

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Zhang, 2024 BCSECCOM 394

Date: 20240910

Meiyun Zhang

Panel

Gordon Johnson
Audrey T. Ho
James Kershaw

Vice Chair
Commissioner
Commissioner

Submissions completed May 10, 2024

Date of findings September 10, 2024

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For the Executive Director

Findings

I. Introduction

- [1] This is the liability portion of a hearing under sections 161 and 162 of the *Securities Act*, 1996, c. 418 (Act).
- [2] In a notice of hearing issued October 14, 2020 (2020 BCSECCOM 407), the executive director alleged, among other things, that:
- a) Between June 23, 2014 and December 31, 2016 (the Relevant Period), Zhang raised \$3,152,110 from three Vancouver and Richmond investors (the Investors) through a fraudulent scheme. She told the Investors their money would go towards various investments that would generate 6-10% monthly returns without risk;
 - b) In fact, Zhang did not spend the Investors' money as promised, and 6-10% monthly returns are not possible without risk;
 - c) Zhang used the Investors' money to, among other things:
 - i. pay returns to investors in Canada and China;
 - ii. repay a personal loan to a Calgary realtor;
 - iii. make retail purchases;
 - iv. pay utility bills;
 - v. pay an immigration lawyer to dispute her removal order by Canada Immigration;
 - vi. make cash withdrawals;
 - vii. spend and gamble at casinos; and

d) By engaging in the described conduct, Zhang contravened section 57(b) of the Act.

- [3] After unsuccessful efforts to conduct this proceeding in the usual manner with an in person hearing held in accordance with BC Policy 15-601 *Hearings*, our procedural rule for hearings, we ordered that this proceeding be conducted in writing and we set out the process for doing so, in *Re Zhang*, 2023 BCSECCOM 315 (the Process Order). The background to why we made that order is set out in our prior decisions, including the adjournment of the hearing reported at 2023 BCSECCOM 192, the extension of the temporary order reported at 2023 BCSECCOM 237, and the reasons for the extension of the temporary order reported at 2023 BCSECCOM 304.
- [4] In accordance with the Process Order, the executive director presented his evidence through the affidavits of five witnesses. Two of those witnesses, a senior forensic accountant (Forensic Accountant) and an investigator (Investigator), are members of Commission staff. The other three witnesses are the three Investors, identified here by the initials LD, TW and JL. The executive director also submitted some of the records gathered during the course of his investigation, identified as reliance documents. These records were provided to Zhang as part of the executive director's larger disclosure obligation, and the list of those sought to be relied on was also provided to Zhang. The executive director sought to rely on them in this proceeding and we subsequently admitted them into evidence.
- [5] Zhang has not participated in this proceeding since our order issued on April 25, 2023. Under the Process Order, she was given the opportunity to challenge the evidence presented by the executive director and to present her own evidence. She did not do so.

II. Factual Background

- [6] In proceedings of this nature, it is common to provide a factual background which consists of largely undisputed facts, commonly followed by an analysis of disputed facts and an analysis and conclusions about what facts have been established in accordance with the appropriate standard of proof.
- [7] In this proceeding, none of the factual evidence presented by the executive director is disputed. For reasons of efficiency, we have summarized the most material evidence as factual conclusions. Before doing so, we have carefully considered the evidence submitted to us and concluded that it is reliable, persuasive and meets the appropriate standard of proof. We explain our conclusion about the reliability of the evidence in the course of our analysis, below.

A. Zhang

- [8] Zhang was born in 1958. She held a British Columbia driver's licence and listed Calgary mailing addresses during the Relevant Period.
- [9] Her occupation was listed as caregiver on some bank forms, and homemaker, business owner, sales manager and investor on other forms.
- [10] As outlined in paragraph 3, above, Zhang is currently subject to a temporary order that we had issued as a result of the delays in holding the liability hearing and in recognition of the seriousness of the allegations against her.

B. Evidence of Commission Investigator

[11] The Investigator provided a detailed affidavit regarding the steps taken in his investigation into Zhang and her purported business, the people interviewed, and the documents reviewed.

[12] The Investigator confirmed that each of the Investors was interviewed under oath in the course of the investigation. The evidence given by the Investors during their multiple interviews was materially consistent with the evidence the Investors provided in the affidavits which were introduced into evidence at the hearing.

