In the Provincial Court of Alberta

Citation: R v Aitkens, 2020 ABPC 129

Date: 20200720
Docket: 131151698P1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Ronald James Aitkens

Defendant

Reasons for Decision of the Honourable Judge L.W. Robertson

Introduction

[1] Ronald James Aitkens (the Accused), is charged with three offences under the Alberta *Securities Act* R.SA. 2000, c. S-4 (ASA). The Accused distributed and sold securities in a real estate investment opportunity known as Legacy Communities Inc. (Legacy). The securities were distributed to investors under the Offering Memorandum exemption made available under the *ASA*. This exemption relieves an issuer from the more onerous requirement of the prospectus and registration system. However, it still requires accurate and plain disclosure in order that investors can properly assess the opportunity and weigh its risks.

[2] To be eligible as an exempt distribution, Offering Memoranda must strictly comply with *ASA Regulations* governing their form and content. These *Regulations* are designed to protect investors by revealing an exempt distributor's business activities, their objectives and their plans to achieve them. Disclosure of all relevant information must be contained in the Offering Memorandum.

[3] Three separate Offering Memoranda were issued, in the period July 2005 – October 2007. The final investments in the project occurred in 2008. In total, more than $35 million was raised from approximately 1400 individual investors. Some investors devoted RRSP savings to the project.

[4] Ultimately, the project failed. By December 2011 Legacy had a cash balance of less than $10,000. Legacy entered the *Companies' Creditors Arrangement Act* process R.S.C. 1985, c. C-36 (*CCAA*), to protect itself from insolvency. A detailed review of its financial activities was undertaken by a court-appointed Monitor. Investigation by the Alberta Securities Commission (ASC) followed. Three charges under the *ASA* were filed in 2013. These charges allege that the Accused misled investors through the Offering Memoranda process. Specifically, it is alleged that the funds were not used for their stated purpose, that highly relevant "Investment Agreements" Legacy had with companies controlled by the Accused were not disclosed, and that the Accused engaged in general fraud in the course of the project.

[5] This matter exposes the need for detailed and accurate information to be delivered to investors. Reliable and efficient capital markets and investor confidence depend on accurate disclosure.

Summary of the Alleged Offences

[6] The Accused was originally charged with a total of six offences under the *ASA,* three offences remain.

[7] Count 3 alleges that the Accused made misleading statements in the Offering Memoranda used to solicit investments for the Legacy project. The statements identified as being misleading were that the funds raised would be for the purpose of acquiring and developing the lands in question. Section 92(4.1) of the *ASA* reads as follows:

> 4.1 "No person or company shall make a statement that the person or company knows or reasonably ought to know:
>
> a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> i) is misleading or untrue, or
>
> ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and
>
> b) would reasonably be expected to have a significant effect on the market price or value of a security, a derivative or an underlying interest of a derivative.

[8] The general enforcement sections contained in Part 16 of the *ASA* provide that contravention of Alberta Securities law is an offence. The penalty for offending s 92(4.1) is contained in section 194(1) of the *Act*, which is discussed below.

[9] Count 4 alleges that the Accused further breached s. 92(4.1) of the *ASA* by omitting to state a necessary fact in the Offering Memoranda, namely, that Legacy was party to two Investment Agreements with a company solely owned and controlled by the Accused, Harvest Capital Management Inc. (Harvest Capital). It is alleged that the non-disclosure of this important and relevant fact misled investors in the Legacy project and could reasonably have been expected to significantly affect the value of the Legacy investment. Count 4 is dependent on a factual finding about the authenticity of the Investment Agreements. These Investment Agreements were put before the Court in evidence as exhibits 52 and 53 respectively.

[10] There is an additional provision of the *ASA* which is applicable to both counts 3 and 4. This provision allows for a defence of "reasonable diligence." That defence is directly applicable to offences alleged under section 92(4.1) of the *ASA*. Section 194(2) of the *ASA* reads as follows:

> "(2) No person or company is guilty of an offence under section 92(4.1) or 221.1 if the person or company, as the case may be, did not know, and in the exercise of reasonable diligence would not have known, that the statement referred to in that subsection was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made."

[11] Finally, count 5 alleges a breach of the general fraud provision contained in the *ASA* within s. 93. Section 93(b) of the *ASA* reads as follows:

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

[12] Once again, the general enforcement provisions contained in section 194(1) of the *ASA* is engaged, contingent on a finding of a breach of section 93(b) of the *Act*.

[13] Counts 3,4 and 5 all carry the same maximum penalty. Pursuant to section 194(1) of the *ASA*, that maximum is a fine of not more than $5 million, a term of imprisonment of not more than 5 years less a day, or both.

Classification of *Securities Act* Offences

[14] Offences under the Alberta *Securities Act* can be tried in different forums. There is the mainly administrative forum of the ASC, and also the criminal forum of the Provincial Court of Alberta or the Alberta Court of Queen's Bench. I do acknowledge that the *ASA*, and its *Regulations* contain many different types of offences, some of which fit the definition of strict liability offences referred to in *R v Sault St. Marie*, [1978] 2 SCR 1299. However, often the sections involved in the present case (sections 92, 93 and 194 of the *ASA*), are subjected to criminal prosecution by the ASC in criminal court.

[15] This begs the question of whether the charges before me are criminal, quasi-criminal or regulatory in their classification.

[16] It is no easy task to classify offences, as observed in Canadian common law as commented on by learned authors[1]. In fact, the courts and academics often struggle to produce clear criteria for offence classification. Some offences seem to defy rigid methods used to sort them into one stream or another.

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[1] see in particular Manning, Mewett & Sankoff, *Criminal Law* 5th ed., (Toronto: Lexis Nexis Canada, 2015) at pp. 266-272, "Initial Classification: Criminal or Regulatory"

[17] Classification is not irrelevant. Criminal offences impart the dual requirements of *actus reus* and *mens rea* components in their consideration. Absolute or strict liability offences do not necessarily involve this. It is also possible for an act to contain multiple offences, some of which might be regulatory in nature, and others which might be criminal. Careful consideration of the classification of the offences before me is therefore required.

[18] One way to classify offences is by examining their penalty provisions. In the present case, I observe that the offences are serious, involve pecuniary subject matter in the tens of millions of dollars and carry significant penalties. As previously observed, s 194(1) of the *ASA* provides that the offences before the Court, carry maximum penalties of a fine of $5 million, imprisonment for up to 5 years less a day or both. The scope of the maximum penalty is strongly suggestive of a criminal classification.

[19] Further, the wording contained in the charges before me requires that an Accused person have personal knowledge of allegedly false statements or to have been in a situation where they ought to have known that such statements were false. Additionally, defences of mistake of fact and due diligence (for example under section 194(2) of the *ASA*), are available in the charges before me. These are hallmarks of a true criminal offence. Finally, count 5 requires a consideration of the *Criminal Code* definition for fraud and jurisprudence from the criminal common-law on that definition.

[20] Having regard to the above noted factors, I accept that all three counts are properly criminal in their classification. This was the approach taken by the Alberta Court of Appeal in the following cases; *Del Bianco v Alberta (Securities Commission)*, 2004 ABCA 344, *Alberta (Securities Commission) v Workum*, 2010 ABCA 405 (see especially paras 134-136), and *R v Kirk*, 2013 ABPC 130 (at paras 55-58).

[21] Accordingly, I find that the three offences before me carry with them the dual requirements of *actus reus* and *mens rea* in their proof before the Court. I will treat them as such.

The Presumption of Innocence, and the Burden and Standard of Proof

[22] It is important to affirm some basic and fundamental principles of Canadian criminal law which apply to this and to every trial.

[23] First, pursuant to section 11(d) of the *Canadian Charter of Rights and Freedoms*, the accused is presumed to be innocent. The Crown has the burden of proving the guilt of the accused, on each of these offences, beyond a reasonable doubt. To achieve this the Crown must prove each and every element of the offences beyond a reasonable doubt. This burden never shifts. It remains constantly with the Crown. There is no obligation on the accused to prove his innocence, call any evidence or to testify in his own defence.

[24] What is meant by the phrase "proof beyond a reasonable doubt"? This question has received much attention. However, the views expressed by the majority of the Supreme Court of Canada in *R v Lifchus* still prevail. I take those principles, carefully set out by our Supreme Court, to be as follows:

i) The concepts of proof beyond a reasonable doubt and the presumption of innocence are inextricably intertwined. They are fundamental to our system of justice. A fair trial cannot exist without them.

ii) "Reasonable doubt" cannot be based on sympathy or prejudice. Rather, the concept is grounded upon reason and common sense. It is logically connected to the evidence or absence of evidence in a particular case.

iii) It is not necessary to satisfy this standard by proving the guilt of the accused to an absolute certainty, or to prove the guilt of the accused beyond any doubt whatsoever. Such a standard of proof is impossibly high. Further, a reasonable doubt is not one which is imaginary or frivolous in nature.

iv) Finally, it is insufficient to prove that an accused is "probably guilty" or "likely guilty". If I find that the accused is only "probably guilty" then I must conclude that the requirement for proof beyond a reasonable doubt has not been achieved. An acquittal must be the inevitable result in such situations. *R v Lifchus* [1997] 3 SCR 320

[25] Much depends on the credibility and reliability of the witnesses who testified in this matter. Credibility and reliability are separate and distinct concepts. Both affect the concept of reasonable doubt. Credibility refers to a witness's veracity. Reliability refers to a witness's accuracy. Reliability and accuracy depend on a witness's ability to observe, recall and recount the events properly. A credible witness may nevertheless be inaccurate, or unreliable. The honest but mistaken witness is a particularly worrisome example and very difficult for triers of fact to deal with. A witness must be both credible and reliable to be believed.

[26] There is an established procedure for assessing credibility and reliability in the context of a trial where an accused calls evidence. This procedure was first outlined by the Supreme Court of Canada in *R v W(D),* [1991] 1 SCR 742. Several subsequent cases (such as *R v Ay,* (1994) 93 CCC (3d) 456 (BCCA), and *R v CWH,* 1991 CanLII 3956 (BCCA)), have served to further explain and refine the procedure. This process must first start with an assessment of the credibility and reliability of the accused's evidence or any other exculpatory evidence. However, the court should not engage in a formulaic approach. I am informed on this by the recent decision of the Alberta Court of Appeal in *R v Ryon*, 2019 ABCA 36. I will now set out this procedure, paraphrased, as follows:

i) If the evidence of the accused is believed (assuming that evidence affords a defence to the charge), the accused must be acquitted.

ii) Even if the evidence of the accused is not believed, if it raises a reasonable doubt, the crown has not met its burden and the accused must be acquitted.

iii) If the court is uncertain of whether to believe the evidence of the accused or the competing evidence of the Crown, the accused must be acquitted.

iv) Finally, even if the evidence of the accused is rejected, or even if it fails to raise a reasonable doubt, the court must still ask itself whether, on the basis of the evidence which it does accept, the crown has proven each and every element of the offence beyond a reasonable doubt. If it has the accused must be convicted. If it has not the accused must be acquitted.

[27] In applying these principles, I accept that evidence capable of raising a reasonable doubt need not come exclusively from evidence presented by the Accused. Of course, evidence raising

a reasonable doubt could come from any source, including the case presented by the Crown. I acknowledge that I am obligated to examine all evidence presented, whether from the Crown or the Accused, and assess whether it is exculpatory and raises a reasonable doubt. If it does, I must acquit the Accused (*R v Ryon*, supra, at paras 29 and 49, *R v Cuthill 2018,* ABCA 321 at paras 94-104).

The Position of the Parties

1. Position of the Crown

[28] Counsel for the Crown argued that full, true and plain disclosure is a cornerstone principle of securities regulation. It was submitted that issuing securities through the Offering Memoranda exemption requires the issuer to strictly comply with the *ASA* and all applicable *Securities Act Regulations* which govern that exemption.

[29] The Crown argues that the Accused failed to meet his obligations under the *Act* by knowingly misleading investors in a variety of ways. This included mis-using funds specifically dedicated to the Legacy project for other unrelated and riskier projects. It is alleged this was accomplished by secretly transferring Legacy funds into or through other corporations (including Harvest Capital), and two numbered companies, which the Accused owned and controlled exclusively. These were numbered company 1252064 Alberta Ltd. (125), and 1330075 Alberta Ltd. (133). It was alleged that the Accused made actual misrepresentations in this process. It was also alleged that he failed to include information which investors needed to know in the Offering Memoranda, such as the previously mentioned investment agreements.

