CITATION: Ontario Securities Commission v. Katmarian, 2025 ONSC 4356
COURT FILE NO.: CR-24-10000027-00AP
DATE: 20250729

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ONTARIO SECURITIES COMMISSION	)	*Peter Griffin, Jim Cruess, and Sean McCormack,* for the OSC
– and –	)	
STEPHAN KATMARIAN	)	*Brian Greenspan, Michelle Biddulph, and Bryan Friedman,* for Stephan Katmarian
	)	**HEARD:** January 10, 2025

R.F. GOLDSTEIN J.

TABLE OF CONTENTS

I. INTRODUCTION

[1] Thierry Mine was a copper mine in northern Ontario. It last produced copper in 1981. In 2018 the mine was owned by a company called Cadillac Ventures Inc. (“Cadillac”). Cadillac, led by its CEO, Norman Brewster, wanted to re-develop the mine. Stephen Katmarian approached Mr. Brewster about a joint venture. Mr. Katmarian had lengthy experience in mining finance. He had created a company called Northen Fox Resources Inc. (“Northern Fox”) to acquire something called an earn-in option to finance the mine’s development. An earn-in option is a common method to finance mining development. The developer opens and works the mine and shares the earnings with the mine’s owner. Northern Fox and Cadillac signed a deal. Northern Fox was to raise US$13.9 million to develop the mine. When it did so Northern Fox would acquire a 70% interest in the mine from Cadillac.

[2] Mr. Katmarian had trouble raising the funds. He decided to try using cryptocurrency to raise money. He turned to a company called Peblik to develop something called a cryptocurrency token. The idea behind the token was that subscribers would obtain the tokens, which would in turn be secured by an interest in the mine. Mr. Katmarian assigned Northern Fox’s earn-in option agreement with Cadillac to Peblik. The agreement with Cadillac, however, required Northern Fox to obtain Cadillac’s consent to any further assignment. Cadillac did not consent.

[3] Peblik's marketing material and other information contained a misrepresentation that it had an interest in the Thierry Mine. Peblik received around $484,000 in investment notes convertible into Peblik tokens. During the marketing campaign, while Peblik tokens were being promoted, the Ontario Securities Commission ("the Commission") wrote to Peblik asking for information about the amount of money raised, and asking how much of that was raised from Ontario residents. Peblik's counsel replied.

[4] Northern Fox was unable to commence the Thierry Mine project. It was unable to raise sufficient funds.

[5] Mr. Katmarian appeared to be the driving force behind the issuance of the tokens secured to the purported interest in the mine. The Commission charged him with four offences contrary to the *Securities Act* that allegedly took place between January 1, 2018 and August 8, 2019:

- Count 1: Contravening Ontario securities law by engaging in a course of conduct related to securities that he knew or ought to have known perpetrated a fraud on Ontario investors, contrary to s. 126.1 of the *Securities Act*, thus committing an offence contrary to s. 122(1)(c) of the *Securities Act*.
- Count 2: Contravening Ontario securities law by making a statement in material, evidence, or information submitted to the Ontario Securities Commission that was misleading in a material respect, contrary to s. 122(1)(a) of the *Securities Act*.
- Count 3: Contravening Ontario securities law by engaging in or holding himself out as engaging in the business of trading securities while not registered, as required by s. 25(1) of the *Securities Act* thus committing an offence contrary to s. 122(1)(c) of the *Securities Act*.
- Count 4: Contravening Ontario securities law by distributing securities without a prospectus, contrary to s. 122(1)(c) of the *Securities Act*.

[6] The fraud charges alleged that investors were defrauded because Peblik did not, in fact, have an interest in the Thierry mine and the tokens were unsecured. The misrepresentation charges alleged that Mr. Katmarian and others responded falsely to the questions asked by the Commission. The trading securities charge and the distribution without a prospectus charge alleged that Mr. Katmarian, by distributing securities without a prospect, was in the business of trading securities. The Commission also alleged that the Peblik tokens were distributed without a prospectus.

[7] The trial took place over 16 days in 2023. Eleven witnesses testified for the Commission. Mr. Katmarian testified in his own defence. The trial judge, Justice Brown of the Ontario Court of Justice, acquitted Mr. Katmarian of all counts.

[8] The Commission appeals the acquittals on the first three charges. The Commission argues that the trial judge made findings of fact to sufficient to ground convictions. She erred in law by failing to do so. The Commission asks that this Court overturn the acquittals, substitute convictions, and sentence Mr. Katmarian.

[9] On June 20, 2025 I gave oral reasons for judgment with reasons to follow. I found the following:

- Count 1: I agreed with the Commission that the trial judge made all of the necessary findings of fact to support a conviction but made an error of law in entering an acquittal. I set aside the acquittal and entered a conviction. I remanded Mr. Katmarian to be sentenced on this count. This was the only error in the trial judge's lengthy and detailed analysis of the facts and the law.
- Count 2: I agreed with the defence that the Commission's argument based on a material omission must fail. The Commission charged in this count that Mr. Katmarian made a statement that was untrue or misleading in a material respect. The defence defended the count as charged. The trial judge's decision was responsive to the count as charged. The count did not charge Mr. Katmarian with making a misleading statement by omission. There was no need to deal with a due diligence defence and no reversible error. I dismissed the appeal in respect of this count.
- Count 3: The trial judge held that under the business purpose test Peblik – of which Mr. Katmarian was a or the driving force – was not primarily engaged in the business of trading or selling securities. I agreed with the defence that this finding was open to the trial judge on the evidence, and she made no error of law. I dismissed the appeal in respect of this count.

[10] What follows are my reasons for judgment.

II. BACKGROUND

(a) The Earn-In Interest Option Agreement

[11] Thierry Mine had been a very large and productive copper mine in northern Ontario for many years. The mine was shut in 1981. In 2004, a company called Richview Resources acquired the mine. Richview Resources sold the mine to a Cadillac in 2010. Cadillac intended to re-open the mine and start producing copper again. Mining, however, is a very expensive and capital-intensive industry. It takes a lot of money to conduct the work necessary to even determine if the mine was still viable. Cadillac to was unable to raise enough money to re-open the mine.

[12] Norman Brewster was the President and CEO of Cadillac. Stephen Katmarian was founder and president of Northern Fox. Mr. Katmarian was the driving force behind Northern Fox and the plan to re-open the Thierry Mine. Mr. Katmarian approached Mr. Brewster in 2016 about becoming involved in the Thierry Mine. Mr. Katmarian believed that the demand for copper would increase because of the green energy revolution taking place. Copper is an essential component of lithium-ion batteries. Lithium-ion batteries typically power electric vehicles, which were

starting to come on the market in large numbers. That would make the Thierry Mine profitable. Mr. Katmarian submitted a proposal memo to Mr. Brewster on June 12, 2016. Mr. Katmarian proposed to acquire the Thierry Mine Project for C$14 million.

[13] On July 19, 2016, Cadillac signed an Earn-In Interest Option Agreement with Northen Fox ("the Earn-In Agreement"). An earn-in agreement is a common way to develop a mining property. Mr. Brewster signed for Cadillac. Mr. Katmarian signed for Northern Fox.

[14] The key terms of the Earn-In Agreement in this case were as follows:

- Northern Fox would acquire a right to earn a 70% interest in the Thierry Mine;
- Northen Fox would pay or issue a combination of cash, notes, and shares to Cadillac;
- Northern Fox would earn the 70% interest by completing feasibility studies and other work in relation to the Thierry Mine, spending a total of $13.9 million (the currency was not specified but it was assumed to be American);
- Under clause 9.7, Northern Fox could sell, assign, transfer, or otherwise dispose of any or all of its interest in the Thierry Mine with the consent of Cadillac.

[15] Northern Fox would earn its 70% interest when the various tasks set out in the Earn-In Agreement were met. That meant spending almost US$14 million on studies and preparation for the Thierry Mine. The work program had to be carried out within 36 months of the closing date; and the feasibility study had to be completed within 42 months of the closing date.

