In the Court of Appeal of Alberta

Citation: Magneson v Alberta Securities Commission, 2023 ABCA 348

Date: 20231205
Docket: 2101-0245AC
Registry: Calgary

Between:

Allan Robert Magneson, 1111108 Alberta Ltd., and New Wave Innovations Ltd.

Appellants

- and -

Alberta Securities Commission

Respondent

The Court:

The Honourable Justice Patricia Rowbotham
The Honourable Justice Anne Kirker
The Honourable Justice William T. de Wit

Memorandum of Judgment

Appeal from the Decision by
the Alberta Securities Commission
Dated the 11th day of August, 2021
(2021 ABASC 129, Docket: ENF-008320)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant, Allan Robert Magneson, was found guilty of perpetuating a fraud by misleading investors about the use of funds they invested in his corporations New Wave Innovations Ltd. (NWI) and 1111108 Alberta Ltd. (Numbered Company), contrary to subsection 93(1)(b) of the *Securities Act*, RSA 2000, S-4. The appellant had an idea to develop a dental drill and raised $7,023,344, from 2011 to 2016, for the research and development needed to produce it. The Alberta Securities Commission (ASC) panel found that the appellant diverted the majority of the investors' monies, $5,793,202, to his own personal benefit or the benefit of members of his family when the investors expected their money to be spent directly on the development of the dental drill.

[2] The appellant argues that the procedure followed by the ASC panel was flawed, and that the panel misapplied the legal test for fraud.

Issues

[3] More specifically, the appellant argues the ASC panel erred by:

1. denying the appellant procedural fairness by deeming him to have elected not to call any evidence in his own defence, despite clear indications to the contrary.

2. failing to correctly apply the test of reasonable apprehension of bias in determining whether the Vice-Chair of the ASC panel should be disqualified; and

3. incorrectly concluding that fraud had occurred despite finding that the appellant did not subjectively foresee a risk of deprivation.

Standard of Review

[4] Questions of procedural fairness are reviewed to determine if the party received the degree of procedural fairness to which they are entitled by law: *Sandhu v College of Physicians and Surgeons of Alberta*, 2023 ABCA 61 at para 36.

[5] Reasonable apprehension of bias is reviewed on a standard of correctness: *Lavesta Area Group Inc v Alberta (Energy and Utilities Board)*, 2012 ABCA 84 at para 16.

[6] Whether the ASC panel properly applied the test for fraud to the facts of this case is a question of mixed fact and law and reviewed on a standard of palpable and overriding error: *Toronto Dominion Bank v Wilde*, 2022 ABCA 128 at para 32.

Analysis

Ground 1: Procedural Fairness

[7] The appellant argues that his right to procedural fairness was breached because he wished to call evidence in his defence but was not allowed by the ASC panel to do so. We have not been provided with the specifics of the evidence that the appellant wished to provide to the panel, which the appellant suggests would have changed the outcome of the hearing.

Procedural History

[8] It is important to have a timeline of the appearances before the ASC panel. Staff members of the ASC (Staff), who investigate and prosecute Alberta *Securities Act* offences, concluded their investigation in 2017 and obtained an interim cease trade order (ICTO) on November 10, 2017 which requires that a *prima facie* case of fraud be established. This ICTO was not challenged or opposed by the appellant.

[9] A notice of hearing on the merits of the allegations against the appellant was issued May 2, 2018, and the merits hearing was to begin January 7, 2019. On November 21, 2018, the appellant made an adjournment application because he was retaining new counsel who was not available for the January dates. It was opposed. On November 28, 2018, the ASC panel granted the adjournment application, directing that the merits hearing conclude no later than June 30, 2019. On December 12, 2018, at a hearing management session, the dates for the merits hearing were set for May 2019. They were later rescheduled to commence on July 26, 2019. On July 23, 2019, the appellant applied for a stay of the proceedings against him and for the exclusion of evidence on grounds that his rights under the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, had been breached.

[10] The merits hearing began on July 26, 2019, as scheduled. The appellant requested time to serve his application. In addition, the appellant objected to the Vice-Chair of the ASC panel adjudicating the merits because he had been a member of the panel that issued the uncontested ICTO, that the appellant said, gave rise to a reasonable apprehension of bias.

