ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Koorbatoff, 2024 ABASC 98 **Date: 20240529**

Benjamin Daniel Koorbatoff

Panel:	Tom Cotter Kari Horn
Representation:	Amanda Goodwin Peter Hurich for Commission Staff
	Peter Osadetz Doris Vucijak for the Respondent
Submissions Completed:	March 20, 2024
Decision:	May 29, 2024

TABLE OF CONTENTS

I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) seek an order imposing permanent market-access bans against Benjamin Daniel Koorbatoff (**Koorbatoff**) pursuant to s. 198.1(2)(a)(i) of the *Securities Act* (Alberta) (the **Act**). That provision permits an ASC panel to make a public-interest order under s. 198(1) against a person who has been convicted of an offence arising from a transaction, business or course of conduct related to securities.

[2] Koorbatoff was convicted of a single count of fraud over $5,000 contrary to s. 380(1)(a) of the *Criminal Code* (Canada) (the **Code**), after he made a fraudulent misrepresentation in connection with a transaction involving the sale of shares of a public company.

[3] We received affidavit evidence and written submissions from Staff and Koorbatoff, and held an oral hearing on March 20, 2024. At that time, we reserved our decision on Staff's request for permanent market-access bans, and on a preliminary question about the admissibility of an affidavit submitted by Koorbatoff. For the following reasons, we admitted Koorbatoff's evidence and ordered permanent market-access bans against Koorbatoff.

II. FACTUAL BACKGROUND

[4] In the spring of 2015, Koorbatoff presented an acquaintance, Terry Raymond (**Raymond**), with an opportunity to invest in a publicly traded company, CableClix (USA), Inc. (**CableClix**). Koorbatoff represented that he indirectly owned CableClix shares through his private holding companies, and he agreed to sell eight million CableClix shares to Raymond for $800,000. At Koorbatoff's direction (and ostensibly for tax reasons), the transaction was structured so that Koorbatoff would transfer the CableClix shares into two newly created offshore companies (Palski Holdings International Ltd. (**Palski**) and R&R International Holdings Ltd. (**R&R**)), and Raymond (via his designated holding company, 1865367 Alberta Ltd. (**1865367**)) would then acquire those offshore companies and indirectly own the CableClix shares. Koorbatoff did not tell Raymond that he did not have CableClix shares and that he actually owned debentures convertible into CableClix shares.

[5] From September 2015 to March 2016, Raymond deposited five payments – in the aggregate amount of $800,000 – into accounts controlled by Koorbatoff, who subsequently used those funds for various purposes including to benefit CableClix. Koorbatoff never conveyed Palski and R&R to 1865367, apparently because Raymond was unable to act as a director or officer of the offshore companies. Koorbatoff initially claimed that the transaction was null and void, but in August 2016 he gave Raymond two forged share certificates naming the offshore companies each as holding four million CableClix shares.

[6] In June 2019, Raymond received a share certificate dated May 31, 2019 confirming that another of his companies, 1418600 Alberta Ltd. (**1418600**), had been issued eight million restricted CableClix shares. By that time, the shares were essentially worthless, and Raymond had initiated civil litigation against Koorbatoff to recover his investment.

[7] On September 3, 2020, Koorbatoff was charged by indictment with unlawfully defrauding Raymond of money with a value exceeding $5,000, contrary to s. 380(1)(a) of the Code. After a five-day contested trial, Koorbatoff was convicted, later sentenced to four years' imprisonment,

and ordered to pay restitution of $800,000 within two years of his release, less any amounts paid through civil proceedings.

[8] The following summary of the trial judge's findings and analysis is from the transcripts of the oral reasons for Koorbatoff's fraud conviction (the **Conviction Reasons**) dated August 22, 2022, and the transcripts of the oral reasons for Koorbatoff's sentence (the **Sentencing Reasons**) dated April 20, 2023.

A. Conviction Reasons

[9] The trial judge found that Koorbatoff represented that his companies held CableClix shares when instead they held convertible debentures, which Koorbatoff was unable to convert into CableClix shares. Applying the test from *R v. Théroux*, [1993] 2 S.C.R. 5, the trial judge found that Koorbatoff's representation was a "falsehood that an ordinary, decent person would feel was discreditable as being clearly at variance with straightforward or honourable dealings". She also considered that Raymond's ability to act as a director of the offshore companies was "a bit of a red herring" because the companies would not have CableClix shares had the transaction been completed. Rather than attempt to transfer the shares outside of the offshore companies, Koorbatoff sent Raymond forged share certificates falsely indicating that the offshore companies had CableClix shares.

[10] The trial judge also found that Raymond was deprived by paying $800,000 and "receiving nothing in return in a timely fashion", and that the receipt of a share certificate approximately three years later was "not the transaction that was bargained for". The trial judge determined that ". . . the three years caused great deprivation as the shares were all but worthless by that time", and Raymond had no opportunity to prevent the loss because the shares were not received until after the loss had occurred.

[11] The trial judge explicitly rejected Koorbatoff's exculpatory testimony. Koorbatoff testified that he offered to transfer CableClix shares via his private companies despite knowing that they did not hold CableClix shares and that he had no ability to issue the shares or convert the debentures into shares. The trial judge also found that Koorbatoff knew his representations could cause deprivation, yet he spent the funds within days of receiving each deposit when he was unable to meet his end of the bargain.