[16] Northern Fox's first task, therefore, was to raise the money. Mr. Katmarian initially tried to use a traditional investment bank to take Northern Fox public to raise the funds. To do that required a 43-101. A 43-101 refers to a document issued by the Canadian Securities Administrators that sets out standards of disclosure for securities in relation to mining projects. A 43-101 report is required before taking a mining company public. A 43-101 report in relation to the Thierry Mine was prepared at Mr. Katmarian's request, paid for by Mr. Katmarian, and completed in April 2017.

[17] Raising money through a Northern Fox IPO proved unsuccessful. Mr. Katmarian then developed a plan to use cryptocurrency to raise the money. Mr. Katmarian had been thinking about using cryptocurrency as a financing vehicle for some time.

(b) The Creation of Peblik Inc.

[18] Peblik Inc. ("Peblik") was incorporated in 2015 as 2489692 Ontario Inc. with the corporate name Peblik. Mr. Katmarian was a director of Peblik Inc. He had been a director since 2016. According to the Corporation Profile Report as of March 15, 2018 he was the active administrator of Peblik. He and an engineer named Kevin Wright had been working on a blockchain project. Mr. Wright had registered the name "Peblik" and owned the domain name. Mr. Wright became a director as of August 2, 2017. Mr. Wright, Mr. Katmarian, and Christopher Pay founded Peblik.

[19] It is useful at this point to describe blockchain and cryptocurrency. Blockchain is a public electronic ledger held by multiple computers. Blockchain records electronic transactions and distributes the information about those transactions to these multiple computers. Cryptocurrency is not the same thing as blockchain, although the two are inter-related. Cryptocurrency is an electronic currency that can be used as a medium of exchange. Cryptocurrency transactions are recorded on blockchain.

[20] The idea behind Peblik was that it would issue a token in a cryptocurrency backed by a real-world asset, in this case the Thierry Mine. The value of the token would be based on the estimated value of the Thierry Mine as set out in the 43-101. Peblik would utilize the Ethereum blockchain platform.

(c) Mr. Katmarian's Role

[21] Stephen Katmarian was the executive director, chair, and managing director of Peblik. The trial judge described his role in terms of the relationship to the Thierry Mine this way:

> He made an admission, potentially against interest in his testimony, that he made it his business to make sure the description of the Thierry Mine and the company's relationship to that mine be accurately reflected in the marketing materials. He also admitted that he was involved in the original white paper, and as a co-author in the ongoing development of that White Paper. He agreed that Gary Sugar had sent an email regarding a version of the White Paper, inviting Peblik Inc. to make sure the representations in the white paper conformed to the 43-101 report, although the focus seemed to be in relation to the value of the in-ground mineral deposit… He maintained… that the disclosure on the mine, (the 43-101 report) by Northern Fox, the relationship between Northern Fox and Peblik Inc., and between Northern Fox and Cadillac was exhaustively explained in the material.

(d) The Assignment Agreement

[22] On August 1, 2017, Northern Fox signed an Assignment Agreement with Peblik. Pursuant to the Assignment Agreement Peblik would obtain 51% of the Thierry Mine (recall that under the Earn-In Agreement that Northern Fox would obtain a 70% interest in Thierry Mine). Thus, the Assignment Agreement contemplated that Peblik would have a 51% interest in Thierry Mine, Northern Fox would have a 19% interest, and Cadillac would retain its 30% interest. Peblik was required to fund and complete the work program set out in the Earn-In Agreement that Northern Fox was supposed to take on. In exchange, Peblik was to issue 120 million Peblik tokens to Northern Fox. Michael Paul signed for Northern Fox. Mr. Katmarian signed for Peblik.

[23] Cadillac was not a party to the Assignment Agreement. Mr. Brewster testified that he did not consent to the assignment of the Earn-In Agreement by Northern Fox to Peblik. As mentioned, under the terms of the Earn-In Agreement, Cadillac's consent was required to any assignment by Northern Fox.

[24] Mr. Katmarian initially testified that there had been a written consent to the Assignment Agreement, but that he could not find it. He later testified that he believed that there was a written consent between Peblik and Cadillac but could not find that (Mr. Katmarian's interpretation was that no assignment agreement was required by the Earn-In Agreement, an interpretation rejected by the trial judge). Eventually Mr. Katmarian testified that it was possible that there was no agreement, but he could not remember. Ultimately the trial judge found that Mr. Katmarian's evidence on that point was not reliable. She preferred the evidence of Norman Brewster, who testified very clearly that there was no written agreement. The trial judge found that no written agreement existed. The trial judge also specifically found (para. 159) that Mr. Brewster did not know that Northern Fox had assigned the Earn-In Agreement to Peblik. Mr. Brewster was obviously aware that the Peblik token was being used to raise funds to develop the mine. That is not the same thing as knowing about the existence of the Assignment Agreement. The trial judge found that even if Mr. Brewster had known about the Assignment Agreement, that did not constitute consent by Cadillac. She also found that Mr. Katmarian knew that a written agreement was required to assign Northern Fox's interest to Peblik.

[25] At trial, Mr. Katmarian's counsel argued that because Mr. Brewster was well aware that Peblik was raising funds, he was aware of the Assignment Agreement. Mr. Katmarian's counsel further argued that this knowledge was tantamount to consent to the assignment. The trial judge rejected that argument and found that there was no consent.

[26] The trial judge also observed that Cadillac was a publicly traded company. The board of directors of Cadillac would have had to approve the Assignment Agreement. There was no evidence it did so. As a publicly traded company, Cadillac was subject to disclosure requirements under securities laws and regulations. There was never a press release or other disclosure by Cadillac. The trial judge found it notable that there was no public evidence of consent to the Assignment Agreement. The trial judge also observed that subsequent agreements between Northern Fox and Cadillac was consistent with Norman Brewster's evidence that Cadillac had given no consent to an assignment of the Earn-In Option Agreement from Northern Fox to Peblik.

[27] The trial judge found as a fact that a consent from Cadillac was required for the assignment from Northern Fox to Peblik; that Mr. Katmarian knew that consent from Cadillac was required; that Cadillac did not consent; and that Mr. Katmarian knew that Cadillac did not consent.

(e) The Misrepresentation Regarding Ownership Of the Thierry Mine

[28] Peblik commenced its campaign to raise the required funds. The marketing campaign centred around the idea that investors could buy tokens and that the tokens were backed by the real asset of the Thierry Mine. There were different marketing vehicles, including the Peblik website; a PowerPoint "deck"; and the White Paper. There were several versions of each vehicle but they had many features in common.

[29] The trial judge was very critical of the way that the Commission presented its case regarding the website. The website of Peblik was an important part of the prosecution piece, and

yet the prosecution, according to the trial judge, failed to find timely versions of the Peblik website and did not even get around to properly researching the earlier versions of the website until the trial was ongoing.

[30] There were three versions of the Peblik website entered into evidence. As an example, the version dated February 7, 2018 indicated that the Peblik had acquired Thierry Mine. The website made multiple mentions of how the Peblik token was an asset-backed cryptocurrency – the asset being the minerals in the ground. The website stated that the minerals amounted to US$4.8 billion. According to this version of the website, Stephen Katmarian was noted as one of 5 executive directors. The version dated April 8, 2019, stated:

> Peblik's First Asset: The Thierry Mine, a USD $4.8 Billion Mineral Reserve
> Peblik chose Thierry Mine as the first asset to support our token. Thierry is Canada's largest, most advanced, underdeveloped copper deposit.

[31] The website developer put together the website based on information received from Mr. Katmarian and Mr. Wright. Mr. Katmarian and others associated with Peblik reviewed it for accuracy. The trial judge found that Mr. Katmarian's understanding was that the Thierry Mine was the asset.

