". JB also stated that he did not know Shaw would use the $175,000 for the Vernon Property.

[57] Other than confirming JB's interest in a holding company named on a 168 Share certificate, Shaw's cross-examination only elicited an acknowledgement that an irrelevant assertion about JB's and Shaw's family history was hearsay based on what JB had heard from other family members.

F. Lender's Evidence

[58] RC is a businessperson who resides in northern Alberta. He met Shaw through a mutual friend in 2009 or 2010. They discussed capital RC needed for a property development, however RC did not pursue that with Shaw. In later conversations, Shaw told RC about other investments he was involved with, including "one particular investment that he thought he was -- it was going very well with him was point of sales stuff going on in Cancun, Mexico, and it was a -- putting point of sales in all the taxis in Cancun". Shaw did not solicit RC to invest in that business.

[59] In 2012, Shaw approached RC and asked him for a $600,000 loan for a term of one week, with interest at 1.3% for the week. RC understood that Shaw had an immediate need for cash, and was expecting other funds to be released to him within the proposed loan term. RC agreed to Shaw's request on the condition that he got adequate security – Shaw offered the Vernon Property as security, which RC accepted. RC and Shaw drafted a promissory note with Shaw, 168 and 158 as the borrowers, and including the Vernon Property as security with an indicated value of $800,000.

[60] On September 24, 2012, RC gave Shaw a certified cheque for $600,000 drawn on RC's holding company's account and payable to Shaw. That was cashed on September 26, 2012, the same day on which RC and Shaw signed the promissory note. Although the loan principal and interest were due on October 3, 2012, according to the terms of the promissory note, Shaw repaid the loan in two instalments – RC received $500,000 on October 15, 2012 and $108,000 on October 17, 2012. Both payments were made by wire transfer from the 168 Account. RC did no further business with Shaw after this loan transaction, and has not had any contact with Shaw since 2015 or 2016.

[61] On cross-examination, Shaw merely received confirmation from RC that Shaw had borrowed money from and repaid RC (with interest) in 2012.

V. ALLEGATIONS AND LAW

A. Allegations

[62] As mentioned, Staff alleged that, from September 26 to October 12, 2012, 168 raised $940,000 from six investors by issuing 168 Shares, on the representation that the invested capital would be used for the Mexican Taxi Business. Instead, Shaw allegedly used the majority of that

capital for the purchase of the Vernon Property, without telling any of the investors that would be the purpose for which their capital was used. Staff alleged that the Respondents engaged in the foregoing activity with the intent to deceive the investors, and that Shaw – as the sole director and guiding mind of 168 – authorized, permitted or acquiesced in 168's acts, practices and conduct. As a result, Staff alleged that the Respondents contravened s. 93(b) of the Act by directly or indirectly engaging or participating in an act, practice or course of conduct relating to securities that they knew or ought to have known perpetrated a fraud on investors.

B. Law

[63] During the Relevant Period, s. 93(b) of the Act prohibited any person or company from "directly or indirectly, engag[ing] or participat[ing] in any act, practice or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know will . . . perpetrate a fraud on any person or company".

[64] The test to establish fraud under the Act was set out in *Capital Alternatives* at para. 309 and has been applied in several decisions of ASC panels:

> The term "fraud" is not defined in the Act. The gist of the meaning is not, however, difficult to discern. Johnston and Rockwell [in *Canadian Securities Regulation*, 4th ed., (Markham: LexisNexis, 2007)] point to the elements of fraud as enunciated at common law by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 at 27 [*Théroux*], which has been adopted in the context of securities regulation (for example, in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 27):
>
> > . . . the actus reus of the offence of fraud will be established by proof of:
> >
> > 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> >
> > 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
> >
> > Correspondingly, the *mens rea* of fraud is established by proof of:
> >
> > 1. subjective knowledge of the prohibited act; and
> >
> > 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[65] The Supreme Court in *Théroux* (at p. 17) explained that an act of deceit or a falsehood has occurred if someone has "represented that a situation was of a certain character, when, in reality, it was not". "Other fraudulent means" refers to dishonest acts which are not necessarily deceit or falsehood, but are assessed objectively based on what a reasonable person would consider to be a dishonest act; examples cited in *Théroux* (at p. 16) included "the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property".

[66] The *mens rea* for fraud arises from the "subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk" (*Théroux* at p. 19). The

focus is on whether the offender "intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation)" (*Théroux* at p. 19).

[67] As stated in *Arbour* (at para. 983): ". . . subjective knowledge can be inferred from the prohibited act and surrounding circumstances".