[12] Accordingly, Koorbatoff was found guilty of fraud in excess of $5,000, contrary to s. 380(1)(a) of the Code.

B. Sentencing Reasons

[13] As mentioned, the trial judge imposed a four-year term of incarceration – while indicating that she would have "seriously considered" a lengthier sentence had one been proposed – along with a restitution order of $800,000 (less any amounts recovered in civil proceedings) payable within two years of Koorbatoff's release. She determined that a conditional sentence order was unavailable due to Koorbatoff's high moral blameworthiness, the gravity of the offence, the various aggravating circumstances, and "minimal" mitigating circumstances. Among the aggravating circumstances was Koorbatoff's related criminal record – he previously pleaded guilty to three counts of fraud that resulted in a two-year term of imprisonment for each charge, for which "he

served penitentiary time". The trial judge concluded that Koorbatoff's scheme was carefully and elaborately planned, involved a large sum of money, and continued over a significant period of time. The conduct also involved a breach of trust, with little evidence to support the claimed mitigating circumstances.

C. Subsequent Developments

[14] Koorbatoff appealed his conviction on the ground that the trial judge misapprehended certain facts about the underlying transaction and the associated documents were not in evidence at trial. Koorbatoff did not seek to adduce fresh evidence for his conviction appeal. The appeal was dismissed (*R v. Koorbatoff*, 2023 ABCA 320). Because he made similar challenges to the trial judge's findings in this proceeding, we set out significant portions of the Court of Appeal's written reasons:

> On the first issue, the appellant argues that the trial judge erred in adopting [Raymond]'s characterization of the deal as a "handshake deal", because there were references in the evidence to some written contracts and paperwork. A written contract was put to [Raymond] in cross-examination, but defence counsel did not want it marked as a full exhibit, and the Crown did not enter it in evidence. If there was anything exculpatory in the contract, it was available to the appellant. In any event, the fact that the agreement may have been reduced in whole or in part to writing does not have an impact on the dishonesty of the appellant's verbal misrepresentations that were the foundation of the fraud (that he owned companies that owned shares in CableClix). It was open to the trial judge to find the misrepresentations were made before most of the money was paid, and before any agreements were signed. There was evidence on the record that could lead the court to describe this colloquially as a "handshake deal", but in any event even if this is a misstatement of the facts, it was not an error as to substance and had no effect on the conviction. [emphasis added]
>
> Secondly, the appellant argues that the trial judge erred in characterizing the "spirit of the deal" as involving shares, not convertible debentures. This is another challenge to the fact and credibility findings of the trial judge, and it discloses no reviewable error. The trial judge was entitled to accept [Raymond]'s characterization of the spirit of the transaction, and reject the appellant's argument that the agreement was that "eventually" [Raymond] would get shares. Some of the cheques drawn by [Raymond] referred to the purchase and sale of shares. The appellant himself testified that the "spirit of the agreement" was: "Very simply, at the end [Raymond], or one of his designates, was to acquire 8 million shares of CableClix, that simple". The trial judge's characterization of the transaction was available on the evidence.
>
> Thirdly, the appellant argues that the trial judge erred in concluding that he had no ability to convert the debentures into shares. In his testimony the appellant admitted that he absolutely "did not have authority to issue stock". The appellant speculates that there may have been circumstances under which the debentures could or would have been converted, but there is no evidence to support that. The trial judge found the representation was about shares, not convertible debentures, so the Crown was not required to prove the characteristics of convertible debentures. The appellant was properly prevented from giving expert evidence on debentures. Further, [Raymond]'s interests were put at risk when the misrepresentation was made, and, as in *R. v Théroux*, [1993] 2 SCR 5, it is no answer to say that if things had turned out differently the appellant may have been able to deliver shares in the future. The Crown was able to prove a dishonest representation that the appellant's companies owned shares and was not required to prove more. The trial judge's finding is consistent with the evidence.
>
> Fourthly, the appellant argues that the trial judge erred in stating that his evidence was not exculpatory. This merely repeats his unsuccessful arguments that the trial judge misapprehended the evidence and overlooks the fact that the trial judge largely disbelieved him. As the trial judge ruled: "I do not accept any exculpatory evidence given by [Koorbatoff]."

[15] Koorbatoff also appealed his sentence, which has since been dismissed (see *R v. Koorbatoff*, 2024 ABCA 177). We understand that Koorbatoff is seeking leave to appeal his conviction to the Supreme Court of Canada.

III. PROCEDURAL BACKGROUND

[16] Staff commenced this proceeding by issuing a Notice of Hearing (the **NOH**) dated September 20, 2023. Section 198.1(2) allows the ASC to make an order under s. 198(1) with or without providing an opportunity to be heard. Koorbatoff was personally served on September 28, 2023 with the NOH, along with Staff's affidavit evidence and written submissions.