[30] Specifically, in respect of count 3, it was argued that the Accused transferred $12.6 million from Legacy between September 24, 2007 to December 20, 2007. Banking records for Legacy, it is argued, support this allegation. Accordingly, the "Use of Proceeds" section of the Offering Memoranda documents were misleading, as the money raised was not entirely spent for the purpose described in those documents. The Crown also submits that these misrepresentations had a significant negative effect on the market value of the Legacy offering.

[31] In respect of count 5, it was alleged that the Accused's use of Legacy funds constituted a general fraud on Legacy investors and Legacy itself. It was argued that the actions of the Accused satisfied the requisite elements for fraud as identified in the Supreme Court of Canada decisions of *R v Théroux*, [1993] SCR 5 and *R v Olan*, [1978] 2 SCR 1175. This included actual misrepresentations to Legacy investors and also purposeful non-disclosure of relevant facts investors needed to know prior to placing their money with the project. In so doing, it was argued, investors suffered actual or potential deprivation of their pecuniary interests as their funds were removed from their intended path of investment. Further, this removal was connected to the failure of the Legacy project as less funds became available to achieve Legacy's objectives.

[32] It was argued that the Accused was solely responsible for the fraud. It was argued that he had exclusive control of Legacy, Harvest Capital and numbered companies 125 and 133 where the money was transferred to. The Crown submitted that even senior executives at Legacy were unaware of the Accused's actions. The actions only came to light, it is alleged, when Legacy finances were closely examined by the court-appointed monitor through the *CCAA* process.

[33] The Crown's position on count 4 is nuanced. Count 4 is dependent on factual findings regarding the authenticity of two corporate documents, the previously mentioned investment agreements (exhibits 52 and 53), between Legacy and Harvest Capital.

[34] The Crown's primary position is that the documents are fraudulent and do not represent the true legal relationship between the two entities. The Crown maintains the documents were only drawn up *after* the *CCAA* process was well underway. Transfers of significant funds from Legacy went first to Harvest Capital and then to other, non-Legacy related projects. The monitor observed this in Legacy banking records and sought clarification from the Accused. The Crown alleges the investment agreements were then drawn up to camouflage these actions. The Crown asserts that this is further evidence of the general fraud perpetrated by the Accused and is applicable to count 5, not count 4. The Crown argues that if the Court agrees with this submission, the Accused must be acquitted on count 4, but convicted on count 5.

[35] In the alternative, the Crown argues that if the documents are genuine, they are misrepresentations. The Crown submits that they were clearly material agreements that Legacy investors had a right to know about. Their deliberate omission in the Offering Memoranda was material and significant. Accordingly, the Crown argues that the Accused offended the provisions of s. 92(4.1)(a)(ii) by failing to alert the investors about the existence of the investment agreements, thereby misleading them. The Crown submits that this failure significantly reduced the market value of the Legacy security.

2. Position of the Accused

[36] In written submissions the Accused argued that the Crown failed to prove the essential elements of the three *Securities Act* charges. In particular, with respect to counts 3 and 4, the Accused submitted that there was no evidence establishing the two-stage test required under s. 92(4.1) of the *ASA* had been proven by the Crown. In particular, the Accused submitted that the Crown had failed to prove the Accused made a misleading representation to investors, or misled them through the omission of a necessary fact which could reasonably be expected to have a significant effect on the market value of Legacy.

[37] In respect of count 5, the Accused argued that the Crown had not established a dishonest act had been committed by the Accused and had therefore failed to satisfy the *mens rea* component of that charge.

[38] The Accused's oral submissions advanced the following additional points:

i. There was no misappropriation of Legacy funds from the objectives detailed in the Offering Memoranda.

ii. The Accused pointed to the investor tally certificate filed under section 218 of the *ASA*. This certificate was part of exhibit 1, which also included the three Offering Memoranda used by Legacy to solicit investors. The Accused asserted the funds raised were just over $27,000,000, not the $35,000,000 alleged by the Crown. He also argued that the certificate showed about 350 less investors than the Crown suggested. The Accused maintained that further exhibits showed that approximately $25,000,000 of Legacy money was actually spent on acquiring the targeted property, advancing the planning approval process and the other administrative costs legitimately associated with any real estate development

venture. Therefore, the Accused maintained that all investor money was properly spent on the goals of Legacy, as stated in the three Offering Memoranda.

iii. It was argued that the Accused was the largest investor in Legacy, having made an investment of approximately $9.7 million. This sum, it was said, accounted for the discrepancy between the section 218 certificate amount and the approximately $35,000,000, claimed by the Crown as the total investment in Legacy. The Accused further suggested that by directing money out of Legacy to various companies controlled exclusively by him, he was only spending his portion, leaving the entire portion raised by investors intact.

iv. In the alternative, the Accused asserted that the ownership of the sum of money that was re-directed from Legacy could not be determined. Even if that amount could not be demonstrated to be directly owned by the Accused it was not part of the portion accounted for by Alberta investors who subscribed to the investment through the Offering Memoranda. Since the origins of that amount could not be traced, investors could not have suffered any loss.

v. The Accused submitted that several documents, including the aforementioned Investment Agreements, had no evidentiary value. It was argued they were hearsay in nature and that there was no admissible evidence about who created, authorized or acted with those documents. This argument applied to the Investment Agreements between Legacy and Harvest Capital (exhibits 52 and 53), as well as promissory notes purportedly transferring approximately $10.7 million from Legacy to Harvest Capital, and numbered companies 125 and 133. It also applied to the Management Services Agreement (exhibit 54).

vi. Specifically, in regards to counts 3 and 4, the Accused submitted that there was no evidence on the effect of the Accused's actions, or the diversion of any Legacy money, on the market price or value of the Legacy investment. Since an effect on the value of the security is a requirement under s. 92(4.1)(b) the Accused submitted that he could not be convicted of count 3 or 4.

vii. The Accused also argued that even if it could be demonstrated that Legacy money was diverted to other projects, he had a right and even an obligation to do so. Specifically, the Accused observed that investors in Legacy were promised a 6% return on the bonds they purchased when they made their original investments. These bonds had a five-year term. The first bonds were coming due at the end of 2011. The Accused argued that the additional projects the Accused attempted to use the money for were in furtherance of securing funds to pay this interest obligation to the investors. As the senior management officer of Legacy, the Accused, and others, were entitled, and in fact obligated, to pursue these opportunities to meet Legacy's financial obligations.

viii. Further, it was argued that "re-allocation" clauses, which were a feature of all three Offering Memoranda, specifically authorized Legacy money to be redirected for "sound business reasons." It was also argued that the Offering Memoranda made it clear that Legacy was not planning to keep large cash reserves but would engage in investing the money. Accordingly, the Accused submitted that these documents clearly warned that the business of Legacy would be conducted at the sole

discretion of the issuer. The Accused argued that he was only acting in accordance with his authority.

ix. The Accused maintained that many of the non-Legacy related investments engaged in were prudent, yet lucrative opportunities. Their success would have benefitted Legacy investors greatly and brought in sufficient cash to pay the bond interest payments that were coming due.

x. The Accused maintained he did not personally profit from the use of the funds, however they may have been spent.

xi. Finally, the Accused pointed to exhibit 58 which he said corroborated his authority to act as he did. He maintained exhibit 58 demonstrated the transparency of his actions, which were not fraudulent but focused on the health of the Legacy investment.

The Evidence at Trial

1. Generally

[39] The Court heard from twelve witnesses. These included five investors and several individuals who held internal and external positions with the company. A senior representative of Ernst and Young, the accounting firm that was appointed to guide Legacy through the *CCAA* process, also testified.

[40] Over fifty exhibits were put before the Court. Most importantly were the three Offering Memoranda documents used by Legacy to solicit investment in the project and the financial records detailing Legacy's activities. Many of these financial records were the subject of a voir dire to determine their admissibility. Extensive argument was previously heard by the Court on these issues. Ultimately, these documents were admitted into evidence. The findings of the Court on the subject of this evidence were reported in two previous rulings; *R. v. Aitkens*, 2019 ABPC 30, and *R. v. Aitkens*, 2019 ABPC 51.

[41] Several other documents were admitted into evidence. Notable among these were the specific Offering Memoranda and Bond Certificates (or Subscription Agreements), of the individual investors who testified. Additionally, the Court received several marketing brochures and Power Point presentations used to solicit interest in the Legacy investment at marketing events. These events took place in Alberta's major cities (including Edmonton, Red Deer and Calgary).

[42] Ten witnesses were called by the Crown, two by the Accused. The Accused called a civil engineer (and fellow senior officer of Legacy), Dr. Bruce Jank. The Accused also called one of the five investors the Court heard from. The Accused did not personally testify.

[43] At the start of the Accused's case a further document was put before the Court, a letter purportedly authored by the accused and Dr. Jank, dated February 1, 2008. This letter became exhibit 58 in the trial. As exhibit 58 touched on many relevant issues in the trial, especially regarding the objectives, methods and activities of Legacy, several Crown witnesses were recalled. This exhibit had not been put to them in their earlier testimony.

2. The Marketing and Sales of Legacy Investments

i) Unofficial Marketing Documents

[44] Roy Beyer did much of the marketing preparation and sales support for Legacy. While he did not personally sell the product he was heavily involved in producing, managing or distributing the non-official brochures which sales agents used in their efforts. Advertising documents alerting investors to the project were also created or managed by Mr. Beyer.

[45] Beyer knew the Accused previously, but a chance meeting in a Lethbridge restaurant in 2005 drew him to the Legacy project. After hearing about the project from the Accused Beyer drove to the actual Legacy site, just west of the Calgary city limits along Highway 8. Beyer testified he was impressed with the location and the exclusivity of the nearby residential communities.

[46] Ultimately, Beyer was hired by the Accused in November of 2006. Beyer stayed with the project until the end. Beyer testified that it was his role to lead the marketing effort for Foundation Capital Corporation (Foundation), which was the Accused's company. Beyer testified that the Accused's other company was Harvest Capital. Beyer said that Legacy was a part of Foundation.

[47] Exhibit 5 was an advertising document directing customers to "Elbow Valley Country Estates". Legacy was described as "503 pristine acres adjacent to the Glencoe Golf and Country Club Estates in Elbow Valley." Photographs of wooded areas, golf courses, and rivers in a foothills environment were prominently featured.

[48] Exhibit 6 was a Power Point presentation which pre-dated Beyer's involvement in the Legacy project, however it was used by him in his marketing efforts. Exhibit 6 also describes the same parcel of land. It highlighted the fact that the property was on the banks of the Elbow River and "Four miles away from Calgary" with "Breathtaking natural beauty". A map of the location, west of Calgary along Highway 8, was prominently featured in the document. The proximity of the Glencoe Golf and Country Club and several nearby exclusive residential communities were prominently mentioned in the document. The "Profit Strategies and Profit Potential" were clearly mentioned as the re-zoning, subdivision and sale of residential parcels to consumers.

[49] Exhibit 7 was a more extensive Power Point presentation. Like exhibits 5 and 6, it heavily promoted the same location for the Legacy development. A larger and more detailed aerial map of the location was featured. (This exact same map was also used in the official Offering Memoranda). The map used highlighting to specifically identify the location on the map. Nearby golf courses, residential communities and the western edge of the City of Calgary limits (that being 101 Street S.W.) were marked on the map. Further slides on property values in Calgary and other facts about the city were included, as was a detailed time-line of how and when the Legacy lands would be developed and sold. The transition of this agricultural land to residentially developed property over "3 to 8 years" was specifically noted.

[50] Exhibit 14 may have pre-dated Beyer's arrival at Legacy but was familiar to him. This document was entered into evidence through sales agent Ron Petersen. Petersen worked under Beyer selling the Legacy investment. While the document is titled as an "Executive Summary" for Foundation, it specifically pertains to the Legacy project. Like the other documents it specifically identifies the location of the Legacy lands and marks that exact location on a map.

The three investment "Profit Strategies" all have to do with purchasing this specific land and attempting to develop and resell it as residential units or, holding the land for later resale.

[51] Exhibits 5,6,7 and 14 were not contested. I accept Beyer's evidence about the creation and existence of these documents for use in the marketing of the Legacy investment. I accept that these documents were extensively used for those purposes.