VI. ANALYSIS AND FINDINGS

A. Security

[68] A preliminary issue is whether the alleged fraud was in relation to a "security", a term which is broadly defined in s. 1(ggg) of the Act and includes "share". Staff cited *R. v. Stevenson*, 2017 ABCA 420 in which the Alberta Court of Appeal noted that the Act is "designed to cover virtually every method by which money could be raised by the public" (at para. 9).

[69] In our view, there is no question that the 168 Shares fall within the meaning of "security" in the Act and that the Respondents' impugned activity was in relation to those securities.

B. Fraud

1. Parties' Positions

(a) Staff's Position

[70] Staff argued that the Respondents engaged in a prohibited act by using investor funds for purposes that were contrary to what was represented. Specifically, Staff stated that investors understood, based on the Respondents' representations, that invested funds would be used for Mexicar, whereas Shaw used the vast majority of those funds to purchase the Vernon Property. Staff enumerated the use of proceeds representations that the Respondents made to investors (summarized earlier in this decision). Similarly, Staff outlined the representations made to investors as to how Mexicar would generate returns (again, summarized earlier in this decision). Staff also pointed to Shaw's admissions in his investigative interview that he told KE that his invested capital would be used for operations in Mexico, and that subsequent communications from Shaw to investors were about Mexicar's progress and setbacks.

[71] Staff submitted that the element of deprivation had been established because investors suffered actual losses – their capital was used directly and indirectly to purchase the Vernon Property. Staff further argued that none of the investors were repaid, although acknowledging elsewhere that KE had received his principal and an interest amount. The ultimate fate of Mexicar was unclear, because investors had stopped hearing from Shaw by July 2017.

[72] Staff contended that Shaw and 168 had actual knowledge of the prohibited act and the consequent deprivation to investors. Some of the evidence cited in support was that Shaw (on his own behalf and as the guiding mind of 168): solicited investors; signed subscription agreements; accepted deposits of some of the investor funds into the 168 Account; sent email updates to investors; and used investor money for Shaw's personal purchase of the Vernon Property.

(b) Shaw's Position

[73] As mentioned, Shaw elected not to adduce any evidence in his defence, nor did he submit any argument. In his investigative interview, Shaw's answers to direct questions were generally evasive, non-responsive, and obtuse. He often claimed no memory of the specific subject of the

questions posed. He did concede that it was possible that he used the RC loan proceeds for personal reasons; when asked to elaborate, he said he was moving from Grande Prairie to Vernon at that time.

[74] From certain questions that Shaw put to Staff's witnesses during cross-examination, we inferred three potential defences that Shaw might have been planning to assert had he made any submissions. All three related to the alleged prohibited act and deprivation (the *actus reus*), not to the Respondents' subjective knowledge of the alleged prohibited act and deprivation (the *mens rea*). First, Shaw seemed to suggest that the "entire agreement" provision of the subscription agreements should be construed as not allowing any representations to be made outside of the agreement. Second, he brought one witness to the risk acknowledgement provision in her subscription agreement, presumably with the intention of establishing that investors accepted all of the risks of how their funds might be used. Third, he had a number of investor witnesses acknowledge that they had received 168 Share certificates, perhaps with the intention of showing that investors received what they had bargained for.

[75] Regarding what argument Shaw might make about his "subjective knowledge", we were able to glean some slight insight from his interview transcripts and the direction of the questions he asked while cross-examining Staff's witnesses. The only possible position we could discern was that Shaw perhaps believed that he could treat money raised by 168 as his own and that he perhaps intended to pay investors their principal and some interest – as happened with KE when he demanded his money – from business operations (if the business were to have any success) or from other sources of funds (perhaps including investments by others in the future).

2. *Actus Reus*

[76] The evidence clearly showed, on a balance of probabilities, that the Respondents engaged in prohibited acts including, as stated in *Théroux* at p. 17, "the use of corporate funds for personal purposes". Staff also proved that the Respondents' prohibited acts caused deprivation to investors by placing their invested funds at risk and, in fact, by causing actual loss to investors. Even KE, although ultimately receiving the return of his principal and the payment of interest, was subject to deprivation through the Respondents' prohibited acts because KE's pecuniary interests were placed at risk.

[77] In reaching our conclusion, we also considered each of the arguments which Shaw perhaps intended to make.