[17] Staff's evidence comprised two affidavits sworn by ASC employees, which included the following exhibits:

- an indictment dated September 3, 2020 (and amended on April 27, 2022) charging Koorbatoff with one count of fraud over $5,000 contrary to s. 380(1)(a) of the Code;
- transcripts of the Conviction Reasons and the Sentencing Reasons;
- corporate searches for two of Koorbatoff's companies – 1819227 Alberta Ltd. (**1819227**) and 1922046 Alberta Ltd. (**1922046**) – both struck from the Alberta corporate registry;
- a September 19, 2023 search of Koorbatoff's name in the Canadian Police Information Centre database, listing Koorbatoff's criminal record; and
- a certificate dated July 14, 2023 and issued pursuant to s. 218 of the Act, indicating that Koorbatoff had not been registered in any capacity under the Act from March 2003 to the date of the certificate.

[18] Koorbatoff responded with affidavit evidence and written submissions. His affidavit (the **Koorbatoff Affidavit**), sworn on December 15, 2023, included the following exhibits:

- Koorbatoff's factum to the Court of Appeal for his conviction appeal;
- a signed Share Purchase Agreement dated March 30, 2016 between Palski and 1865367, along with an executed "Closing Agreement for Share Purchase" dated April 28, 2016;
- an unsigned "Purchase of Business Agreement" dated October 12, 2015 between R&R and 1819227;
- a quarterly financial report for CableClix for the period ending January 31, 2018; and
- the first page of a convertible promissory note from CableClix to 1922046, for a principal amount of $100,000 and a maturity date of May 10, 2018, along with a page of the Court of Appeal's written decision dismissing his conviction appeal (with some handwritten remarks) and a single page from the transcripts of the Conviction Reasons.

[19] Koorbatoff acknowledged in the Koorbatoff Affidavit that he was convicted for fraud and that his conviction appeal was dismissed.

A. Preliminary Issue – Admissibility and Use of Koorbatoff's Affidavit Evidence

[20] Staff requested an opportunity to address whether Koorbatoff could rely on the Koorbatoff Affidavit as part of an attempt to re-litigate the facts underlying his criminal conviction. With the panel's permission, Staff made further written submissions to address this issue.

[21] In response, Koorbatoff provided written submissions along with another affidavit (the **Supplemental Affidavit**) sworn by a legal assistant employed by Koorbatoff's legal counsel. The Supplemental Affidavit attached several exhibits, including:

- transcripts from two days in Koorbatoff's criminal trial – April 27 and 28, 2022 – which included Koorbatoff's trial testimony and a portion of Raymond's testimony when he was recalled to address certain documentary evidence;
- transcripts from oral sentencing submissions on April 17, 2023;
- an affidavit sworn by Koorbatoff on February 9, 2024 and filed with the Court of Appeal in relation to his sentence appeal, which included the following documents:
  - a letter dated June 3, 2019 from CableClix's president, as well as a stock certificate dated May 31, 2019, confirming the issuance of eight million restricted, common CableClix shares to 1418600; and
  - "true copies" of three convertible securities and related documents, consisting of:
    - two Convertible Promissory Notes apparently signed by Koorbatoff, each for a principal amount of US$70,000 and a maturity date of May 1, 2017, issued by CableClix to Blue Flame Manufacturing Ltd.; and
    - a Convertible Promissory Note apparently signed by Koorbatoff, for a principal amount of US$100,000 and a maturity date of May 10, 2018, issued by CableClix to 1922046.

[22] At the outset of the oral hearing, Staff consented to the admission of the Koorbatoff Affidavit but suggested that the panel could decline to admit the Supplemental Affidavit because it was provided after the Respondent's deadline to submit evidence and without leave of the panel. We marked the Supplemental Affidavit for identification and said that our written reasons would include our ruling on whether the Supplemental Affidavit would be admitted into evidence.

1. Parties' Submissions

[23] Staff's position on the use to be made of Koorbatoff's evidence was that s. 198.1(2)(a) of the Act establishes an efficient process that allows the ASC to make a public-interest order based on a respondent's securities-related, criminal conviction without the need for a hearing to determine the underlying facts. Staff submitted that Koorbatoff's reliance on new documentary evidence to re-litigate his criminal conviction was contrary to this statutory scheme and constituted a blatant abuse of process, as recognized by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. Although Staff conceded that some of Koorbatoff's evidence might be relevant to assessing whether market-access bans should be issued under s. 198(1) of the Act, that evidence should not be used for the purpose of challenging the correctness of his criminal

conviction and that the trial judge's findings should form the basis for consideration of a public-interest order.

[24] Staff argued that Koorbatoff is asking the ASC to make new findings of fact that are contrary to the trial judge's essential findings about the nature of the misconduct and the basis for Koorbatoff's conviction, in an apparent attempt to make his actions seem less culpable. Staff submitted that this challenge to the trial judge's findings is an inefficient use of ASC resources and that the ASC is not well suited to second guess the basis for the criminal conviction, particularly as Koorbatoff relies on only a portion of the trial record.

[25] Staff also argued that re-litigation in this forum harms the integrity of the adjudicative process by undermining the authority and finality of Koorbatoff's criminal conviction and could lead to inconsistent results. Staff contended that criminal proceedings are inherently reliable, in part based on the protections fundamental to such proceedings and the strong incentive for an accused to defend against criminal allegations. Staff maintained that the documents relied on by Koorbatoff would not have changed the trial judge's findings, as reflected by the Court of Appeal's rejection of the argument that his conviction was flawed due to the lack of documentary evidence.