[11] The ASC panel ruled that there was no reasonable apprehension of bias and proceeded with the merits hearing. On July 26, 29, 30 and 31, 2019, Staff presented its case against the appellant. On July 31, 2019, the appellant's counsel sought an adjournment to obtain certain documents before completing his cross-examination of Staff's final witness. This adjournment application was granted. The cross-examination could not be rescheduled until October 23, 2019.

[12] On October 23, 2019, cross-examination of Staff's final witness was completed, and the appellant's counsel and the ASC panel scheduled hearing time for the appellant's section 7 and 8 *Charter* challenges. On December 19, 2019, the ASC panel dismissed the constitutional challenges and stay application, and the appellant's counsel was asked whether the appellant would be calling evidence. Dates for the continued hearing were also canvassed. Counsel for the appellant indicated he was not available until fall 2020. The ASC panel rejected such a lengthy adjournment, but to allow counsel to obtain instructions from his client, adjourned the matter to a hearing management session on January 6, 2020. On January 6, 2020, counsel for the appellant informed the ASC panel that he intended to call between four and seven witnesses which would likely take three or four days. He gave no indication of the content of this evidence. With respect to scheduling, counsel for the appellant maintained that he had no available dates other than June 1, 29, July 21 and 23, 2020. He informed the ASC panel that if those dates were not available, the appellant would need to find new counsel. The ASC panel decided that in the public interest and in fairness to the appellant, they would set the continuation of the merits hearing on the dates suggested by counsel for the appellant.

[13] Counsel for the appellant withdrew on April 28, 2020. Staff contacted the appellant, by email on April 30, 2020, and inquired about the upcoming hearing dates in June and July 2020. The appellant indicated that he was unable to proceed with his defence without counsel. Staff informed the appellant that he would have to bring an adjournment application to the ASC panel and referred him to the Rules of Practice and Procedure for Commission Proceedings. Staff also indicated to the appellant that there was an upcoming hearing management session on May 6, 2020. Instead of bringing an adjournment application, the appellant indicated to Staff that there was no need for the May 6, 2020 hearing management session. He indicated again that he was unable to proceed without counsel and that he was opposed to a remote hearing.

[14] The hearing management session proceeded on May 6, 2020, as scheduled. The appellant participated by telephone. The appellant objected to proceeding with the merits hearing on the scheduled dates but he had not filed an adjournment application pursuant to the applicable rules and stated he was not making any such application. The appellant argued he had a constitutional right to an in-person public hearing and that he should be allowed to call live evidence from witnesses. He also indicated that he was not willing to say how many witnesses he planned to call without having counsel and he was unwilling to have consultations with lawyers by telephone. The ASC panel decided to give the appellant more time. The ASC panel directed that the June 1 and 29, 2020 hearing dates be released and that the merits hearing continue on July 20 to 24, 2020. The ASC panel indicated that new counsel for the appellant needed to be available for the July 2020 hearing dates. The ASC panel also stated that the appellant's insistence on an in-person hearing was unreasonable and would not be relied on for further delay. A further hearing management session was scheduled for May 22, 2020. The ASC panel explained its expectation that the appellant would attend the May 22, 2020 hearing management session and advise whether he had retained counsel or would be self represented.

[15] On May 22, 2020, the hearing management session was again held remotely because of the COVID pandemic. At this hearing, Staff and the appellant were present and when questioned by the ASC panel as to whether he had retained counsel, the appellant replied that he had been unsuccessful in retaining counsel. When asked by the ASC panel how many lawyers he had attempted to contact, the appellant answered "several" but when questioned further as to steps he had taken, he refused to say more. The appellant maintained that he needed counsel. The ASC panel informed him that if he wished to obtain legal advice, lawyers were available and he had ample time to obtain it. The ASC panel directed that the appellant deliver to Staff, no later than June 19, 2020, a list of the additional witnesses that the appellant intended to call to testify at the continued merits hearing, a summary of what each witness was expected to say, and any additional documents the appellant intended to put before the ASC panel as evidence in the hearing.

[16] The appellant pushed back against this direction by saying again that he wanted a public hearing. The ASC panel explained that the appellant had the right to be heard, but the panel would determine the format of the hearing. The ASC panel also stated that hearing witnesses remotely would not be unfair and that was how the hearing would be conducted.