[13] In essence, the Investors told Commission investigators the following:

a) Zhang said the Investors' money would be either:

- i. lent to Chinese students coming to Canada;
- ii. used to exchange money for tourists and Chinese students visiting Canada; or
- iii. lent to Chinese students to assist with getting a student visa or a visa renewal, (Zhang's Representations),

and that, in return for their investments, Zhang guaranteed various rates of return between 6% and 10% monthly, without any risk (the Investment Scheme);

b) Zhang instructed them on where and how to pay for their investments. This involved the Investors making payments to Zhang and to entities and persons they did not know;

c) There were no written agreements between Zhang and the Investors, nor were there any written documents outlining the terms of the Investment Scheme. The Investors relied on Zhang's verbal representations and entered into verbal agreements with Zhang; and

d) The Investors did not have to do anything except advance funds in order to receive returns on their investments.

[14] The Investigator also described efforts to track what happened to funds obtained by Zhang from the Investors. The Investigator interviewed specific individuals who received funds sent to them by the Investors on Zhang's instructions. Among the people interviewed were the operators of a money exchange business that received almost half of the Investors' funds. That money exchange business operated as an Alternate Remittance Service Provider, or ARSP. An ARSP is an informal network of businesses that operates outside the traditional banking system and allows for the transfer of money, often across international borders, without the use of traditional banking channels. The owner told the Investigator that he or related parties received funds from Zhang and sent funds to various accounts in Canada and China on Zhang's instructions. He did not know the account holders.

[15] The Investigator is not aware of any student, tourist or school that has received funds according to Zhang's Representations.

C. Accounting and banking records and analysis/evidence of Forensic Accountant

- [16] The Forensic Accountant provided extensive affidavits explaining the steps she took and the materials she analyzed in order to determine how much money was paid by the Investors to Zhang, what happened to those funds, and how much was paid back to the Investors.
- [17] The Forensic Accountant interviewed each of the Investors and questioned them about the transactions recorded in their banking documents, additional payments made by the Investors, and repayments received by the Investors.
- [18] The Forensic Accountant organized the key information obtained from interviews and source documentation into 29 schedules. The schedules are connected by footnotes and by explanations in the Forensic Accountant's affidavits to the source documents.
- [19] At this phase of the proceeding, the key evidence of the Forensic Accountant is as follows:
- a) Payment and repayments of Investors' funds
 - i. DL invested \$1,745,414 with Zhang and received back \$757,735;
 - ii. TW invested \$227,700 with Zhang and received back \$96,550; and
 - iii. JL invested \$1,178,996 with Zhang and received back \$601,962;
 - b) Use of Investors' funds
 - i. The Forensic Accountant identified two limitations in the tracing she conducted. First, she had incomplete information about how all the Investors' funds received by the ARSP was spent due to poor record keeping by the ARSP. Second, the tracing was limited to Canada because the Commission has no authority to obtain bank records from China; and
 - ii. Subject to those limitations, the Forensic Accountant's evidence is that none of the Investors' funds (save for \$898,810 paid to the ARSP and sent to unknown recipients such that the use was unknown) were used for purposes related to Zhang's Representations. None of the repayments to Investors (save for \$178,255 which came from unknown sources) came from groups or entities referred to in Zhang's Representations.

D. Evidence of LD

- [20] LD was born in China in 1966. She immigrated to Canada with her daughter in 2005. As of the date of her November, 2023 affidavit, she held two jobs, one as a cleaner at Vancouver International Airport and the other translating for a translation and interpretation agency.
- [21] LD was introduced to Zhang in June of 2014 through a mutual friend. Zhang treated LD and her friend to what LD described as an expensive dinner.
- [22] Zhang told LD that she was in the business of lending money to Chinese students who needed to demonstrate to Canadian immigration authorities that they had sufficient funds to remain in Canada to study. Zhang told LD that this was a legitimate business and Zhang suggested that she had connections at the local school board.