[26] Staff also pointed out that Koorbatoff was represented by experienced and competent counsel and afforded a fair opportunity to make full answer and defence to the criminal allegations. Ultimately, Koorbatoff made a tactical decision not to tender certain documents into evidence at his trial and he is now stuck with the repercussions of that decision. In the circumstances, Staff argued that it would not be unfair for the trial judge's findings to form the basis for the issuance of market-access restrictions against Koorbatoff.

[27] Koorbatoff's position was that the ASC's decision to issue a public-interest order pursuant to ss. 198.1(2)(a) and 198(1) of the Act involves the exercise of discretion and should not be done by simply applying the trial judge's findings, but requires consideration of all relevant and material evidence, including documentary evidence that was not before the trial judge. Staff did not oppose consideration of his evidence on the ground that it was irrelevant, and Koorbatoff submitted that the admission of relevant evidence would enhance the credibility of the ASC's adjudicative process by providing a basis for determining whether a public-interest order is warranted, proportionate and reasonable in all the circumstances.

[28] Koorbatoff also claimed that he was not re-litigating his conviction or seeking to "open up" the trial judge's findings, and asserted that criminal and administrative proceedings have different evidentiary rules and burdens of proof that "make it entirely conceivable that different findings might result" (*Re Workum*, 2006 ABASC 1490 at para. 38). He pointed to certain discrepancies between the "facts" deposed to in his affidavit and the trial judge's findings, and argued that the additional documentary evidence justified making independent findings for the purpose of s. 198(1) of the Act. Some of the alleged discrepancies included the following:

- evidence of the conversion rights as ". . . clearly reflected on the convertible debentures" contradicted the trial judge's finding that Raymond would not have been able to convert the debentures into shares;

- the convertible debentures reflected that the basis for Koorbatoff's fraud conviction was the failure to inform Raymond that "he would need to go through an extra step of providing a conversion notice to convert the convertible debentures into shares", and that "Raymond was to receive what he bargained for, just not in the nature of what he believed he bargained for", which was ultimately received but ". . . just at a much later time";
- the purchase and sale agreements substantiated the complexity and sophistication of the commercial transaction and was inconsistent with the trial judge's findings of a "handshake" deal and that Koorbatoff engaged in a breach of trust; and
- CableClix's financial disclosure indicated that Raymond was a registered owner of CableClix shares "pursuant to the debt and assignment conversion", which suggested that Raymond's deprivation was fundamentally a result of market forces beyond Koorbatoff's control, and reflected a disconnect between the finding of fraud and Koorbatoff's actions.

[29] In reply, Staff argued that any corrections to the trial judge's findings should occur through appellate proceedings, and that the additional documentary evidence does not demonstrate that the trial judge's findings were incorrect, particularly as they would need to be considered in light of all of the other evidence before the trial judge. As an example, Staff pointed out that the purported conversion rights associated with the debentures are not reconcilable with Koorbatoff's apparent inability to have those instruments converted into CableClix shares until 2019, nor do they explain why he provided forged share certificates to Raymond.

[30] Koorbatoff also argued that an ASC panel may decline to reciprocate a fundamentally flawed decision (*Re Alexander*, 2007 ABASC 146 at para. 37) and asserted that his actions were improperly characterized as an abuse of trust and treated as an aggravating factor in the Sentencing Reasons. The Court of Appeal found that the trial judge erred in finding a breach of trust as aggravating, but this did not affect Koorbatoff's sentence (*Koorbatoff (2024)* at para. 4). Staff submitted that they were not seeking to reciprocate Koorbatoff's sentence and that they were not relying on a breach of a trust as an aggravating factor.

2. Analysis of Admissibility and Use of Koorbatoff's Affidavit Evidence

[31] Because some of the evidence in the Supplemental Affidavit was potentially relevant to matters in issue, we concluded that the Supplemental Affidavit is admissible for the purpose of assessing whether an order should be issued under s. 198(1) of the Act. Accordingly, we direct that the Supplemental Affidavit be included in the record as an exhibit.

[32] Despite its admissibility, we did not consider Koorbatoff's affidavit evidence (including the Koorbatoff Affidavit) for the purpose of reconsidering the trial judge's findings, as doing so would be contrary to the legislative purpose of reciprocal proceedings and constitute an abuse of process.

(a) Re-litigation in Reciprocal Proceedings

[33] Section 198.1 of the Act provides for a process that allows an ASC panel to issue an order under s. 198(1) based on prior determinations made by certain other decision-making bodies. Such a proceeding, often referred to as a reciprocal proceeding, is an efficient process that avoids

unnecessary duplicative proceedings. As explained by an ASC panel in *Re Anderson*, 2007 ABASC 912 (at para. 16), a reciprocal proceeding:

> . . . establishes a mechanism by which this Commission can issue protective and deterrent orders on the basis of determinations made by other decision-making bodies *without* the necessity of duplicating the process by which the original determinations were reached. The effects – and, it may be inferred, the legislative purposes – are to enhance the efficiency and effectiveness of regulatory oversight of the capital markets . . . . [original emphasis]

[34] A reciprocal proceeding is not an appeal or a review of the underlying decision, nor a rehearing into the events giving rise to it. It provides for a distinct procedural and evidential approach from a typical enforcement hearing, in large part because the "triggering event" is based on the decision rendered by another body (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 54; see also *Re DaSilva*, 2020 ABASC 186 at para. 11). This unique proceeding "obviates the need for a full hearing on the merits based on similar facts that were litigated in another jurisdiction" and "saves time and resources and avoids the need for an inefficient and parallel duplicative proceeding . . ." (*Re Black*, 2014 ONSEC 16 at para. 9). In *Re Wong*, 2022 BCSECCOM 7 at para. 50, a British Columbia Securities Commission panel found, based on an analogous provision, that it was ". . . entitled and expected to base its decision on the findings of the court which made the originating order . . ." when considering a public-interest order based on a criminal conviction.