[17] The ASC panel again explained to the appellant that his pre-hearing disclosure needed to be provided by noon on June 19, 2020 and explained what such disclosure entailed. The ASC panel warned the appellant that he would be deemed to have elected not to call evidence in the event that he did not comply with the directions by the specified deadline of June 19, 2020 and that the evidentiary portion of the hearing would be concluded. The ASC panel said it would then proceed to determine a timetable for the delivery of written submissions by Staff and the appellant. The ASC panel encouraged the appellant to contact the registrar if he required summonses for any of the witnesses.

[18] The appellant asked if he would receive the ASC panel's instructions in writing and the panel indicated that he would. Later that day, the appellant received an e-mail setting out what he was to provide and when.

[19] On June 18, 2020, the appellant wrote to the registrar reiterating the arguments he made at the May 6 and 22, 2020 hearing management sessions. He indicated that his efforts to retain counsel were ongoing and that he was unable to conduct his defence without legal counsel. He also said that his previous counsel had provided pre-hearing disclosure to Staff as required by the *Securities Act*, but that without counsel, he was unable to determine whether he would adduce any further evidence. He maintained that he had not agreed or consented to the continuation of the merits hearing on July 20, 2020 and still did not consent to that hearing date. He further indicated that he was entitled to provide full answer and defence and was entitled to a full public hearing where he could provide live evidence and witnesses who were personally in attendance. He reiterated that he did not consent to the hearing being conducted remotely or electronically. He then indicated that the panel had chosen to convene on July 20, 2020 despite the COVID pandemic and its restrictions regarding witnesses from out of province and out of country. The appellant did

not provide a witness list, will-say statements or copies of any documents that he intended to provide at the continued hearing.

[20] On June 22, 2020, the ASC panel sent an email to the appellant stating that because he had not complied with its directions, he was deemed to have elected not to call evidence. The evidentiary portion of the hearing was thus concluded. The email advised that the previously scheduled hearing dates of July 20-25, 2020 were cancelled. Staff were directed to provide their written submissions by July 13, 2020 and the appellant was directed to provide his written submissions by August 17, 2020. Staff were to provide any reply submissions by August 24, 2020. Oral submissions were directed to be heard on September 1, 2020. The appellant did not respond to this email or question the ASC panel's directions. He provided his written submissions to the panel as directed and appeared on September 1, 2020 to make oral submissions.

[21] The evidence before the ASC panel upon which Staff relied included an interview with the appellant which had taken place on August 22, 2017. The appellant did not testify at the oral hearing although the ASC panel indicated that he could have if "he had wanted to augment or explain anything he had said during his interview": *Re Magneson*, 2021 ABASC 129 at para 52.

[22] In addition, Staff's primary investigator gave *viva voce* evidence and related interviews he had had with investors. Evidence of the bank records and other financial records of NWI and the Numbered Company were also part of the evidentiary record to which Staff referred in their submissions. Four of the investors gave *viva voce* evidence and were subject to cross-examination.

[23] During the oral hearing, the appellant referred to will-say statements of witnesses whom the appellant's former counsel had indicated may testify, but the ASC panel indicated that as these will-say statements were not in evidence, they were given no weight.

Procedural fairness

[24] The appellant argues that the ASC panel erred in preventing him from calling evidence in his defence. According to the appellant, after he wrote to the registrar on June 18, 2020, "procedural fairness required the ASC to hear further submissions, clarify the ambiguity, or at minimum, give reasons for why his response was insufficient". In addition, the appellant claims that the ASC panel neglected to treat the appellant as a self-represented litigant, which required them to assist him.

[25] There is no doubt the ASC panel owed the appellant a duty to ensure that the hearing to determine whether he contravened section 93(b) of the *Securities Act* was procedurally fair. But what is procedurally fair is variable, inherently flexible, and context specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 77. As the Supreme Court of Canada explained in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 79:

> Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[26] The context requires that this Court keep in mind the ASC's functions and responsibilities to the public. Under the Rules of Practice and Procedure for Commission Proceedings, found under *Alberta Securities Commission Rule* 15-501, section 2.2 sets out the goals and purposes of the rules including that ASC panels are to be efficient, cost-effective and timely in their determinations:

> Purpose and Application of Rules
>
> The purpose of these Rules is to assist a panel in securing an efficient, cost-effective and timely determination of the issues raised in a proceeding. These Rules apply to any proceeding before a panel and shall be interpreted in accordance with the requirements of natural justice. A panel may exercise any of its powers on its own initiative or at the request of a party to a proceeding. [Emphasis added.]