[32] The Peblik White Paper was available through a link on the website (there was more than one iteration, but I will refer to White Paper v7.2). The White Paper had a hyperlink to the NI 43-101. Stephen Katmarian and Kevin Wright were listed in the White Paper as Executive Directors. The White Paper further stated that:

> Peblik is the world's only open-source, decentralized, digital token that is supported by natural resources that have an intrinsic value. Peblik currently has direct control of an advanced-stage USD $4.8 billion mineral deposit in Canada. The Peblik token is asset-backed with the real asset value of the proven in-ground reserves of this resource.
>
> * * *
>
> Peblik currently has direct control of the Thierry Mine property in Northern Ontario, an advanced-stage USD $4.8 billion mineral deposit in Canada. This value was established according to the conservative Canadian National Instrument NI 43-101 standard…

[33] The assertions in the different versions of the White Paper were untrue. As the trial judge found, Peblik did not have direct control or even any kind of valid interest in the Thierry Mine. The different versions of the Investor Deck contained the same misrepresentation. It indicated that the Peblik token was backed by the Thierry Mine.

[34] The trial judge found that the representations by Peblik about the Thierry Mine were false:

> Any representation by a party that Peblik Inc. had an interest in the Thierry Mine was a misrepresentation of the facts. It would be a deceit or a falsehood. This finding is contrary to the primary submission of the defence, that Peblik Inc. had direct control of the Thierry Mine via an earn-in option.

(f) The Element Of Deprivation

[35] The trial judge found that 32 outsiders invested a total of $448,515.50 in Peblik. The investments were in notes convertible to Peblik tokens.

[36] Seven investors testified: Daniel West, Chris Balsingh, Bridget Flynn, Vasanthaseelan Ratnaananthan, Erin Taylor, and Walter Heidary.

[37] Daniel West believed that the mine would become operational and there would be value in the Peblik tokens. He had earlier invested in Northern Fox. He testified that he relied on the oral representations of Suganthan Krishnarajah to invest in Peblik. He did not meet anyone from Peblik. Although he did see the website and the White Paper, the trial judge found that he did so after he made his investment. The trial judge was unable to find what version of the White Paper or the website he looked at.

[38] I pause to mention another issue, one that came up during Mr. West's evidence. As I have mentioned, the trial judge was very critical of Commission counsel for presenting a version of the Peblik website that may have been in existence after Mr. West made his investment. Indeed, the trial judge was very critical of many aspects of the way that Commission counsel presented the case, including accusations that Commission counsel mis-stated the evidence from time to time during questioning.

[39] I understand the trial judge's frustration, especially with the fact that older versions of the website came late in the day. There were problems with the disclosure and with the way that some of the evidence was presented. With great respect, however, I do not share her criticism of Commission counsel on this point. This was a complicated matter. There was a great deal of documentary and *viva voce* evidence. It was obviously not Commission counsel's fault that there were multiple versions of the website and the White Paper. Moreover, in a complicated case counsel do not always know what even their own witnesses will say. I obviously wasn't there, as the trial judge was, but my review of the transcripts does not suggest an attempt by Commission counsel to mislead the court or the witness on this or any other point. No prosecution is perfect, and a trial judge can always find fault with some aspect of counsel's presentation. Prosecuting counsel are not held to a standard of perfection. Errors do not necessarily amount to an ethical violation. Respectfully, and again acknowledging that the trial judge was there, and I wasn't, I do not think the transcripts bear out the criticism that Commission counsel crossed an ethical line.

[40] Although the trial judge ultimately found that Mr. West looked at the website after the investment, she noted that Mr. West initially testified that he looked at the Peblik website before making the investment, but then later backtracked.

[41] The trial judge found that Chris Balsingh made investments on the basis of recommendations by Wasim Osa. She found that although Mr. Osa was a director of Firm Group. Firm Group was a company that shared two directors with Peblik. The trial judge found that Mr. Osa was not an agent of Peblik. She also found that Mr. Balsingh was provided with a subscription agreement and a partial copy of the White Paper, but that he did not read it. Although she found that Mr. Osa made misrepresentations to Mr. Balsingh, there was no evidence that Mr. Katmarian was involved in Mr. Osa's misrepresentations. Mr. Balsingh did not rely on anything produced, said, or done by Mr. Katmarian. Mr. Katmarian met Mr. Balsingh after the initial investment. Mr. Katmarian provided the White Paper and other Peblik materials. The trial judge found that Mr. Balsingh did not actually read the various documents provided by Mr. Katmarian and that since Mr. Katmarian met Mr. Balsingh in September 2018 after the investment in January 2018 Mr. Katmarian could not have been involved in a deprivation.

[42] Bridget Flynn testified that she did not have a lot of investment knowledge or sophistication when she made her small ($5000) investment in Peblik. She learned about Peblik from Erin Taylor. She understood that Peblik was a crypto currency token backed by natural resources. She stated that she could not recall the website she looked at although she did view it prior to investing. She could not recall whether she was told that Peblik had a reserve asset of up to US$4.8 billion. She did not meet with Stephen Katmarian. The trial judge found that there was no evidence that Ms. Flynn looked at any particular information about the Thierry Mine, other than information that it was backed by a resource asset. Ultimately the trial judge found that the Commission failed to prove that Ms. Flynn "relied upon a deceitful representation or falsehood by Stephen Katmarian related to Peblik's interest in the Thierry Mine… the Commission had failed to prove that Ms. Flynn made the investment based on a deceitful representation that Peblik Inc. had a valid interest in the Thierry Mine…"

[43] Erin Taylor met Mr. Katmarian when she was trying to raise funds for an investment project. She went to work for Peblik in 2017. The trial judge did not find Ms. Taylor to be a credible witness. That, of course, is a finding which is entitled to deference. It is clearly supported by the evidence – Ms. Taylor testified that she did not understand what an earn-in option was, which made no sense considering her position in Peblik. The trial judge rejected her evidence that Mr. Katmarian pressured her to invest in Peblik. She found that Ms. Taylor wanted to believe that Peblik owned the Thierry Mine. The trial judge noted that Ms. Taylor went to the Commission with her lawyer as a whistleblower when the investment collapsed. The trial judge found with regard to Ms. Taylor:

> While the Commission has proven, as the court notes above, that there was a deceitful misrepresentation in the Peblik Inc. White Paper and other materials which Erin Taylor read before making the investment, she did not rely on it. Instead, she wanted to believe that Peblik Inc. owned the Thierry Mine, even though nothing she read said that and nothing said by Stephan Katmarian or anyone else in evidence supported that opinion. She was bound and determined to believe that there was ownership, even though that was not represented to her by Stephan Katmarian or anyone else. Accordingly, there was no deceit or misrepresentation associated with

> her investment in Peblik Inc. as she did not rely on it. She read it, but she did not want to believe it. There was no deprivation arising from the deceit or falsehood representing that Peblik Inc. had an earn-in interest option in the Thierry Mine. She did not rely on those representations,

[44] Walter Heidary was another investor. Dr. Heidary is a dentist. He knew Stephen Katmarian and considered investing in Northern Fox. He reviewed a confidential offering memorandum in relation to a potential IPO by Northern Fox. His understanding was that Northern Fox had a 75% interest in the Thierry Mine. He was not aware of the participation of Cadillac. It appears that the confidential offering memorandum was prepared when Mr. Katmarian was considering taking Northern Fox public in order to raise funds to meet its obligations under the Earn-In Agreement. Dr. Heidary subscribed for CDN$200,000 in shares of Northern Fox in two tranches. The trial judge found that the Commission failed to prove the element of deprivation as Dr. Heidary testified that he did not know if he read the representations in the confidential offering memorandum before or after he made, he invested. It is unclear from the evidence what Dr. Heidary thought he was investing in. He was noted as an investor in Peblik tokens. The trial judge ultimately found that the element of deprivation was missing.

[45] An important finding by the trial judge was that there was no evidence one way or the other that earlier versions of the White Paper or the website contained the misrepresentations about ownership of the Thierry Mine. That was because the Commission was not able to obtain earlier versions of the White Paper or website, at least prior to the trial – it was not because there was evidence that the earlier versions did not contain the misrepresentation. That said, it would have made no sense for the website or other marketing materials to fail to have the misrepresentation about the ownership of the Thierry Mine. That was the whole point of the Peblik token – that it was backed by an actual real-world asset. The trial judge did not draw the inference that the earlier versions contained the misrepresentation. Although I might have drawn a different inference, this was a factual finding that was not challenged on appeal and is entitled to deference.