[35] While it is not uncommon for a respondent to question or attempt to challenge the findings or determinations made by the underlying decision maker in a reciprocal proceeding, this is not the proper forum to revisit or re-litigate those findings. Any challenges to the validity or correctness of the initial or underlying decision should not be pursued in the reciprocal proceeding but through the appropriate appeal or review mechanisms (*Black* at para. 34; see also *Re Weeres*, 2013 ABASC 215 at para. 10).

[36] Koorbatoff submitted that the ASC can question the validity of the underlying decision if there is a discernible flaw in that decision, and pointed to the finding in the Sentencing Reasons that Koorbatoff's abuse of a position of trust was an aggravating factor. We reject this argument because a reciprocal proceeding under s. 198.1(2)(a)(i) of the Act does not require consideration of the respondent's sentence and instead necessitates an assessment of whether the respondent's conviction arose from a transaction, business or course of conduct relating to a security or derivative and, if so, whether the public interest warrants issuing an order under s. 198(1). Accordingly, we limited our consideration of Koorbatoff's evidence to these two questions.

(b) Re-litigation as an Abuse of Process

[37] In *Toronto*, the Supreme Court of Canada held that litigating a matter previously decided by a court – particularly a criminal conviction – should be discouraged and will generally be considered an abuse of process (*Toronto* at paras. 35-55). The abuse of process doctrine arises when other common law doctrines – notably, collateral attack or issue estoppel – are unavailable and the principles of judicial economy, consistency, finality and the integrity of the administration of justice are potentially compromised by an attempt to re-litigate a previous court finding. As indicated in *Toronto* (at para. 52), re-litigation may be necessary in limited situations where the initial proceeding was tainted by fraud or dishonesty, when fresh and previously unavailable

evidence becomes available that impeaches the original results, or where fairness dictates that the original result should not be binding in the new context.

[38] The common law doctrines of issue estoppel and collateral attack are seemingly inapplicable in the circumstances, given that Staff did not prosecute the criminal allegations against Koorbatoff and he does not dispute the fact that he was convicted of fraud. Nevertheless, Koorbatoff seeks to revisit and significantly alter important findings that grounded his fraud conviction. In our view, the abuse of process doctrine is applicable in the circumstances, as the re-litigation of the findings underlying Koorbatoff's criminal conviction would undermine the integrity and credibility of the criminal process and result in an inefficient administrative proceeding that is contrary to our legislative scheme.

[39] Koorbatoff did not suggest that his conviction was somehow tainted by fraud, nor does he seek to rely on new and compelling evidence that was unavailable to him during his criminal trial. Instead, he points to evidence that was previously available to him in an attempt to challenge the basis for his conviction. Koorbatoff was represented by competent counsel, both at trial and on appeal, and given a full and fair opportunity to defend himself. Yet he seeks to undo the tactical decision he made in his criminal trial to avoid the consequences of his criminal misconduct. That does not enhance the credibility of the administration of justice, nor is it an efficient use of the ASC reciprocal process.

[40] It was also argued in oral submissions that the credibility of the adjudicative process would be enhanced where the assessment of an order under s. 198(1) is based on all relevant and material evidence. We are mindful that the record before us did not include most of the evidence that was before the trial judge. Instead, we received only a portion of the transcripts comprised mostly of Koorbatoff's testimony (which the trial judge did not accept, to the extent it was exculpatory). In our view, the adjudicative process would not be enhanced by revisiting the trial judge's findings based primarily on a combination of testimony that was afforded no weight and on documents not adduced into evidence at trial, while ignoring evidence that grounded Koorbatoff's conviction.

[41] For these reasons, we find that it would constitute an abuse of process for Koorbatoff to rely on his evidence to re-litigate the basis for his criminal conviction in this proceeding. Accordingly, we gave no weight to Koorbatoff's evidence, to the extent that it was adduced for the purpose of challenging, questioning or undermining the findings made by the trial judge, which have since been affirmed on appeal. Subject to any further appeal, those findings are final and binding.

IV. ANALYSIS

[42] We now address Staff's request for an order for permanent, market-access bans against Koorbatoff pursuant to s. 198.1(2)(a)(i) and 198(1) of the Act, which requires an assessment of whether Koorbatoff's conviction arose from a transaction, business or course of conduct related to securities or derivatives, and whether such an order is in the public interest.

A. Conviction Arose From a Transaction Related to Securities

[43] There was no dispute that his conviction arose from a transaction involving CableClix shares. Clearly, listed shares fall within the definition of a security in the Act. Accordingly, we find that Koorbatoff's conviction arose from a transaction related to securities.