[23] Zhang provided to LD the following details about her business:

- a) Some of the Canadian dollars invested went to a school in Calgary which loaned the money to students. The students put the money into their bank accounts to show Immigration Canada that they had sufficient funds to live and study in Canada;
- b) Some of the Canadian dollars invested went to students who need money to renew their Canadian student visas;
- c) The RMB (Chinese yuan) invested would go to students in China who needed more in their accounts in order to get visas to study in Canada;
- d) The school relied on Zhang's investors;
- e) LD would receive 10% return each month on her investment;
- f) The 10% return comes from the student. It is a high return because the student is anxious to get their visa; and
- g) With later investments, Zhang promised LD up to 40% returns on her investments.

[24] LD was initially hesitant to invest but Zhang was persistent and pressured LD, calling LD daily. LD trusted Zhang because LD's friend trusted her.

[25] LD's first investment was \$90,000. Zhang repaid \$50,000 within a few days. LD then continued to make investments as directed by Zhang.

[26] LD eventually made 102 investments totaling \$1,745,414 with Zhang. LD used funds from various sources, including a line of credit and short-term, high-interest loans which LD borrowed using several properties as collateral.

[27] As directed by Zhang, LD opened multiple bank accounts to make her investments, and deposited her funds into bank accounts of people whom she did not know.

[28] At one point, Zhang asked LD to obtain a loan from a specific bank. When the bank refused to lend LD more than \$60,000, Zhang referred LD to a company outside of the usual banks. LD borrowed \$220,000 from that company through a high interest rate loan using a property as collateral. LD invested the \$220,000 with Zhang. Zhang had assured LD that Zhang would repay those funds quickly, but that did not happen.

[29] During the Relevant Period, LD received payments of \$757,735 from Zhang. Those payments came from Zhang, Zhang's husband and other people not known to LD.

[30] There was no written agreement documenting LD's investments. LD provided her notes, bank and credit card records to the Forensic Accountant. Those notes and records were used to confirm the investments made by LD with Zhang, the amounts repaid and the amounts lost.

[31] LD described her mental and physical suffering caused by the loss of her investments. She also described various other consequences from her dealings with Zhang. Those consequences

included the loss of a friendship with a friend she had introduced to Zhang and Zhang's Investment Scheme, the loss of all her properties which were either used to secure loans taken out to invest with Zhang or were ordered by a court to be sold to repay the friend she had referred to Zhang.

E. Evidence of TW

- [32] TW was born in China in 1943. He immigrated to Canada with his family in August of 1987. At all times relevant to his dealings with Zhang, and since, he has worked as a tailor.
- [33] TW first met Zhang in around 2014 when Zhang became a customer at his store.
- [34] In April of 2015, Zhang asked TW to lend her money which Zhang said would be used for tourists, students and children who were coming to Canada and needed Canadian dollars. Zhang explained that she would give them Canadian dollars in exchange for US dollars or RMB, earning a profit which funded the returns being paid to TW.
- [35] TW's first loan to Zhang was made in April of 2015 and was for \$20,000. TW felt he could trust Zhang because they had spent a lot of time together and they were friends.
- [36] Further loans followed at Zhang's request. After the first two loans, Zhang told TW that she would pay him between 8 and 10% interest on his loans.
- [37] TW used funds from his bank accounts, term deposits and credit cards to pay for his investments. Zhang gave instructions to TW on how and where to send his money. Sometimes, Zhang accompanied TW to the bank where TW made a deposit to a bank account that Zhang designated. TW also obtained bank drafts in names given by Zhang and gave the bank drafts to Zhang. At other times, TW gave cash to Zhang or transferred money directly to Zhang through TW's bank. TW did not know the people to whom he sent money.
- [38] There was no written agreement documenting TW's loans. Zhang provided TW with handwritten notes which confirmed some details of the loans made by TW.
- [39] TW made 34 loans to Zhang totaling \$227,700. Some cheques provided by Zhang to TW to repay loans bounced, but Zhang repaid a total of \$96,550 to TW. The balance was not recovered.
- [40] TW provided evidence of the consequences he suffered as a result of dealing with Zhang.
- [41] The flow of funds between Zhang and TW was captured in schedules prepared by the Forensic Accountant. Those schedules were reviewed by TW before TW swore his affidavit.