[52] In summary, the marketing efforts for Legacy referred specifically to the highly attractive parcel of land immediately west of the City of Calgary, along Highway 8. Investors saw these documents at group events or individual "sales pitches", just before investing in the project and signing the subscription agreements attached to the Offering Memoranda.

[53] As the Senior Marketing Director for Legacy Beyer understood the funds raised by Legacy would be used to acquire the specific lands that were marketed in these advertisements and brochures (transcript, April 17, p. 26).

ii) Offering Memoranda

[54] Three Offering Memoranda (OMs), were used to subscribe individual investors to the Legacy project. OM 1 was dated July 15, 2005. OM 2 was used effective September 15, 2006. Finally, OM 3 was effective as of October 29, 2007. Each OM followed the protocol and form set out in the Alberta *Securities Act Regulations*. These *Regulations* are designed to govern investments issued under the Offering Memorandum Exemption. The *Regulations* require the OMs to provide detailed descriptions of the issuer's business activities, their objectives and their plans to attain them. Issuers are required to disclose the terms of material agreements, relevant information about each director or officer connected with the project (their history and experience in similar activities), and payments or agreements involving directors, officers, promoters or other parties connected to the project.

[55] There is a specific requirement that there be an identification of risk that reasonable investors would consider important before placing their investment. The current use of the forms is based on the 2006 amendments to the *Regulations*, which are found in the Alberta *Securities Act Regulations* under "*National Instrument 45-106 Prospectus Exemptions*" *(N1-45-106)*. The form of an OM is precisely prescribed, and can be found in N1-45-106F2 for "Non-Qualifying Issuers". *N1-45-106* governed OM2 and OM3. OM1 was governed by *N1-45-103* (which was then titled "Capital Raising Exemptions")[2]. *N1-45-103* was very similar in its content to the current forms.

[56] Neither versions of the form are casual documents. Risks are required to be detailed precisely and sub-categorized into "Investment Risk", "Issuer Risk" and "Industry Risk".

[57] The *Regulations* also require the CEO/CFO of the issuer to sign a certificate that "*This Offering Memorandum does not contain a misrepresentation*".

[58] The Offering Memorandum is the window that the potential investor looks through before deciding whether to place their money into the project. The Regulations prescribing their form, and the forms themselves, are precise and specific.

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[2] Sometimes also referred to as "MI," Multilateral Instrument, N1/M1 45103 was repealed and replaced effective September 14, 2005.

[59] All three of the Legacy OMs specifically described a 503 acre parcel of land "4 miles west of the City of Calgary" as the project. They all stated the lands were currently designated for agricultural use and were covered by prairie grasslands. The lands were also precisely identified by their legal description. Maps of the exact area were included. These maps were identical to those used in the marketing brochures and Power Point presentations referred to above, in exhibits 5,6,7 and 14.

[60] Four separate investment strategies were identified in the OMs, should Legacy be successful in acquiring all the necessary lands; 1) Holding the land and selling it for a profit, without re-designation; 2) Selling the lands to a third-party developer after the necessary re-designation approvals; 3) Jointly developing the property after re-designation with another real estate investor as a joint venture and 4) Receiving re-designation approval and engaging in the business of developing the lands into residential parcels and then marketing these parcels to the public. Market values of this land were referenced in all of the OMs and updated as their values increased (OM1 at 1.3.1, OM3 at 2.4).

[61] The long-term goals of Legacy are referred to in the OMs (for example OM1 at 1.7, OM2 at 2.2 and 2.5, and OM3 at 2.1 and 2.8), as being consistent with pursuing and receiving re-designation approval and developing the lands for profitable resale to consumers. No other goals are identified. Likewise, wherever the "Corporate Goal", "Our Business" or "Business Strategies" headings of Legacy are referred to in the OMs they are identified in the paragraphs under those headings as the purchase, development and resale of this same 503 acre parcel of land and the realization of profits from this specific venture.

[62] Notably, there is no mention in any of the three Offering Memoranda of several other activities that Harvest Capital or Foundation (referred to collectively as the "Harvest Group of Companies" in exhibit 8 and in the various reports of the "Monitor" -- see for example the Ninth Report of the Monitor, August 30, 2013 exhibit 40, tab 3), appear to have been involved in. These "other activities" included Railside Industrial Park (a commercial property south of Edmonton), Liberty Crossing (a commercial real estate project in Red Deer), an interest in two quarter sections of land near Granum, Alberta (referred to later as the "Granum lands" which also came with accompanying water rights), Balsam Lake (a proposed solar farm 1.5 hours north of Toronto Ontario), or a project known as "Panama – Isle del Ray" (a proposed ocean-front resort property on the Pearl Island Archipelago, situated south of the mainland of Panama in the Pacific Ocean).

[63] To be clear, absolutely no description of any of these other projects, their intended purposes or the business strategies to achieve them appear in OM1, 2 or 3. None of the risks required to be identified in the form of the OM speak to any of these other activities. Neither does any other project or investment.

[64] Each OM contains a "Use of Net Proceeds" section. In all three OMs the clear intention to purchase and develop the previously identified Legacy lands, and paying the costs associated to that specific activity are the only uses mentioned.

[65] Each OM contains a "Reallocation" clause. For example, the "Reallocation" clause at 3.4 of OM1 reads as follows:

"3.4 Reallocation

We intend to spend the available funds as stated. We will re-allocate funds only for sound business reasons."

[66] The reallocation clauses in OM2 (at 1.3) and OM3 (at 1.3), are worded slightly differently, but convey essentially the same meaning.

[67] Each Offering Memorandum contains the following wording under the title "Certificate," which is found near the end of each OM:

"This Offering Memorandum does not contain a misrepresentation."

[68] Beneath these words Mr. Aitkens has signed on behalf of Legacy Communities Inc., as "President," "Director" and "Promoter."

[69] In summary, all three Offering Memoranda describe a specific investment in a real estate development on the western boundary of the City of Calgary. All business strategies identify potential profits from the purchase and sale of these lands in some fashion. The primary investment strategy is not left in doubt. This is the pursuit of re-designation approvals for this land and the development and construction of individual parcels of that land for sale to consumers.

iii) Individual Investors

[70] The Court heard from five investors. Between them, they placed $210,000 into the Legacy project. All five subscribed after sitting through presentations on Legacy. The Crown called investors Norman Yee, Dale Nelson, Thomas Tompkins and Janelle Weigum. The Accused called investor Jerry Froese. Yee, Tompkins and Froese subscribed under the terms of OM2, while Nelson and Weigum invested under OM3.

[71] Investor documents for these witnesses were put into evidence. Exhibit 2, for example, was the complete "Confidential Offering Memorandum" for Mr. Yee. This included the full contents of OM2 (from September 15, 2006, identical to the OM2 contained in exhibit 1, tab B), along with the signed and executed "Schedule B" and "Schedule C." These Schedules demonstrate that Yee completed his investment of $50,000 on August 13, 2007. "Legacy Communities Inc." appears as the "Corporation" or the "Issuer" on Schedule B. Yee's "Bond Certificate" demonstrating that he held $49,950 in "Series II bonds" in Legacy Communities Inc. was exhibit 3. The Certificate was signed on September 28, 2007 by the Accused as "President" and Jank as "Director." Exhibit 4 was a similar document labeled "Redeemable Bond Certificate" in Legacy Communities Inc. for Nelson. That Certificate was signed only by the Accused, on January 31, 2008, on behalf of Legacy.

[72] Exhibits 10, 11,13 and 59 were similar documents detailing the investment details for Tompkins, Weigum and Froese. The Accused signed each Bond Certificate in a prominent location as "President" or, under the heading "Legacy Communities Inc." with no official title, but as the sole representative of Legacy. I accept that exhibits 2,3,4,10,11,13 and 59 were all accurate documents outlining the individual investments by Yee, Nelson, Tompkins, Weigum and Froese.

[73] All investors who testified were under the impression that the funds used would be for the Legacy lands. None of the investors had in mind Foundation or Harvest Capital's other

activities in relation to their specific investment in Legacy. While many conceded it was a risky investment, they also drew comfort in the fact that the risk was mitigated by investment in the specifically identified Legacy lands. Nelson, for example, remarked that his investment in the venture was stabilized by these lands.

> *"Q: Would it have affected your decision to invest if you'd been made aware that your funds could have been used elsewhere?*
> *A: Well, it would've because we were investing on the premise that the land was backing up our investment.*
> *Q: The Legacy lands?*
> *A: Yes."*
> (transcript, April 17, 2008 at pp. 5 - 6)

[74] That is not to say Foundation or Harvest Capital's other activities were completely unknown to some of these investors. Nelson agreed he had invested in one of Foundation's other projects in Airdrie (which was not put before the Court). Tompkins also may have invested in the same unnamed Airdrie project and also possibly in the Liberty Crossing project. The details of these additional investments were not elaborated on in their evidence. It is clear, however, that both Nelson and Tompkins saw those as separate activities, not as a part of their investment in Legacy (transcript, April 18, 2017 at pp. 49 – 50).

[75] Froese, who testified on behalf of the Accused, thought the Legacy deal was structured well. He later went on to say that he expected there would be an opportunity for the issuer to "diversify." Froese commented on a particular slide of the Power Point presentation on "Elbow Valley Country Estates" which was put before the Court as exhibit 6. Froese remembered a passage which reads:

> *"Diversification Opportunities"*
>
> *Long Term Purchase Option – offers big advantage Land option on 400 acres does not have to be exercised till July, 2017.*
>
> *Board of Directors uniquely positioned to find excellent "Green" opportunities.*
>
> *Elbow Valley Country Estates Purchase Agreement provides opportunities for diversification."*

[76] Froese understood that there was a risk to the Legacy project. The Legacy lands had not yet received development approval. He viewed diversification efforts positively, in the sense that his investment was "not just potentially stuck on one thing if it goes wrong" (transcript, August 21, 2019 at p. 4).

[77] However, Froese also testified that he had not heard about the Panama, Railside, Granum lands or Balsam projects at the time he placed his investment in Legacy. Froese, as already observed, subscribed under OM2. That OM contains nothing about those other projects. Froese also conceded that he may have heard more about the Legacy situation as information leaked out to investors through the *CCAA* process. In any event, he did not follow that process very closely. When the investment failed he simply assumed that his money was lost and was more interested in putting the matter behind him (transcript, August 21, 2019 at pp. 11 – 12).

[78] Witness Weigum was much more direct. Weigum went to multiple Legacy presentations. She very carefully reviewed OM3 before placing $50,000 into the project. She recalls being told that the Legacy lands were in the Elbow Valley location and fully expected her funds to go exclusively to that effort. She had OM3 in her possession for at least a month before deciding to invest. She also took the effort to drive by the location personally, and found it "beautiful" (transcript, April 18, 2018 at p 80).

[79] When asked about how she expected her investment would be applied she said the following:

> *"Q: And did you understand that your investment or your funds would remain with the Legacy project?*
> *A: Yes.*
> *Q: Did you give authorization for the use of your investment in other projects, whether locally, nationally or internationally?*
> *A: No.*
> *Q: Would you have invested if you'd been given the information about the use of your funds outside of Legacy?*
> *A: Of course not."*
> (transcript, April 18, 2018 at pp. 80 – 81).

[80] I find that witness Weigum's evidence was the most detailed and reliable on the subject of how investors thought their funds would be directed. I accept her evidence entirely on this point. I also accept the evidence of Nelson and Tompkins that the other projects they may have heard about or invested in were not, in their view, part of the Legacy offering. I further accept that all of the investors who testified expected their funds to go towards the specific Legacy lands identified in the OMs they individually subscribed under.

[81] As a whole, these five investors did not have much information about the current status of their investment. Most appeared to believe the opportunity was lost and their investment was irretrievable. In cross-examination, counsel for the Accused, Mr. Kothari, suggested that their shares had been converted into equity in the company, and also that the option to purchase additional lands at the Legacy location had been exercised in 2017. However, the full details of this were not put before the Court.

[82] Witness Froese was questioned about exhibit 58 when he gave evidence on August 21, 2019, as part of the Accused's case. Investor witnesses Yee, Nelson and Tompkins were recalled by the Crown to address this specific issue on November 19, 2019 along with several other witnesses. Ms. Weigum could not be located at the time of this second inquiry.