III. THE STANDARD OF REVIEW FOR PROVINCIAL OFFENCES APPEALS

[46] Trials under provincial offences legislation are held in the Ontario Court of Justice: *Provincial Offences Act*, s. 29(1). The Commission may require that a trial under the *Securities Act* be held before a provincial judge: s. 122(8). The prosecutor may appeal from the dismissal of charges to the Superior Court where the trial has been held before a provincial judge: *Provincial Offences Act*, s. 116(1)(b), s. 116(2)(b).

[47] An appellate court has broad powers under the *Provincial Offences Act*. The appellate court may dismiss the appeal or allow the appeal and set aside the finding. The appellate court may then order a new trial. An appellate court may also, pursuant to s. 121(b)(ii) of the *Provincial Offences Act*, enter a finding of guilt if accused should have been found guilty. They appellate court may then pass sentence on the offender.

[48] The Commission argues that I should apply s. 121(b)(ii) to all three counts that it has appealed. The Commission argues that Mr. Katmarian should have been found guilty. I should, therefore, enter a finding of guilt and pass sentence.

[49] In order to set aside an acquittal and enter a guilty verdict the appellate court must find:

- That the trial judge made an error of law; and,
- That the accused would have been found guilty but for the error of law as long as the trial judge had made the necessary findings of fact for each element of the offence.

[50] See: *R. v. Riesberry*, 2014 ONCA 744 at para. 37, where the Court of Appeal found that the necessary facts had been proven in a fraud case and entered convictions. The Supreme Court of Canada dismissed Mr. Riseberry's appeal: *R. v. Riesberry*, 2015 SCC 65 at paras. 29-32.

[51] The Commission argues in the alternative that the if the trial judge made errors of law but that she did not make the findings of fact necessary for each element of the offence, I should order a new trial.

[52] The appeal court must find, to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred. The appellate court need not be satisfied that the verdict would have been different, but the burden is a heavy one: *R. v. Hodgson*, 2024 SCC 25 at para. 36.

[53] I turn to the issues.

IV. ISSUES AND ANALYSIS

[54] Given the way that the Commission has framed this appeal, there are three issues to be determined:

- First, did the trial judge err by finding that the Commission failed to prove that the investors relied, to their detriment, on misrepresentations when they invested?
- Second, did the trial judge fail to consider all of the elements of the offence of making a misleading statement to the Commission?
- Third, did the trial judge err by failing to convict Mr. Katmarian under the business purpose test?

(a) Did the trial judge err by finding that the Commission failed to prove that the investors relied, to their detriment, on misrepresentations when they invested?

[55] Individual investors in Peblik purchased notes convertible into Peblik tokens. Some 32 investors purchased about $485,000 in Peblik notes. All lost their investments, although merely losing an investment does not, obviously, make something a fraud.

[56] The appeal on this point turns on the element of deprivation. Counsel for Mr. Katmarian argues that the risk of deprivation cannot be inferred causally simply from any deceit or falsehood in commercial setting. In cases involving a regulatory scheme – such as in *R. v. Drabinsky*, 2011 ONCA 582, 107 O.R. (3d) 595, and *R. v. Riesberry*, *supra*, relied on by the Commission – the investor is entitled to assume that shares are issued in lawful accordance with that scheme (or the bettor is entitled to assume that the horse rase is not rigged in the case of *Riesberry*). There is no need to prove any individual investor lost money. This case is different – based on the theory of liability advanced by the Commission at trial, the prosecution needed to prove individual losses based on detrimental reliance on misrepresentations. The trial judge did not err when she found that the Commission failed to do so.

[57] Respectfully, I disagree with the defence on this point and agree with the Commission. The trial judge found all the facts necessary to make a finding of guilt. Unfortunately, she erred in not doing so. Specifically, she erred in her interpretation of the essential element of deprivation.

[58] Section 122(1)(c) of the *Securities Act* states:

> 122 (1) Every person or company that,
>
> (c) contravenes Ontario securities law,
>
> is guilty of an offence…

[59] The Commission charged that Mr. Katmarian engaged in a course of conduct related to securities that he knew or ought to have known perpetrated a fraud on Ontario investors, contrary to s. 126.1 of the *Securities Act* (and specifically clause 126.1(1)(b)) which states:

> 126.1 (1) A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,
>
> (b) perpetrates a fraud on any person or company.

[60] In *R. v. Olan, Hudson, and Hartnett*, [1978] 2 S.C.R. 1175, Dickson J. (as he then was) observed that courts have been loath to provide a definition of fraud – no doubt because there are so many ways to commit fraud. Two elements are essential: dishonesty, and deprivation. As Dickson J. noted at para. 11, "the Crown must establish dishonest deprivation." Deprivation is not

confined to actual loss. The Crown will establish deprivation where the economic interests of the victim are prejudiced or placed at risk: *R. v. Olan*, *supra*, at para. 13.

[61] In *R. v. Theroux*, [1993] 2 S.C.R. 5, McLachlin J. (as she then was) identified four essential elements of the offence of fraud at para. 26:

> … the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> … 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 c).

[62] The trial judge did not err in respect of three of the four elements of the offence of fraud. I am reasonably certain that the verdict of acquittal would not necessarily have been the same but for the error in relation to deprivation.

(i) The prohibited act, be it an act of deceit, a falsehood or some other fraudulent means

[63] In this case, the trial judge was satisfied beyond a reasonable doubt that the Peblik marketing materials contained a material misrepresentation: that the Peblik token was backed by a real-world asset, the Thierry Mine. Peblik had no valid interest in the Thierry Mine. The trial judge found that any representation that Peblik had an interest in the Thierry Mine was a deceit or falsehood. The Assignment Agreement, the trial judge found, was not valid. The trial judge's conclusion on this essential element was unassailable.

(ii) Deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk

[64] Whether the trial judge erred in her treatment of this essential element is the most important question on this appeal.

[65] The key argument of counsel for Mr. Katmarian on this point is set out in paragraphs 40-42 of the factum. Relying on Spies J.'s decision in *R. v. Kazman*, 2017 ONSC 5300 the factum states (I excerpt the key points):

> Justice Spies conducted an exhaustive review of the law on the causation/reliance element of the *actus reus* of fraud in her 2017 decision in *R. v. Kazman*, a case dealing with actual acts of deceit. In that case, the defence took the position that the Crown had not proven that any banks actually relied upon the

> misrepresentations of the accused in advancing mortgage funds. After reviewing a significant amount of jurisprudence, Justice Spies concluded that fraud can only be proven where the dishonest conduct caused deprivation. Causation was to be assessed on whether the assumption that the misrepresented fact was true was a factor outside of the *de minimis* range that contributed to approval of the loan, or that the loan would not have been made if the lender had known about the misrepresentation…
>
> Both *Drabinsky* and *Riesberry* were cases in which the accused's non-compliance with a regulatory scheme formed the causal link between the act of deceit and the risk of deprivation. In both cases, the public was entitled to rely on the regulatory scheme and the assumption that it had been complied with when opportunities were offered to invest or bet.
>
> The present case, however, is more akin to *Kazman* than it is to *Drabinsky* or *Riesberry*. The alleged deception was not that the Respondent had failed to comply with a regulatory scheme, but, rather, that the Respondent had misrepresented the nature of Peblik's interest in the Thierry Mine to investors. There was, therefore, no assumption of compliance with a regulatory scheme that could ground an inference of risk of deprivation. Rather, the Appellant was required to factually prove that risk of deprivation for the individual investors, which required proof that the investors were (a) aware of the alleged misrepresentation; and (b) that misrepresentation was or could have been material to their decision to invest.