[27] In *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301, 1989 CarswellAlta 19, the Supreme Court stated at paragraphs 35-36:

> Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in *Gregory & Co. Inc. v. Que. Securities Comm.*, [1961] S.C.R. 584, 28 D.L.R. (2d) 721 [Que.], where Fauteux J. observed at p. 588:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.
>
> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

[28] While attempting to achieve these goals and purposes, an administrative tribunal, such as the ASC panel in this case, is given wide latitude to control its hearing process. As stated in

Prassad v Canada (Minister of Employment and Immigration), [1989] 1 SCR 560, 1989 CarswellNat 128 at paragraph 46:

> We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice...

[29] The ASC panel on May 22, 2020 was well within its powers to set deadlines for the appellant to decide whether to call evidence and to provide the required disclosure of that evidence. It also had the authority to move the matter forward and in all the circumstances of this case, its decision to do so was not procedurally unfair.

[30] When the panel inquired of the appellant as to his progress in obtaining new counsel, and how many lawyers he had spoken with, he answered "several" and would not give any further information. At no point did the appellant make an application on proper evidence for an adjournment. His objections to proceeding because he did not have counsel were instead vague and obfuscating. The ASC panel informed the appellant that if he had not "received counsel" prior to the commencement of the July 20, 2020 hearing, they would assume he would be representing himself. The appellant was informed in the May 22, 2020 hearing management session (and by an email from the registrar the same day) what was required of him to present his case. It was made clear he would be deemed to have elected to call no evidence if he did not comply with these directions by June 19, 2020. The ASC panel also made it clear that the merits hearing would proceed on the scheduled dates in July 2020. The ASC panel had granted a number of adjournments while the appellant had counsel and gave the appellant extensions of time after he became self-represented. Procedural fairness did not require the ASC panel to delay the matter indefinitely in the face of the appellant's refusal to follow the Rules of Practice and Procedure for Commission Proceedings and provide a proper explanation for his professed inability to retain new counsel or proceed without.

[31] The appellant argues that because he was self-represented, the ASC panel should have taken further steps to clarify whether he wished to call evidence. In *Mountainstar Gold Inc v British Columbia Securities Commission*, 2022 BCCA 406, the court confirmed that the principles for self-represented litigants and accused persons apply to those who appear before administrative tribunals and stated at paragraphs 103 to 105:

> In *Pintea v Johns*, 2017 SCC 23, the Supreme Court of Canada endorsed the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council ("*Statement of Principles*"). The Statement of Principles is designed to promote access to justice to self-represented litigants by, for example, recognizing that "[j]udges, the courts and

> other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation."
>
> Although the Statement of Principles is directed at court proceedings, both courts and administrative tribunals have recognized that it provides helpful guidance in the conduct of administrative proceedings: *Hirtle v College of Nurses of Ontario*, 2022 ONSC 1479 (Ont. Div. Ct.) at paras. 54–55; *Lum v British Columbia (Ministry of the Attorney General dba Liquor Distribution Branch) and another*, 2022 BCHRT 48 at para. 40.
>
> I accept that, much like a trial judge dealing with a self-represented litigant, the panel had a duty to offer sufficient assistance to Mountainstar and Mr. Johnson to ensure a fair hearing. The panel had to balance the duty to ensure a fair hearing with the duty to both appear and remain neutral [citations omitted].

[32] Sufficient assistance requires that a judge or administrative tribunal provide some guidance to a self-represented litigant including "information about the process [to] help explain and clarify what is happening": National Judicial Council, *Civil Law Handbook for Self Represented Litigants*, 1.4. However, a tribunal cannot provide legal advice and cannot tell a litigant how they should run their case. It must remain neutral and unbiased with respect to how the litigant's case will proceed or what evidence will be called. A self-represented litigant has a responsibility to learn about the court or administrative hearing process. The fact that a litigant does not have a lawyer does not excuse them from following the tribunal's rules and processes and from making decisions about how to present their case (*Civil Law Handbook for Self Represented Litigants*, 1.3).