3. Ownership and Control of Legacy Communities Inc. and Associated Companies

[83] The issue of ownership and control of the relevant corporate entities has already been addressed. In *R. v Aitkens*, 2019 ABPC 30 ownership, control and authority to act on behalf of Legacy and the other corporate entities was central to the admissibility of financial records which were the subject of a *voir dire*. The Court's findings on those issues were reported in relation to that voir dire, especially at paragraphs 36 – 85. I do not find it necessary to repeat those reasons here.

[84] In summary, I find that the Accused was the operating mind behind Legacy, Foundation, Harvest Capital and numbered companies 125 and 133. There is a wealth of documentary evidence establishing this fact beyond a reasonable doubt. In respect of Legacy the Accused's name appears prominently in all documents relating to Legacy, especially the three OMs. He is described as either "President" or "Director" in those documents. Sometimes he is simply portrayed as "signing authority" for Legacy. Official bond certificates and other important communications, which were returned to investors after their money was invested, were signed by the Accused as "President" or as signing authority on behalf of "Legacy Communities Inc".

[85] Documents filed to the ASC, as part of Legacy's obligation to report the exempt distribution, came directly from the Accused.

[86] The Accused was also in possession of, and acted on, the bank statements of Legacy, 125, and 133 which he received at their joint offices in Lethbridge, Alberta. He relied on these documents in his dealings with his external accountant (McCarthy) and throughout the *CCAA* process. I accept that exhibits 38 (also duplicitously entered as exhibit 42), and 39 (also entered as exhibit 41), were genuine and accurate copies of the banking records of Legacy and 125. I discuss these exhibits in more detail below.

[87] Individual witnesses who worked for Legacy all described the Accused as the sole person in control of the relevant companies. This included Roy Beyer, the Marketing Director for Foundation, Olaf Petersen, a selling agent for Foundation, Frank Lonardelli, the CEO of the Harvest Group of companies and Mark McCarthy, the external accountant for Legacy and Harvest Capital and associated companies. All took direction from the Accused. All saw him as the only person in control of the relevant companies. I accept their evidence on this point entirely.

[88] When Legacy and its relevant related companies went into *CCAA* protection it was the Accused who directed the process. Neil Narfasson, the Court-appointed Monitor, met and corresponded with the Accused frequently during this process. Narfasson confirmed that Legacy, 125 and 133 were all the Accused's companies. When Narfasson required further information about these companies, to advance the *CCAA* process, he received it from the Accused. The Accused's interactions with Narfasson, whether verbally, in person, or in writing confirmed the Accused's position as the sole authority in charge of these corporate entities and the only one able to supply critical information about their operations and financial activities. The Accused's dealings with Narfasson left the latter in no doubt that the Accused knew about and authorized the financial activities of those same companies. This included the Accused's knowledge of and authorization for the flow of funds through Legacy and its related companies.

[89] When Narfasson questioned the apparently irregular activities of those companies it was the Accused who provided documents which seemed to authorize those activities. The documents themselves were signed by the Accused, and the Accused alone, on behalf of these companies. This included exhibits 50 (promissory notes signed by the Accused on behalf of Harvest Capital and 125), 51 (promissory notes on behalf of Legacy, Harvest Capital and 125), 52 and 53 (the Investment Agreements between Legacy and Harvest Capital), and 54-56 (three Management Services Agreements between Legacy and Foundation).

[90] All evidence, whether led through documents or *viva voce* testimony showed the Accused was in firm control of Legacy, Harvest Capital, Foundation, 125 and 133. I find that he was aware of and responsible for their decisions and activities, including all of their financial activities.

4. The Allegedly Improper Uses of Legacy Investor Funds

[91] As discussed above, Legacy was formed for the specific purpose of the acquisition and development of a 503-acre parcel of land immediately west of Calgary. This was understood by the employees of Legacy and the individual investors who made the funding for the project possible. This specific land, and the risks and benefits associated with its development, were exhaustively set out in the official and unofficial written materials supporting the project.

[92] In December of 2011, when it became clear that Legacy could not make its payments on the bonds, Legacy sought *CCAA* protection from its creditors. Under the *CCAA* the Alberta Court of Queen's Bench appointed a "Monitor." The role of the Monitor is to oversee the financial affairs of the company, investigate the cause or causes of its financial difficulty and report back to the Court. The Monitor represents both the debtors and creditors of a given company during this process. Under section 35(1) of the *CCAA*, officials with the debtor company must assist the Monitor so that the Monitor can adequately carry out its functions. Superior court records, put before this Court in exhibit 40, demonstrate that the accountancy firm Ernst & Young undertook this duty. Accountant and Senior Vice President of Ernst & Young, Neil Narfasson, conducted the investigation along with a team of professionals.

[93] The transition of the companies into *CCAA* protection involved several different corporate entities, including Legacy. That history is revealed in paragraphs 1-8 of the "Seventh Report of the Monitor," found at tab 2 of exhibit 40. Briefly, Legacy went into *CCAA* protection, along with Airdrie Capital Corporation (ACC) and Airdrie Country Estates Inc. (both companies controlled by the Accused), on December 21, 2011. On March 21, 2012, Railside Capital Inc. and Railside Industrial Park also went into *CCAA* protection. Finally, on June 7, 2012, 125, 133 and Harvest Capital were also placed under *CCAA* protection.

[94] One of the primary duties of the Monitor was to examine the "sources and use of the funds" for Legacy and these associated companies.

[95] Narfasson testified that he needed a deep understanding of Legacy's assets and liabilities to put forward a workable re-structuring plan. Narfasson and his team reviewed bank reconciliations, financial statements, general ledgers and both internal and external documents to glean the complete financial picture of Legacy and its related companies.

[96] During his investigation, Narfasson worked closely with the Accused and Legacy's external accountant Mark McCarthy. Narfasson also communicated with the Accused regularly. It was immediately obvious to Narfasson that the necessary corporate documentation for the Accused's companies were absent or incomplete. This required the Monitor to seek clarification from the Accused on specific inquiries and also to look deeply into bank statements, cancelled cheques, transfers and third-party documents to facilitate the process. Narfasson paid careful attention to this process. I accept his evidence on this and his ultimate findings (contained in the numerous "Reports of the Monitor" and "Receiver" found at exhibit 40), as accurate.

[97] As explained earlier, exhibits 38(42) and 39(41), were the subject of a *voir dire* for admissibility, reported at 2019 ABPC 30. In that matter they were known as exhibits VD-4 and VD-7. The Reports of the Monitor, exhibit 40, were also subject to the *voir dire* and were VD-8. All were found to be admissible on the basis of the "documents in possession" exception to the hearsay rule. The Accused received 38(42) and 39(41) and acted upon them for significant financial matters relating to Legacy and 125, such as accounting and tax purposes. When Legacy went into *CCAA* protection, the Monitor relied on these banking records, at the behest of

the Accused, to report on the financial activities of those entities. Exhibit 40 was prepared with reliance on 38(42) and 39(1).

[98] In finding these documents reliable and accurate, I place sufficient weight on them to arrive at the conclusions I have drawn in the following analysis. This particularly includes the uses that Legacy eventually went towards, and how and when those funds were removed from its account.

[99] Narfasson concluded that the only reliable documents he and his team could look at were third-party documents. This included the aforementioned banking records and cancelled cheques. Those documents revealed the following re-direction of Legacy investors' funds:

1) On September 24, 2007, $4,664,880 of Legacy funds were transferred to 125, the Accused's private company. 125 received the transfer as a deposit to its account on September 24, 2007. This transaction is revealed as a "credit adjustment" in the financial records (Royal Bank of Canada statements) for both 125 (exhibits 38 and 42) and Legacy (exhibits 39 and 41). This money was destined for the Panama investment (Panama – Isle del Ray). Indeed, the exact same amount was withdrawn from 125 the following day.

2) On November 14, 2007, $5.3 million of Legacy investor funds were transferred to 125. Again, these are revealed in the financial records of both 125 (exhibits 38 and 42) and Legacy (exhibits 39 and 41). This money was then immediately transferred out of 125 towards the Railside project.

3) On October 15, 2008, $825,082.72 of Legacy funds were withdrawn. The evidence was that the funds ended up in the account of 133. The banking records for 133 were not put before the Court. However, the withdrawal of that amount did appear in the Legacy banking records (exhibits 39 and 41). These included a copy of the cheque which accomplished the transaction (cheque #0411). The memo written on that cheque said simply "Granum." While a more detailed explanation of the evidence is appropriate, I am satisfied that these funds went to purchase a parcel of land, bundled together with a water rights package, known as "the Granum lands." 133 did not have sufficient funds to purchase these lands, and so relied on the transfer of Legacy funds for the acquisition. 133 then sold the water rights (without the accompanying land), back to Legacy for $950,000, $125,000 more than the entire property, inclusive of the water rights, was originally purchased for.

[100] These three transactions together totaled $11,739,962.72. They represent the total amount of Legacy investor funds diverted to other projects, inclusive of the $950,000 return sale of the water rights back to Legacy. If the $950,000 return sale is not included, then the figure is $10,789,962.72.

[101] Transactions 1, 2 and 3 were all supported by the banking records of Legacy. Over a period of 1 year at least $10.7 million of Legacy investor funds were removed from Legacy's dedicated account. Items 1 and 2 were also supported by the banking records of 125 which show the corresponding transfers into its account as "deposits." All three transactions were also corroborated by *viva voce* testimony outlining the Accused's knowledge of the transfers, the ultimate destination of the Legacy money, and his purported justification.

[102] Legacy's external accountant, McCarthy, provided bookkeeping, accountancy and tax preparation services for Legacy and many other of the Accused's companies. McCarthy was familiar with Legacy finances and its bank statements from the very early stages of Legacy's formation. His evidence was particularly helpful for understanding the flow of Legacy funds. I accept his evidence on these points entirely.

[103] Sometime after July of 2011, McCarthy was responsible for a complete reconciliation of the total funds generated by Legacy. Exhibit 43 represented the spreadsheet McCarthy created to perform this reconciliation. He did this using Legacy's bank statements and by reference to Legacy's internal accounting system. I accept his evidence in this regard and acknowledge that sufficient weight can be placed on exhibit 43 to support the reconciliation conclusions that McCarthy came to when he testified. In particular, the conclusion that $35,453,800 was raised by the three OMs (transcript, April 25, 2018 at p. 94).

[104] McCarthy's last work for Legacy involved assisting the Monitor with financial inquiries into its activities. During the reconciliation, McCarthy observed the $4.6 million transaction from September 24, 2007. He asked the Accused about the transaction. As a result of this conversation, McCarthy wrote the word "Panama" next to that entry on the Legacy record along with the full digits for numbered company 125. He made a similar written notation on the 125 records, circling the entry of $4.6 into and out of 125 for the same amount. He wrote "Legacy" on those records (transcript, April 25 at p. 102). I specifically find that McCarthy was provided details on the destination of that money, that being Panama, from the Accused personally.

[105] When Narfasson learned of the Panama investment, he directly confronted the Accused. Narfasson asked why funds that were specifically destined for a land purchase west of Calgary went to the Panama project. The Accused confirmed to Narfasson that the money had gone to Panama. He further justified his actions by stating that he was trying to achieve a return for the investors (transcript, April 16, at p 63). When Narfasson asked the Accused why he felt the Panama investment was authorized to come from Legacy investor funds, the Accused explained that the OMs for Legacy allowed for the transaction under the "Sound Business Reasons" clause (transcript, April 27, 2018 at p 15). I accept Narfasson's evidence on this point.

[106] There were other witnesses who testified to the Accused's knowledge of Panama. For example, witness Beyer knew of the project before the investment was made. In fact, Beyer testified that he brought the Panama opportunity to the Accused's attention after hearing about it from a friend. Beyer said the project seemed worthy and exciting. Beyer actually toured the foreign site with the Accused in May of 2007. There they met the manager of the proposed project and discussed the opportunity (transcript, April 17 at p 27).

[107] Beyer eventually became aware that an interest in Panama had eventually been purchased. However, he did not originally know where the funds to invest in Panama came from. Ultimately, he discovered that Legacy funds were used. Beyer learned this *only after* the *CCAA* process started, in December 2011. The Accused later told him that the OMs allowed for the use of Legacy funds in this way (transcript, April 17, at pp. 29-30).