F. Evidence of JL

- [42] JL was born in China in 1965. JL was a businessperson in the hospital industry in China. JL has continued some business activities in China, but she immigrated to Canada with her family in 2007.
- [43] JL was introduced to Zhang by a mutual friend, DL, in May or June of 2015. JL understood from DL that Zhang was in the business of assisting Chinese students to obtain Canadian visas. Zhang confirmed that to JL and explained that Zhang provided Chinese students with money so

those students could show Immigration Canada that they had sufficient funds to pay for expenses while living in Canada. Zhang told JL that Zhang's business was stable and Zhang had no difficulty paying interest to DL.

- [44] Zhang told JL that six or seven other people were getting involved in her business.
- [45] Zhang asked JL about JL's financial circumstances, and Zhang became aware that JL had funds to invest. For a period of time, Zhang pressed JL repeatedly to invest through Zhang, but JL was initially not interested. Zhang continued her efforts to convince JL to invest. She told JL that there was no risk in investing in Zhang's business, and that JL would receive a high return, with the principal and return guaranteed.
- [46] In August of 2015, Zhang contacted JL and asked for money for the business. JL did not want to invest, and so she gave Zhang an interest free loan of \$10,000 with a one month term. After the loan was made, Zhang contacted JL on a daily basis, and at the end of the month Zhang provided JL with a return on the loan.
- [47] Zhang emphasized to JL that the funds invested would be used to help students. JL felt that Zhang was calling on her sympathy as a mother after JL had made it clear she was not motivated to invest her money in order to earn interest. Eventually JL was persuaded to invest. She made 34 investments for a total of \$1,178,996.
- [48] The loans by JL were initially made on the basis that Zhang would pay her 6% interest, but during the course of the relationship, the agreed interest rate was increased to 8%. Zhang also provided JL with occasional gifts and bonus payments.
- [49] According to JL, her investments were made in the following ways:
- a) Zhang sent her text messages about the investments. Those messages typically contained a bank account number and instructions to deposit a sum of money to that account. Upon arriving at the bank branch, JL would show the bank teller Zhang's text message so the teller could complete the transfer;
 - b) On Zhang's instructions, JL transferred or deposited money to unknown third party's bank accounts in Canada and China;
 - c) Zhang would sometimes accompany JL to the bank, when, on her instructions, JL obtained bank drafts in the names of people she did not know. Every time Zhang accompanied JL to the bank, Zhang would cover her face with a scarf and sunglasses; and
 - d) As instructed by Zhang, JL made cash deposits to people that she did not know.
- [50] During one of JL's trips to the bank to make an investment on Zhang's instructions, the bank teller asked JL if she knew the person to whom she was transferring the money and whether JL was certain she wanted to transfer the money. JL told Zhang about this conversation. Zhang told JL that the bank wanted to keep her money and was troublesome and to switch to another bank.

- [51] JL trusted Zhang because they met on what JL said was an almost daily basis and they got to know each other. JL also trusted Zhang because her friend, DL, trusted Zhang.
- [52] JL did not enter into written agreements documenting the loans, although Zhang provided JL with a booklet to record their transactions. JL did keep some records of her own.
- [53] JL provided her relevant banking records to the Forensic Accountant who prepared a schedule of the flow of funds between JL and Zhang. JL reviewed that schedule before swearing her affidavit.
- [54] JL received repayments of \$601,962 from Zhang.
- [55] JL provided evidence of the impacts she suffered as a result of her dealings with Zhang.

III. Position of the Executive Director

- [56] The executive director submits that the totality of the evidence proves the allegations set out in the notice of hearing. Between June 23, 2014 and December 31, 2016:
- a) Zhang raised \$3,152,110 from the three Investors through a fraudulent scheme;
 - b) As part of the fraudulent scheme Zhang told the Investors that their investment funds would be part of a business she operated:
 - i. exchanging USD and RMB to Canadian dollars for Chinese students and tourists visiting Canada, making returns on the difference in the exchange which she used to pay returns to the Investors,
 - ii. helping students immigrate to Canada to study, with investor returns paid by the student or the school, and
 - iii. providing loans to students from China to obtain Canadian visas, with the student paying the investor returns.
- [57] The executive director submits that the verbal agreements made between Zhang and the Investors constitute oral investment contracts and as such they were securities under the Act, as these agreements included terms on the use of the funds invested, amount that would be invested, amount of interest each Investor would receive, and the duration of the investment.
- [58] The executive director submits that a review of all the evidence before the panel demonstrates significant consistency about the nature of the investments. This evidence includes the testimony of the Investors, corroborated by bank deposits, bank records, text messages, Investor notes and the similar correspondence that Zhang sent to the Investors. Further, Zhang described the investment to the Investors in a similar manner, including that:
- a) the investment was risk free;
 - b) funds would be loaned to non-Canadians;
 - c) they were not required to do anything to generate the high returns; and