[33] The decision to call evidence or certain witnesses was clearly in the purview of the appellant. These were not determinations that could be made by the ASC panel. The appellant had ample opportunity to understand this. The ASC panel explained what he needed to do if he wished to apply for an adjournment or to prepare to call evidence when the merits hearing resumed. He did neither. The information provided was not so complicated that it could not be understood or complied with by a self-represented litigant.

[34] The appellant's letter to the registrar, on June 18, 2020, maintained the appellant's position that he was entitled to a public hearing where he would be personally present and call live evidence with witnesses in attendance. He reiterated that he did not agree with or consent to the hearing being conducted remotely or electronically. In its decision, *Re Magneson*, the ASC panel considered the appellant's objection to a remote hearing (at paras 199-210). The panel referred to numerous cases where administrative tribunals rejected a respondent's claim that they were entitled to a physically in-person merits hearing because of the seriousness of the allegations against them. See: *Re Forum National* 2020 BCSECCOM 285, *Re First Global Data Ltd*, 2020 ONSEC 23, *Re Zianian*, 2020 IIROC 34. These decisions found that there is no absolute right to an in-person administrative hearing and there is no prejudice to the parties involved in a remote or

video conference hearing. During the pandemic, video hearings were held at all levels of court and in administrative hearings. The ASC panel's decision to proceed virtually was not procedurally unfair.

[35] In his June 18, 2020 letter to the registrar, the appellant stated, "My previous counsel Mr. Kothari provided the disclosure of the defence to staff counsel as required by the act previously". This disclosure is referenced in the ASC panel's decision in *Re Magneson* at paragraph 165 where the panel indicated that the appellant's prior counsel had provided will-say statements of witnesses who may testify at the merits hearing in this matter.

[36] The appellant claims that during the May 22, 2020 hearing management session, there was some ambiguity in the discussion between members of the ASC panel and counsel for Staff with regard to whether Staff had received any witness lists from the appellant in the past. Staff indicated they had received a witness list and will-say statements in July 2019. The appellant argues that his June 18, 2020 letter to the registrar, indicating that his previous counsel had provided disclosure of the defence to Staff as required by the *Securities Act*, was, in effect, all he needed to do to comply with the ASC panel's direction. Given this communication, he says he should not have been deemed to be calling no evidence.

[37] Leaving aside that the appellant overlooks what else he said in his June 18, 2020 email about being unable to decide whether to call additional witnesses or to proceed without counsel – meaning that his email was not compliant with the ASC panel's direction in the way he seems to suggest it was – the ASC panel responded to the appellant by email dated June 22, 2020 and communicated its view that he had not complied with its direction, and that he was therefore deemed to have elected to call no evidence. The ASC panel's email set out certain dates and deadlines for written submissions and oral submissions. The appellant did not respond to or challenge this email, but instead complied with it.

[38] The ASC panel could not tell the appellant how to run his case and had to remain neutral and unbiased. It had provided information about the process and set certain deadlines. It was not incumbent on the ASC panel to ask further questions, especially when the appellant had been non-responsive to questions on previous occasions and was persistently unresponsive.

[39] The June 22, 2020 email set out that it was deemed that the appellant had elected not to call evidence and the evidentiary portion of the hearing had concluded. If the appellant actually wanted to present evidence, he could easily have asked further questions and made his desire clear. Instead, he did nothing to indicate that he wanted to call evidence. He complied with the ASC panel's remaining directions but said nothing further about wanting to call any evidence. In our view, it was reasonable for the ASC panel to conclude that the appellant did not wish to call further evidence.

[40] *Alberta Securities Commission Rule* 15-501 section 2.4 sets out the ASC panel's ability to deal with the failure of a party to comply with orders, rules or directions:

> Failure to Comply with Rules
>
> If a party to a proceeding fails to comply with any provision of these Rules that was not waived or varied, or with any order, ruling or direction made by a panel under these Rules, the panel may consider that party's conduct:
>
> (a) when ruling upon any request for an adjournment;
>
> (b) in assessing costs; and
>
> (c) in determining whether to make any other order, ruling or direction the panel considers appropriate.