[108] Transaction 2, the Railside project, was also corroborated by the investigations of the monitor. The Ninth Report of the Monitor, released on August 30, 2013 (exhibit 40, tab 3), revealed that the $5.3 million withdrawn from Legacy went to 125 and then into Railside.

[109] In the discharge of his accounting duties, McCarthy duly noted the November 14, 2007 withdrawal of $5.3 million from the Legacy account. He marked exhibit 39 (41) with the digits

"1252064" next to that entry. I accept McCarthy's evidence that this information was given to him by the Accused (transcript, April 25 at pp. 115-116).

[110] Transaction 3, the transfer for the Granum lands, went through 133. This was another of the Accused's private companies. During the reconciliation, McCarthy observed the transaction dated October 15, 2008 on Legacy's account statement for the period September 16 – October 1, 2008. He wrote "Granum Land" next to that transaction. He also identified the Accused's signature on cheque number 411 for the exact amount of that withdrawal and dated the same date (transcript, April 25, 2018 at p 128). The cheque was, as previously observed, noted with the word "Granum" in the lower left corner. I accept McCarthy's evidence that he was familiar with the Accused's signature from observing him sign other documents.

[111] As Monitor Narfasson was highly critical of the Granum transaction. He did not think it was a proper use of Legacy funds (transcript, April 16, 2018 at pp. 59-60). He discussed this particular transaction with the Accused in the same fashion as the other questioned uses of Legacy money. The Accused confirmed the transaction and justified the purchase on the basis that Legacy needed a water license to proceed with its development (transcript, April 16, 2018 at p 63 and April 27, 2018 at p 15). In fact, this statement was untrue. Legacy already had a pre-existing water license agreement in place. This fact was made plain by OM3 which identified the existing agreement in clause 2.10.6. That pre-existing agreement allowed Legacy to divert up to 500-acre feet of water per year from the nearby Elbow River "to be used to provide water to the development of the property" (exhibit 1, tab C, 2.10 "Material Agreements"). This agreement existed at least 11½ months prior to the purchase of the Granum lands.

[112] Dr. Jank, whose expertise was in environmental engineering, testified that 500-acre feet of water was far in excess of what would be needed, even in contemplation of the fully developed Legacy property. In fact, there was an excess of some 350-acre feet of water which could sell or put into some other allocation (transcript, August 20, 2019 at pp. 13-14).

[113] Despite his duty to assist the Monitor on behalf of the debtor corporations, the Accused never produced any proper Board of Directors' resolutions or meeting minutes authorizing the use of Legacy funds for any of these three transactions. This was true of the Panama, Railside and Granum purchases. However, the Accused did try to explain to the Monitor that he was justified in the use of Legacy funds for other projects. He produced a series of "Promissory Note(s)" (contained in exhibits 50 and 51). These notes had various dates and were for various amounts. Some were between Harvest Capital and Legacy, others were between 125 and Legacy. The four notes in exhibit 50, for example, ranged in date between September 24, 2007 and June 27, of 2008. These totaled $9,587,880. The three notes in exhibit 51 were in the same date range and totaled $10,711.433.

[114] The Monitor could not confirm the accuracy of the notes. Specifically, the Monitor could not confirm that the amounts purportedly loaned with the documents were accurate or that those amounts of money went to any of the projects listed in the notes (Panama, Balsam Lake "green technology facility" or Liberty Crossing).

[115] Narfasson and his team found he could not rely on the accuracy of any of the information contained in any of these documents and resolved to use only banking documents and other third-party records (transcript, April 27, 2018 at p 27).

[116] Finally, the Accused justified his use of Legacy funds through two "Investment Agreements" (exhibits 52 and 53). Both agreements bear the same date, December 15, 2005. Narfasson and his team were given these agreements by the Accused or a member of his staff as

they probed the transactions in Legacy accounts (transcript, April 27, 2018 at pp. 28-29). The agreements are between Harvest Capital and Legacy. These agreements revealed that the Accused signed on behalf of both entities as "Director."

[117] When Narfasson questioned the withdrawals from Legacy's accounts, the Accused suggested these agreements authorized his movement of Legacy funds to other projects (transcript, April 27, 2018 at p 28). The date of these questioned Investment Agreements, December 15, 2005, pre-date OM2 and OM3. These "Investment Agreements" are not mentioned in either of those OMs despite those OMs having "Material Agreements" sections.

[118] Despite the Accused's argument that these agreements were hearsay, and inadmissible, these documents had already been entered into evidence after a lengthy *voir dire*. I have already referred to two previous decisions of this Court on this exact point. The Accused adopted these agreements as genuine and represented them as such to Narfasson. The Accused's purpose was to justify his use of Legacy funds. I accept the accuracy of Narfasson's evidence in this regard. I find that these exhibits have sufficient weight for the limited purposes of the Accused's knowledge of these documents and how he tried to represent them. However, I do not find the documents to be *factually accurate*, a point which is discussed below.

5. The Evidence of Dr. Jank and the February 1, 2008 Letter to Investors (Exhibit 58)

i) Dr. Jank

[119] Dr. Bruce Jank was the main witness called by the Accused. He holds a PhD in the field of environmental engineering. He has had a distinguished career in the waste-water technology industry since 1971.

[120] Jank was introduced to the Accused by a local home builder. He joined the Legacy project, ultimately serving as both "Director" and "Treasurer." Under Jank's influence, ambitious plans to make the Legacy development environmentally sustainable and responsible were put into place. In fact, this was one of the selling features of Legacy. Legacy was to offer geo-exchange technologies for its heating needs, solar and wind generated electricity and progressive storm-water, waste-water and composting facilities. All were integrated into a consumer-friendly design.

[121] As a director, Jank testified that he had direct knowledge of Legacy's plans to secure an area structure plan, a water license and proceed to develop the specific 503-acre parcel. He was involved in making presentations to investors and also to municipal planning authorities. The latter were in efforts to obtain the required development approval.

[122] Jank confirmed that Legacy was operated and controlled by the Accused. While Jank was described as "Treasurer" of Legacy, he did not actually perform any treasurer-type duties (transcript, August 20, 2019 at p 42). In fact, he had no signing authority on any Legacy bank accounts (transcript, August 20, 2019 at p 46). Likewise, there was no evidence he had control over any funds for Legacy, 125,133, Harvest Capital or any of the Accused's private corporate interests. I accept Jank's evidence in this regard.

[123] Jank confirmed, when presented with the OM documents, the four central business strategies of Legacy. These were to hold the specific lands and sell them for a profit, receive re-designation approval and develop the property either as a joint venture with another partner, or receive that approval and proceed with development of the property itself.

[124] Jank watched as the municipal authorities voted down the necessary re-designation approvals (presented in concert with other potential development projects), by a one vote margin. This happened on multiple occasions. He was disappointed by this as he felt the Legacy plan was for a fair and environmentally responsible development which would have benefitted the community and consumers alike.

[125] Jank testified about his personal understanding of the clauses pertaining to the "Use of Net Proceeds" and "Re-allocation" contained in the OMs. It was his view that the failure to obtain re-designation approvals reduced Legacy's ability to repay the upcoming bond obligations. His personal interpretation was that Legacy funds might be available for other projects, in order to meet Legacy's bond payments.

[126] One of Jank's ideas was to sell Legacy's excess water rights to service the bond debts. There had been an appreciation in the unit price for water, during the term of the three OMs, which he testified might make this possible (transcript, August 20, 2019 at p 17). He further testified that the management of Legacy, including the Accused, resolved to do "everything possible to look at other business opportunities...." that Legacy could engage in with its available cash (transcript, August 20, 2019 at p. 17).

[127] Jank was familiar with several of the projects Legacy funds ultimately went towards. This included Panama. However, he did not know where the funds for investment in these other projects actually came from. Although purportedly on the Board of Directors for Legacy, he never approved use of Legacy funds for Panama, Balsam Lake, Liberty Crossing or Railside (transcript, August 20, 2019 at pp. 63-63). Interestingly, he agreed that from 2007 to 2011, only he and the Accused sat on the Legacy Board.

[128] As previously discussed, Jank was aware that the Granum lands were purchased. However, he did not know the purchase occurred through the Accused's personal numbered company. He understood that water rights were associated with the Granum lands, yet he also confirmed that Legacy did not need this water supply. While he speculated that the Granum water might be sold to other developers, as it was capable of being upgraded to municipal uses and transferred, he testified that Legacy took no steps to do this (transcript, August 20, 2019 at pp .64-66).

[129] Jank, for all his expertise in the engineering aspects of the Legacy project, had a thin understanding of the clauses in the OMs. He had little concept of how those clauses might apply in the daily business of Legacy or how they might affect the use of Legacy funds. Jank appears to have assumed it was the responsibility of others to draw up the OM documents and assumed there were no problems (transcript, August 20, 2019 at p 42). He left the actual running of Legacy to the Accused.

[130] Jank did not recognize the Investment Agreements (exhibits 52 and 53). He did not recall authorizing the Accused to enter into these agreements on behalf of Legacy as a Board Member (transcript, August 20, 2019 at pp. 75-79). Further, he did not recall seeing any promissory notes authorizing investment in Panama, Balsam Lake or Liberty Crossing (transcript, August 20, 2019 at p 88).

ii) February 1, 2008 Letter to Investors (Exhibit 58)

[131] Exhibit 58 was a letter written on Foundation Capital Corporation letterhead. It is addressed to investors in Legacy. It is dated February 1, 2008. Exhibit 58 was introduced

through Dr. Jank. The contents of the letter were directly relevant to many issues raised in the trial, including the ill-fated investment in Panama. The letter discusses Legacy's plans to diversify its investments to service the upcoming interest payments due on the Legacy bonds.

[132] Neither the contents of the letter, nor its existence were put to any previous witnesses. This necessitated the recalling of virtually all of the Legacy management and investor witnesses who could be located, to satisfy the rule in *Browne v Dunn,* 1893, 6 R 67 UKHL. Several Crown witnesses were called to address this issue. This included investors Norman Yee, Thomas Tompkins and Dale Nelson. Witness Janelle Weigum could not be located. Legacy employees Frank Lonardelli, Roy Beyer and Olaf Petersen were recalled as well. Further, Noel Winter and the court-appointed Monitor, Harold Narfasson also re-testified on this single issue.

[133] Exhibit 58 contained a specific paragraph which seemed highly relevant to many issues before the Court. It outlined the investment in Panama and the exact amount of Legacy funds devoted to that project. This paragraph went on to state that Legacy could expect a "turn-around" on that investment within "2 to 3 years."

[134] The introduction of exhibit 58 was preceded by contextual evidence provided by Jank about the corporate strategy of Legacy. Jank testified that in July of 2006, Legacy held a board meeting where the Accused was in attendance. The directors of Legacy resolved to make all efforts to explore business opportunities with extra Legacy cash (transcript, August 20, 2019 at pp. 16-17).

[135] Jank testified that he did not create exhibit 58, but provided content for it. He acknowledged his name was listed on the final page of the letter, along with the Accused's name, in signature format.

[136] Jank's evidence on exhibit 58 was essentially that Legacy investors were made aware of the Panama project through that document. Jank seemed sure that the letter had been sent to all investors. He also seemed sure that the letter had been generated in February of 2008 (transcript, August 20, 2019 at pp. 35-36).

[137] However, he also testified to many things that dispute those claims. For example, he admitted he did not create the letter. He also confirmed he did not send it out (transcript, August 20, 2019 at p 37). In fact, there was no evidence to satisfy the claim that Jank, or anyone else, sent the letter to anyone. Jank's assurances that the letter had been created and sent were mysterious.

[138] Further, while Jank claimed to provide content for the letter, he never specified what content that was, beyond the vague description "anything related to development" (transcript, August 20, 2019, at p 61). When specific concepts in the letter were raised, such as a paragraph concerning the Management Services Agreement (which purportedly allowed Legacy Directors to manage loans and investments made by Legacy), Dr. Jank seemed unaware of those concepts. Moreover, Dr. Jank was not aware that Legacy had entered into a Management Services Agreement. He had no recollection of such an agreement from his time on the Board of Legacy.