- d) they were required to deposit or transfer their investment funds to other accounts, including accounts belonging to Zhang's husband, ARSP accounts, and others.

[59] Given the foregoing, the executive director also submits that the nature of the investments fall within the definition of "evidence of indebtedness" and as such they were securities under the Act, as outlined in *Re FS Financial Strategies*, 2017 BCSECCOM 238, because:

- a) Zhang's purpose was to use Investors' funds as part of the Investment Scheme;
- b) Zhang solicited the Investors in person;
- c) the public would expect that investment agreements in this matter would be securities; and
- d) there is no other regulatory regime that would lessen the risk of these investments.

[60] The executive director submits that Zhang breached section 57(b) of the Act, as it then was, when:

- a) she used investor funds contrary to the purposes for which those funds were raised. Instead, Zhang used investor funds to pay returns to the Investors, repay personal loans, make retail purchases, pay lawyers, and spend at casinos; and
- b) she knew that it was impossible to provide the promised returns on the investments without risk.

[61] The executive director outlines Zhang's deceitful acts, in particular pointing to the diversion of funds received from the Investors to a number of expenses and payments unrelated to the purported businesses that Zhang had described as a basis for the Investment Scheme. Zhang never disclosed to the Investors that their investment funds would be used for these unrelated expenses and payments. Further, the executive director submits that the Investor funds were not secure, and that the returns the Investors received did not come from the underlying business, but came from their own funds or those of other investors. Commission staff was unable to find any evidence that Zhang was operating businesses consistent with what had been described to the Investors. The only bank accounts Zhang and her husband maintained were personal ones, and there was no evidence of loans to students or tourists, or operating any type of foreign exchange or student visa business.

[62] The executive director invites the panel to find that the Investment Scheme had elements of a Ponzi scheme as well as an affinity fraud. A Ponzi scheme is an inherently fraudulent investment scheme where new investor money is used to make payments to earlier investors, to give the illusion of legitimacy. Affinity fraud is a type of fraud that targets a particular section of the population, exploiting trust and friendship within a group that have things in common.

[63] The resulting deprivation caused by the investment scheme is the cumulative loss of \$1,695,863 by the Investors.

[64] The executive director submits that Zhang had knowledge of both the deceitful acts as well as the subsequent deprivation, as it was Zhang who made the representations to the Investors about what their investments would be used for, and subsequently diverted those funds for

unrelated, personal uses. Further, Zhang knew or ought to have known that these actions would result in the Investors being deprived of their investment funds, or at a minimum their investments would be put at risk by being diverted.

IV. Applicable Law

A. Standard of proof

- [65] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLii), the Supreme Court of Canada held, at paragraph 49:

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

- [66] The Court also held at paragraph 46 that the “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”.

B. Relevant provisions of the Act and caselaw

Definition of security

- [67] Section 1(1) of the Act defines “security” to include:

(d) ...other evidence of indebtedness...

(l) an investment contract.

- [68] When interpreting the definition of security under the Act, the executive director directs us to the oft cited line of cases in *Pacific Coast Coin Exchange of Canada Ltd. V. Ontario (Securities Commission)*, 1977 CanLII 37 (SCC), [1978] 2 S.C.R. 112, where de Grandpré J. for the majority cited with approval *Tcherepnin v. Knight* [389 U.S. 332 (1967)], at p. 336:

...in searching for the meaning and scope of the word ‘security’ in the Act, form should be disregarded for substance and the emphasis should be on economic reality.