[78] In our view, the Respondents cannot rely on the "entire agreement" provision of the subscription agreements as a defence, for the same reasons given in *Re Chmelyk*, 2017 ABASC 13, where an ASC panel said (at para. 105, although in relation to a different provision of the Act):

> An entire agreement clause cannot provide a safe harbour from the consequences that would otherwise follow from making misleading or untrue statements in contravention of section 92(4.1) of the Act. Stated another way, issuers and their principals cannot contract out of provisions of the Act that provide fundamental investor protections, such as section 92(4.1). It would be a perverse result, and one we consider to be contrary to the public interest, to suggest that an entire agreement clause in a subscription agreement could give an issuer licence to misrepresent the attributes of its securities in collateral oral presentations or other promotional materials.

[79] In the ordinary course – as was the case here – a subscription agreement does not include information about the business of the issuer and its attendant risks, the intended use of proceeds, and other disclosure typically found in an offering document. It is therefore untenable to argue that an entire agreement provision in a subscription agreement can be relied on as a defence to collateral misrepresentations concerning the issuer's business and intended use of proceeds.

[80] Similarly, the risk acknowledgement declaration in some of the subscription agreements does not afford the Respondents a defence relating to those investments. Statements in risk acknowledgement forms to the effect that subscribers are investing entirely at their own risk, that the investments are risky, and that subscribers could lose all their money, do not contemplate risks outside of what one would reasonably contemplate in the ordinary course of business. We do not construe generic risk acknowledgment provisions like those found in the subscription agreements here to cover the risk of fraud perpetrated by an issuer or its principals. Further, the same principle articulated in *Chmelyk* applies here – the Respondents cannot contract out of fundamental investor protection provisions of the Act, including s. 93(b).

[81] Lastly, it would be risible to suggest that delivery of share certificates completely discharges the duties and obligations that issuers and their principals owe to their shareholders. The absurdity of such a proposition is obvious, and nothing more need be said in that regard.

[82] Therefore, we find that the Respondents engaged in prohibited acts within the meaning of *Théroux*. They misrepresented the use to which investors' funds would be directed and misappropriated the majority of those funds for Shaw's personal benefit – namely, the purchase of the Vernon Property. Such prohibited acts caused deprivation by placing investors' funds at risk and by causing actual pecuniary loss to investors.

3. *Mens Rea*

[83] The evidence was overwhelming that Shaw engaged in the prohibited acts with full knowledge that he was doing so and with full knowledge that those acts would cause deprivation to 168's investors. In many cases he personally told investors how their funds were to be used to advance the Mexicar business and continued the charade by providing updates on the Mexicar business to investors when he knew that their funds had instead been used for the Vernon Property. Investor funds were deposited proximate to the time when Shaw, controlling the 168 Account, transferred those investor funds to the Shaw Account and repaid the RC loan, all for the purpose of purchasing the Vernon Property. Moreover, those transfers of the impugned funds were not an isolated instance that could be attributed to a mistake – they were an orchestrated series of transactions with the clear objective of purchasing the Vernon Property and repaying the associated RC loan. We have no doubt that Shaw's conduct was deliberate and calculated to cause pecuniary loss to the investors – that is, pecuniary loss was not merely a foreseeable risk, but an intended outcome.

[84] It is perhaps conceivable that Shaw intended to attempt to make up later for this misappropriation if the Mexicar business were ultimately successful or if he were to receive funds from another source. However, that does not negate our finding that he had the necessary subjective awareness that he was undertaking a prohibited act which could cause deprivation. As noted by the Supreme Court of Canada in *R. v. Zlatic*, [1993] 2 S.C.R. 29 at p. 40:

> . . . fraud by "other fraudulent means" does not require that the accused subjectively appreciate the dishonesty of his or her acts. The accused must knowingly, i.e. subjectively, undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation. . . .

[85] We attribute Shaw's knowledge and state of mind to 168, as he was the company's guiding mind. Accordingly, we find that 168 also knew that it was undertaking the same prohibited acts as Shaw and that investors' pecuniary interests were placed at risk through the Respondents' prohibited acts.

VII. CONCLUSION AND NEXT STEPS

[86] We find that the Respondents contravened s. 93(b) of the Act.

[87] This proceeding will now move into a second phase for the determination of what, if any, orders for sanction or cost-recovery ought to be made in light of our findings.

[88] Staff and Shaw (and, through him, 168) are each directed to inform one another and the Registrar, in writing, not later than noon on Friday, December 9, 2022, of the following: (i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and (ii) their expected timing requirements and suggested dates. After the panel has received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of next steps in this proceeding.

November 7, 2022

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Karen Kim

"original signed by"
James Oosterbaan