[139] When questioned on the paragraph detailing the Panama investment, Jank was equally mysterious. He agreed that he was aware of the Panama opportunity. He also knew that money had gone towards that project. Yet he did not know where the money had come from (transcript, August 20, 2019 at p 63 and pp. 85-87). He also did not see any agreements related to the Panama investment (transcript, August 20, 2019 at p 87). This claim was despite the fact that he was 1 of only 2 directors of Legacy at the time the investment was made. It was clear from the

evidence that Dr. Jank could not have provided the information for that paragraph of the letter (contained at exhibit 58, page 3, paragraph 10). Nor could he have read that paragraph at the time, given his disavowed knowledge of where the Panama money came from.

[140] Despite Dr. Jank's assurances that the letter had been sent, no investor recalled receiving it. This included Froese, who testified for the Accused, and the three investor witnesses recalled by the Crown, to address this specific issue. At best, witness Froese recalled being aware of some of the concepts discussed in the letter. However, he could not specify which items those were or where he learned them (transcript, August 21, 2019 at p. 7). It was clear Froese learned something about Legacy investments through the *CCAA* process. Froese could not say with any clarity what that information was. Froese's understanding of what he learned and when he learned it was unreliable. I do not accept his evidence on exhibit 58, other than to find he did not recall receiving it.

[141] Witness Yee did not recall the document at all. Neither did witness Tompkins. Tompkins, in fact, collected all correspondence he received from Legacy in a special file folder. Exhibit 58 was not amongst the correspondence in that folder (transcript, November 19, 2019, at p. 16).

[142] Likewise, the employees of Legacy did not recall exhibit 58. Frank Lonardelli, the CEO for Legacy did not recall the document. Roy Beyer, the Marketing Director, thought the document *may* have been created by Dr. Jank. He confessed that the material in exhibit 58 was familiar to him (transcript November 20, 2019 at p. 6). However, in cross examination, he confirmed his earlier evidence that he was not aware that it was Legacy funds that had been used for Panama until 2011 (transcript, November 20, 2019 at pp. 7-8). This means that Beyer could not have authored or even read paragraph 10 of exhibit 58 in February of 2008 since that paragraph clearly specifies that Legacy funds were used. Olaf Petersen had never seen exhibit 58 nor was he ever aware that Legacy funds were used for Panama, as described in that document (transcript, November 20, 2019 at p. 13).

[143] Witness Noel Winter was not an employee of Legacy. His corporation originally shared office space with Foundation Capital and he knew the Accused through that association. He testified that he had never seen exhibit 58 before. He also admitted he did not see very many Legacy investor documents anyway (transcript, November 20, 2019 at pp. 3-4).

[144] Finally, Narfasson did not come across exhibit 58 in his duties as Monitor. This was despite working with a team of professionals who were actively searching for key documents pertaining to Legacy transactions and the authority to engage in them. Narfasson and his team were specifically on the alert for any documents rationalizing funds leaving the Legacy project. Indeed, Narfasson had earlier testified that he worked directly with the Accused on these issues. It was through this process that the Accused presented Narfasson with the justifications contained in exhibits 50-56. The Accused did not give him exhibit 58. Narfasson felt that it was unusual that a letter, of the type exhibit 58 appears to be, would have not come to his attention in the course of his investigation. Narfasson speculated that the letter may have been fabricated. He observed that the font, or type-style, differs between pages 1 and pages 2 and 3 of exhibit 58 (transcript, November 20, 2019 at p. 10).

Legal Principles

1. General Principles – Fair and Accurate Representation

[145] The purpose of the Alberta *Securities Act* is to create a fair, transparent and regulated investment environment for a market economy. The *ASA*, and its *Regulations*, are a statutory framework designed to fairly and efficiently promote investment while guarding against forces that detract from its benefits. The *Act* creates an investigative body, the Alberta Securities Commission, to investigate and enforce compliance with the rules of the marketplace. Protection of the investor is paramount.

[146] Participation in the capital markets is a privilege, not a right. The participants in the market have an underlying obligation to engage honestly and legally in the market. They must comply with all statutory and regulatory objectives (*Hampton Court Resources Inc., (Re)*, 2006 ABASC 1345 at paras 151-152). Participant issuers are deemed to know the rules associated with their particular offerings (*British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at par 64).

[147] Securities trading is a highly regulated activity. There is good reason for this. Securities trading is a crucial part of the economy. Protection of the public, through honest and competent participants and an accurately informed public is critical. The system relies on transparent and accurate information to ensure an efficient and prosperous market. Public confidence is also a key aim of securities regulation. As previously observed, misinformation leads to poor investments and erodes investor confidence (*British Columbia Securities Commission*, supra, at paras 54, 57-59).

[148] The ASC regulatory scheme uses a variety of devices to protect investors and ensure a fair and efficient capital market, which is blessed with investor confidence. Chief among these is the registration and prospectus requirement. All securities must be traded under this method unless they fall under an officially regulated exemption. The prospectus and registration method is intended to provide potential investors with a trained and regulated individual capable of advising them of the investment objectives and risks associated with it.

2. The Exempt Market – Offering Memoranda

[149] The official exemptions (the exempt market), is an acknowledgement by the *ASA* that not every investment requires the protection of the onerous prospectus and registration scheme. However, this does not mean that those exemptions are not regulated. Nor does it mean that issuances under these exemptions are absolved from the responsibility of supplying investors with accurate and transparent information.

[150] The offering memorandum exemption, which Legacy used, is one such exemption. Because these exemptions relieve issuers from the fundamental requirements of the *ASA*, and the onerous registration and prospectus scheme, those seeking to use the exemption must do so within the strict boundaries of that exemption. Issuers must demonstrate that their securities offering falls within the permissible exemption and also that they have strictly complied with "all of the requirements, conditions and restrictions associated with the relied-on exemption" (*Arbour Energy Inc.*, *Re* 2012 ABASC 131 at par 737).

[151] Whether by prospectus and registration, or an official exemption, the *ASA* regulatory schemes are not designed to ensure that every investment succeeds or that investors are relieved from applying critical thought when evaluating potential investments. Rather, it is to ensure that investors are fairly treated and that they have accurate and factual information on which to select their investments. Investors must be put in a position to make fully informed investment decisions, adequately apprised of the opportunities and legitimate risks associated with their choices (*Arbour Energy*, supra at par 722. see also *R v Boyle*, 2002 ABPC 136 at par 24).

[152] It is a fundamental principle that representations contained in offering memoranda must be fair and accurate. There must be no misrepresentation, either by deliberate statement or omission of critical facts. It is not the obligation of the investor to sift through the materials, carefully inspecting and weighing what might be truthful and accurate and cautioning themselves about might not be. Instead, it is the obligation of the party seeking the investment capital, the issuer, to provide only accurate and truthful facts about the opportunity. An investor is entitled to rely on this information before deciding whether or not to place their money into a particular venture. Misrepresentations are not permitted (*R v Boyle*, supra, *Kustom Design Financial Inc.* Re 2010 ABASC 179, at par 200). Investor confidence is the ultimate aim.

[153] The need for accuracy in the information provided in securities transactions of all kinds was best described in *Smylski (Re)*, where possible harm to the market by misrepresentations was referenced. The following passage is highly relevant:

> *"There is also the harm that comes from market participants making prohibited representations concerning a public listing of a security and making misleading or untrue statements or misrepresentations. Such information deprives investors of the ability to make informed investment decisions. It thus can lead to flawed investment decisions and subsequent investor losses. Those, in turn, can jeopardize investor confidence and the reputation and integrity of the capital market generally."*
> (*Smylski (Re)*, 2010 ABASC 449 at par 47)

[154] I accept that honest, accurate, fair and transparent representations from securities issuers is a cornerstone principle of the *ASA*. All exempt offerings must be in compliance with this fundamental principle.

3. General Fraud Under Section 93 of the *Securities Act*

[155] The Crown has alleged that the Accused committed general fraud in his use of Legacy funds. Section 93 of the *Act* makes it an offence to perpetrate a fraud. However, the concept of fraud is not defined in the *ASA*. Securities regulators and the courts have resorted to the criminal definition of "fraud" articulated in the *Criminal Code of Canada* RSC 1985, c. C-46, interpreted in seminal decisions from our Supreme Court.

[156] Fraud is currently referenced under section 380 of the *Code*. That section makes it an offence to engage in "...deceit, falsehood or other fraudulent means" as a method of defrauding others. This wording is specific and has a long history of being considered by the courts.

[157] In *R v Olan,* [1978] 2 SCR 1175, our Supreme Court considered this exact wording and clarified its meaning. The Court found that the *actus reus* of fraud has two essential elements.

1) some element of "dishonesty; and

2) resultant deprivation.

[158] Regarding the first element, the Court was careful to observe that "deceit" was only one of the many forms of dishonesty that exist. "Deceit," strictly speaking, is not exclusively necessary for a finding of fraud. Deceit (or deception), is itself a separate concept. "Deceit" also gives rise to a specific civil tort of action. However, the Court in *Olan* found that dishonesty of any kind is enough to constitute fraud. The concept of fraud, further clarified by the words "other fraudulent means," will encompass all conduct which might be "stigmatized as dishonest" despite not being false or deceitful (*Olan*, supra, at p. 1180).

[159] On the second element, "deprivation," the Supreme Court in *Olan* concluded that *actual deprivation* is not required. The *risk of deprivation*, or a *risk of prejudice* to the economic interests of another is sufficient. Further, the Court observed that the offence is made out even in the absence of an intention that actual loss be suffered. The Court cited with approval, the following passage from the English Court of Appeal in *R v Allsop*, (1976), 64 Cr App R 29:

> *"Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.*
>
> *We see nothing in Lord Diplock's speech [in Scott] to suggest a different view. "Economic loss" may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists it may be measured in terms of money...*
>
> *Interests which are imperiled are less valuable in terms of money than those same interest when they are secure and protected. Where a person intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context."*
> (*R v Olan*, supra, at pp. 1182-1183)

[160] The Supreme Court confirmed and expanded on these concepts later in *R v Théroux*, [1993] 2 SCR 5. In *Théroux*, the Court meticulously divided the concept of fraud into its *actus reus* and *mens rea* components. The Court particularly focused on clarifying the *mens rea* component, which *Olan* did not directly address. A summary of the principles enunciated in the *Théroux* decision can be reduced to the following:

i) The *actus reus* of fraud contains two elements, as previously observed in *R v Olan*. Those elements are:

   i) a dishonest act; and

   ii) deprivation.

The dishonest act may be one of deceit, falsehood or "other fraudulent means."

The dishonesty in question is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. The phrase "other fraudulent means" can be satisfied in a number of ways. The Supreme Court reviewed several situations which might fit this description, including the use of corporate funds for personal purposes, non-disclosure of important facts, unauthorized diversion of funds and similar situations (*R v Théroux*, supra, at p. 16).

Deprivation may be established by proof of detriment/disadvantage/ prejudice or risk of prejudice to the economic interests of another. No actual loss is required to satisfy "deprivation."

ii) The *mens rea* required for fraud is met by the subjective knowledge of the prohibited conduct (deceit, falsehood or other dishonest acts), and the subjective knowledge that that conduct *could*, as one of its consequences, deprive another or place them *at risk* of deprivation. Importantly, the Court additionally found that an Accused is not saved from conviction simply because they believed there was nothing wrong in what they were doing, or that they hoped *actual deprivation* would not occur. To that end, the following passage by Justice McLachlin is critical:

> *"The fact that the Accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence"* (*R v Théroux*, supra, at p. 19, see also *R v Zlatic*, [1993] 2 SCR 29 at pp. 48-50).

[161] Finally, the Court in *Théroux* found that an Accused could satisfy the elements of the offence whether they intended the prohibited consequence (loss or threat of loss), or was reckless as to whether it would occur (*R v Théroux*, supra, at p. 20 and *R v Zlatic*, supra at p. 49).

Count 3 False or Misleading Statements in Legacy's Offering Memoranda

[162] I will first deal with the elements of the offence, as described in Count 3. I find that the elements of the offence are as follows:

i) that the Accused made a statement in an offering memorandum, about the use Legacy funds would be put to.

ii) that the Accused knew, or reasonably ought to have known, that the statement was misleading or untrue in a material respect at the time it was made and in light of the circumstances in which the statement was made or,

iii) that the statement did not state a fact required to be stated or that was necessary to make the statement not misleading.

iv) that these untrue or misleading statements would reasonably be expected to have a significant effect on the market price or value of the Legacy security.