[41] The functions and responsibilities of the ASC panel required it to ensure a timely determination of the issues in question. The appellant argues that the ASC panel did not have the jurisdiction to declare that no evidence could be called. However, the ASC panel did not declare that no evidence could be called. It set deadlines if the appellant wished to put forward evidence. In our view, the actions of the ASC panel did not infringe on the appellant's right to procedural fairness.

[42] The appellant argues his right to make full answer and defence includes the right to call evidence and cites the decision in *Anderson v Alberta Securities Commission*, 2008 ABCA 184, where this Court found the appellant was denied procedural fairness because the ASC failed to provide him with an opportunity to lead evidence.

[43] That case was entirely different from this appeal. In *Anderson*, the appellant was not given notice that the panel was considering a motive for engaging in trades which was a different motive than what had been alleged in the notice of hearing. In other words, the appellant did not know the case against him and therefore did not have an opportunity to lead evidence in response. The decision held that the procedural unfairness arose from the lack of notice of the case against him which resulted in the appellant not knowing he needed to call evidence, and not from the Securities Commission's failure to allow the appellant to call evidence.

[44] Lastly, the appellant has not given any indication of what evidence he intended to proffer, which may have changed the decision or caused unfairness in the proceeding. It is difficult to find that an administrative tribunal erred in not allowing certain evidence into a hearing where the relevance of such evidence is speculative. In *Mountainstar Gold Inc*, the British Columbia Court of Appeal stated at paragraph 91:

> If the panel improperly excluded relevant, credible evidence that could be expected to have affected the result, that evidence would meet the so-called "*Palmer*" criteria for admissibility as fresh evidence on appeal: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8. Yet, Mountainstar and Mr. Johnson have not made a

> fresh evidence application. In these circumstances, I have to conclude that the panel's determinations of relevance and exclusion of certain documents were not problematic.

[45] In our view, the ASC panel met the duty of fairness owed to the appellant and we dismiss this ground of appeal.

Ground 2: Reasonable Apprehension of Bias

[46] The Vice-Chair of the ASC panel that heard the merits sat on the panel that granted the ICTO where only Staff was heard. Staff had the onus of showing there was a *prima facie* case of fraud.

[47] The appellant submits that a reasonable apprehension of bias arises when the same person sits on the ASC panel after granting the ICTO. He argues that although the ASC panel set out the proper test for reasonable apprehension of bias, they did not apply that test and ignored it in making their determination. The appellant's position is that the ASC panel focused on whether there was actual bias rather than a reasonable apprehension of bias. We disagree.

[48] The ASC panel understood that the test for determining a reasonable apprehension of bias is "whether a reasonable person viewing the matter realistically and practically, and after having obtained the necessary information in thinking the matter through, would have a reasonable apprehension of bias": *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para 29. The onus is on the party who claims that there is a reasonable apprehension of bias to prove this on a balance of probabilities. See: *Yee*; *Baker v Canada*, [1999] 2 SCR 817.

[49] In *Lavesta Area Group*, this Court set out a number of principles regarding reasonable apprehension of bias including that there is a "strong presumption that the Commission and its panels will properly discharge their duties and are not tainted by bias": *Lavesta* at para 24. In *Lavesta*, this Court also stated at paragraph 26:

> The appellant essentially argues that any member of the Commission that was previously involved in hearings respecting the new transmission lines cannot hear any further hearings that involve that subject. It matters not how minor the member's role was in the prior hearing, nor how central the transmission lines are to the issues in the present hearing. In *Wewaykum Indian Band* at paras. 71-2 the Court held that the circumstances in which an automatic apprehension of bias will arise are very narrow. In general, the law requires some meaningful indication of a real objective prospect that the decision maker's mind was, consciously or subconsciously, affected by bias. There is no rule that "any degree of earlier participation in a case is case for automatic disqualification": *Wewaykum Indian Band* at para. 81. The facts and context are key.