[44] Although Koorbatoff acknowledged that he was convicted of fraud, he submitted that an order should not be issued until his appeal rights have been exhausted. Staff argued that Koorbatoff has been convicted of a serious offence that takes "full effect as soon as it's entered", that the public interest requires the timely determination of whether the requested market-access bans should be ordered under s. 198(1) of the Act, and the legislation does not limit the ability to seek a reciprocal order until all rights of appeal have been exhausted. Staff submitted that the reciprocal order may be revoked pursuant to s. 214(1) of the Act if Koorbatoff's conviction were to be overturned. Koorbatoff suggested that this would create an inefficient process and be contrary to the intent of the reciprocal proceeding structure.

[45] Koorbatoff has not applied for a stay of this proceeding, and his conviction appeal was dismissed. Whether he will be granted leave to further appeal his conviction is unknown, but the Act does not forestall the issuance of an order under s. 198(1) until appeal rights have been exhausted. In our view, the public interest is better served in this instance by considering Staff's reciprocal application on the merits – as mentioned, the predicate conditions for issuing an order under s. 198.1(2)(a)(i) have been met. It remains open under s. 214(1) of the Act for either party to apply for revocation of any reciprocal order if an appeal overturns the basis for the order.

B. Public-Interest Order Under Section 198(1)

[46] Having found that the conditions of s. 198.1(2)(a)(i) of the Act are met, we now consider Staff's request for an order imposing permanent market-access bans pursuant to s. 198(1).

1. Parties' Positions

[47] According to Staff, Koorbatoff poses a significant risk of engaging in future misconduct detrimental to the integrity of the capital market, which necessitates an order imposing an array of permanent market-access bans under s. 198(1). Staff argued that such an order was proportionate and reasonable in light of the serious nature of his misconduct, the high degree of his responsibility and the absence of mitigating circumstances.

[48] Koorbatoff submitted that an order under s. 198(1) was not appropriate, proportionate or reasonable, taking into account the various sanctioning factors, the extent of deterrence required to address his misconduct, and the outcomes in other cases. Alternatively, he argued that an order should not be permanent in duration, although he did not propose another period of time that might be appropriate. In oral submissions, he also argued that any market-access bans should not impede his ability to operate a business.

2. Principles and Factors Relevant to an Order Under s. 198(1)

[49] An order under s. 198(1) of the Act must be in the public interest, which requires consideration of the ASC's two principal objectives – protecting investors from unfair, improper or fraudulent practices and fostering a fair and efficient capital market – while ensuring that the order is preventive in nature and prospective in orientation (*Committee for the Equal Treatment of*

Asbestos Minority Shareholders v. Ontario (Securities Commission), 2001 SCC 37 at paras. 39-45). While specific and general deterrence are both legitimate considerations, an order must also be proportionate to the individual and reasonable in the circumstances (*Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (leave to appeal to the Supreme Court of Canada refused [2014] S.C.C.A. No. 476) at para. 154).

[50] The ASC has previously enumerated certain factors relevant to the analytical framework under s. 198(1), consisting of the seriousness of the misconduct, the respondent's characteristics and history, any benefit sought or obtained by the respondent, and any other mitigating or aggravating considerations (*Re Homerun International Inc.*, 2016 ABASC 95 at para. 20). These factors are addressed below, in the context of Koorbatoff and his misconduct.

(a) Seriousness of the Misconduct

[51] Fraud generally involves a combination of deceit or falsehood and the risk of financial loss, and is thus considered to be serious misconduct (*Homerun* at para. 23). As stated by an ASC panel in *Re Arbour Energy Inc.*, 2012 ABASC 416 (at para. 80): "[i]nvestment fraud is reprehensible and completely unacceptable capital-market misconduct; instances of fraud in the capital market severely threaten the public's confidence and sense of fairness in the whole of our capital market".

[52] An ASC panel in *Re Neilson*, 2022 ABASC 137 (at paras. 27-28) elaborated on the seriousness of fraud in the context of a reciprocal proceeding:

> Fraud is among the most serious types of capital-market misconduct, and previous ASC decisions have consistently emphasized the serious implications it has for the public interest. For example, an ASC panel in *Re TransCap Corporation*, 2013 ABASC 201 (at para. 155) stated that it is ". . . self-evident that conduct that perpetrates a fraud on Alberta investors is wholly inconsistent with the welfare of investors and the integrity of our capital market". Securities commissions from other jurisdictions have taken a consistent view on the seriousness of fraud, including in *Re Reeve*, 2018 ONSEC 55 (at para. 28) where a panel of the Ontario Securities Commission indicated that: ". . . fraud is one of the most egregious violations of securities law" and "causes direct and immediate harm to its investors, and it significantly undermines confidence in the capital markets".
>
> Consequently, ". . . where Staff seeks reciprocation of a criminal conviction for securities-related fraud, particularly where that fraud was perpetrated on Alberta investors, it is difficult to conceive of a circumstance when orders under section 198(1) would not be considered to be in the public interest" (*Carruthers* at para. 32).