- [69] The majority in *Pacific Coast Coin* holds that the Act is remedial in nature and must be construed broadly and in the context of the economic realities to which it is addressed.
- [70] When considering whether a loan agreement falls within the “evidence of indebtedness” definition of a security, the executive director directs us to the decision *FS Financial Strategies*. In that decision, the panel states that not all debtor/creditor arrangements give rise to “securities” under the Act, as loan agreements can arise in a wide spectrum of transactions – some of which are likely to fall within the scope of the Act (where a loan is principally an investment), while others likely do not (where a loan serves a specific commercial purpose).
- [71] The panel in *FS Financial Strategies* refers at paragraphs 31-32 to factors cited by the BC Court of Appeal in *British Columbia (Securities Commission) v. Gill*, 2003 BCCA 169, where the panel in the underlying matter considered whether a loan agreement was a security under the Act. *Gill* in turn cites the US Supreme Court decision *Reves v. Ernst & Young*, 49 US 56 (1990), applying a purposive approach to the definition of “security”, and listed relevant factors to consider when making a determination if an instrument is a security under the Act. These factors include:

- a) the motivation that would prompt a reasonable seller and buyer to enter the transaction: if the seller's purpose is to raise money for general business purposes and the buyer's purpose is to profit from the returns the instrument is expected to generate, the instrument is likely a security;
- b) the intended distribution of the instrument: if it is one in which there will be "common trading for speculation or investment" it is likely a security;
- c) the reasonable expectations of the investing public: the more the public expects that an instrument will be a security and thereby regulated by the securities laws, the more likely it is a security; and
- d) the existence of another regulatory regime: if there is no other regulatory regime that significantly reduces the risk of the instrument, thereby rendering securities regulation necessary, the more likely it is a security.

[72] The term "investment contract" is not defined in the Act. Rather, the definition of "investment contract" that falls within the scope of a security under the Act has developed to be "an investment of money in a common enterprise with the profits to come from the efforts of others" (see *Re Nickford*, 2017 BCSECCOM 272 at para. 68).

[73] In *Pacific Coast Coin*, the "common enterprise" was described as follows (at p. 129):

... the investor's role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words the "commonality" necessary for an investment contract is that between the investor and the promoter.

[74] Similarly, in *Re Braun*, 2018 BCSECCOM 332 at para. 91, the Commission addressed both the "common enterprise" and "efforts of others" aspects of the investment contract definition as follows:

All of that suggests that the "significant efforts of others" aspect of the test must focus on how material the decisions and efforts of others are to failure or success and not on the quantum or length of those efforts. Further, that the "common enterprise" aspect of the test must focus on how interwoven and dependent the investor's returns are on the success or failure of the efforts of a third party. We do not see a requirement that there must be a long-term relationship between the investor and the third party to meet the "common enterprise" aspect of the test.

[75] The executive director relies on four previous Commission decisions in support of the proposition that a verbal agreement can constitute a security under the Act, including: *Re Nickford*, *supra*, *Re Oei*, 2017 BCSECCOM 365, *Re Bezzaz Holdings*, 2019 BCSECCOM 415 and *Re Bridges*, 2023 BCSECCOM 548.

[76] Consistent in those previous decisions is an analysis by the panel of the interactions between the investor and the persons raising funds and evidence of what the investor was told, and a review of what other evidence exists that can establish a relationship demonstrating an investment of money in a common enterprise, or indebtedness, that satisfies the requirements of the Act. That analysis has included reviewing bank deposits and other bank transactions, witness testimony and records of conversations between the parties.

Fraud

[77] Section 57(b) of the Act stated during the Relevant Period:

A person must not, directly or indirectly, engage in or participate in conduct relating to securities....if the person knows, or reasonably should know, that the conduct

...

(b) perpetrates a fraud on any person.

[78] The test for fraud under the Act has been consistently applied for many years. It comes from *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, where the British Columbia Court of Appeal cites at paragraph 27 the elements of fraud from *R. v. Théroux*, [1993] 2 SCR 5:

...the *actus reus* of the offence of fraud will be established by proof of:

1. The prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. Deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interest at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. Subjective knowledge of the prohibited act; and
2. Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[79] Guidance for the analysis to be applied in considering "other fraudulent means," as outlined above in the *actus reus* component of fraud, comes from the Supreme Court of Canada in *Théroux*, and *R. v. Zlatic*, 1993 CanLII 135 (SCC), [1993] 2 SCR 29.