[66] In other words, the defence distinguishes between cases where the prosecution must prove an actual deprivation, and cases where the deprivation or risk of deprivation can, for practical purposes, be assumed where there is non-compliance with a regulatory scheme.

[67] With respect, I cannot agree. This argument takes Justice Spies' decision in *Kazman* too far. It is a good illustration of Justice Dickson's observation that courts are loathe to create an all-encompassing definition of fraud. It is also a good illustration of Justice Cromwell's observation in *Riesberry* that proof of detrimental reliance is not required in every case.

[68] The trial judge stated:

> The critical question in this case, as it relates to the investors in Peblik Inc., is whether the deprivation was caused by the deceitful representation or falsehood regarding Peblik Inc. having a valid interest in the Thierry Mine… A challenge for the Commission, as identified by the court and discussed below, is whether the particular investors reviewed or saw any of the potential deceitful representations or falsehoods regarding the nature of the Peblik Inc. interest in the Thierry Mine, prior to or at the time of making the investments… The issue is whether the deprivation was "caused by" the deceitful representation or falsehood regarding the

> interest of Peblik Inc. in the Thierry Mine arising from the website or the written materials.

[69] The trial judge's penultimate finding about deprivation was the following:

> Overall, for the first prong of fraud, as it relates to the investments in Peblik Inc. the Commission has failed to prove that the investors relied upon any deceit or falsehood in making their investments. For most of the investors who did not deal directly with Stephan Katmarian, those representations could only have been through written materials or the website. But the investors did not rely upon those written materials or the website version at the time. The Commission has failed to prove the essential element of deprivation.

[70] With respect, these passages demonstrate an error of law. It is the same species of error made by the trial judge in *R. v. Riesberry*, *supra*. What is required for a conviction is not detrimental reliance on a material misrepresentation causing a loss. What is required is a causal link between a material misrepresentation and the risk to the economic interests of the victim or victims. That causal link may be in the form of detrimental reliance leading to actual loss but need not be. It is a sufficient condition but not a necessary condition.

[71] Riesberry was a licenced horse trainer. Prior to a race, he injected a horse with a performance-enhancing substance. Prior to another race, he tried to bring a performance-enhancing substance to inject another horse but was caught and arrested. Both incidents were recorded on video. The rules applicable to horse racing prohibited a licenced trainer from possessing the drugs or using them to enhance the performance of a racehorse. Riesberry was charged with cheating at games contrary to s. 290 of the *Criminal Code* and fraud contrary to s. 380(1) of the *Criminal Code*. The trial judge found that Riesberry breached the racing rules. He found, however, that since the prosecution had failed to prove that any particular investor had suffered a loss that the essential element of deprivation had not been proven. He acquitted Riesberry. The Court of Appeal found that was an error. So did the Supreme Court of Canada. Riesberry argued that there was no evidence that the fraudulent conduct had induced anyone to bet or that anyone had lost anything as a result. Cromwell J. rejected that argument at para. 22:

> Contrary to Mr. Riesberry's contention, proof of fraud does not always depend on showing that the alleged victim *relied* on the fraudulent conduct or was *induced* by it to act to his or her detriment. What is required in all cases is proof that there is a sufficient causal connection between the fraudulent act and the victim's risk of deprivation. In some cases, this causal link may be established by showing that the victim of the fraud acted to his or her detriment as a result of relying on or being induced to act by the accused's fraudulent conduct. But this is not the only way the causal link may be established…

[72] Cromwell J. then noted at para. 24, relying on the earlier case of *Olan*, that fraudulent conduct is not limited to misrepresentations, but encompasses "all other means which can properly be stigmatized as dishonest."

> It follows that where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. This is such a case.

[73] Riesberry's use and attempted use of performance enhancing substances an example of "other fraudulent means" because it was dishonest in the context of the highly regulated horse racing industry. There was a risk to the betting public that but for the dishonest acts, the outcome of the race might have been different. That in turn created a risk that bettors would be deprived dishonestly of something that they might have obtained. Thus, there was a direct causal relationship between Riesberry's dishonesty and the risk of deprivation. The fact that the race was rigged created the risk to the economic interests of the bettors. "Provided a causal link exists, the absence of inducement or reliance is irrelevant": *Riesberry*, at para. 26.

[74] As I have mentioned, reliance on misrepresentations to induce conduct might be a sufficient condition for a fraud conviction in many cases, but it is not a necessary condition for a fraud conviction in all cases. What is necessary is that the dishonest conduct is the cause of the risk of deprivation to the economic interests of the victim. Inducement and reliance may factually amount to causation, but it is an error to find that as a matter of law that they must.

[75] *R. v. Drabinsky*, *supra*, is also relied on by the Commission – in my view correctly – and distinguished by the defence. The offenders owned a live entertainment company called MyGar. In 1993 MyGar made an initial public offering, or IPO, of shares and became a public company known as Livent. The financial statements at the time of the IPO, however, misrepresented the true financial affairs of the company. Payments to the offenders in material amounts had been booked as fixed assets and production costs. These misrepresentations inflated the real value of the shares. Livent's costs were also fraudulently reduced to misleadingly inflate the income of the company. A key defence argument was that the misrepresentations were not material to the investing public's decision to purchase shares in the IPO. The trial judge rejected the materiality argument. She found that the very nature of an IPO is that the public is asked to invest and is entitled to rely on the accuracy of the financial statements. When the statements contain a falsehood, the investing public is at risk. The trial judge made the following statement, which the Court of Appeal agreed with at para. 81:

> The inclusion of a balance sheet that is false is an act of deceit, falsehood and dishonesty. Since members of the public are entitled to rely on these statements before risking their funds, there is potential risk to the public.
>
> If the balance sheet is false, it is no answer to say that the investors would only look to the income statement. One cannot pick and choose sections that may be more or

> less important to a potential investor. The reasons for investing may be as diverse as the number of investors.
>
> That the accused did not profit from the falsehood is irrelevant to the charge. That the public did not suffer is irrelevant to the charge.

[76] The Court of Appeal went on to state at para. 83 that "Materiality was a fair inference from the nature of the misrepresentations, the documents in which they appeared, and the context in which those documents were used." In my view, the misrepresentations here met the same test of materiality. It is a fair inference from the misrepresentations in the marketing materials – whether any individual investor testified or not that he or she relied on them – that they were highly material. As I keep noting, there was no value to the Peblik token unless it was backed by the Thierry Mine asset. The documents were presented to and available to potential investors. The trial judge did not consider how it was that all the investors came to understand that the Peblik token was backed by a valid interest in the Thierry Mine.

[77] I turn back to *Kazman*, which the defence relies on. *Kazman* was a complex case, but at bottom it simply dealt with applications to obtain small business loans. The accused persons in that case made applications for loans under a small business program created by the federal government and administered by the banks. Applicants were required to disclose certain information. Justice Spies considered whether the Crown was required, to prove that the misrepresentations in the loan documents caused the banks to approve the loans. As I interpret *Kazman*, Justice Spies was not suggesting that all fraud cases require that the prosecution prove that deprivation (which was real in the case of the loans in that case) was factually caused by the misrepresentations. She was whether, factually, applicants used false information or misrepresentations or material omissions to induce an institutional lender to make the loan. The cases in her Appendix Q, which the defence correctly describes as an exhaustive review of the law on the causation/reliance element, all concerned loan frauds where the applicants misled the lenders into advancing funds. These cases include (and I will not mention them all): *R. v. Winning*, [1973] O.J. No. 461 (C.A.); *R. v. Steinbuhl*, 2012 ABCA 260; *R. v. Park*, 2010 ABCA 248; *R. v. Rosen* (1979), 55 C.C.C. (2nd) 342 (Ont.Co.Ct.).

[78] One of the cases mentioned by Spies J. was *R. v. Drakes*, 2006 CarswellOnt 1585, [2006] O.J. No. 129, in which Epstein J. (as she then was) pithily summarized the deprivation aspect of the offence at paras. 46-47:

> The decision in *R. v. Olan*, [1978] 2 S.C.R. 1175 (S.C.C.) makes it clear that imperiling of an economic interest of a victim is sufficient to satisfy the dishonest deprivation requirement of fraud, even though no economic loss is actually suffered. To satisfy dishonest deprivation there must be proof of detriment, prejudice or risk of prejudice.
>
> With respect to the deprivation element of the offence, it is clear that it must have been caused by the defendant's dishonest conduct. However, it is equally clear from

> cases such as *R. v. Smithers* (1977), [1978] 1 S.C.R. 506 (S.C.C.) and *R. v. Currie* (1984), 12 C.C.C. (3d) 28 (Ont. C.A.) that the defendant need not be the sole cause of the deprivation in order to satisfy the *actus reus* of the offence of fraud. The defendant's conduct must have contributed to the deprivation, outside of the *de minimus* range. As well, the Crown need not prove that a particular complainant was deceived by the representations.

[79] The trial judge in *Steinbuhl* also relied on that aspect of *Drakes*. Notably, *Drakes* was not a mortgage fraud case. It involved a fraudulent scheme where victims were induced to pay a fee to unlock money in Nigeria.

[80] Several of the mortgage fraud cases analyzed by Spies J. noted that the institutions would not have made the loan but for the misrepresentations.

[81] What Spies J. also noted was that whether the Crown calls evidence of detrimental reliance, the misrepresentations must be material: *R. v. Meer*, 2015 ABCA 340. Spies J. went on to quote the Alberta Court of Appeal in that case at para. 59:

> While reliance is not directly in issue on this appeal, we would add that when a lending institution sets out its lending requirements and requires an applicant for a loan to complete them, it is not doing so for nothing. The only reasonable inference, in the absence of any evidence to the contrary, is that these requirements are the basis on which the lending institution is willing to advance the loan in question. To find otherwise is to deny economic and financial realities along with common sense…

[82] In a similar way, it is something of a denial of common sense to suggest that investors in Peblik would have invested even if they the tokens were not backed up with a real-world asset. What would have been the point of that? Indeed, as noted, the trial judge found that the investors did believe that Peblik had a valid interest in the Thierry Mine. I distinguish *Kazman* on the basis that Justice Spies' conclusions apply in the circumstances of that particular mortgage or lender fraud case. Justice Spies was not purporting to lay down a rule that applies in other types of cases.

[83] It follows that I cannot agree with the defence argument that this case was more like *Kazman* than it was like *Riesberry* or *Drabinsky* on the point of causation.

[84] Thus, the trial judge erred by requiring the Commission to prove inducement or reliance by individual investors on materials (such as the white paper or the website), rather than focussing on whether the misrepresentations created a risk to the economic interests of the investors. Again, this was similar the error made by the trial judge in *Riesberry*. This is not a case where there were simply misrepresentations untethered to any actual risk. Rather, they were materials that were actively used – as the trial judge accurately found – to promote an investment that was represented as worth a substantial amount of money when it was not. That was the causal connection that the Commission was required to prove and did prove.

[85] Respectfully, this error led trial judge to confine her analysis to the initial investments. She framed the question in this way (and I paraphrase): was anyone induced to invest because of a material misrepresentation at the time of the investment? Her finding was that the Commission could not necessarily produce the website or other materials at the point in time of the investment.

[86] I note that there were, in fact, two investors who did testify that they were induced to invest in reliance on either the website or the white paper – Daniel West and Chris Balsingh – but the trial judge found as a fact that the Commission could not establish that they viewed materials containing the misrepresentation. I think that is an unrealistic finding, as I have mentioned – the whole point of Peblik was that the token was backed by the interest in the Thierry Mine. There would have been no point whatsoever in producing materials that did not include that representation. And, indeed, every investor, testified that they believed that the Peblik token was backed by an ownership interest of some kind in the Thierry Mine, whether they saw the misrepresentation in marketing materials or not. That, of course, makes sense – the whole selling feature of the Peblik token was that it was supposedly backed by a real-world US$4 billion asset. That said, the Commission has not argued that the trial judge materially misapprehended the evidence and I make no finding in this regard.

[87] Mr. Katmarian met Mr. Balsingh in September 2018 and provided documents containing the misrepresentation (although it is not clear that Mr. Balsingh could identify Mr. Katmarian at the trial). By doing so, Mr. Katmarian continued to perpetrate the fraud. Mr. Balsingh lost any opportunity to discover the truth about the actual ownership of Thierry Mine.

[88] The trial judge found that Mr. West relied solely on the oral representations of Suganthan Krishnarajah in making his Peblik investment. She found that "the Commission has failed to prove that there was deceit or a falsehood arising from a written representation which caused a deprivation."

[89] Mr. Ratnaananthan was part of the Firm group. The Firm Group invested in Northern Fox. The trial judge noted that he testified that he and Suman Pushparajah, who was also part of the Firm Group, partnered with Mr. Katmarian in starting Peblik. Mr. Ratnaananthan looked at the Peblik website in December 2017 or early January 2018. It was not clear from the evidence which version of the website he had looked at and the trial judge therefore found that there was no evidence that Mr. Ratnaananthan looked at the website or White Paper with the misrepresentation in it. Although he was given the White Paper, the trial judge found it significant that he did not read it. He did not deal at that time directly with Mr. Katmarian. The trial judge found that "the evidence falls short of the Commission proving that investments were made by Mr. Ratnaananthan in Peblik Inc., based upon deceit or a falsehood by Stephan Katmarian as to the nature of the Peblik Inc. interest in the Thierry Mine… There was no deprivation caused by any misrepresentation."

[90] Respectfully, these findings fail to account for the fact the fraud need not have been confined solely to the time of investment. Even if the misrepresentation was made only in later versions of the website, investors were placed at risk of deprivation because they easily could have checked the website or the White Paper and been reassured about the nature of their investment.

It is still a fraud if the victim is denied the opportunity to find out what has really happened with his or her money. Indeed, the trial judge still found as a fact – correctly, in my view – that there were misrepresentations in Peblik material during the entire currency of each investor's investment. Thus, dishonest or "other fraudulent means" were employed: *R. v. Zlatic*, [1993] 2 S.C.R. 29. In *R. v. Nowack,* 2019 ONSC 2914, the defence made an argument similar to that accepted by the trial judge in this case: that at the time of the initial investment there had been no misrepresentations. The dishonesty only occurred in relation to misrepresentations about the state of the investment. I rejected that argument and stated at paras. 22, 25-26:

> The Crown is not required to prove that the misrepresentations were material to the losses. It is enough that the misrepresentation placed the economic interests of the victim at risk…
>
> To accept the defence argument would be to accept the following proposition: a financial adviser could accept money from an investor, lose it in speculative investments, and then lie to the investor about what happened. That would not be a fraud, the argument goes, because the investor was not induced to invest based on misrepresentations. The misrepresentations came after the loss. Thus the misrepresentations are not material.
>
> With respect, that is not the law. That assumes the misrepresentation must cause the deprivation. In fact, the causal connection must be between the misrepresentation and the risk to the investor's economic interests. The failure to disclose is arguably a type of dishonest conduct…[1]

[91] Finally, there is another aspect of causation that I must deal with. The trial judge seemed to rely on the fact that several investors did not read the material containing the misrepresentation and so the Crown did not prove the element of deprivation. As a policy matter, the test is risk of deprivation (rather than actual deprivation) because it would be all too easy for fraudsters to escape criminal liability by producing long and complicated documents containing misrepresentations hidden in the tiny fine print, and then point to the fact that the victim didn't read the tiny fine print. If that were the law, it would invite rather than discourage fraud.

(iii) Subjective knowledge of the prohibited act

[92] As McLachlin J. (as she then was) stressed in *R. v. Theroux*, *supra*, the accused must be subjectively aware that their conduct will put the economic interests of others at risk: see para. 26.

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[1] *Nowack* was my case. It is ordinarily very self-indulgent to rely on one's own previous decision, and I would avoid doing so, but both parties relied on or mentioned *Nowack* in their materials, which were filed prior to knowing that I would hear the appeal.

The trial judge's findings on this point lead inescapably to the inference that Mr. Katmarian was subjectively aware that his actions in relation to the Peblik misrepresentations would place the economic interests of the victims at risk. As McLachlin J. stated:

> In certain cases the inference of subjective knowledge of the risk may be drawn from the facts as the accused believed them to be… in cases like the present one, where the accused tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of another would be put at risk is clear.

[93] The trial judge made the following findings at paras. 247-48 of her reasons for judgment:

> Further, the actions of Stephan Katmarian and Northern Fox consisting of payments by Northern Fox to comply with the financial obligations of the earn-in option agreement, following the assignment to Peblik Inc., are notable. Northern Fox was not liable for these payments, if the transfer to Peblik Inc. was valid. Only Peblik Inc. was required to make those payments if the transfer was valid. Yet Northern Fox made the payments pursuant to its earlier earn-in option interest assignment agreement with Cadillac.
>
> The court would also note that given the extensive experience and knowledge of Stephan Katmarian in areas relating to earn-in options and development of mines, as set out above that Stephan Katmarian would have known that he had not obtained the consent of Cadillac to any assignment of the earn in option by Northern Fox to Peblik Inc. or any other party. He knew that Cadillac had not consented to this. Stephan Katmarian knew that there was no written agreement between Cadillac and Peblik Inc. required for the assignment of the earn-in option agreement.

[94] In other words, the trial judge found that Stephen Katmarian knew that Cadillac did not consent to the Assignment Agreement for several reasons, not the least of which was that Northern Fox, not Peblik, made payments to Cadillac. The trial judge also found that Mr. Katmarian was aware of and responsible for the misrepresentations in the Peblik material that the token was backed by a real-world asset. Those findings show that Mr. Katmarian was subjectively aware of the prohibited act – the misrepresentation that Peblik had an interest in the Thierry Mine.

(iv) Subjective knowledge that the prohibited act could have as a consequence the deprivation of another

[95] As McLachlin J. pointed out in *Theroux*, subjective knowledge that the prohibited act could have as a consequence the deprivation of another may consist in knowledge that the victim's pecuniary interests are put at risk. Although the trial judge did not explicitly address this element of the offence in these terms, she clearly found as a fact that Mr. Katmarian was a highly experienced mining finance promoter and knew that the representations were false. It is an obvious implication of those two findings that Mr. Katmarian subjectively knew that the prohibited act –

the misrepresentation about the true state of Peblik's interest – could put the economic interests of the investors at risk.

(v) The Commission has not advanced a different theory of liability on appeal

[96] The defence argues that at trial the Commission called investors to show that they had read the marketing material, the material contained the misrepresentation, and that the investors were induced to invest as a result. On appeal, however, the defence argues that the Commission has raised a different theory of liability, one that claims "a risk of deprivation inherently flows from any deceptive statement, and that the trial judge therefore was not required to find that any investor was actually aware of or relied on the allegedly deceptive statements in making their investment." The Crown is not entitled to rely on one theory of liability at trial and another theory at trial: *R. v. Varga* (1994), 18 O.R. (3d) 784 (C.A.).

[97] I cannot agree that the Crown has advanced a different theory on appeal. First, Mr. Katmarian's material quoted the part of the Commission's representations to support this argument but did not mention that the Commission's written argument went on to state that "while actual economic loss suffered by a victim will establish deprivation, it is not required. Deprivation is satisfied on proof of 'detriment, prejudice, or risk of prejudice' to the economic interests of the victim" – meaning that causation was not confined to the misrepresentation inducing the investment.

[98] Second, as the Commission pointed out in its written materials, witnesses, including Chris Balsingh, Bridget Flynn, and Daniel West believed that the Peblik token was backed by Peblik's interest in the Thierry Mine. Firm Group members and Erin Taylor, a Peblik consultant (although she was disbelieved on other points). also testified that without the ownership of the Thierry Mine the token was worthless. As well, the Commission argued that every version of the website, the Fast Facts, and other material extended well beyond the period of initial investing, and all contained the same misrepresentation.

[99] The Commission argued at trial that all versions of the White Paper, the website, and other material contained the fundamental misrepresentation about Peblik's interest, or "ownership" of the Thierry Mine. The Commission argued at trial that all investors testified that they understood (whether they had actually read the material or not) which placed investor assets at risk.

[100] Third, there was nothing in Commission's written submissions suggesting that the fraud was confined only to the moment of initial investment, or even an argument that the losses suffered by the investors were the result of the misrepresentations – only that the misrepresentation put the economic interests of the investors at risk.

[101] The trial judge focussed on the misrepresentations at the moment of investment, which was in accordance with the defence theory. I do not read the Commission's arguments on appeal as raising a new theory of liability, but rather being responsive to the errors it alleged the trial judge made. I therefore do not accept this argument.

(vi) Conclusions on the issue of causal link

[102] As noted, I find that the trial judge erred in law in relation to the essential element of deprivation or risk of deprivation. To repeat, I am reasonably certain that the verdict of acquittal would not necessarily have been the same had the error not occurred. The Commission has satisfied its heavy burden on this aspect of the appeal: *R. v. Hodgson*, the appeal on this count is allowed.

(b) Did the trial judge fail to consider all of the elements of the offence of making a misleading statement to the Commission?

[103] The Commission charged that Mr. Katmarian contravened Ontario securities law by making a statement in material, evidence, or information submitted to the Ontario Securities Commission that was misleading in a material respect, contrary to s. 122(1)(a) of the *Securities Act*, which states:

> 122 (1) Every person or company that,
>
> > (a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Chief Executive Officer of the Commission or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> is guilty of an offence…

[104] The Commission argues that by omitting relevant information, Mr. Katmarian misled Commission staff by omission.

[105] The law is clear that a person can be held liable on the ground of an omission under s. 122(1). The Commission relies on *Norshield v. Ontario Securities Commission*, 2011 ONSC 4685 (Div.Ct.) at paras. 94-95 and on *Wilder v. Ontario Securities Commission* (2001) 53 O.R. (519). As the Commission asserts and Mr. Katmarian's counsel concedes, s. 122(1)(a) provides two routes to liability: first, by making a statement or statements that are misleading or untrue; or second, by making a statement that does not state a fact required to be stated or is necessary to make the statement not misleading.

[106] I do not, however, agree with the Commission's argument on this count. The route to criminal liability is much steeper and longer than the route to civil or administrative liability. Both *Norshield* and *Wilder* concerned administrative proceedings before the Commission. They were

not criminal proceedings or quasi-criminal proceedings like this one, where the criminal standard of proof applies. Additionally, in both those cases the Commission did particularize an omission.

[107] Mr. Wilder's counsel argued that because the *Securities Act* created an offence in s. 122(1)(a), only the Ontario Court of Justice could hear quasi-criminal proceedings for violations of that section. The Commission was proceeding administratively. Since only that Court could hear the proceeding, according to Mr. Wilder's counsel, the Commission had no jurisdiction. The Court of Appeal rejected that very creative argument. In doing so, Sharpe J.A. for the Court stated at para. 24:

> It is true that if Wilder were prosecuted under s. 122, he would enjoy procedural protections and other advantages not available in proceedings brought under s. 127. I fail to see, however, how that leads to the conclusion that he can only be prosecuted under s. 122. Different procedural rights are accorded because different consequences follow. The Act provides for various remedial routes which themselves entail varying procedural consequences. The reduction in procedural rights under s. 127 from those available in a prosecution under s. 122 results from the simple fact that there is no criminal sanction attached to a s. 127 order. The essence of the statutory scheme is remedial flexibility, not remedial exclusivity, and differing procedural consequences are an inevitable result of such a scheme.

[108] One of the procedural protections available to an accused person in a criminal (or quasi-criminal) proceeding is that the prosecution must prove the offence that is particularized in the charging document: *R. v. Saunders*, [1990] 1 S.R.C. 1020 at p. 1023. Or, as Laskin J.A. put it in *R. v. Sadeghi-Jebelli*, 2013 ONCA 747 at para. 23, "if the Crown charges an accused with trafficking in heroin, it cannot, without an amendment to the charge, obtain a conviction for trafficking cocaine."