[53] Staff argued that fraud is incompatible with a well-functioning capital market, that Koorbatoff's misconduct demonstrated that he cannot be trusted to comply with Alberta securities laws, and that the privilege of participating in Alberta's capital market should be taken away. Koorbatoff suggested that his misconduct was "far less egregious" in comparison to other fraud cases, in part because the transaction "was real" and negotiated by experienced businessmen. He also submitted that his moral culpability was low and did not reflect a "high degree of deceit or dishonesty", since this was not a situation where the fraud was intentionally perpetrated (such as a Ponzi scheme) and that his testimony – in which he purportedly represented to Raymond that his companies held convertible debentures – was rejected by the trial judge. Koorbatoff also suggested that any deprivation was the result of CableClix's poor performance and the company's delay in issuing the shares, and that the loss was minimized by a tax write-off for Raymond.

[54] Koorbatoff's characterization of his culpability and the nature of the deprivation stood in stark contrast to the trial judge's findings, particularly that his misconduct reflected a high-degree of moral blameworthiness, he knowingly exposed Raymond to the risk of pecuniary loss, and the issuance of CableClix shares three years later "caused great deprivation". In our view, the seriousness of Koorbatoff's misconduct was aggravated by his reckless indifference to the potential harm caused by making knowingly false representations. That other forms of fraud might be considered more serious is not mitigating. Our assessment of the seriousness of his misconduct is reinforced by the fact that he was sentenced to a significant period of incarceration and ordered to pay $800,000 in restitution.

[55] Considering the serious nature of the fraud, Koorbatoff's culpability, and the significant harm suffered by Raymond, we consider that Koorbatoff presents a significant future risk to the public interest and thus considerable deterrence is warranted.

(b) Respondent's Characteristics and History

[56] As stated in *Homerun* (at para. 30):

> A disciplinary history – in the securities sector, or perhaps elsewhere – may itself demonstrate considerable risk and a need for commensurate deterrence. An individual who has already been sanctioned for a transgression should be particularly mindful of the need to behave in accordance with the law. Such an individual who engages in further misconduct may be thought to present a distinct risk of further recidivism, demanding specific deterrence. This may also call for general deterrence, to discourage like-minded others from similar misconduct.

[57] In his trial testimony, Koorbatoff referred to his many years of business experience and said that this involved ". . . public markets and public companies" including ". . . some public company start-ups . . .". He also acknowledged his prior fraud convictions, and said that they arose in connection with "individual financial transactions that were individually identified". Before us, he submitted that we do not know whether his prior convictions pertained to securities because the facts surrounding those prior convictions were "not in front of this Panel", and that there was no evidence that he had previously been sanctioned by the ASC. He also argued that he has not engaged in additional misconduct in the "nearly ten years" since his offence (though he neglected to mention the forged share certificates sent to Raymond in August 2016), and submitted that deterrence was therefore unnecessary to protect the public interest.

[58] Staff submitted that an absence of more recent misconduct was not mitigating or indicative of a reduced risk of recidivism, particularly as there was no evidence of remorse or any acknowledgement of the seriousness of the misconduct. Rather, Koorbatoff's previous fraud convictions raised concerns about his integrity and ability to comply with the law.

[59] Koorbatoff's extensive capital-market experience and his history of perpetrating fraud presents obvious concerns about Koorbatoff's continued participation in the Alberta capital market. The implications for the public interest, both in terms of the risk to investors and to the integrity of the capital market, demonstrates a strong need for specific deterrence. General deterrence is also a factor, and requires a stern message to warn experienced capital-market participants of the consequence of engaging in fraud.

(c) Benefit Sought or Obtained by Koorbatoff

[60] Koorbatoff argued that he did not benefit from his misconduct, apparently because some of the $800,000 obtained from the transaction was redirected to the benefit of CableClix. While his testimony implied a possible benefit from these payments – in the form of a "debt note" issued by CableClix to Koorbatoff's companies based on these payments – the trial judge concluded that Koorbatoff's use of funds was never "totally explained", although it was clear that ". . . the majority of the funds were taken" by him. Specifically, the trial judge found that Koorbatoff had accepted the payments from Raymond, and he ". . . used or spent the $800,000 at his own discretion . . . within days of receiving each of [the] deposits".

[61] Accordingly, we are satisfied that Koorbatoff obtained a significant benefit from his misconduct, which presents a risk of similar misconduct in future by Koorbatoff or by others who may be tempted to perpetrate securities fraud.

(d) Aggravating or Mitigating Factors

[62] Staff submitted that they were not relying on abuse of trust as aggravating, but they expressed concern about the "overall context" surrounding Koorbatoff's actions, and argued that his lack of acknowledgement about the seriousness of his conduct was an issue "for a regulator that's trying to ensure that we have a fair and efficient market that's free from fraud". Staff were particularly concerned by the dishonest conduct that occurred after Koorbatoff received full payment from Raymond – sending forged share certificates to "continue the deception". Staff argued that Koorbatoff's explanations – that Raymond pressured him and that the certificates had been validly issued and were simply altered after they had been cancelled – overlooked the fact that his actions were "still forgery" and may have formed the basis of a separate criminal charge. Koorbatoff characterized the "the issuance of the one share certificate" as a poor decision, and pointed out that this was not the basis for the fraud conviction.

[63] The delivery of forged share certificates reflected Koorbatoff's willingness to engage in ongoing deception. It undermined Koorbatoff's assertion that he has not engaged in improper conduct since 2015. We view this as a significant aggravating factor that raises a serious concern about Koorbatoff's future risk to the integrity of the capital market, and thus warrants a measure of specific deterrence.