[163] Bearing in mind the foregoing principles, I find that Legacy's offering memoranda were misleading and untrue. I further find that the Accused was responsible for making these misleading and untrue statements in the Offering Memoranda. The major misrepresentation was how the funds investors put into the project would be used. I find that the Accused knew this, or reasonably ought to have known this. I also find that the market price and value of Legacy's offerings were unquestionably lessened as a direct result of these misrepresentations.

[164] As previously observed, the Legacy project was devoted to a single opportunity. This was a specific, 503-acre parcel of real estate on Calgary's western boundary. All three of Legacy's OMs, which were distributed amongst approximately 1400 investors, clearly outlined that the purchase and development of these specific lands is what the investors' money would be directed at.

[165] The official "Use of Net Proceeds" sections in all three OMs left no doubt about this (OM1, section 3, OM2 section 1 and OM3 section 1). Further sections of the OMs, speaking to the specific business strategies of Legacy and its short and long-term objectives, also confirm this. Those sections serve to add specifics to Legacy's use of investor money for this clear purpose. Yet those additional details are hardly necessary for a conclusion on what the Legacy funds were to be used for. They simply clarify the promised use of Legacy proceeds with additional information as to how that use will take place.

[166] The "Use of Net Proceeds" section in the Legacy OMs are solidified by the "Re-allocation" clauses. In all three of Legacy's OMs the issuer pledges to use the funds as stated in the previous "Use of Net Proceeds" paragraphs. It promises to re-allocate funds "only for sound business reasons."

[167] Both the "Use of Net Proceeds" and "Re-allocation" sections are part of the required form and content under the offering memorandum exemptions. *ASA Regulations* demand that those sections are present and prominent in the use of that particular exemption. It has previously been held that the "Use of Net Proceeds" clauses are critical and central to the offering memorandum exemption. The entire investment is based on this clause (*Mandyland*, 2012 ABASC 436 at paras 301-302 and *Arbour Energy*, supra, at par 776). Of course, this clause needs to be accurate and free of misrepresentation.

[168] Re-allocation clauses are also critical to the equation. "Re-allocation" does not mean the issuer may change direction or radically rethink how it intends to use the funds. Re-allocation of funds must be connected in scope and purpose to the originally stated plan. Re-allocation clauses must be read narrowly. They must also be considered in context to the other clauses in the offering memorandum and the purpose of the investment. Re-allocation clauses are secondary to the formative "Use of Net Proceeds" clauses that immediately precede the re-allocation clause in the prescribed form of the OM.

[169] This approach was taken in *Shire International Real Estate Investments Ltd. Re*, 2011 ABASC 608. In *Shire*, a re-allocation clause virtually identical to the ones used in Legacy's

OMs, was considered. After confirming that a re-allocation clause must be read in context of the entire offering memorandum the panel went on to say the following:

> *"191 Second, the reallocation statements were themselves limiting. The first statement reiterated what we think a reader would reasonably have assumed, that the intention was to do with the money what had just been disclosed in some detail. The second statement casts a reallocation as something exceptional, "only" to happen in certain circumstances.*
>
> *192 Third, those certain circumstances were described as "sound business reasons." While not stated expressly, we think a reader would reasonably have inferred – and would have been entitled to infer – two things: (i) that the "business reasons" would have something to do with the business of Bearspaw, which (as discussed) was the purchase and development (and eventual resale) of the Bearspaw Land; and (ii) that the soundness of such exceptional business reasons would be assessed, in a businesslike way, with a view to their consistency with the interests of Bearspaw and its investors.*
>
> *193 To place any broader interpretation on the reallocation disclosure would, in our view, render the mandatory "use of the net proceeds" disclosure in the Bearspaw OMs devoid of any value or purpose."*
> (*Shire*, supra, at paras 191-193)

[170] At its core, Legacy was an investment vehicle directed at purchasing and developing one parcel of land. No one who read any of the OMs would come to any other conclusion. It is also relevant that presentations to investors were exhaustively specific about the location and description of this land and its value as a real estate speculation. These representations inspired those who ultimately invested in the project to drive to that specific location and view it for themselves.

[171] Yet very significant sums were diverted from this project by the Accused. The timing of these diversions is very revealing. OM3 began to solicit investment in Legacy in October 29th, 2007. Nowhere in OM3 is it mentioned that funds will be used for anything other than the specific lands. Yet over $4.6 million in investors funds was removed from the project and diverted to the Accused's private company (125) on September 24, 2007. This money went towards Panama. This fact alone made the entire "Use of Net Proceeds" section of OM3 untrue and misleading. As the investments gleaned by OM3 were in the process of being collected, the Accused diverted more funds to Railside ($9.3 million), and the Granum Lands ($825,082.72 minimum).

[172] All of these diversions were directed through the Accused's private companies. No investor was told, no employee of Legacy was told.

[173] It goes without saying that the withdrawal of these funds greatly depleted the available money Legacy had to achieve its objectives. It also significantly reduced Legacy's ability to honour the interest payments it offered on the bonds sold to investors. Both events would be reasonably expected to have a significant effect on the market price of Legacy or its value as a security.

[174] Each of these effects were tangible from the moment the first Legacy funds were taken by the Accused on September 24, 2007. I accept that the banking records exhibited through exhibit 38 (42) and 39 (41), were accurate and reliable documents. I further accept that they revealed the flow of funds from Legacy to several other projects. I accept these banking records

as genuine copies of the actual original banking records. McCarthy also relied on them, at the behest of the Accused. McCarthy circled on these records the suspect transactions which have become central to these proceedings. I accept McCarthy's evidence on his use of those records and the information the Accused provided him, which McCarthy subsequently marked on those records.

[175] While these documents reveal the exact timing of the transfer of funds (September 24, 2007, November 14, 2007 and October 15, 2008), I also accept that the Accused had determined to use the funds much sooner. I accept Dr. Jank's evidence that, as early as July 2006, the Accused was actively searching for other opportunities to use the Legacy investor funds. While Dr. Jank was not a careful historian of all of Legacy's activities, he was very attentive to its development strategies. I accept his evidence about the July 2006 board meeting and the sentiments of the Accused to use the money for other opportunities. This would obviously have been a breach of Legacy's promised use of the funds revealed in the OMs. Neither Legacy nor anyone directing the company (including its staff of employees), had any authority to do this without first seeking approval of all the investors. This would have involved a re-issuance of an updated and revised OM. It also would have required a re-subscription by each individual investor. It would have been time-consuming and costly.

[176] None of this was ever done. Instead, the Accused secretly transferred the Legacy funds and directed them to these other projects through his own personal corporations. These corporations, not Legacy investors, would have realized the benefit had these other speculations succeeded. Legacy investors were stuck with the bill, but none of the proceeds.

[177] The Accused's actions cannot be redeemed or justified by the re-allocation clause. Like the situation in *Shire*, any re-allocation would have to be connected to the 503-acre parcel of land that was the subject of the investment. Re-allocation would have necessarily been for the purposes of developing that land or selling it, on behalf of Legacy investors.

[178] Finally, I do not find that exhibit 58 assists the Accused. First, I do not accept that it was a genuine document. I agree with the evidence of Narfasson on this point. The document did not exist at the time the document is dated (February 1, 2008). If it had, it would have surfaced in the careful review conducted by the Monitor. This is particularly true as Narfasson directly communicated with the Accused on the very points addressed by the letter. I accept Narfasson's evidence entirely on this point. Moreover, the letter, on its face, appears irregular and concocted. Its text contains two different fonts. It is a suspicious and mysterious document.

[179] Further, no investor ever recalled receiving it. I find the evidence of witnesses Yee and Tompkins very persuasive in this regard, particularly Tompkins. I accept their evidence that they never received this letter. Witness Tompkins, in particular, would have saved such a document and remembered it, especially since it apparently revealed that over $4.6 million of Legacy money went to a foreign investment.

[180] Where the evidence of the individual investors differs from Dr. Jank on the subject of exhibit 58, I prefer and accept the evidence of the investors. Dr. Jank's evidence that the letter was created and sent was internally inconsistent. While claiming to have created some of its content, he could not properly identify this material. He claimed to have no knowledge of paragraph 10, on page 3 or other important features of the document. He had no relevant knowledge of the process for disseminating the document and took no steps at all in that regard. I reject his evidence on exhibit 58 for these reasons.

[181] Even if I am wrong about all of the above, exhibit 58 cannot assist the Accused. Even assuming exhibit 58 is genuine, it was created only after the investors had pledged their money to the project. Such notice is inadequate. As already discussed, the "Use of Net Proceeds" sections in offering memoranda are of critical importance. Permitting an issuer to deliver late notice of a multi-million-dollar investment in a risky foreign venture, one that was entirely disconnected with the issuer's previously stated business objectives and planned uses of investor funds, would render the entire offering memorandum process meaningless. It would be contrary to securities laws and regulations to permit such a practice. It flies in the face of the principle of informed investment decision making, critical to an efficient capital market.

Conclusion on Count 3 False or Misleading Statements in Legacy's Offering Memoranda

[182] For all the reasons stated above, I find that the Crown has proven, beyond a reasonable doubt, that the Accused knowingly made misleading and untrue statements in the third Legacy OM, namely, that the funds would be used for the purposes stated in that OM. I am further satisfied that the large diversion of Legacy funds would reasonably be expected to have a significant effect on the market price and value of the Legacy investment.

[183] Finally, I find that the defences of "reasonable diligence" and "lack of knowledge" contained in s 194(2) of the *ASA*, is not available to the Accused. He clearly knew about the misleading and untrue statements from their inception. These statements were purposely made. They did not fall into the category of statements which were unavoidable. Nor were they innocent misrepresentations which only became known about later or which would have gone undetected, even through the exercise of reasonable diligence. I find that section 194(2) does not assist the Accused.

[184] Accordingly, I find the Accused guilty of Count 3.

Count 4 Non-Disclosure of the Investment Agreements

[185] The elements of the offence for Count 4 are as follows:

i) the Accused omitted to state a fact in Legacy Offering Memoranda, used to solicit investment in Legacy.

ii) the fact omitted was that Legacy had entered into investment agreements with Harvest Capital.

iii) that the Accused knew, or reasonably ought to have known that the failure to identify the existence of the investment agreements made the Legacy Offering Memoranda misleading or untrue; and

iv) the effect of not identifying the existence of the investment agreements would reasonably be expected to have a significant effect on the market price or value of the Legacy security.

[186] The outcome of Count 4 is dependent on a factual finding regarding exhibits 52 and 53. These were two "Investment Agreements." Both were allegedly executed on December 15, 2005. The agreements purport to give broad authority to invest Legacy funds in a wide range of poorly described opportunities. The rationale for this, stated in the agreements, is to seek out

sources of income so that Legacy would be able to meet its obligation on the bonds and reduce the risk associated with a fall in property values. Both agreements stated that a long-term option to purchase further lands on the proposed Legacy property did not have to be exercised until July of 2017. The agreements went on to state that the delayed activation of the option gave Legacy flexibility to pursue diversified investments while still keeping Legacy business objectives alive.

[187] Both agreements reference the "Re-allocation" clause in the Offering Memorandum as the source of the apparent authority to apply Legacy funds to other opportunities. The wording of the re-allocation clause is reproduced at paragraph 4, under "Reason for the Agreement" on both exhibits 52 and 53. That clause, placed in quotations in each exhibit, reads as follows:

> *'"Re-allocation. The Issuer intends to spend the net proceeds as stated. The Issuer will re-allocate funds only for sound business reasons."'*

[188] This wording, quoted in exhibits 52 and 53, is identical to the "Re-allocation" clause from OM3, found at section 1.3, dated October 29, 2007.

[189] OM 1 and 2 use slightly different wording. In my view, the exact language used is important. Accordingly, I will take some care to set it out here.

[190] The clause from OM1, dated July 15, 2005 reads as follows:

> *"3.4 Re-allocation – we intend to spend the available funds as stated. We will re-allocate funds only for sound business reasons."*

[191] The clause in OM2, dated September 15, 2006, reads:

> *"1.3 Re-allocation*
>
> *The corporation intends to use the net proceeds as stated. The Board of Directors of the corporation will re-allocate the proceeds only for sound business reasons."*

[192] Neither Investment Agreement is mentioned in any of the OMs. The agreements came to light only *after* the *CCAA* process commenced. Narfasson, in his role as Monitor, detected the withdrawal of Legacy funds. Narfasson questioned the Accused about why Legacy funds went to projects such as Panama. The Accused responded that he was trying to get a return for investors through these projects (transcript, April 16 at p. 63). Later, the Accused made the argument that the Investment Agreements authorized transfers of Legacy funds for other purposes (transcript, April 27, 2018, at pp. 28-29).