[50] The appellant effectively takes the same position here: that a panel member who sits on a preliminary hearing will automatically have a reasonable apprehension of bias. The appellant relies on cases in criminal and family court where judges were involved in preliminary hearings of cases and then became the judges at trial. He ignores the comments of the Supreme Court of Canada in *Brosseau* at paragraphs 33 and 34:

> Certain other factors should be taken into consideration along with the question of statutory authorization. For example, in a specialized body such as the Securities Commission, it is more than likely that the same decision-makers will have repeated dealings with a given party on a number of occasions and for a variety of reasons. It is hardly surprising, given the fact that there is only one Alberta Securities Commission, that the commission in this case was required to deal with many aspects of the failure of Dial over a period of years.
>
> Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity.
>
> When a party is subjected to the enforcement proceedings contemplated by ss. 165 or 166 of the Act, that party is given an opportunity to present its case in a hearing before the commission, as was done in this case. The commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations…

[51] The appellant argues that *Brosseau* states that such overlap of duties must be explicitly authorized by statute and the *Securities Act* does not authorize a chairperson to sit on multiple panels involving the same matter and gives the example of subsection 36(4) of the *Securities Act*, which permits the person whose decision is being appealed to make representations at the appeal. In *Brosseau*, the overlapping duties included both investigatory and adjudicative duties. That is not the case here.

[52] The issue in this case is similar to the issue that arose in *North American Financial Group Inc. v Ontario Securities Commission*, 2018 ONSC 136. The court in that case held that there was no automatic apprehension of bias and stated at paragraphs 98 and 99:

> In this case Commissioner Carnwath did not act outside his statutory authority when he issued the three cease trade orders and presided over the merits hearing. The Appellants' position would require a new commissioner, completely devoid of any previous knowledge, for each interim order, pre-hearing conference, interlocutory motion or merits hearing for each different case. The amount of time and resources required to meet this standard could undermine the mandate of the Commission, which is to provide timely, efficient and cost-effective adjudication so as to fulfill its primary objective of protecting the public.
>
> For these reasons I find that the Appellants have not met their burden of establishing a reasonable apprehension of bias on the part of Commissioner Carnwath.

[53] Like the commissioner in *North American Financial Group Inc.*, there is no reasonable apprehension of bias in this case. The Vice-Chair of the ASC panel did not act outside his statutory authority when he sat on the merits panel after sitting on the ITCO panel.

[54] The ITCO panel was only required to find a *prima facie* case. As the ASC panel explained, a *prima facie* case does not involve finding actual misconduct. *Prima facia* means "at first sight" or "upon initial examination" and does not include a thorough examination and consideration of all the evidence as is required in a merits hearing. Moreover, the ITCO was not opposed or appealed. A reasonable person, viewing the matter realistically and practically, would understand that an ITCO panel member was not functioning in the same adjudicative role and the Vice-Chair's duties on the two panels did not overlap.

[55] The appellant cannot point to any other basis to overcome the "strong presumption that the commission and its panels will properly discharge their duties and are not tainted by bias": *Lavesta* at para 24. As there was no reasonable apprehension of bias, this ground of appeal is dismissed.

Ground 3: Fraud

[56] Subsection 93(1)(b) of the *Securities Act* provides that no person shall "perpetrate a fraud on any person or company". In *R v Théroux*, [1993] 2 SCR 5, 1993 CarswellQue 5, the Supreme Court of Canada set out the legal test for civil fraud, which required Staff to prove the *actus reus* and *mens rea* of fraud on a balance of probabilities.

[57] With respect to the *actus reus*, the offence has two elements: dishonest act and deprivation. The dishonest act is established by proof of deceit, falsehood or "other fraudulent means". The element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act: *Théroux* at para 13, citing *R v Olan*, [1978] 2 SCR 1175. In *Théroux*, the Supreme Court explained (at paragraph 15) that the sort of conduct which may fall under the third category of "other fraudulent means" includes "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" and

"all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not".

[58] The Supreme Court went on at paragraph 21 of *Théroux* as follows:

> The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk. The *mens rea* would then consist in 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. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. To put it another way, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the *actus* of the offence (see Williams, [*Textbook of Criminal Law* (2nd ed. 1983)] c. 3), the proper focus in determining the *mens rea* of fraud is to ask whether the accused 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). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence. [Emphasis added.]

[59] Further, the Supreme Court explained that the above summary applies to the third head of fraud, "other fraudulent means" and only requires knowingly undertaking dishonest conduct, awareness that deprivation or the risk of deprivation could follow as a consequence, or recklessness as to whether or not the prohibited consequences ensue (paras 22-23).