[64] Although not expressly characterized as a possible mitigating factor, we also considered Koorbatoff's suggestion that a public-interest order under s. 198(1) could, in the circumstances, set a "dangerous precedent". According to Koorbatoff, it is not uncommon – perhaps even routine – for purchase and sale transactions in Alberta to involve misstatements or mistaken representations in connection with "how the assets are held or what the assets actually are". He submitted that such mistakes are often uncovered by a purchaser's due diligence, and that Raymond "ought to have done" more in this regard as "the misrepresentation . . . between the parties" would have been cleared up had he done so. Koorbatoff also submitted that he did nothing to dissuade Raymond from conducting due diligence or from seeking legal advice in connection with the transaction, which demonstrated that his actions did not "enhance the risk of some deprivation" and implied a lower level of moral culpability.

[65] Staff contended that Koorbatoff's actions cannot be dismissed as being a mistake or even a negligent misrepresentation, and any suggestion otherwise was an unfair challenge to the trial judge's determination that Koorbatoff knowingly deceived Raymond.

[66] We do not accept Koorbatoff's suggestion that ordinary course business transactions typically involve misrepresentations about the nature of the subject asset. His conviction involved making a representation that he knew was false. In the circumstances, the trial judge found that this was an objectively dishonest act that ". . . an ordinary, decent person would feel was discreditable as being clearly at variance with straightforward or honourable dealings". Koorbatoff's fraudulent misconduct was not a mere lapse of judgment or an oversight that could occur in any transaction.

[67] We are not persuaded that a public interest order would have a detrimental effect on ordinary business transactions. On the contrary, an order under s. 198(1) of the Act should encourage honest dealings among market participants and caution them from engaging in securities transactions based on knowingly false representations.

[68] We also observe that in analogous cases, courts have found that the potential for due diligence to reveal the falsity of a fraudulent misrepresentation does not offer a defence to the author of that statement: "[i]t should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected" (*Performance Industries Ltd v. Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at para 67; see also *Kowal v. Sun Star Energy Inc*, 2020 ABQB 244 at paras. 392-393). As observed by Southin J. (as she then was) in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd* (1988), 22 B.C.L.R. (2d) 322 (at para. 64) (S.C.):

> There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue.

[69] Similar considerations apply here, where the public interest requires the protection of investors from harm and maintaining the integrity of the capital market. We therefore did not consider the degree of Raymond's due diligence to have any bearing on our assessment of Koorbatoff's risk to the public interest.

(e) Conclusion from Sanctioning Factors

[70] In light of our assessment of the *Homerun* sanctioning factors and their application to Koorbatoff and his misconduct, we have no hesitation in finding that Koorbatoff presents a significant risk to the public interest and warrants an order directing permanent, market-access bans against Koorbatoff pursuant to s. 198(1) of the Act. He realized a significant pecuniary benefit by engaging in serious misconduct, despite his considerable capital-market experience and his related criminal record.

C. Scope of a Public Interest Order

[71] In the NOH, Staff requested various market-access bans to restrict Koorbatoff's ability to trade securities or derivatives, engage in other market-related activities (including the ability to

advise in securities or derivatives, or engage in investor-relations activities), and to assume certain positions. In oral submissions, Staff explained that certain of the bans – including his ability to trade securities and to act as director or officer – were directly related to the fraud, whereas some of the other requested bans were to preclude Koorbatoff from assuming designated "gatekeeping" roles in the securities industry.

[72] Koorbatoff requested that any order not directly impact his ability to operate a business. He submitted that any restriction on his ability to act as an officer and director would not be appropriate, proportionate, or reasonable. He acknowledged that he is a director and officer of certain private companies, but argued that his ability to act as director and officer of private companies would not increase the risk to the public, and that the fraudulent misrepresentations could have been made regardless of his roles in his private companies. Staff submitted that Koorbatoff's history demonstrated that he was unsuitable for director and officer responsibilities, but he could still own and operate his businesses by appointing others to assume those roles.

[73] Koorbatoff's misconduct – a fraudulent misrepresentation that his private companies held CableClix shares – was clearly connected to his control over the companies, acting as a director and officer. He also structured the closing of the transaction with Raymond using other private companies. Koorbatoff's deceit presents a clear risk to the public, and is incompatible with the serious responsibilities borne by directors and officers. Capital-market access is a privilege, and that privilege was abused here. Accordingly, we have concluded that a permanent ban on Koorbatoff acting as an officer or director (or both) of any issuer was appropriate, reasonable and proportionate in the circumstances.

[74] It remains open for Koorbatoff to apply for the variation of any market-access ban pursuant to s. 214(1) of the Act if he is able to demonstrate that such variation would not be prejudicial to the public interest.

V. SANCTIONS ORDERED

[75] Accordingly, we order against Koorbatoff that, with permanent effect:

- under ss. 198(1)(b) and (c) of the Act, he must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him;
- under ss. 198(1)(d) and (e), he must resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system; and
- under ss. 198(1)(c.1), (e.1), (e.2) and (e.3), he is prohibited from, respectively: engaging in investor relations activities; advising in securities or derivatives; becoming or acting as a registrant, investment fund manager or promoter; and

acting in a management or consultative capacity in connection with activities in the securities market.

[76] This proceeding is concluded.

May 29, 2024

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn