ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Lackan, 2024 ABASC 103 **Date: 20240610**

Paul Lackan

Panel:	Kari Horn Tom Cotter James Oosterbaan
Representation:	Amanda Goodwin Tom McCartney for Commission Staff Paul Lackan for himself
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I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) alleged in an October 4, 2022 notice of hearing (the **NOH**) that Paul Lackan (**Lackan**) contravened s. 93(1)(b) of the *Securities Act* (Alberta) (the **Act**) by engaging in fraud. The allegation was based on Lackan raising $153,500 from eight investors between July 1, 2018 and December 31, 2020 (the **Relevant Period**). Lackan raised the money apparently as part of a plan to acquire or invest in ACT Medical Centres Inc. (**ACT**). No such acquisition or investment occurred. Staff alleged that Lackan spent much of the money on personal expenses and on unrelated business expenses, not on acquiring or investing in ACT.

[2] This hearing (the **Hearing**) was scheduled to start on October 12, 2023, that date having been set on November 24, 2022. On October 5, 2023, Lackan sought an adjournment, stating that he needed to conduct and present certain scientific research at approximately the same time the Hearing was scheduled. That application was denied on October 10, 2023 by a panel of two (two of the panel members on this Hearing panel), and written reasons were later issued: *Re Lackan*, 2024 ABASC 39. That decision set out some of the procedural history of this matter up to October 2023, including Lackan's very minimal participation in the process to that date.

[3] Lackan represented himself throughout the process and at the Hearing. The panel told Lackan clearly that he could tender evidence only through a witness – a Staff witness, his own witness, or by testifying himself. He chose to call no evidence. He did not testify and was not present for the majority of the Hearing – he attended only one partial day. He cross-examined one witness. After the Hearing, Staff made written submissions, but Lackan made none. There were no oral submissions. Communications to the panel through the ASC Registrar (the **Registrar**) indicated that Lackan had not contacted Staff or the Registrar about the deadlines set for him to provide written and oral submissions. Without the benefit of any submissions from Lackan, we considered the defences he might have raised, based on the evidence before us, including transcripts of Staff's investigative interview of Lackan over two days (the **Lackan Transcripts**). In all the circumstances, we did not discern any unfairness to Lackan in the conduct of the Hearing.

[4] There was no dispute that Lackan raised money from several investors, told them he was raising money to acquire or invest in ACT, and used at least some of that money for his personal expenses – he admitted those facts in the Lackan Transcripts (although he claimed he was clear he did not yet own ACT and was not selling ACT Shares). Lackan's evidence (from the Lackan Transcripts) differed in important respects from other evidence before us (from witnesses and documents) regarding Lackan's words and actions when raising and using the money. The issue before us is whether Lackan perpetrated a fraud on the investors in the way that he raised and spent that money.

[5] For the reasons set out below, we find that Lackan breached s. 93(1)(b) of the Act.

II. BACKGROUND

A. General

[6] Lackan provided bookkeeping and accounting services through Paul Lackan Consulting Inc. (**Lackan Consulting**). Most of the investors were his bookkeeping clients. Lackan convinced investors to give him money during the Relevant Period, telling them it would be used for the purpose of acquiring or investing in ACT. ACT operated pharmacies and medical clinics,

specializing in addictions recovery. At least some of the investors expected to receive shares in ACT (**ACT Shares**), but they ostensibly received certificates for 1495516 Alberta Ltd. shares instead (respectively, **149** and the **149 Shares**). After giving money to Lackan, most investors experienced evasiveness and a lack of communication from him. Lackan spent the money he raised from investors, but did not acquire or invest in ACT. Most investors did not receive their principal back or any return on their investments (although we had no evidence on that point for three of the investors).

[7] C.A.M.P. Ltd (**CAMP**) was also in the addictions recovery field. During the Relevant Period, Lackan owned CAMP through his wholly owned company, PMBRK Holdings Ltd. (**PMBRK**). James Alexander (Alex) Wylie (**Wylie**), the sole director and shareholder of ACT, testified that he started ACT to provide services similar to CAMP's, after Lackan's CAMP business proved largely unsuccessful. The evidence showed discussions and documents at various times during the Relevant Period relating to potential deals for Wylie to sell ACT to Lackan. Lackan seemed to take the position that those discussions and documents were sufficient to indicate that the money he raised from investors was raised and used in accordance with what he told investors and with Alberta securities laws.

[8] Lackan appeared to control 149 and its bank account (the **149 Account**), although Emery Ostrosky (**Ostrosky**) was the sole director and shareholder of 149 during the Relevant Period. Lackan and Ostrosky, a pharmacist, worked together over many years and had long-term family connections. Staff tendered evidence through a Staff investigative accountant (**Ruttan**) showing money going into and out of the 149 Account during the Relevant Period (the **Source and Use Analysis**).

[9] Wylie sold ACT to Levitee Labs Inc. (**Levitee**) on July 28, 2021 for over $5 million. Lackan was not a party to that transaction.

B. Lackan and Related Corporate Entities

1. Lackan and Lackan Consulting

[10] Lackan was a Calgary resident during the Relevant Period. Searches of Alberta's corporate registration system (**CORES**) showed that he was the sole director and shareholder of Lackan Consulting, an Alberta company which was registered on May 10, 1993 and struck on November 2, 2017. A December 10, 2020 CORES search showed that annual returns for Lackan Consulting had not been filed for 2016 through 2020. Lackan Consulting was subject to a receivership order (the **2017 Receivership Order**) dated June 23, 2017.

2. CAMP

[11] CAMP was registered in Alberta on February 19, 2003 and struck on August 2, 2019. The evidence indicated that Lackan was the sole director and PMBRK was the sole shareholder since May 31, 2017. He and PMBRK had also been in those respective positions between February 25, 2016 and November 7, 2016 (another individual was in those positions at the times when Lackan was not). There was other evidence of CAMP's complicated history, but that was not directly relevant to Staff's allegation.

3. PMBRK

[12] PMBRK was incorporated in Alberta on April 29, 2015 and struck on October 2, 2018. Lackan was shown as the sole director and shareholder for PMBRK throughout its existence. PMBRK held 100% of the shares in CAMP and 1508686 Alberta Ltd. (**150**) during the Relevant Period. A December 10, 2020 CORES search showed that annual returns for PMBRK had not been filed for 2017 through 2020. PMBRK was subject to the 2017 Receivership Order.

4. 150

[13] 150 was formed by amalgamation on December 23, 2009 and was struck on June 2, 2018. It was relevant to Lackan's background but was not directly connected to Staff's allegation. During the Relevant Period, Lackan was the sole director of 150, and PMBRK was its sole shareholder. A December 31, 2020 CORES search showed that annual returns for 150 had not been filed for 2016 through 2020. 150 was subject to the 2017 Receivership Order.

C. Other Corporate Entities

1. ACT

[14] ACT was incorporated in Alberta on January 16, 2017 as 2017156 Alberta Ltd, with its name changed on May 17, 2018. Wylie was the sole director from incorporation. He was also the sole shareholder as of January 25, 2019. Ranchland Capital Corp. (**Ranchland**), of which Wylie was the sole director and shareholder, was ACT's sole shareholder before that.

[15] Wylie also had six non-profit Alberta corporations with the "ACT" name: ACT Medical Calgary Downtown Ltd.; ACT Medical Calgary Northeast Ltd.; ACT Medical Grande Prairie Ltd.; ACT Medical Lethbridge Ltd.; ACT Medical Medicine Hat Ltd.; and ACT Medical Red Deer Ltd. Wylie was the sole officer of each. Wylie and his spouse were directors of each (with a third person, unrelated to this Hearing, previously a director instead of Wylie's spouse). Further details of these non-profit corporations are irrelevant to the Hearing. We use ACT to refer to all of the ACT Medical entities, if the context requires.

[16] At one point in the Lackan Transcripts, Lackan stated that CAMP and ACT were separate entities, but he later indicated that CAMP was a predecessor company to ACT or that Lackan had owned ACT before Wylie did. In conjunction with those latter alternatives, Lackan also stated that he had to spend five years trying to reacquire ACT (or CAMP) after Wylie took it over. The CAMP corporate search documents showed that it had a registered "Trade Name / Partnership Name" or "Trade Partner Name" of "ACT Medical Centre Calgary Downtown". We were not directed to any other evidence regarding this. A presentation which Lackan acknowledged giving to investors stated that ACT was "previously known as CAMP Clinics". Wylie testified that he did not know what that meant. There was no other evidence that CAMP had been directly connected to ACT or Wylie. Consistent with Wylie's testimony, Lackan was not listed on the CORES searches as a director, officer, or shareholder at any point with any ACT entity. We are satisfied that CAMP and ACT were always separate entities and that Lackan never had an official role with ACT.

2. 149

[17] 149 was incorporated in Alberta on October 13, 2009 and struck on April 2, 2018 (it had been struck before and revived on April 17, 2015). Ostrosky was the sole director, officer, and shareholder from October or November 2009, with the minute book of 149 (the **149 Minute Book**) and the CORES records showing the two different months. Jodi Katrusik (**Katrusik**) was the

original director and testified Ostrosky assumed his positions in November 2009 but those were backdated to October. (At the time, Katrusik was using the name Jodi Campbell, the significance of which is discussed later in this decision.) Lackan was not listed on the CORES searches or in the 149 Minute Book as a director, officer, or shareholder of 149 at any point. An October 22, 2021 CORES search showed that annual returns for 149 had not been filed for 2016 through 2020. Ostrosky was called by Staff as a witness, but did not attend the Hearing on the scheduled date to testify. We did have transcripts from Staff's investigative interviews of Ostrosky on three separate days (the **Ostrosky Transcripts**).

[18] Lackan referred in the Lackan Transcripts to a numbered company, which we conclude was 149. He stated that, in attempting to buy ACT (or, as he phrased it at that point, to reacquire CAMP from Wylie):

> . . . I have engaged brokers in Calgary to assist me with the financing of the deal to reacquire it. And in doing so, what we did was we set up a numbered company, and we were raising seed capital to get what we needed to be done done. And we were going to, through the seed capital and through friends and family, we were going to go ahead and issue -- give them back -- how do I say it? For the cash, we were going to give them shares in the company. . . .

[19] Lackan purported to issue 149 Shares to investors. As discussed below, we conclude the 149 Share certificates were fabricated.

III. ALLEGATION AND PARTIES' POSITIONS

A. Allegation and Staff's Position

[20] Staff alleged that Lackan breached s. 93(1)(b) of the Act by engaging "in acts, practices or a course of conduct that he knew or ought to have known may perpetrate a fraud on investors".

[21] Staff argued that the alleged fraud involved Lackan raising at least $153,500 from eight investors during the Relevant Period (the NOH referred to Lackan raising at least $200,000 from nine investors, but Staff tendered evidence and made submissions based on the lower figures). Staff alleged that Lackan told investors their money would be used either to buy ACT Shares or to acquire ACT (which would result in investors receiving ACT Shares after that acquisition).

[22] Staff contended that Lackan held no position with ACT and had no authority to issue ACT Shares, promise ACT Shares, or raise money for ACT. Moreover, Staff submitted that Lackan never acquired ACT, did not give ACT Shares to the investors (some instead received certificates purporting to represent 149 Shares), and used the majority of investor funds for himself personally or for other purposes unrelated to ACT.

[23] Staff asserted that Lackan's conduct met the legal test for fraud because he:

- engaged in prohibited acts by providing false information to investors about the use of their funds and by using those funds improperly;

- caused deprivation to the investors (through actual loss or by placing the investors' pecuniary interests at risk); and

- had subjective knowledge of the prohibited acts and the fact that the prohibited acts caused or could cause deprivation to the investors.

[24] Ruttan estimated that Lackan misappropriated between $52,935 and $103,913 of the $153,500 at issue. (All dollar figures are rounded in this decision.) However, Staff argued that her approach was too conservative, thus underestimating the amount misappropriated. Staff urged us to find that Lackan misappropriated between $118,184 and $134,924 of the $153,500.

[25] Lackan also received money during the Relevant Period in the form of loans. Those loans were not part of the allegation against Lackan. Other than one indirect connection to the matters here, we do not discuss them further.

B. Lackan's Position

[26] As noted, Lackan participated only briefly in the Hearing, did not testify, and did not make any submissions. However, it was apparent from the questions he asked during cross-examination and his statements in the Lackan Transcripts that he did not admit to engaging in fraudulent conduct and that he claimed he did not intend to defraud investors.

[27] Lackan's position seemed to be that he did not engage in prohibited acts because he said that he told investors he would be using the money they invested to pay his salary and (directly or indirectly) his personal expenses while he was in the process of trying to acquire ACT. He claimed that he had another investor who would be providing the acquisition money for ACT, and the investors' money at issue in this Hearing was never intended to be used for the acquisition cost. He appeared to be contending that he told investors they would be receiving 149 Shares at first, and ACT Shares only later, if the acquisition were successful. We also expect he would have argued that his actions did not cause actual or potential deprivation to investors because they understood what he would be doing with their invested money. We consider it likely Lackan would have contended that there was no need to consider whether he had subjective knowledge of the alleged prohibited acts because he was denying the prohibited acts occurred. Lackan also blamed his failure to purchase ACT (and, therefore, to issue ACT Shares to investors) on Wylie.

IV. PRELIMINARY MATTERS

A. Standard of Proof

[28] As stated by an ASC panel in *Re Aitkens*, 2018 ABASC 27 (at para. 48):

> The applicable standard of proof in ASC enforcement hearings is proof on a balance of probabilities. We must "be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" ([*Re Arbour Energy Inc.*, 2012 ABASC 131] at para. 38; see also *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49).

B. Lackan's Lack of Participation in the Investigation and Hearing

[29] Ruttan testified that Lackan failed to comply with various parts of Staff's investigation (the **Investigation**):

- Ruttan conducted a voluntary interview with Lackan on April 12, 2021 (remotely, through the Zoom platform). She gave Lackan a May 11, 2021 notice to compel production of certain documents. Lackan's response was delayed and incomplete.

- Staff issued a November 8, 2021 summons to Lackan, requiring him to attend a second interview. Lackan failed to attend two interviews scheduled on the basis of that summons, in each case providing reasons for his absence a few days later. Lackan finally attended a compelled interview on April 14, 2022, again through Zoom (after Staff brought a court application to compel his attendance). Lackan gave undertakings during that interview, but did not comply with them all.

- Lackan did not respond to a letter from Staff dated December 21, 2021 asking for responses to certain questions. He also failed to respond to a second notice to compel production, issued by Staff on August 29, 2022.

[30] Lackan did not dispute Ruttan's testimony and did not provide explanations in the Lackan Transcripts or otherwise. Lackan attended only one partial day of the Hearing and cross-examined only one witness. The Hearing clerk and Staff stated, respectively, that Lackan had accessed the draft exhibit list and associated documents, but had never accessed Staff's initial disclosure (referred to as *Stinchcombe* disclosure), made available to Lackan in October 2022.

[31] Because Lackan tendered no evidence and made no submissions, we do not know if he would have disputed the procedural fairness he was accorded throughout the Investigation and Hearing. However, we have no doubt that the proceeding against Lackan was conducted fairly, giving him many opportunities to explain his actions, provide information he thought important, and contest Staff's allegation by calling witnesses, tendering documents, or testifying himself at the Hearing.

C. Investigative Interview Transcripts

[32] As noted, Staff tendered the Lackan Transcripts and the Ostrosky Transcripts. Staff relied on certain excerpts from each and also tendered the entire transcripts. The Lackan Transcripts were from interviews held April 12, 2021 and April 14, 2022. Both were held remotely by videoconference. Lackan was affirmed for the second, and was not represented by counsel for either interview. The Ostrosky Transcripts were from telephone interviews on November 2, 17, and 23, 2021. Ostrosky was not sworn or affirmed and was not represented by counsel.

[33] Lackan did not make submissions, so we do not know if he would have contested any reliance by the panel on the Lackan Transcripts and the Ostrosky Transcripts.

[34] We conclude that it is appropriate for us to consider those transcripts, treating them with appropriate caution because there was no live testimony from Lackan and Ostrosky, and no opportunity for cross-examination or panel questions. In so concluding, we rely on the decision of the Alberta Court of Appeal (the **ABCA**) in *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (at paras. 31-40), which has been followed in other ASC panel decisions, including *Arbour* (at paras. 49-52) and *Re Ward*, 2022 ABASC 139 (at para. 64). In *Brost*, the ABCA discussed the appropriate use of investigative interview transcripts in ASC proceedings. The respondents in that case appealed the ASC panel's decision, in part because of that panel's reliance on the respondents' interview transcripts. The ABCA noted (at para. 34) that the ASC panel had "treated the impugned hearsay evidence with caution when assessing its value and reliability". The ABCA further stated that the respondents at the ASC had the "opportunity to test the impugned hearsay evidence", but

declined to challenge its reliability and content (at para. 36). The ABCA confirmed that it was appropriate to use the contents of the interviews in the regulatory proceeding (at para. 40).

[35] We discuss below our assessment of Lackan's and Ostrosky's credibility and the resulting level of reliance on their statements in their respective interviews.

D. Admissibility and Weight of Evidence

[36] Under ss. 29(e) and (f) of the Act, respectively, an ASC panel "shall receive that evidence that is relevant to the matter being heard" and "the laws of evidence applicable to judicial proceedings do not apply" to hearings before ASC panels. Therefore, all relevant evidence, including hearsay evidence, is admissible (subject to the rules of natural justice and procedural fairness) – see *Aitkens* at para. 50. ASC panels must then determine the appropriate weight to ascribe to the evidence admitted. That requires examining the "indicators of its reliability, such as corroboration by other evidence" (*Aitkens* at para. 51).

[37] As part of this process, we are "entitled to draw inferences from the evidence as a whole", including circumstantial evidence (*Arbour* at para. 39 and *Aitkens* at para. 49). In so doing, we are mindful of the direction of the ABCA in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (leave to appeal dismissed, [2014] S.C.C.A. No. 476) to ensure that inferences are supported by evidence and not based on speculation (at paras. 26-28).

[38] The ASC panel in *Ward* commented further on inferences (at para. 33):

> . . . this panel is permitted to draw inferences from facts established by the evidence (see [*Arbour*] at para. 39). While inferences can be drawn "using common sense, human experience and logic after considering the totality of [the] evidence and any competing inferences that could be drawn from the facts", inferences "must be grounded on proven facts and must be reasonable" (see *Re De Gouveia*, 2013 ABASC 106 at para. 95).

E. Credibility and Conflicting Evidence

1. General

[39] In determining the weight ascribed to particular evidence, ASC panels consider the existence of conflicting evidence and the testimony of witnesses, including the credibility of those witnesses. This involves assessing the source of the evidence and its consistency (or not) with other reliable evidence, such as testimony from neutral parties or undisputed documents. The panel in *Aitkens* (at para. 52) cited *Faryna v. Chorny*, [1951] B.C.J. No. 152 (BCCA) (at para. 11, also cited in *R. v. Boyle*, 2001 ABPC 152 at para. 107):

> The credibility of interested witness[es,] particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[40] We also rely on the ABCA's statement in *Walton* (at para. 36) that disbelief of a witness does not necessarily mean that the opposite of what the witness said is true, unless there is positive evidence to support such a conclusion (also see *Aitkens* at para. 53 and *Ward* at para. 32).

[41] In the present case, we found most of the witnesses to be credible, each giving testimony largely consistent with the documentary evidence and the testimony of other witnesses. Lackan's lack of cross-examination of other witnesses did not affect our assessment of the witnesses' credibility in the circumstances because of the consistency of their testimony with other evidence and because the panel members had the opportunity to ask questions of those witnesses.

2. Wylie's Credibility

[42] We had some concerns with inconsistencies and unexplained discrepancies in Wylie's testimony. For example, it was difficult to reconcile Wylie's statements that he kept entering into negotiations and even letters of intent with Lackan with his statements that he had earlier decided that Lackan could not be trusted and he did not want to engage with Lackan. However, Wylie's evidence on the key issue of his testimony was supported by the documentary evidence from CORES searches and the fact that ACT was ultimately sold to Levitee – Lackan was never a director or shareholder of ACT, never had a binding agreement to buy ACT, and never had authority to sell shares in ACT or otherwise raise money for ACT.

3. Lackan's Credibility

[43] As also noted throughout this decision, we conclude from all the evidence, including the Lackan Transcripts, that Lackan was completely devoid of credibility. We could not rely on the statements he made to investors, to others, and in the Lackan Transcripts, even for some of the basic information central to this Hearing. For example, Lackan made statements in the Lackan Transcripts and in some documents given to investors claiming that CAMP was the predecessor to ACT and that he used to own ACT. We have no hesitation finding that was untrue. Lackan gave ludicrous explanations for some of his actions, including his stated rationale for issuing fabricated 149 Share certificates purportedly signed by Katrusik, the former director of 149 (discussed below). He also stated in the Lackan Transcripts that he told investors he would be using their money as a salary and for personal expenses, which was contrary to the credible evidence from all of the investor witnesses.

[44] Where Lackan's statements were consistent with other evidence, we could accept them. However, where Lackan's statements were inconsistent with other evidence or were the only evidence on a particular topic, we could not rely on them.

4. Ostrosky's Credibility

[45] We find the relevant statements by Ostrosky in the Ostrosky Transcripts to be generally supported by the other evidence before us. For example, Ostrosky said that Lackan did accounting work for him, had signing authority over the 149 Account, and sent money from Ostrosky's pharmacy work from the 149 Account to Ostrosky. Ostrosky also stated that he knew Lackan was raising money for a deal to buy clinics from Wylie, but did not know Lackan was using 149 or the 149 Account in connection with that. Where consistent with other evidence, we are satisfied that we could rely on such statements.

[46] Some of Ostrosky's statements were less persuasive. Ostrosky claimed at one point that he did not know Lackan was raising money for ACT directly, but later admitted passing on ACT financial information, putting together a video presentation relating to ACT, and asking people if they wanted to invest. He also said that he knew Lackan planned to issue ACT Shares to investor

MR once Lackan took over ACT; in fact, Ostrosky apparently arranged that plan. Ostrosky acknowledged that he said in a text message to MR that "we" are closing the deal and "we" will be listing on a stock exchange, but claimed he did not know what company, was just passing on what Lackan had said, and thought this referred to a company other than ACT or 149. In an email to MR, Ostrosky said "we're still in the process of . . . raising seed capital". Both those communications were discussed in the Ostrosky Transcripts. A January 24, 2019 email in evidence from Ostrosky to MR gave financial information for what was clearly ACT. Ostrosky also stated in the Ostrosky Transcripts that he told **AS** (whose brother, **RS**, invested) that Lackan was raising money to buy ACT, and that Ostrosky would be the operations manager. We are convinced that Ostrosky was minimizing his knowledge and level of involvement. For the most part, however, Ostrosky's statements were not relevant to Staff's allegation against Lackan, and there were no allegations against Ostrosky.

F. Text Messages in Evidence

[47] Staff entered into evidence a document with screenshots of text messages between Lackan and AS, and another document with screenshots of text messages between Ostrosky and AS (together, the **AS Messages**). AS did not testify; the documents were entered through Ruttan, who received them from AS. Although Staff referred to AS as an investor, we are satisfied from the Ostrosky Transcripts and the AS Messages that the investor was AS's brother, RS. We accepted the AS Messages into evidence as relevant, although we gave less weight to them than if RS or AS had testified at the Hearing. The content of the AS Messages – particularly Lackan's excuses and non-responsiveness – was consistent with other evidence before us.

V. ANALYSIS

A. The Law

[48] Section 93(1)(b) of the Act provides:

> 93(1) No person or company shall, directly or indirectly, engage or participate or attempt to engage or participate in any act, practice or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know may
>
> . . .
>
> (b) perpetrate a fraud on any person or company.

[49] Staff must prove both the *actus reus* and *mens rea* elements of fraud. These were set out by the Supreme Court of Canada (the **SCC**) in *R. v. Théroux*, [1993] 2 S.C.R. 5 at para. 27 and adopted by ASC panels (see, for example, *Arbour* at para. 975, and *Ward* at para. 277):

- *actus reus*:
  - a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means"; and
  - "deprivation caused by the prohibited act" (whether by "actual loss or the placing of the victim's pecuniary interests at risk"); and
- *mens rea*:

- "subjective knowledge of the prohibited act"; and
- "subjective knowledge that the prohibited act could [result in] the deprivation of another . . .".

[50] The ASC panel in *Ward* discussed these elements (at paras. 278-279):

> With respect to *actus reus*, the SCC [in *Théroux*] explained that an act of deceit or falsehood may include representing that "a situation was of a certain character, when, in reality, it was not", and that "other fraudulent means" may include other dishonest acts such as "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" (at para. 18). It is not necessary to prove that the fraudulent party profited from the fraud or that an investor suffered actual financial loss (at paras. 17 and 19; see also *Arbour* at para. 981).
>
> The SCC further explained that the *mens rea* of fraud is established if the fraudulent party had "subjective awareness that one was undertaking a prohibited act . . . which could cause deprivation in the sense of depriving another of property or putting that property at risk" (at para. 24). Stated another way, the *mens rea* is established if it is proved that the fraudulent party "knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means", and "was aware that deprivation could result from such conduct" (at para. 39). In *Arbour*, the panel explained (at para. 983):
>
>> In many cases involving allegations of fraud, a panel will reach conclusions based on inferences reasonably drawn from the evidence. Further, given the nature of fraud, it is unnecessary to prove what the transgressor was thinking at the time the dishonest act was committed – subjective knowledge can be inferred from the prohibited act and surrounding circumstances, unless there is some plausible explanation that casts doubt on the inference. The [ABCA] has confirmed that the trier of fact can infer subjective knowledge from the totality of the evidence (*Brost* at para. 48).

B. Factual Background

1. Lackan's Relationship with ACT

(a) Interactions Between Lackan and Wylie

[51] Much of the evidence of Lackan's relationship and interaction with ACT came from the documentary evidence and Wylie's testimony. Some of Lackan's statements in the Lackan Transcripts were consistent with that other evidence. Where there were conflicts, however, we rely on the other evidence and not on Lackan's statements.

[52] Wylie said that he and Lackan met in about 2016, when Bill Leslie (**Leslie**) asked for Wylie's advice regarding CAMP. Leslie or his spouse had earlier sold CAMP to Lackan, and Lackan was in default of the payments. Leslie and his spouse took most of the CAMP companies back in 2016, but Leslie's spouse again sold CAMP to Lackan in June 2017. Wylie testified that he started ACT in January 2017 because he saw an opportunity in the market, given CAMP's struggles. Some CAMP employees began working for ACT. The CORES searches were consistent with this intermittent ownership of CAMP by Lackan and with the incorporation date of ACT by Wylie.

[53] Wylie testified that Lackan continually expressed interest in acquiring ACT, starting with a January 22, 2018 letter of intent (the **January 2018 LOI**). However, Wylie stated that, "after the first time it didn't work, I really didn't take [Lackan] seriously". That was inconsistent with evidence of Wylie's continued dealings with Lackan (discussed below) after that initial proposal.

[54] Lackan maintained in the Lackan Transcripts that he was planning to buy ACT. He acknowledged that he did not own ACT Shares, but stated that he had a good relationship with Wylie for five years, had a good faith contract with Wylie, and approached the investors in good faith. Lackan also confirmed that he was not selling ACT Shares and was putting the money raised into 149.

[55] Lackan stated at some points that he did not own ACT, but there were at least four instances of him claiming to have previously owned ACT. First, he said in the Lackan Transcripts that he had invested $1 million of his own money into ACT "at the time that I owned ACT Medical". Second, he stated in the Lackan Transcripts that: "Prior to [Wylie] owning ACT Medical, I was the principal owner, which would have been in 2017." Third, one of the written presentations he gave to investors described CAMP (Lackan's company) as the predecessor company to ACT (implying that Lackan had also owned ACT). Fourth, Lackan described the 149 Account as "being opened to cover all costs and expenses associated with the *reacquisition* of ACT" (emphasis added). We find all those statements to be false.

[56] In connection with conversations over a few years, Wylie sent Lackan confidential financial and other information at various times (including information about **BlockMD**, a proposed telehealth service). Wylie identified some of that content in presentation material given by Lackan to investors. However, Wylie was adamant that he had not put the material together in the format in which investors received it. For example, Wylie testified that he would not have circulated information about BlockMD because it could not proceed for regulatory reasons. Lackan did not admit to preparing materials himself, but said that Wylie had provided most of the information Lackan gave to investors, and Ostrosky had prepared at least some information (Ostrosky's statements were consistent with that, although he said it was at Lackan's direction). We conclude that Lackan prepared – or directed the preparation of – materials in the form given to investors. We also are satisfied that Lackan gave that material to investors. Later in this decision, we set out details about some of the presentation material.

(b) Potential Transactions Between Lackan and Wylie

[57] There were signed and unsigned documents in evidence relating to a potential purchase of ACT by Lackan (or a Lackan company). We include some details for context and completeness, and to ensure we considered potential defences which Lackan may have raised had he participated fully in the Hearing. However, the aspect relevant for Staff's allegation is that Lackan never had a binding agreement to purchase ACT and never purchased ACT. Lackan was also not a party to the eventual sale of ACT to Levitee. The potential transaction documents between Lackan and Wylie included:

- January 22, 2018 – the January 2018 LOI between Ranchland (Wylie's company) and PMBRK (Lackan's company), with a sale price of approximately $4 million for ACT. This was signed by Wylie and Lackan. According to Wylie, this "went nowhere".

- January 2, 2019 – an unsigned letter of intent between Ranchland and PMBRK, with a sale price of $10 million for ACT. Lackan provided this to Staff. Wylie did not think he had seen that document. We were not directed to any discussion of this document in the Lackan Transcripts.

- September 11, 2019 – a purchase agreement between Wylie and PMBRK (signed by Wylie but not by Lackan), with a proposed closing date of December 15, 2019 and a sale price of $10 million for ACT. We were not directed to any discussion of this document in the Lackan Transcripts.

- December 22, 2020 – a signed "non-binding letter of intent agreement" (the **December 2020 LOI**) between Lackan and Wylie for the sale of ACT, with a closing date of January 11, 2021. The December 2020 LOI did not have a purchase price – it was an agreement to agree (although Lackan erroneously discussed the document as providing for a total purchase price of $1 million). It had a clause providing for a $500,000 cash payment to Wylie on closing to repay shareholder indebtedness to Wylie (to be paid in trust to Wylie's legal counsel by December 31, 2020). There was also a vendor take-back provision under which Wylie would get $500,000 owed to Wylie by ACT. Wylie said "the whole thing made no sense", but then explained that ACT owed him about $1 million, so those two clauses were a way for him to get that money back. Wylie further claimed that he never thought Lackan would be able to come up with the money to complete that agreement, making those terms irrelevant. He also said that he did not care if Lackan immediately were to sell ACT to Levitee if the purchase by Lackan from Wylie succeeded. Lackan discussed Levitee in the Lackan Transcripts. At one point, Lackan agreed with a Staff investigator's summary that Wylie was to sell ACT to Lackan, with Lackan then completing a merger of ACT with Levitee and running ACT as a subsidiary of Levitee (and investors would receive shares – presumably in either ACT or Levitee).

[58] In the Lackan Transcripts, Lackan stated that he had everything lined up for a deal with Wylie to close February 16, 2021, but Wylie would not provide the promised financial information and told Lackan on about February 14, 2021 that there was no deal. That purported closing date was over a month later than the closing date of January 11, 2021 set out in the December 2020 LOI.

[59] As noted, there were inconsistencies in Wylie's evidence regarding his various dealings with Lackan. Wylie defended the December 2020 LOI as a final chance for Lackan, even though he also said he did not think Lackan could afford to buy ACT.

[60] Another inconsistency in Wylie's evidence related to the timing of the December 2020 LOI compared to the time at which investor **MA** was asking Wylie and other ACT personnel about Lackan and his position with ACT, and stating that Lackan had taken money from her, purportedly for ACT Shares (discussed below). Wylie insisted that he did not take MA's comments seriously because "it was so far out of left field", he did not connect her comments with Lackan's frequent attempts to buy ACT, and he did not think that the December 2020 LOI would lead to a transaction

in any event. It appeared that MA's inquiry was not answered in November 2020, leading her to send another email with similar statements and questions to Wylie on February 10, 2021 and to ACT's controller on February 22, 2021. Wylie testified that three or four people "came out of the woodwork" in 2021, asking about Lackan and if Lackan had a director or officer position with ACT. Only then, according to Wylie, did he start to wonder: "What has this guy done"?

[61] We do not accept Wylie's claim that he did not take Lackan seriously while still negotiating and discussing the ACT sale over a period of three years. However, Wylie also phrased this as taking Lackan less seriously over time, but not "shut[ting] the door completely because if perchance he has someone that's going to be a buyer, I'm happy to sell it". We find this explanation more accurately explains the dynamic during that period. Overall, we are not completely satisfied with Wylie's explanations, but our concerns did not alter the fact that Lackan never owned ACT or had the authority to sell ACT Shares.

(c) Lackan's Involvement in Other Potential Transactions with ACT

(i) Evelyn Lee

[62] Lackan referred in the Lackan Transcripts to engaging Evelyn Lee (**Lee**) as a broker to assist with acquiring ACT. He gave inconsistent answers when asked for the dates of Lee's involvement. It appeared that the most likely time of her involvement was for several months during 2019. According to Lackan, Lee had been planning "to open up a shell company or a holding company for the funds to be basically deposited to be used for the acquisition of ACT and expenses". However, "we" decided to use 149 instead – "we" apparently meaning Lackan, Ostrosky, and Lee, and perhaps Wylie. Wylie did not testify about any such discussion, nor did he testify about Lackan's assertion that Wylie finally said he no longer wanted to work with Lee. Ostrosky claimed he did not know exactly how Lackan was using 149. We note that the dates Lackan gave for Lee's involvement were after some of the investors' money was paid to 149, which undermined his contention that using 149 was Lee's idea.

[63] Lackan stated that he and Ostrosky trusted Lee because she was hired as a broker and knew "the public side", but he would have done things differently in hindsight. Ostrosky mentioned that they dealt with a woman named Evelyn in 2019 for about a year, who was involved only for "information", but could not recall her last name and was not asked for any more details.

[64] Lackan referred multiple times in the Lackan Transcripts to emails between himself and Lee which he claimed would support his statements, but Ruttan testified he did not produce those (or other documents he said would be exculpatory). We were directed to no evidence which supported Lackan's statements about Lee's supposed advice. Given that, and the absurdity of Lackan's explanations, we do not believe his statements about the rationale for using 149 or for giving investors 149 Share certificates purportedly signed by Katrusik (under the name "Jodi Campbell"), discussed below, both of which he blamed on Lee.

(ii) Gilbert Bong

[65] After his dealings with Lee ended, Lackan engaged Gilbert Bong (**Bong**) as a broker, apparently in approximately March of 2020. A March 6, 2020 email from Bong to Lackan mentioned that Wylie had told Bong that another letter of intent between Wylie and Lackan would be a waste of time. In a September 17, 2020 email from Lackan to Wylie (copied to Bong), Lackan asked Wylie for "the financials". Wylie testified that he was not prepared to give Lackan any more

financial information, even with Lackan copying Bong on the email to increase Lackan's credibility.

(iii) Stage Left, Darren Dumba, and Levitee

[66] Lackan was involved with Stage Left Partners Ltd. (**Stage Left**) through its principal, Darren Dumba (**Dumba**). Wylie called Stage Left a "bona fide advisory group". According to Wylie, Lackan brought Stage Left and Wylie together in the fall of 2020, with Levitee in the background as a potential buyer for ACT, through Stage Left. Levitee eventually bought ACT. A July 9, 2021 prospectus in evidence for Levitee (the **Levitee Prospectus**) referred to the potential acquisition of ACT (finalized and announced later that month). The Levitee Prospectus disclosed that Levitee and ACT had entered into a January 29, 2021 letter of intent, with Levitee paying approximately $50,000 as a non-refundable deposit.

[67] Wylie said that he was not initially receptive to working with Stage Left because Lackan had told Stage Left that Lackan owned ACT. However, Wylie testified that Dumba learned Wylie was the owner, then they began serious discussions about Levitee acquiring ACT. Stage Left and ACT entered into a consulting services agreement effective December 10, 2020 (the **December 2020 Consulting Services Agreement**). Wylie said Lackan "was trying to find his way in the middle, but I wasn't taking him seriously [because] he wasn't bona fide". When directed to Lackan's signature at the end of the December 2020 Consulting Services Agreement, signing as "Partner Advisor" of ACT, Wylie said he did not know what that was for, and "that wouldn't have been part of anything that I would have signed". Wylie confirmed that Lackan had never been a partner of or advisor to ACT. Also in evidence, however, was an email chain between Wylie and Lackan, including Wylie sending to Lackan on December 17, 2020 what was apparently the December 2020 Consulting Services Agreement. Wylie testified that, "[a]t the time, [Lackan] was still involved". Wylie did not have a satisfactory explanation for sending that to Lackan. We also note that the December 2020 Consulting Services Agreement was approximately contemporaneous with the December 2020 LOI between Lackan and Wylie. Wylie's explanation for having these two agreements at about the same time was also unhelpful, and we did not have an explanation from Lackan.

[68] Staff asked Wylie about an April 27, 2021 email from Lackan to Bong (copied to Wylie). The subject line was "Offer to purchase". In that email, Lackan referred to having $500,000 from himself and his lenders, and wanting financials from Wylie. Lackan said (quoted verbatim): ". . . I must have an email sent to Stage West and levitee labs key personal instructing them to resume unrestricted communication directly with me". Wylie said that email was "complete nonsense" and repeated that he had cut Lackan out of his life and had not spoken to him since January 11, 2021.

[69] Lackan's role, if any, in the Stage Left and Levitee discussions remained unclear, although we are satisfied that he never held a position with ACT or had authority to act for ACT or sell ACT Shares. Lackan justified some of his spending on legal fees incurred as a result of Wylie breaking his supposed deal with Lackan (discussed below).

[70] However, the uncertainty regarding Wylie's intentions, Lackan's knowledge, and Lackan's involvement was ultimately irrelevant to the fraud allegation against Lackan.

2. Investor Evidence

(a) Investor Witnesses

[71] We heard testimony from five investor witnesses: **GR**; MA; **SV**; **PV**; and MR (for privacy reasons, we identify them only by initials). Their evidence was strikingly consistent.

(b) Specifics of Investments

[72] The evidence showed $153,500 of investments with Lackan (based on the dates of the investor's cheques or bank drafts, according to Ruttan's evidence):

- GR and her spouse invested $10,000 on July 12, 2018 and $7,500 on January 6, 2020.
- MA invested $50,000 on July 31, 2018.
- SV invested $20,000 on July 12, 2018 and $10,000 on November 1, 2018.
- PV invested $20,000 on July 13, 2018 and $10,000 on October 23, 2018.
- MR invested $6,000 on February 15, 2019.
- RS (who did not testify, but from whose brother, AS, we had evidence of texts) invested $5,000 on September 25, 2020.
- Two other investors (who did not testify) invested a total of $15,000 in September and October 2018.

[73] In the Lackan Transcripts, Lackan stated that he raised about $200,000 from about six friends and family members, at least some of whom were accounting clients.

[74] GR, MA, SV, PV, and MR did not receive their initial investments back, nor did they receive any return on their investments. We do not know if RS received his money back, after Lackan said he would return the money, but then engaged in months of delays. We do not know if the other two investors (in September and October 2018) received their money back or received any return.

[75] SV and PV gave Lackan an additional $50,000 ($25,000 each) in January 2021. SV said Lackan told them it was needed urgently for a merger between ACT and Levitee, and PV's evidence was consistent with that. Lackan also told them their money would be placed in a trust account (other evidence indicated this was a trust account for lawyer Charles Osuji (**Osuji**)) and used for legal fees connected to Lackan's insistence that he owned ACT or should be part of the deal between ACT and Levitee. SV and PV received only some of that money back. However, the loan and return were outside of the Relevant Period and the scope of the NOH, and we discuss this no further. Staff argued that certain money paid earlier to Osuji should be considered an improper use, as discussed below.

(c) Investors' Relationships with Lackan

[76] Lackan had performed accounting services for investors GR, MA, SV, and PV for many years; some of them also considered Lackan to be a friend. Lackan approached them directly about the supposed opportunity to invest in ACT. GR testified that Lackan was very persistent and contacted her and her spouse "nonstop" until they agreed to invest. Investor MR described himself as a good friend of Ostrosky, and met Lackan though Ostrosky. AS also was introduced to Lackan by Ostrosky.

(d) Lackan's Description of the Investment

[77] The investors gave similar evidence regarding how Lackan described the investment:

- GR said that Lackan told her she would be a shareholder in ACT, starting as a ground-level investor.

- MA said that Lackan told her that her money would be used for start-up expenses for clinics, such as leasing equipment and hiring pharmacists. Lackan said that ACT would later go public, and MA would get a return of five to ten times her investment.

- SV (who was with his brother, PV, when they discussed the ACT opportunity with Lackan) said that Lackan told them this was a good opportunity to invest in a medical company, that he was going to buy ACT and take it public, and that SV and PV would get ACT Shares once Lackan bought ACT.

- PV said that he and SV were told by Lackan that he was raising funds for ACT, which was a clinic to help addicts, and that the money would be used to expand ACT's clinics. PV also stated that Lackan said the ACT Shares would later be public, and that PV and his brother would see a profit of 10% to 15% over six to twelve months. PV testified he was confused when he received a December 12, 2018 email from Lackan referring to a "buyout of ACT" because that was contrary to his initial understanding of funding the expansion of ACT's clinics.

- MR said he was approached by Lackan and Ostrosky about investing in ACT, with Lackan planning to purchase "what was already an existing business" (ACT). MR later received a purported 149 Share certificate. MR understood 149 was a company associated with ACT. He stated that Lackan said the shares would be listed on an exchange.

[78] We do not believe Lackan's claim in the Lackan Transcripts that he told investors they would be investing in 149 and their 149 Shares would be exchanged for shares in ACT once he acquired ACT:

> They were going to invest in the numbered company. Once we acquired it, we would transfer the shares over, and they were going to get shares within the new ACT Medical. And then as we moved forward from there and the merger became realistic with the BC company [meaning, we conclude, Levitee], then what they were informed of was that instead of having ACT Medical shares, they were going to be given shares within the merging companies.

[79] We do not believe Lackan's statements in the Lackan Transcripts that he was clear with investors that "[t]hey were buying shares of the company that was going to acquire ACT", with "a converting of the shares upon [the] purchase [of ACT]", and with "the funds that have been used . . . given back to [the investors] in the form of shares". Nor do we believe his claim that he would be able to issue ACT Shares to investors because Wylie told him that he would get "a book of shares" when the deal was concluded and could do what he wanted with them.

(e) Lackan's Stated Position with ACT

[80] Four of the five investors who testified described Lackan as telling them that he had some type of position with ACT:

- GR thought Lackan said he was a director and a large shareholder of ACT.
- MA thought Lackan told her he was one of ACT's founders and was on its board. She identified a copy of a bank draft dated June 26, 2015, showing a $500,000 payment from Lackan Consulting to PMBRK. She said Lackan told her PMBRK was the company that held the assets for ACT. Other evidence proved PMBRK was Lackan's company, and there was no evidence indicating that PMBRK ever held assets for ACT or had any other connection with ACT.
- SV recalled Lackan saying he was either a board member of ACT or otherwise part of the company, although SV did not remember Lackan's purported title with ACT.
- MR believed Lackan "would be the president perhaps or the main operator of the business" with ACT. It was unclear, however, if MR meant he thought that Lackan held that position at the time of MR's investment or would hold it after the purchase of ACT.

[81] PV recalled a less direct connection – that Lackan knew board members but was himself at arm's length.

(f) Use of Money by Lackan Personally

[82] None of the investor witnesses who testified were told that Lackan would use any of their money for personal expenses. MA, SV, PV, and MR also stated that Lackan did not tell them he planned to use their money for a salary for himself. GR was not asked if Lackan mentioned a salary. As noted, all five thought they were investing in the business or shares of ACT and that their money would be used for that.

[83] In contrast, Lackan stated in the Lackan Transcripts that he told investors their money would be used "for due diligence and salaries" and "predominantly for overhead and operations". He said that he used investors' money for his own personal expenses because he had no other source of money at the time. Lackan told Staff investigators he was using other outside sources to fund the purchase of ACT – that is, that the money at issue from the investors was not intended to be used to acquire or invest in ACT. He did not identify the outside source, but gave different amounts for that purported additional investment money (ranging from $250,000 to $2.5 million). There was no reliable evidence of any such arrangement.

(g) Lackan's Explanation of 149 and 149 Shares

[84] Lackan discussed 149 with each of the investor witnesses, and conveyed similar information.

- MA knew Lackan was using 149 to receive the investment money, but said there was nothing proving that 149 was connected to ACT. MR thought 149 was a holding company for ACT and connected to or associated with ACT. Lackan told GR that the initial investment was in 149, with the name to be changed later. SV and PV thought 149 was a way for Lackan to gather funds together before moving them to ACT.

- GR, SV, PV, and MR each testified that Lackan told them to make their investment payments to 149 (SV and MR referred to a numbered company, which we are satisfied was 149). MA was not asked to what entity she made her payment, but her bank draft was deposited in the 149 Account and she received a purported 149 Share certificate.

- Share certificates for each of MA, SV, PV, and MR were in evidence. Those purported to be for 149 Shares and had the signature "Jodi Campbell" (we discuss below the significance of that signature). GR's share certificate was not in evidence.

- PV testified that he told Lackan in about January 2021 that the shares should have been ACT Shares, not 149 Shares, and that Lackan "said he would change that", but did not.

(h) Documents Received by Investors from Lackan

[85] We set out here some of the documents received by investors.

[86] Several investors identified some of the same nine documents as ones they received from Lackan, and he stated in the Lackan Transcripts that he gave the same presentation documents to all of the investors. We briefly describe some of those documents.

[87] GR, MA, SV, and PV each received an undated ACT presentation, which included financial information and began with the erroneous descriptive phrase "previously known as CAMP Clinics" (and also erroneously described ACT as having been in business for 15 years). It appeared to have been created sometime after early 2018. GR, SV, and PV each received that presentation document after their investment; MA received it before investing. MR received a somewhat similar document after investing. Another undated document titled "CAMP Clinics Investment Proposal" and one including financial information for the year ended March 31, 2018 were identified by GR, MA, and SV as received from Lackan after they invested. MR also received a document similar to the "CAMP Clinics Investment Proposal" after he invested. The description of the proposed investment target in the various documents matched ACT. At least some investor witnesses received presentations which included information about BlockMD, ACT Dental Centres, and ACT Family Practice.

[88] MA, SV, MR, and GR each received from Lackan an August 2019 "ACT INC" term sheet. MA testified that Lackan sent it to her after she asked him for proof that he was part of ACT. She

said that nothing in that document referred to Lackan. We note that the document also appeared to be a generic draft, the few specifics did not match the claimed ACT transaction, and 149 was not mentioned.

[89] SV received some additional documents. Those included: (1) an unsigned December 15, 2020 non-binding letter of intent from Levitee to Lackan, with a signature block for Lackan as "CEO" of ACT; (2) the December 2020 LOI between Wylie and Lackan, signed by both; (3) and the December 2020 Consulting Services Agreement between Stage Left as consultant and ACT as client, signed by Stage Left and ACT (per Wylie), and signed by Lackan as "Partner Advisor" (Lackan was also mentioned in that document as a "representative" of ACT; as noted, Wylie testified that Lackan's signature on that document was not part of anything Wylie had signed). SV stated that some of the additional documents Lackan sent him were Lackan's attempts to convince SV that Lackan was involved with ACT and with the sale of ACT.

[90] MR received some documents from Lackan and Ostrosky on a confidential basis. It was not clear from the evidence why that was the case for MR but apparently not for the other investor witnesses. Shortly before he invested, MR was sent, and signed, a confidentiality agreement between him and 149. It did not mention ACT. MR thought 149 "was connected to ACT Medical, which I believed I was investing in". MR also received "confidential" information from Ostrosky at about the time of MR's investment. That was financial information for "the clinics" and "the pharmacies". MR understood that was information about existing clinics which would be merging with ACT. MR received other financial information as well.

[91] MR also received an ACT presentation marked "Confidential" on every page. It appeared to date from about mid-2018. One of the pages of that presentation listed Lackan and two others as executives of ACT. Wylie was not mentioned in the document, nor was he asked about this document during his testimony. MR said the document reassured him that he would be investing in something which would earn a return.

[92] Lackan told Staff investigators that Wylie had given him at least one of the presentations. Wylie testified that he recognized the content of some of the presentations in evidence, but had not prepared those documents. Wylie stated that he had sent considerable confidential financial and other information about ACT to Lackan over several years, as Lackan was always wanting to buy ACT.

[93] The evidence was clear that the investors received the above documents from Lackan, regardless of whether Lackan prepared all of them himself. The documents themselves corroborated the investors' testimony that they thought they were acquiring or investing in ACT, which Lackan either already had an interest in or would be buying imminently.

(i) Communication with Lackan After the Investments

[94] In addition to documents received by some investors from Lackan, the investor witnesses testified about their various communications with Lackan after they invested. Their evidence was consistent:

- GR stated that Lackan often did not answer his telephone, and she could not find him. She testified that if Lackan did answer his telephone, "he was always in a hurry

because he was so busy with ACT Medical", and if he did not, "he was actually either at a funeral or he was at [someone's] drug overdose".

- MA testified that she tried to reach Lackan by email, text, telephone, and going to his house. He often did not answer. When he did answer, MA said he would say about her investment "that he's working on it, that it's coming, that it's happening".

- SV stated that, when he asked Lackan about the investment, Lackan said the deal was in progress. After SV and PV each gave Lackan an additional $25,000 in January 2021, SV said Wylie told SV: "[Lackan] was lying and there is no merger between [Wylie and Lackan] and [Lackan is] not involved in [the ACT] deal". Lackan then sent SV several documents (some described above) to convince SV that Lackan was being truthful.

- PV testified that he had little luck contacting Lackan, although he finally received some documents months after he started asking Lackan for them. When PV asked Lackan in January 2020 for a refund of PV's and SV's investments, Lackan did not respond. PV and SV did not receive a refund.

- MR testified about some contact with Lackan after investing. It appeared to be minimal, and MR was not asked for more details about any contact.

[95] Neither investor RS nor his brother, AS, testified. We did have the AS Messages in evidence (one set between AS and Ostrosky and one set between AS and Lackan). The AS Messages were consistent with the other evidence that RS gave $5,000 to Lackan as an investment. The majority of the AS Messages dealt with Lackan's communications with AS after AS tried to get RS's money back.

[96] AS complained to Ostrosky on May 17, 2021 that Lackan was not responding to AS, and asked Ostrosky on May 19, 2021 to tell Lackan that RS needed his money back. On May 19 and 25, 2021, Ostrosky said he would pass the message on to Lackan. On May 29, 2021, Ostrosky told AS that "the securities and exchange commission" (presumably meaning the ASC) was involved, and Lackan could not access RS's money from a trust account "because while this is going on nobody has access to it". On June 13, 2021, AS told Ostrosky that Lackan said he would take the money from his own account, but now was not responding to AS. There was no record of Ostrosky replying to that or to a June 29, 2021 message from AS, which was the last message shown between the two.

[97] The AS Messages between AS and Lackan covered a variety of topics, including speeding tickets, government assistance programs, and the COVID-19 pandemic. Between April 14 and June 30, 2021, AS repeatedly asked Lackan for "the draft" and "the money", which we find referred to RS's $5,000 investment with Lackan, which AS was trying to get Lackan to return (for context, that was after the failure of the December 2020 LOI between Lackan and Wylie and after Levitee signed the January 29, 2021 letter of intent with ACT and Levitee had paid ACT Medical a non-refundable $50,000 deposit). Lackan mentioned none of that in the AS Messages. When Lackan did reply to AS, those replies were replete with unconvincing excuses, including (all quotations are verbatim):

- April 20, 2021 – "I'm working on it. We have funds but they are being cleared by the bank due to new laws for money laundering".

- April 25, 2021 – ". . . We have to take funds from the trust accounts, inform the lawyers and the security exchange, then pay him out. With covid extended again, everyone is hard to reach. If not for covid it would be done in a week. Our merger has been pushed back 3 weeks because of covid."

- May 7, 2021 – Lackan said that the lawyer said "the funds are here" and asked if he should prepare a draft or an electronic transfer. AS replied that he sent the necessary information to Lackan by email.

- May 14, 2021 – AS proposed (for at least the third time) that Lackan pay RS back with Lackan's own cheque, then recover the money when it was released. Lackan replied that he had been thinking the same thing and said he would try to do it that day.

- May 26, 2021 – After more delays, excuses, and non-responses from Lackan, Lackan said: "I'm on the phone right now witb [the lawyer's] office. I said I want a chq no later than Friday. This is rediculous and i can't have my friend being treated like this".

- June 1, 2021 – after several more messages between the two about the lawyer, AS asked Lackan to "give me the cheque and whenever he releases the money you take it". Lackan replied: "I am.on it".

- June 7, 2021 – after more messages, Lackan said he was at the bank and sent the money, but "it could take a while for such a large tranfer".

- June 13, 2021 – after more messages from AS, largely not responded to by Lackan, Lackan said: "I don't answer when I'm with my kids or patients. I phoned you a couple days ago, you didn't answer. How come.? I did this fund tranfer for you, I could get into a lot of trouble for that. Lot of trouble. But I took the risk. Now your saying I'm giving you a hard time bro. Your brother request was last minute. We are on the verge of going public and certificates are being issued. Closed shares, and listing with numerous agencies. I never thought your brother would need the funds this quickly. And when I spoke to you, I said clearly I would get the funds to you. That was in the context of after the public ipo. Our shares and dollars outstanding are reported, it's been presented to funding companies and audited statements. The valuation of the shares is based on all monies collected and the valuation of the company. It may not seem like a big deal but it's a huge deal. Any changes this close to listing will cause a ripple effect of thousands of dollars, and potentially delay things. I thought when we spoke your brother understood it was at least 3-6 months. Neither you, him, or I thought it would be this quick. So to conclude my response, he will receive the funds. I'll follow up with the bank

tomorrow. I have done the very best I can. And I am not willing to over extend myself to jeapordize this deal and many people's lives. I'll work with you and your brother to resolve it. That's the best I can do. I'll send a copy of this to [Ostrosky] so he is informed."

- June 26, 2021 – after many more messages between AS and Lackan, Lackan told AS he would meet AS and RS at a Calgary mall on June 28, 2021 at 6:30 pm with a draft for $5,000 in AS's name.

- June 28, 2021 – on a 6:28 pm text thread, in response to a message from AS, Lackan said he was driving back from Lethbridge with the draft but still over two hours away. At 8:29 pm, Lackan said he was still driving and doing the best he could.

- June 29, 2021 – Lackan said he did not make the June 28, 2021 meeting because he was caught speeding on the way back with the draft and lost his licence and car. When AS said he would come to where Lackan was, Lackan said: "I'm going to send you a copy of the draft. Do you can stop calling me dude and a lier. . . ".

- June 29, 2021 – AS asked where the picture of the draft was, and Lackan said on June 30, 2021 that he had sent it.

[98] There were no further messages in the text thread in evidence. We do not know if RS recovered his $5,000 from Lackan.

(j) Conclusion on Significance of Investor Evidence

[99] There was some overlap between the investors' evidence, Lackan's explanations to the Staff investigators, and some of the documentary evidence. For example, some of the investors realized they were not investing directly in ACT. It was obvious that not all investors were told several essential facts. We are satisfied Lackan did not tell investors that he: did not own ACT and had no binding agreement to purchase ACT; had no position with ACT; was not planning to use investors' money to purchase ACT, but intended to (and did) use their money as his personal income while purportedly attempting to buy ACT; would give them falsified certificates for 149 Shares; had no authority to issue 149 Shares; and did not own 149 or have a position with it, other than as a bank signatory.

[100] The investor evidence as a whole showed Lackan as communicative and involved while asking for money and shortly after receiving it. In contrast, Lackan's pattern after investors started to ask questions, seek a share certificate, or try to recover their money was either to make excuses or to ignore communication efforts.

3. Lackan's Explanation for Using 149 Account

[101] Lackan stated in the Lackan Transcripts that he told investors to make their cheques out to 149. He also confirmed that he did not provide investors with documents for their investments, such as subscription agreements, term sheets, or letters of understanding. Lackan claimed he told investors that their 149 Shares would later be converted to ACT Shares, but said he did not remember if he gave investors any documents with information such as the purported conversion price. We were not directed to any documents in evidence supporting Lackan's conversion claim.

[102] Lackan acknowledged sending an email to MR with the subject "Confirmation of Share purchase for ACT Medical PPM" (he said that "ACT Medical PPM" meant a private placement of ACT). Lackan stated in the Lackan Transcripts that he told MR in a telephone conversation that he was really buying 149 Shares, even though that was not in the email and the email specifically referred to ACT. A December 12, 2018 email from Lackan to PV and SV confirmed their investments "for the acquisition of the buyout of [ACT]", with the money "to be converted to shares upon completion of the purchase" – again Lackan did not refer to 149 or 149 Shares in that email.

[103] In the Lackan Transcripts, Lackan gave a convoluted and wholly unbelievable explanation to justify using 149 to receive investors' money. He claimed that he received advice from Lee to use 149 for the acquisition of ACT, despite 149 being in Ostrosky's name and used by Ostrosky to receive payments for his work as a pharmacist. Lackan claimed that Lee told him it would somehow be better to use 149 than to use a new shell or holding company. Aside from the lack of logic in this explanation, Lackan was using the 149 Account from at least the time of GR's and SV's July 12, 2018 investments. However, Lackan's own statements in the Lackan Transcripts were that Lee was not involved until sometime in 2019.

4. Lackan's Issuance of 149 Share Certificates Signed by Former Director

[104] In evidence were purported 149 Share certificates for MA, SV, PV, and MR. They were dated September 2019, although those investors had given Lackan their money between July 2018 and February 2019. Each 149 Share certificate was signed by "Jodi Campbell". Lackan initially claimed Lee was "[m]ore than likely" the person who prepared the 149 Share certificates for investors, but later said that he filled in the information.

[105] Katrusik testified at the Hearing. Her name from 1991 to 2011 was Jodi Campbell. Katrusik owns NameQuest Corporate Services Inc., a registry business. One of its functions is incorporating shelf companies for future sale to clients. Katrusik incorporated 149 in October 2009, selling it to Lackan about a month later. She stated that, as part of the sale, Ostrosky replaced her as the sole director and became the sole shareholder. This was confirmed by CORES searches and the 149 Minute Book in evidence. Katrusik never dealt with Ostrosky. She testified that she provided Lackan in 2009 with a paper version of the 149 Minute Book, which included director's and shareholder's resolutions, Katrusik's resignation as director, and a 149 Share certificate for Ostrosky (the **Ostrosky Certificate**).

[106] Katrusik explained that she prepared the Ostrosky Certificate (for 100 class A voting shares of 149) in 2009 using a template and signed it "Jodi Campbell", her name at the time. She also stated that she provided Lackan with specimen share certificates for voting and non-voting shares, and that she had initialled (but not signed) those. She had not supplied any blank share certificates to Lackan, signed or unsigned.

[107] Katrusik testified about the four 2019 purported 149 Share certificates in evidence. She stated that she did not use the name "Jodi Campbell" in 2019 and that she would not have signed 149 Share certificates in 2019 at all because she was not an officer or agent of 149, so had no authority to do so. She also confirmed that 149 did not have class C preferred shares, despite three of the purported 149 Share certificates ostensibly being for such a class.

[108] It was evident on the face of the 2019 149 Share certificates that they had been altered – the box with the number of shares in it was not flush on its edges, and some of the borders were askew. Lackan claimed that he had typed information (including the number of shares) using as a template a 149 Share certificate from the 149 Minute Book which was blank except for the signature of Jodi Campbell. We believe that Lackan filled in the information, but we do not believe the 149 Minute Book contained a 149 Share certificate which was blank except for the signature of Jodi Campbell. We accept Katrusik's testimony on that point, supported by the 149 Minute Book. Based on all the evidence, therefore, we conclude that Lackan prepared the falsified 149 Share certificates he gave to MA, SV, PV, and MR using as a template the 2009 Ostrosky Certificate, which had the signature "Jodi Campbell".

[109] Lackan confirmed in the Lackan Transcripts that he knew "Jodi Campbell" was not an authorized officer when he created the falsified 149 Share certificates. According to Lackan, Lee was the one who recommended using the Ostrosky Certificate as a template. Lackan's description of a conversation with Lee about using certificates signed "Jodi Campbell" was nonsensical (quoted verbatim):

> Because the original certificate within the corporate books was signed by J Campbell, and when we presented the folder to Ms. Lee, we showed her the share, and she said, Well, if this person has signed the shares, she is not -- she's an officer according to Ms. Lee. She said, We can issue the shares with her signature because she's not a board of directors, but she's an officer acting on behalf of the corporation. . . .

[110] When asked about one of the 149 Share certificates being for class C preferred non-voting shares (which Katrusik said did not exist) and one being for class C common non-voting shares, Lackan's explanation of the difference was (quoted verbatim): "Would be when -- that the preferred shares we were going to issue was based on very close friends and family, and the preferred shares that we received -- or I received -- was going to be divvied up at most some very, very close friends and relatives." In addition to the explanation being incoherent, it was different than his explanation minutes earlier in that interview, when he stated that Lee said there would be three classes of 149 Shares: A (preferred shares for founding partners); B (preferred shares for investors); and C (common shares).

[111] Lackan also stated in the Lackan Transcripts that Ostrosky gave Lackan verbal authorization to issue 149 Shares to investors. Ostrosky stated that he did not give such authorization to Lackan. On this point, we believe Ostrosky over Lackan. However, even if Ostrosky had given such authorization, that would not have affected our conclusion on Staff's allegation – the most fundamental issue was not Lackan's authority to issue 149 Shares, it was his conduct in telling investors one thing then using their money for something else.

[112] We reject Lackan's explanations for the issuance, signature, form, and content of the purported 149 Share certificates given to investors and in evidence before us. We are satisfied that Lackan prepared those falsified certificates himself – well after the investment money was paid, with no authorization, and with an invalid signature.

5. Lackan's Explanations for Using Investment Money

[113] Lackan made various statements in the Lackan Transcripts about the use of investors' money, including that it would be used for his own income, salary and expenses, "for the acquisition of ACT Medical", for "seed capital", and for "operating expenses". However, as noted elsewhere in this decision, we find that Lackan told investors the money was to acquire or invest in ACT, and did not tell investors the money was for his own expenses.

[114] Consistent with the Source and Use Analysis, discussed below, Lackan acknowledged in the Lackan Transcripts that he spent the majority of investors' money for his own purposes, not for ACT or even 149 business purposes. For example, he said that he used the 149 Account for personal expenses and expenses unrelated to ACT because "that was the only source of income that we had at that time". He stated that "efficiency and timing" led him to pay personal bills straight from the 149 Account instead of always paying himself from the 149 Account and then paying personal bills from his own accounts. When asked how he characterized for income tax purposes the investors' money he spent, he said that some was salary and some was a promissory note, then claimed he was in the process of figuring out which was which in conjunction with figuring out his taxes owed.

[115] At another point, Lackan characterized his use of the investors' money differently, stating that he did not take a "salary", but considered the money to be a loan which he would pay back "through the cash that I received for the closing of the deal". Lackan did not explain why he would be receiving cash as the purchaser in a transaction. Lackan gave yet another explanation, stating that he, Ostrosky and Lee agreed that Lackan would be compensated a maximum of $25,000 – essentially a salary, which would not need to be repaid – and would have to repay the rest of the money he used from the 149 Account.

[116] Lackan also blamed others for telling him that he could use the investment money personally. For example, Lackan stated that Bong told him he could use investment money "as a source of income for yourself while you're going through this process", even though he also said Bong knew the investors' money was for the purchase of ACT. We do not believe this. Even if we did – even if Bong had said Lackan could spend the money personally – Lackan's own story was that he engaged Bong in 2020, well after the initial investors had paid money into 149 and Lackan had spent that money on himself.

[117] None of Lackan's explanations were reasonable or persuasive. To the contrary, they were inconsistent and illogical, such as claiming he drew a salary yet saying he did not, and stating he was assessing in 2022 the tax status of money he spent in 2018 to 2020. In addition to his statements and justifications being self-serving, they were unsupported by other evidence. For example, the investor witnesses testified that Lackan told them their money was for acquiring or investing in ACT, not for paying Lackan's personal expenses as a salary, a loan, or some combination of those. Lackan did not tender any documentary evidence supporting his versions of the events, such as detailed records tracking his spending of investors' money to ensure he could pay it back. Further, even if we believed Lackan had a binding agreement with Wylie to buy ACT and that Lackan intended to pay back some or all of the money he used on personal expenses (which we did not), that is irrelevant – the significant point is that he did not use investors' money in the way he told them he would.

C. Amount Misappropriated

1. Staff's Position

[118] Staff submitted that Lackan misappropriated $118,184 to $134,924 of the $153,500 raised from investors and at issue in this Hearing. This range was higher than Ruttan's estimate of $52,935 to $103,913, which, as mentioned, Staff contended was too conservative.

2. Lackan's Position

[119] Lackan participated very little in the Hearing or the process leading to the Hearing. It was apparent, however, that he took the position that ACT should have been his, he could use the investors' money for his personal expenses during the period he was hoping to conclude the acquisition of ACT, and the problems happened because Wylie and Levitee cut Lackan out of the deal to purchase ACT.

3. Source and Use Analysis

(a) Summary

[120] In preparing the Source and Use Analysis, Ruttan used information acquired during the Investigation, including transaction information for the 149 Account and Lackan's two personal bank accounts (the **Lackan Accounts**). Ruttan requested supporting bank records only for amounts of at least $1,000, meaning that some amounts (including amounts earned by and paid to Ostrosky for pharmacy work) would have been omitted or underreported.

[121] Ruttan described three main sources of money into the 149 Account for the Relevant Period: investor deposits of $153,500; loans of $238,000 (with $54,000 in repayments, for a net amount of $184,000); and pharmacy payments of $115,196 for Ostrosky's work (with $89,421 paid out to Ostrosky). Ruttan also noted over $33,000 in miscellaneous deposits.

[122] There were net transfers of $160,486 from the 149 Account to the Lackan Accounts.

[123] There was no satisfactory explanation for the 149 Account being opened on July 6, 2018, when 149 had been struck from the corporate registry on April 2, 2018. We also were not told what account Ostrosky's pharmacy payments were deposited into before the 149 Account was opened.

(b) Structure of Source and Use Analysis

(i) Groups

[124] Ruttan divided the investors into five groups (**Groups A to E**), based on when their money was transferred in and out of the 149 Account. In doing so, she isolated the investors' money from the majority of other transactions in the 149 Account during the Relevant Period.

(ii) Group A

[125] The Group A amounts were from July 6, 2018 (the day the 149 Account was opened with a zero balance) to September 12, 2018 (a balance of $2,268). Between July 12 and 31, 2018, there were deposits from investors GR, SV, PV, and MA, totalling $100,000. There was also a July 20, 2018 pharmacy payment deposit for Ostrosky of $2,693, as well as miscellaneous deposits during the period of $3,715.

[126] Payments out of the 149 Account during this period were:

- $45,000 to Dentons Canada LLP (**Dentons**) ($15,000 on July 12, 2018 and $30,000 on August 2, 2018);

- $12,340 to Ostrosky;

- $30,592 to the Lackan Accounts (of that, the evidence was clear that $6,000 on August 21, 2018 and $5,970 on September 4, 2018 were used for payments to Dentons, although their purpose was unknown); and

- $16,208 in miscellaneous withdrawals.

[127] Of the $16,208 in miscellaneous withdrawals, Ruttan identified:

- $6,661 in payments to "Enmax, Telus, Shaw Cable and Direct Energy"; and

- $2,226 in payments to "Costco, Lone Star Mercedes-Benz, Nuaid Pharmacy, Moxie's, Tropical Corner restaurant, and Calgary Co-op Gas".

(iii) Group B

[128] The Group B amounts were from September 28, 2018 (a balance of $84) to November 30, 2018 (an overdraft balance of $41). The only deposits were amounts from investors (between September 28 and November 1, 2018) – a total of $35,000 from SV, PV, and two others who did not testify.

[129] Payments out of the 149 Account during this period were:

- $5,978 to Dentons on October 1, 2018;

- $4,400 to Ostrosky;

- $16,980 to the Lackan Accounts (of that, the evidence was clear that $6,000 on November 1, 2018 was used for a $5,970 payment the same day to Dentons, although its purpose was unknown); and

- $7,768 in miscellaneous withdrawals.

[130] Of the $7,768 in miscellaneous withdrawals, Ruttan identified $1,742 in payments to "Costco, Lone Star Mercedes-Benz, Second Specs, Blairs No Frill, Calgary Co-op, and Real Cdn Superstore".

(iv) Group C

[131] The Group C amounts were from February 15, 2019 (a balance of $7) to February 28, 2019 (a balance of $909). The only deposit was from investor MR on February 15, 2019 for $6,000.

[132] Payments out of the 149 Account during this period were:

- $3,000 to the Lackan Accounts on the same day as the deposit from MR; and
- $2,098 in miscellaneous withdrawals (including $300 to "Enmax" and $342 to "Blairs No Frill and Best Buy").

(v) Group D

[133] The Group D amounts were from January 6, 2020 (a balance of $1,002) to January 9, 2020 (a balance of $589). The only deposit was $7,500 from investor GR on January 6, 2020.

[134] Payments out of the 149 Account during this period were:

- $5,000 to MA (apparently a loan repayment) on the same day as the deposit from GR;
- $2,500 to the Lackan Accounts on the same day as the deposit from GR; and
- $413 in miscellaneous withdrawals.

(vi) Group E

[135] The Group E amounts were from September 25, 2020 (a balance of $176) to October 1, 2020 (a balance of $187). The only deposit was $5,000 from investor RS (mistakenly identified by Staff as being from AS) on September 25, 2020.

[136] Payments out of the 149 Account during this period were:

- $3,000 to Osuji, identified by Ruttan as being for legal and professional fees (on September 28, 2020); and
- $1, 990 in miscellaneous withdrawals.

(c) Specific Payments from 149 Account

(i) Transfers to Lackan Accounts

[137] Of the $153,500 Lackan raised from investors, he transferred a total of $53,072 to the Lackan Accounts (as set out above). He acknowledged in the Lackan Transcripts that he paid personal bills from the Lackan Accounts (and also paid some personal bills directly from the 149 Account, which is relevant to the discussion later in this decision). We find that none of the $53,072 was used as the investors were told it would be used. Instead, Lackan used that for his own purposes, unconnected to his acquisition of ACT which was never agreed to and never happened. Even if Lackan had at some point acquired ACT, we still would have found this $53,072 to be misappropriated because he did not tell the investors he would be using it for his own purposes.

(ii) Payments to Law Firms

(A) Dentons

[138] Ruttan noted payments to Dentons between July 2018 and October 2020 of $166,172: $98,732 from the 149 Account (in eight payments); and $67,440 from the Lackan Accounts (in seven payments). Of that amount, $68,918 was at issue here: $50,978 paid to Dentons directly

from the 149 Account; and $17,940 paid to Dentons from the Lackan Accounts (immediately following investors' deposits into and subsequent transfers from the 149 Account, as set out above).

[139] The Lackan Transcripts showed Lackan being asked about approximately $93,000 paid from the 149 Account to Dentons. He responded that about half related to acquiring ACT, with the other half for personal use and relating to another company. However, he also said he was not confident about those proportions and would need to review his notes to be sure. Ruttan testified that Lackan never provided any further details. She noted that Dentons had acted as counsel to the Bank of Montreal in connection with the receivership proceedings for 150, Lackan Consulting, and PMBRK. This was confirmed by the 2017 Receivership Order. There was no specific evidence connecting the payments made to Dentons from the 149 Account (or the Lackan Accounts) with the receivership proceedings. We are satisfied that Lackan did not retain Dentons in connection with the purported ACT acquisition and other personal or corporate purposes – that was a fiction. We find it inconceivable that Dentons would act for Lackan while at the same time acting for his creditor, the Bank of Montreal, in the receivership.

[140] The Source and Use Analysis showed that Ruttan presented calculations of the amount allegedly misappropriated based on half, all, or none of the $50,978 paid to Dentons from the 149 Account.

[141] We are satisfied, on a balance of probabilities, that the $50,978 paid to Dentons from the 149 Account using investor funds was wholly unrelated to ACT. Accordingly, we consider that $50,978 to have been misappropriated. (The $17,940 paid to Dentons from the Lackan Accounts is included in the $53,072 we determined to have been misappropriated through transfers to the Lackan Accounts.)

(B) Osuji

[142] Ruttan stated that she did not include the $3,000 paid to Osuji from the 149 Account in her calculation of the amount misappropriated because Lackan was not asked questions about it during the Investigation.

[143] Staff contended that the $3,000 should be considered misappropriated because there was no evidence Osuji did work related to Lackan's purported acquisition of ACT or did work related in any other way to ACT. Staff argued that Lackan likely retained Osuji to defend the collection steps in connection with the receivership proceedings against 150, Lackan Consulting, and PMBRK. We were not directed to any evidence of that.

[144] We are satisfied that $3,000 of investors' money was used to pay Osuji. However, we were provided with no evidence of the purpose of the expenditure and, as mentioned, Lackan was not asked about these funds during his interviews with Staff. Without any evidentiary foundation, we are not prepared to infer that these funds were misappropriated.

(iii) Utilities and Retail Payments

[145] Ruttan classified $6,961 and $4,310 of the payments from investors' money in the 149 Account as utilities and retail, respectively (the utility and retail payees are set out above). However, she excluded those from her estimate of misappropriated funds because she could not be certain that they were not business expenses connected to ACT. While we agree it is possible

for utilities and retail payments to be business expenses in some contexts, we find here that the $6,961 and $4,310 were not used as investors were told their money would be used.

(iv) Loan Repayment to MA

[146] Although loans to Lackan were not generally within the scope of this Hearing, a February 1, 2019 $45,000 loan from MA was relevant. The evidence showed Lackan used most of that money to pay $40,608 he owed to Mercedes-Benz, then later used $5,000 of GR's $7,500 investment on January 6, 2020 as a partial repayment to MA of her loan. We agree with Ruttan's inclusion of the $5,000 in her estimate of misappropriated funds. That use of funds was clearly not disclosed to GR, and we find Lackan misappropriated that amount.

(v) Amounts Paid to Ostrosky

[147] Our assessment of Lackan's use of the investors' money deposited into the 149 Account was complicated by the use of the 149 Account to receive payments for Ostrosky's pharmacy work and to pay amounts to Ostrosky. The absence of specifics for amounts less than $1,000 also added complexity. We were able to discern the following:

- In the Groups A to E transaction periods, showing deposits to the 149 Account at the time investor money was deposited, Ruttan identified a pharmacy deposit on July 20, 2018 of approximately $2,693 (with possible deposits under $1,000 not identified).

- In the Groups A to E transaction periods, showing payments from the 149 Account at the time investor money was paid out, Ruttan identified payments to Ostrosky of $16,740 (with possible payments under $1,000 not identified). Part of the $16,740 was a payment to Ostrosky of $2,500 on July 20, 2018, the same day that the $2,693 deposit was made.

- The Source and Use Analysis covered transactions between May 28, 2018 and December 31, 2020. During that time, pharmacy deposits into the 149 Account totalled $115,196, and payments to Ostrosky totalled $89,421 (with possible deposits and payments under $1,000 not identified). Therefore (excluding amounts under $1,000), Ostrosky received $25,775 less from the 149 Account than his employment deposits contributed to the 149 Account.

[148] Staff argued that Lackan did not explain the purpose of the $16,740 paid to Ostrosky from the 149 Account during the Groups A to E transaction periods and, therefore, that amount should be considered to be misappropriated by Lackan.

[149] There were several problems with Staff's suggested approach. First, there was an explanation in the evidence for the payments from the 149 Account to Ostrosky – that account was clearly used by Ostrosky for his employment deposits and withdrawals. Second, Staff's approach did not account for the July 20, 2018 deposit of $2,693, which was a pharmacy payment to which Ostrosky was entitled. Deducting that amount leaves an excess balance of $14,047 paid to Ostrosky during the Groups A to E transaction periods. Third, Staff's approach did not account for Ruttan's summary that Ostrosky received $25,775 less from the 149 Account than the pharmacy deposits paid into the 149 Account.

[150] Ruttan and Staff presented the 149 Account transaction information using the specific tranches of the Groups A to E transaction periods. That was a useful and appropriate method in the circumstances. However, that did not account for timing differences between amounts deposited by Ostrosky during the Relevant Period and the excess $14,047 paid to him during the Groups A to E transaction periods. There was a reason for the payments to Ostrosky and those payments during the entirety of the Relevant Period were less than the amounts Ostrosky contributed to the 149 Account. We conclude that the excess amount of $14,047 paid to Ostrosky from the 149 Account during the Groups A to E transaction periods should not be considered as money misappropriated by Lackan.

(vi) Conclusion on Payments from 149 Account

[151] We conclude that Lackan spent $120,321 of the investors' money on goods and services not connected to an investment in or acquisition of ACT and, therefore, not in accordance with how he told investors their money would be used. That amount is comprised of: $53,072 transferred to the Lackan Accounts from the 149 Account; $50,978 paid to Dentons from the 149 Account; $6,961 and $4,310 of utility and retail payments, respectively, from the 149 Account; and $5,000 repaid to MA from the 149 Account.

(d) Deductions from Amount Used from 149 Account

[152] Of the $120,321 we have found was spent for Lackan's own purposes, Staff suggested we deduct $5,136 as adjustments for: miscellaneous deposits ($3,715); net payments to Ostrosky ($193); and balances in the 149 Account before the Groups A to E transaction periods, as well as a small overdraft ($1,228).

[153] The Ostrosky amount has been accounted for in the above analysis. However, we agree that the other two deductions are appropriate, totalling $4,943.

(e) Conclusion on Amount Misappropriated from Investors

[154] Deducting $4,943 from $120,321, we find that $115,378 of the $153,500 raised from investors was spent by Lackan for purposes not disclosed to them at the time they invested. As he admitted in the Lackan Transcripts, he considered the money from investors to be money he could use for his personal expenses while he tried unsuccessfully to purchase ACT from Wylie. Lackan did not tell investors he planned to use their money for himself, and even led some investors to believe that he already owned ACT, he had a position with ACT, they would be receiving ACT Shares, or they would have an interest in 149 as an interim measure before Lackan acquired ACT.

[155] That $115,378 appears to be gone, along with the rest of the investors' $153,500. The investors who testified did not receive their principal back and did not receive any return. They received falsified 149 Share certificates, and they never had any interest in ACT, either before or after it was acquired by Levitee. It was not clear from the evidence if the other investors (RS and the other two who did not testify) received any money back from Lackan (principal or return).

[156] As stated below, there will next be a sanction phase of this Hearing. Should Staff seek any monetary sanctions against Lackan, the parties may choose to tender additional evidence or make additional submissions on the amount of such sanctions, which may differ from the figure we are finding here as being misappropriated.

D. Elements of Fraud Allegation

1. Security

[157] We have found that Lackan told investors they would be acquiring or investing in ACT, and that they would receive ACT Shares. He also gave investors falsified 149 Share certificates. Lackan's activities involved "securities" because they fell under ss. 1(ggg)(i) and (v) of the Act (something which was "commonly known as a security" and was a "share", respectively). Our determination that these were securities is not affected by the fact that Lackan had no authority to sell ACT Shares or 149 Shares, gave investors no subscription agreements or similar documents, and gave investors what we found were falsified 149 Share certificates – the subject matter purportedly being sold does not have to exist to engage securities laws and protections under those laws.

[158] We find that Lackan was engaged in an "act, practice or course of conduct relating to a security" within the meaning of the Act.

2. *Actus Reus*: Prohibited Acts Resulting in Deprivation to Others

[159] The evidence from each investor was clear. It was also remarkably consistent with the other evidence before us, including the evidence of other investors. We have no hesitation concluding that Lackan lied to investors, thus engaging in acts of deceit, falsehood, or other fraudulent conduct, including in the following ways:

- He told investors their money would be used to invest in or acquire ACT, either directly or indirectly through 149, or that the money would be used for ACT expenses, such as hiring pharmacists or expanding clinics – but he used most of their money for personal expenses or expenses unconnected to ACT. Contrary to his claims, he did not tell investors he considered their money to be his salary. He even admitted to Staff investigators that his only source of income at the relevant time was money from investors.

- He told at least some investors that ACT would become a public company, be listed on an exchange, and generate significant returns for them.

- He said he had, or would soon have, a position with ACT – but he did not.

- He gave investors falsified 149 Share certificates as an ostensible first step to getting ACT Shares or to satisfy investors who were getting concerned (or both) – but he prepared those purported 149 Share certificates himself with an invalid authorizing signature and with no authority to issue 149 Shares. Lackan's explanation in the Lackan Transcripts for this was nonsensical.

- When pressed by investors (and by AS, an investor's brother), Lackan avoided them or made non-credible excuses.

[160] We therefore find that Lackan engaged in prohibited acts.

[161] We further conclude that Lackan's prohibited acts caused deprivation to investors. Investors gave Lackan their money to be used for acquiring or investing in ACT. He did not invest that money in ACT but used most of it for his personal expenses, as set out above. He not only put investors' money at risk, but also caused investors to suffer actual losses. The evidence showed Lackan spending the investors' money, with no acquisition of ACT and no prospect of any return or recovery.

3. *Mens Rea*: Knowledge of Prohibited Acts Resulting in Deprivation to Others

[162] Based on all the evidence and the analysis above, we find that Lackan knew he was engaged in the prohibited acts and knew that his prohibited acts could cause deprivation to investors. He knew he was lying to investors when he said and implied that their money would be used to invest in ACT. Lackan also knew that his purported issuance of 149 Share certificates was invalid, and his attempts to blame others were unconvincing and, ultimately, irrelevant.

[163] Lackan knew that he was spending investors' money for his own purposes – even acknowledging to Staff investigators that he was treating investors' money as his salary. It is evident that the money Lackan spent on utilities, for car payments, and at retail stores was not being used to acquire or invest in ACT, was not generating a return, and was not later available to repay investors. We also rejected Lackan's alternate explanation that he was borrowing some of the money and would be paying it back, as none of the credible evidence supported that claim.

[164] The unchallenged evidence that Lackan was avoiding investors and making excuses to them reinforced our conclusion that he was fully aware he had lied to them and spent much of their money on himself, not on a possible acquisition of ACT. Giving investors falsified 149 Share certificates months after they invested further confirmed that he had not intended to, and did not, use investors' money as promised.

[165] Finally, even if Lackan intended to acquire ACT and issue legitimate ACT Shares to investors, that would not have cured his lies and his misuse of investors' money. As is clear in the legal test, intention is irrelevant: Lackan engaged in prohibited acts which had the potential to (and did) cause deprivation to investors; and Lackan had subjective knowledge that he was engaging in those acts and that they could cause deprivation to investors.

E. Determination on Fraud Allegation

[166] We find that Staff proved, on a balance of probabilities, that Lackan, in relation to securities, engaged in prohibited acts which caused deprivation to investors, and had subjective knowledge of the prohibited acts and that the prohibited acts could cause deprivation to investors. He thus perpetrated a fraud on investors, contrary to s. 93(1)(b) of the Act.

VI. CONCLUSION

[167] We find that Lackan breached s. 93(1)(b) of the Act by perpetrating a fraud on investors, as alleged in the NOH. We further find that Lackan misappropriated at least $115,378 in the course of his fraudulent conduct.

[168] This proceeding now moves into a second phase to determine what (if any) orders for sanctions and cost-recovery ought to be made against Lackan.

[169] Staff and Lackan are each directed to inform one another and the Registrar, in writing, not later than noon on Monday, July 8, 2024 of the following:

(i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and

(ii) their expected timing requirements and suggested dates.

[170] After we have received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of the next steps in this proceeding.

June 10, 2024

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter

"original signed by"
James Oosterbaan