[80] These two cases demonstrate that "other fraudulent means" encompasses all means, other than deceit or falsehood, which can properly be characterized as dishonest, and is "determined objectively, by reference to what a reasonable person would consider to be a dishonest act".

[81] The frequently cited passage from *Zlatic* about the determination of dishonesty is as follows (at page 45):

Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs. J. D. Ewart, in his *Criminal Fraud* (1996), defines dishonest conduct as that "which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings".

[82] *Théroux* provides further context for the consideration of "other fraudulent means," by reviewing what other courts have included within the meaning that phrase (at p.16), including 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”. The Court in *Zlatic* further states (at p. 46) that when considering unauthorized diversion of funds, an important consideration will be whether the diversion “could reasonably be thought to serve personal rather than *bona fides* business ends”.

V. Analysis and Findings

[83] The onus is on the executive director to establish the following elements:

- a) that the evidence contained in the affidavits presented to us is reliable and convincing in accordance with the standard set out in *McDougall*;
- b) that Zhang's conduct related to securities;
- c) that Zhang committed the *actus reus* of fraud by inducing the Investors to put their funds at risk by investing those funds for use consistent with Zhang's Representations while Zhang was using the funds invested for other purposes; and
- d) that Zhang had subjective knowledge she was using the invested funds for purposes inconsistent with Zhang's Representations and that by doing so she was creating a risk that the Investors would suffer an economic loss.

A. Is the evidence before us reliable?

[84] We conclude that the affidavit evidence presented to us is reliable and convincing in accordance with the required standard of proof. There are several reasons why we have reached that conclusion.

- a) First, the documentary record establishes the time line of the investments made by the Investors and that timeline closely matches the evidence of the Investors. According to the evidence presented to us, Zhang initially tried to entice the Investors, then after the initial investments made resulted in the payment of some degree of return, the number of investments made grew as trust grew, and finally investments stopped as trust eroded. The flow of funds matches the testimony of the Investors.
- b) Second, the descriptions provided by the Investors of their initial reluctance to invest and place their funds at risk, and of Zhang's slightly customized descriptions of how the funds would be used, demonstrates to us that the Investors each made their investments based on their own distinct conversations with Zhang. Zhang did not provide submissions challenging the evidence of the Investors.
- c) We closely scrutinized the evidence of the Investors for any signs that they tailored their evidence through consultation with each other, and found no reasonable basis to have such a concern. In fact we note that there are differences between the evidence of each Investor which makes the totality of their evidence more convincing. For example, LD appears to have been mostly motivated by the potential to earn a return and Zhang mentioned returns of 10% to LD. In contrast, JL emphasized that when she told Zhang she was not interested in earning interest by lending money, Zhang's approach shifted to emphasize how invested funds could help young people who were new to Canada.
- d) Third, although we are aware that there are some differences between the evidence of the Investors, their stories are highly similar overall and each one reinforces the other.

- e) Fourth, although most of the communications between the Investors and Zhang were verbal, there were some documents, in the form of informal agreements, handwritten notes and emails recording events, which provide indications of the nature of the relationships between Zhang and the Investors. There is nothing in those written communications which is inconsistent with the narratives provided by the Investors.
- f) In summary, we have before us clear, uncontested, sworn evidence from witnesses. That evidence is internally consistent and it accords with the contemporaneous banking records and the contemporaneous written communications with Zhang. We accept that evidence.

B. Were the funds invested in relation to securities?

[85] We conclude that the funds invested by the Investors were investments in relation to securities.

[86] As explained below, we find that the agreements between Zhang and the Investors were both investment contracts and evidence of indebtedness. As a result, they were “securities” as defined by the Act.

[87] As is indicated in our summary of the case law above, our focus should be on the substance and not on the form of a particular arrangement. The invested funds in this case were characterized as loans made to Zhang for the agreed rates of return. The Investors looked to Zhang for repayment. These loans satisfy the test for “evidence of indebtedness” outlined in *FS Financial Securities*. The purpose of the loans was to fund Zhang’s business and the Investors’ purpose was to profit from the returns promised by Zhang. In substance, the Investors placed their funds in a business which Zhang was to operate. The Investors were wholly dependent and reliant on Zhang’s managerial skills and her honesty. The public would expect interest-bearing loans like the ones here to be securities. There is no other regulatory regime that would lessen the risks of these investments.