[60] The ASC panel found the elements necessary for the *actus reus* had been established. The appellant perpetrated acts of deceit, falsehood, and other fraudulent means when he told investors that all funds invested in NWI would be spent to develop the drill but neglected to tell them how the majority of their funds would actually be spent and particularly that a majority would be paid to the appellant himself. The appellant claimed he was entitled to $5.7 million of the $7 million raised but refused to provide financial disclosure to investors when asked. One of the appellant's justifications for diverting investors' funds from NWI to himself was that NWI owed him $1.5 million but investors were never told about any debts and three investors testified they would not have invested had they been told NWI owed a large debt. Further, the amount the appellant paid to himself exceeded what he claimed he was owed. The appellant never told investors he intended to use investment funds to pay himself back. Instead, he concealed his intentions by having investors make their payments to NWI and telling them all their money would go toward advancing

the drill project. NWI's unaudited financial statements, which were not provided to investors until after the commencement of the ASC proceedings, were also misleading in failing to show any payment for shares transferred from the appellant.

[61] The record supported the ASC panel's conclusion that the appellant misled investors about how their funds would be used, that he took the vast majority of the funds for himself, and he actively tried to hide that he was taking proceeds while telling investors all of their money would go towards the drill project. The appellant was, as described in *Théroux*, leading the investors to believe that the "situation was of a certain character, when, in reality, it was not".

[62] The record further supported the panel's conclusion that the appellant's acts caused NWI and the investors deprivation. The panel found that the investors' money had likely been lost entirely. Even were it not the case, the panel found the diversion of such a large proportion of the invested funds to the appellant personally put the pecuniary interests of NWI and the investors at risk. The appellant sought further investment on the basis that NWI's project was at risk. Two investors testified that the appellant begged them for further funds urgently needed in order to pay NWI's bills and to keep the drill project alive.

[63] With respect to the *mens rea* of the offence, the panel concluded the appellant may have expected the drill would be a success and that everyone would make their money back plus a return, but this is not a defence.

[64] Contrary to the appellant's assertions, the ASC panel conducted the necessary analysis to establish the appellant's subjective knowledge. It found in *Re Magneson* at paragraphs 234 and 235:

> It may be that Magneson did not think there was anything wrong with raising funds on false pretences because he was entitled to the money and expected that the Drill would be such a success that everyone would soon make their money back plus a return. However, his efforts to conceal his compensation, the repayment of purported debts, and whether he or NWI would receive the proceeds from the sale of his personal Shares could also be interpreted as full consciousness of guilt. Either way, proof of awareness that the conduct was wrong is not a requirement of the legal test.
>
> We are satisfied that Magneson knew what he was doing, and also that he was aware of the possibility that his prohibited acts could cause deprivation: obviously, if he took the money, it would not be available to NWI. As a result, the Drill project – and thus the investors' economic interests – would be jeopardized. Indeed, this possibility appeared to manifest itself on several occasions, when Magneson pleaded with certain investors for more money because NWI was without funds to pay a bill or to take the next step with the project.

[65] The ASC panel's comments in the first paragraph of the above quote that the appellant may have expected his project would be such a success that everyone would make their money back plus a return was not a failure to find the appellant had subjective knowledge. As the Supreme Court in *Théroux* at paragraph 21 stated and as the ASC panel also noted, "[t]he fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence".

[66] The second paragraph in the above quote clearly shows the ASC panel concluded the appellant knew there was a possibility his prohibited acts could cause deprivation. The panel's conclusion was well supported by its earlier detailed description of the appellant's conduct which is solidly grounded in the documentary evidence, the investors' testimony and confirmed by the appellant's statements in his investigative interview.

[67] Finally, contrary to the appellant's assertion that the ASC panel was required to establish the elements of fraud beyond a reasonable doubt, the panel correctly identified the standard of proof on the balance of probabilities, as stated in *Théroux* at paragraph 27. This ground of appeal is dismissed.

Conclusion

[68] The appeal is dismissed.

Appeal heard on November 7, 2023

Memorandum filed at Calgary, Alberta
this 5th day of December, 2023

REGISTRAR
FILED
05 Dec 2023
SI
Court of Appeal of Alberta

Rowbotham J.A.

Kirker J.A.

de Wit J.A.

Appearances:

B.A. Beresh, KC
for the Appellants

A. Goodwin
T.J. Knight
for the Respondent