[109] Given the penal consequences in this quasi-criminal proceeding, which can include heavy fines and jail time, people charged with provincial offences are cloaked with the protections referred to by Sharpe J.A. In other words, the principles set out in *Saunders* and *Sadeghi-Jebelli* apply here.

[110] The information in this case charged that Mr. Katmarian contravened Ontario securities law by:

> … making a statement in material, evidence, or information submitted to the Commission or any person acting under the authority of the Commission that, in a material respect, is misleading or untrue…

[111] Peblik answered the two questions at issue by indicating that NIL proceeds had been raised from the sale of Peblik tokens; and that NIL proceeds had been raised from residents of Ontario. The trial judge correctly noted that the answers were responsive to the questions as posed by the Commission.

[112] The Commission argues that the trial judge erred by failing to consider whether the answers either did not state a fact required to be stated or was necessary to make the statement not misleading. That is true, but it was not an error. The trial judge did not consider two potential paths to liability, but she was alive to the issue. She found that the Commission chose to proceed in a particular way, and the defence responded to the case as presented.

[113] I agree with the Commission that the answers probably did include material omissions. Had this matter proceeded as a s. 127 administrative hearing the Commission might well have obtained a finding of liability. Had the information as sworn provided both routes to liability the Commission might well have obtained a conviction. But that is not what was charged. The particular charge was defended on the basis of the information as it was sworn. The Commission made no attempt to amend the information or put a new information before the Court. Laskin J.A. in *R. v. Sadeghi-Jebelli* explained why, at para. 24, it might well be unfair to require an accused person to answer a case that has not been particularized in the charging document:

> This principle is grounded in fairness. Particulars permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial".

[114] I see no error in the trial judge's analysis. The appeal is dismissed in relation to count 2.

(c) Did the trial judge err in her application of the business purpose test?

[115] The Commission charged that Mr. Katmarian contravened Ontario securities law by engaging in or holding himself out as engaging in the business of trading securities while not registered, as required by s. 25(1) of the *Securities Act* thus committing an offence contrary to s. 122(1)(c) of the *Securities Act*.

[116] To repeat, s. 122(1)(c) of the *Securities Act* states:

> 122 (1) Every person or company that,
>
> (c) contravenes Ontario securities law,
>
> is guilty of an offence…

[117] Section 25(1) of the *Securities Act* states:

> 25 (1) Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as a dealer; or

> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

[118] The Commission argued that the trial judge correctly set out the elements of this offence, but erred in law by finding that Mr. Katmarian was not engaged in the business of trading securities while unregistered. The Commission further argued that share trading was not merely incidental to Mr. Katmarian's business, but was a core part of it. Peblik only sought to create a blockchain protocol for the purpose of selling securities. At heart, the Commission argued, Peblik was created to raise money to develop the Thierry mine. As the Commission put it in its factum:

> Though Peblik may have had other long-term goals, its core business during the offence period was the sale of securities – in the form of convertible notes – in order to raise money from investors to use on the Thierry Mine. Its core business was trading in these securities.
>
> Peblik had effectively no active non-securities business. Peblik was a fundraising company that used the promise of an uncreated cryptocurrency as an inducement to investors.

[119] I cannot accept the Commission's argument on this count. Although the Commission has framed this issue as being an error of law, I disagree. This argument actually about whether the trial judge made a factual error. There was evidence upon which the trial judge could find that Mr. Katmarian, and Peblik, were not engaged in the business of selling securities for the purpose of s. 25(1) of the *Securities Act*. The Commission does not argue that the trial judge misapprehended the evidence in this area. In my view her findings of fact are entitled to deference, and I see no error in her application of the law to the facts.

[120] There is no doubt that Mr. Katmarian and Peblik traded securities: see the definition of "trade or trading securities" in s. 1(1) of the *Securities Act*. See also: *Re Rezwealth Financial Services Inc*., 2013 ONSEC 28 (CanLII) at paras. 213-214. The question was whether Mr. Katmarian was in the business of trading securities.

[121] In *Re Hibbert*, 2012 ONSEC 11 (CanLII) at para. 66, Commissioner James Carnwath (formerly a judge of this Court) set out the relevant factors for determining whether a person or company is in the business of trading securities:

> In determining whether a person or company is trading in securities for a business purpose, section 1.3 of Companion Policy 31-103 sets out a number of relevant factors that are derived from case law and regulatory decisions that have interpreted the "business purpose test" for securities matters. The relevant factors are as follows:

> a) engaging in activities similar to a registrant, including promoting securities or stating that an individual or company will buy or sell securities;
> b) intermediating trades or acting as a market maker;
> c) directly or indirectly carrying on in the activity with repetition, regularity or continuity, especially trading in any way that produces, or is intended to produce profits;
> d) being, or expecting to be, remunerated or compensated for trading and it is irrelevant if the individual or company actually received compensation or in what form; and
> e) directly or indirectly soliciting, including contacting anyone by any means to solicit securities transactions.

[122] See also: *Re Merchand*, 2018 ONSEC 51 (CanLII) at paras. 111-116.

[123] Other important factors include:

- The extent to which management was engaged in raising capital: *Re Paramount Equity Financial Corporation*, 2022 ONSEC 7 (CanLII) at para. 47; and,
- Whether trading securities was incidental or core to the business: *Re Momentas*, 2006 ONSEC 15 (CanLII).

[124] As the Commission points out (and I agree) the trial judge articulated the test correctly:

> It is important for this court to consider whether the process of seeking and obtaining investors in subscription agreements was incidental to, or a core part of the business…

[125] In applying the test, the trial judge found that there were no commissions paid to anyone for the sale of the convertible notes, and none of the notes were converted to tokens. The trial judge also found that Mr. Katmarian did not hold himself out as a person who was in the business of trading securities, his trading was infrequent, and there was no profit made in the sale of securities. The trial judge also found that Mr. Katmarian himself did not sell any securities. The trial judge found that Erin Taylor was not credible. She rejected the evidence of Erin Taylor that Mr. Katmarian asked her to canvass friends and family for sales of Peblik securities. The trial judge also found that Erin Taylor was the person primarily employed by Peblik to raise funds, but that it was a small portion of her job. The trial judge further observed:

> The business of Peblik Inc. was to create the technology to launch a blockchain protocol, to ensure that it worked, to create a concept for attaching it to a resource such as copper, to negotiate the requirements for compliance, to explore domestic and international jurisdictions for the launch of this product, and related issues. The fundraising that took place in this case was a very small portion of the activities of Mr. Katmarian and Peblik Inc. The uncontradicted evidence is that there were

> dozens of people at a time working in the office of Peblik Inc. on its various initiatives, and only a few of those people (Erin Taylor, and possibly Kris and Suman if they attended the office occasionally) were engaged in raising funds.

[126] The Commission does not argue that the trial judge materially misapprehended the evidence. Indeed, the trial judge's findings on this point were grounded in the evidence and are entitled to deference. I see no error in the way that the trial judge applied the factors set out in *Re Hibbert* and *Re Merchand* given the facts as she found them. The appeal is dismissed in respect of Count 3.

V. DISPOSITION

[127] The appeal is allowed in part and dismissed in part as follows:

- Count 1: The Commission's appeal is allowed, the acquittal is set aside, a conviction entered, and the count is remanded for sentencing before me.
- Count 2: The Commission's appeal is dismissed.
- Count 3: The Commission's appeal dismissed.

R.F. Goldstein J.

Released: July 29, 2025

CITATION: Ontario Securities Commission v. Katmarian, 2025 ONSC 4356
COURT FILE NO.: CR-24-10000027-00AP
DATE: 20250729

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO SECURITIES COMMISSION

– and –

STEPHAN KATMARIAN

REASONS FOR JUDGMENT ON SUMMARY CONVICTION APPEAL

R.F. Goldstein J.