[88] In addition, the arrangement between Zhang and the Investors included an investment of money, where the “common enterprise” and “efforts of others” elements which are at the core of the traditional definition of investment contracts are discussed above. The common enterprise was the business that Zhang described to Investors, and the profits were to come entirely from the efforts of Zhang. As a result, these investments were also investment contracts as defined by *Pacific Coast Coin*.

C. Did Zhang commit the *actus reus* of fraud?

[89] The evidence is unequivocal that Zhang induced the Investors to advance funds based on Zhang’s Representations about how the funds would be used. The evidence is also unequivocal and we find that significant amounts of the funds advanced were used for purposes wholly inconsistent with Zhang’s Representations. The evidence supports the allegations of the executive director that some of the actual uses of the funds were purely personal to Zhang, such as making retail purchases, gambling in casinos and paying utility bills. Other uses of the funds from Investors were still inconsistent with Zhang’s Representations.

[90] We have deferred our analysis of the precise amounts obtained by Zhang pending further argument at the sanctions phase of this proceeding. However, we do conclude that the amounts alleged to have been advanced and recovered by the Investors based on Zhang’s Representations are clearly established by the evidence from the Investors and the Forensic

Accountant. Specifically:

- a) DL invested \$1,745,414 and received back \$757,735;
- b) TW invested \$227,700 and received back \$96,550; and
- c) JI invested \$1,178,996 and received back \$601,962.

D. Did Zhang commit the *mens rea* of fraud?

- [91] When we consider the total amount raised by Zhang from the Investors (over \$3,000,000), the number of transactions involved in Zhang's efforts to raise funds from the Investors (several hundred), the number of months over which funds were solicited from the Investors (approximately 30) and how quickly during that process Zhang began to spend funds raised for unauthorized purposes (almost immediately), and that Zhang was the one who directed the flow of Investors' funds, we conclude that Zhang fully intended to make Zhang's Representations in order to induce the Investors to place the relevant funds into Zhang's control so that Zhang could use the majority of the funds for her own, inconsistent purposes.
- [92] There are additional factors beyond the obvious ones mentioned above which convince us that Zhang's actions were calculated and even predatory. One of these factors is the persistence Zhang demonstrated in convincing the initially reluctant Investors to advance both their initial investments and then to continue investing more. Zhang demonstrated that persistence both with the sheer volume of communications soliciting more funds and also with her decisions to at times pay back some of the funds advanced, presumably to maintain the trust of Investors.
- [93] Another additional factor which convinces us that Zhang's conduct was intentional is the degree to which Zhang varied her "pitch" to the Investors in order to find a message which would work for each of them. Here we repeat our example from above of Zhang at times emphasizing the high return available and at other times Zhang emphasizing the degree to which young students would benefit from funds advanced.
- [94] We conclude that Zhang also had actual knowledge that by deceitfully making the Zhang Representations Zhang was putting invested funds at risk. When funds are received on the basis that they will earn an implausibly high return, as is the case here with the funds obtained from the Investors, and then those funds are diverted to personal expenses and uses which cannot earn the expected return, there can be no doubt that both the invested amounts and the expected contractual return are at risk.

VI. Summary of Conclusions

- [95] In conclusion, we find that during the Relevant Period, Zhang raised \$3,152,110 from the Investors through a fraudulent scheme and that all elements of a breach of section 57(b) of the Act are proven.

VII. Submissions on Sanction

- [96] We direct the executive director and the respondent to make their submissions on sanctions as follows:

By October 4, 2024

The executive director delivers submissions to the respondent and the Commission Hearing Office.

By October 18, 2024

The respondent delivers response submissions to the executive director and the Commission Hearing Office.

Any party seeking an oral hearing on the issue of sanctions so advises the Commission Hearing Office. The hearing officer will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

By October 25, 2024

The executive director delivers reply submissions (if any) to the respondent and to the Commission Hearing Office.

September 10, 2024

For the Commission

Gordon Johnson
Vice Chair

Audrey T. Ho
Commissioner

James Kershaw
Commissioner