[193] The position of the Crown is that the Investment Agreements are not genuine. The Crown argues that they were concocted by the Accused in response to the probing of the Monitor into the use of Legacy funds. Effectively, the Crown is urging the Court to acquit the Accused on Count 4 by reason of the fact that exhibits 52 and 53 are fraudulent creations of the Accused.

[194] The Crown submits that exhibits 52 and 53 are tangible evidence of the Accused's general fraud which is alleged in Count 5. In the alternative, the Crown argued that if the documents are real, and they represented the true state of affairs between Legacy and the other parties to the agreements, they ought to have been disclosed in the OMs. They argue that OM1 would have had to been amended and re-issued to disclose the Investment Agreements within their "Material Agreements" sections. The Crown further argues that the existence of the Investment Agreements, which hypothetically predated OM2 and 3, would have been required to

be disclosed in these OMs to avoid making them misleading to investors. The Crown further hypothetically argues that non-disclosure of such agreements would have greatly affected the market price or value of the Legacy investment, thus giving rise to an offence under section 92(4.1) of the *ASA*.

[195] The Accused, apart from arguing against the admissibility of these two documents, offered no tangible argument on their effect regarding counts 4 or 5.

[196] I find that exhibits 52 and 53 are not genuine documents. They were created personally by the Accused or by someone else having the Accused's knowledge and consent. They were concocted to hastily add legitimacy to the withdrawal of Legacy funds. Their creation was in response to increasingly probing questions asked by the Monitor who sought answers for why Legacy funds were used for investments completely at odds with the terms of the Legacy OMs. As such, they are compelling evidence of the general fraud alleged to be contrary to section 93 of the *ASA* and as charged in Count 5. In the alternative, they are evidence of an attempted cover-up of that fraud after the fact. Ironically, the insincere nature of the exhibits requires an acquittal of the Accused on Count 4.

[197] Exhibits 52 and 53 are not legitimate for a variety of reasons. First, there is the duplicity of the documents. Both agreements bear the same date, December 15, 2005. This was just five months into the term of OM1, and months before OM2 and OM3. Both documents cover the same subject matter and are very similar in their form and general content. Both are signed by the Accused in a dual capacity, on behalf of "Harvest Capital Management Inc." and "Legacy Communities Inc."

[198] If the documents were genuine, there would be no need for two to exist. This fact alone demonstrates their inauthentic quality. There would be no need to draw up and execute two agreements pertaining to the same subject matter.

[199] Further, the agreements are inherently contradictory in their relationship to the Legacy offering memoranda. Legacy was a single purpose investment vehicle. As previously observed, it was created and marketed to purchase, and likely develop, a specific parcel of land. Descriptions of the opportunities and risks associated to this specific project were exhaustively described in the OMs. Yet the Investment Agreements in exhibits 52 and 53 refer to a very wide range of unspecified investments that might be authorized with Legacy funds. This was said to be on the grounds of reducing the risk to Legacy investors.

[200] The very existence of the Investment Agreements makes the information delivered in the Legacy OMs worthless. There would be no point for an investor to consider the highly specific assurances and risks delivered by a Legacy OM, only to have their investment subject to the whimsical array of investments contemplated in clause 2 of exhibit 53, which reads:

> *"Pursuant to the terms of the Offering Memorandum, underutilized capital may be invested in a wide range of Interim Investments at the discretion of the Issuer, including but not limited to Real Estate Joint Ventures, Real Estate directly, Real Estate companies or any company related to Real Estate building or development."*

[201] Both exhibit 52 and 53 are hopelessly at odds with the Legacy OMs, a fact which is strongly suggestive of their inauthentic nature. Neither document bears any serious scrutiny in this regard. No competent legal counsel would draw up such an agreement and try to reconcile it with the existing Legacy OMs. Further, it would be a conflict of interest for a single party to sign on behalf of both entities, as is the case in these documents.

[202] Additionally, if the documents represented authorization to channel Legacy funds to other projects, Legacy received no compensation for the uses the Accused put the funds to. Panama, Railside, Granum and other investments were all completed through the Accused's private numbered companies, especially 125. Legacy investors had no interest in these companies, nor did they even know about them. Neither 125 nor 133 was ever mentioned in any of the three Legacy OMs. It stands to reason that if any of these investments had succeeded, Panama for example, it would be the owner and controller of 125, the Accused, who would benefit. It is difficult to comprehend how Legacy investor risk was reduced by the actions the Investment Agreements purportedly authorize.

[203] Then there is the way exhibits 52 and 53 came to the attention of the monitor. As observed above, no Legacy employee or investor had ever heard of the Investment Agreements. Dr. Jank did not recognize them, as Treasurer of Legacy. Nor were they ever presented to him for authorization or legitimacy purposes. The existence of these documents only arrived after increasingly probing questions were asked by the Monitor about the use of Legacy funds. The following passage from Narfasson's evidence was key, discussing how he came into possession of exhibits 52 and 53 (at that point in the trial labeled exhibit "F" and "G" and later exhibit VD 11 and 12) and also the reliances made by the Accused on those documents to answer the Monitor's inquiries:

> *"Q And then Exhibit 'G' for Identification – this one's two pages. Same date, December 15, 2005. Can you identify this document, this investment agreement?*
>
> *A I've definitely seen before. It -- it --it -- it's the same type of investment agreement that relates to marked item 'F'. Just revised, but same dates, same signatures, same – like, same executed document, with the same date.*
>
> *Q And do you know if either of these items were relied upon in support of transactions between Legacy and either Harvest or Mr. Aitkens numbered companies?*
>
> *A* ***Mr. Aitkens made – made the argument that these supported the reason that he was able to move money out of Legacy into other entities.***
>
> *Q Both of them, or one or the other?*
>
> *A Initially the -- the -- initially I believe it was 'F' that when we were discussing, that as we continued to do the investigation – the other – the other document shows up.*
>
> *Q And do you know why there's two documents of – of the same date between Legacy and Harvest, in the possession of Legacy?*
>
> *A I believe that the one -- the -- the -- the -- the second document is created to try to justify – better justify a reason for funds moving.*
>
> *Q Why do you say that?*
>
> *A Because when we – we're doing our investigation, we start asking questions. Why – why – why – is all this money coming out of Legacy and going starburst into various other related entities. And we're asking very probing questions like, why are you doing this? What's the justification for this? What is the offering memorandum say? So we get told about these – this document, and then we continue to tie back to source documents, where promissory notes aren't lining up to how the money moved. The way this first investment agreement stopped lined up*

to certain things we're seeing, and then the new one shows up. So my belief is that the second document was trying to enhance and justify what was done.

Q *Did they both arrive at Ernst and Young at the same time, or did one follow the other?*

A *One followed the other. That wasn't uncommon.*

Q *Sorry, that wasn't uncommon?*

A *No. To – to have documents that – that came – came – came at us after we ask a number of questions, and the next day a document would show up executed between entities that related to some of the questions we were just asking a day or two before."*

(transcript, April 27, 2018 at pp. 28-29, emphasis added)

[204] Neither agreement is mentioned in any of the Legacy OMs. This was despite the existence of several "Material Agreements" sections in each OM. For example, OM1 had a "Material Project Agreements" section referring to the real estate purchase of the subject lands. This section set out all the intricacies associated with the purchase of the subject lands and the option agreement. That section clearly identified the parties and the costs. A "Material Corporate Agreements" section was also included noting the management fees paid to "Eyelogic" (to organize shareholder meetings), a Management Agreement with "Foundation Capital Corporation" and an agreement with the "Olympia Trust Company" (as Legacy's subscription and transfer agent). Stock option agreements with the Accused and other directors of the company are also dutifully disclosed in the "Material Corporate Agreements" sections. Similar agreements are also carefully noted in each of OM2 and OM3.

[205] Oddly, the critical "Investment Agreements," purportedly giving sweeping authorization to apply Legacy funds far outside the proposals outlined in the Legacy OMs, are nowhere mentioned in any Legacy OM.

[206] Finally, there are irregularities on the face of the documents themselves. These are very revealing. For example, different interest rates as compensation to Legacy are offered in exhibits 52 and 53. Exhibit 52 authorizes a return to Legacy of 6% ("Investment Terms" clause 1). However, exhibit 53 offers 7% ("Investment Terms ("Interim Investments") at clause 1 and 2).

[207] Most tellingly, there is the adoption of the exact re-allocation wording from OM3 on both investment agreements. This is despite the fact that both Investment Agreements were signed in December of 2005, a full 22 months before the re-allocation clause in OM3 was written. Yet the clause is word-for-word the same. The date for OM2 is chronologically closest in time, following the apparent execution of exhibits 52 and 53, yet this wording is not used in the Investment Agreements.

[208] "The corporation" is the reference for Legacy in OM2, not the "Issuer." Neither does OM1 use such a reference. Yet the exact wording of OM3 is quoted in each of exhibits 52 and 53 as the wording for the re-allocation clause in the Legacy OM. That's despite the fact that OM3 would not be drafted for another 22 months. How could a genuine agreement cite such exact wording from a document not yet in existence? I do not find this fact to be inconsequential.

<u>Conclusion on Count 4 Non-Disclosure of Investment Agreements</u>

[209] For all of these reasons, I find that exhibits 52 and 53 are false documents. They were contrived and created by the Accused or by someone else with the Accused's consent and knowledge. They were fed to Narfasson, the Monitor, as genuine when he and his team asked increasingly uncomfortable questions about the use of Legacy funds. The Accused personally acknowledged the existence of the Investment Agreements and represented that they justified his actions.

[210] As the Investment Agreements did not exist in December of 2005, an acquittal on Count 4 must follow.

[211] If I am wrong in my finding that exhibits 52 and 53 are ingenuine then a conviction on Count 4 is the only proper result. Had these agreements actually existed they would undoubtedly have been material. Failing to disclose them in OM 2 and OM3 would breach the provisions of section 92(4.1) (a)(i) and (ii). The existence of the investment agreements would have made those OMs misleading, particularly on the critical subject of how investors' money would be used. This would have obvious effects on the value of the Legacy issuance, lessening it substantially.

[212] For the reasons stated above, I find the Accused not guilty of count 4.

Count 5 Perpetration of Fraud

[213] The essential elements of Count 5 have been discussed, in their legal details, above (General Fraud Under Section 93 of the Securities Act). However, for clarity, they are:

i) that the Accused, in the course of his involvement in Legacy, either directly or indirectly

ii) engaged in acts, practices or a course of conduct that he knew, or reasonably ought to have known

iii) perpetrated a fraud, through deceit, falsehood or other fraudulent means, on Legacy or Legacy investors; and

iv) the fraud described above can be said to meet both the *actus reus* and *mens rea* requirements for fraud, as previously described by our Supreme Court of Canada, (particularly in *R v Olan*, supra and *R v Théroux*, supra).

[214] I am satisfied that the Accused's use of Legacy funds amounted to fraud. I find that the Accused directly engaged in acts and practices that he knew, or reasonably ought to have known, would result in fraud to Legacy Communities Inc. and individual Legacy investors. The Accused's actions satisfy the criminal definition of fraud as described by our Supreme Court and as adopted through section 93 of the *ASA*.

[215] A finding of fraud is based upon the Accused's diversion of Legacy funds and the secrecy employed to accomplish this. The Accused used funds specifically dedicated to a real-estate development project. The removal of those funds amounted to a betrayal of the terms and assurances that were given to investors who carefully considered the original investment.

(A) Dishonest Acts

[216] The fraud perpetrated on investors involved acts of commission and omission; both of which were wilful and intended. As previously observed, the Accused began seeking out additional opportunities with available Legacy funds as early as July of 2006. Further, he kept that information hidden from Legacy investors. Likewise, the actual removal of Legacy funds, beginning in September of 2007, was deliberate. This was carried out secretly, purposely designed to be filtered through the Accused's private corporations. The Accused maintained exclusive control of Legacy and purposely kept this information from Legacy's other employees. This included Legacy's CEO Lonardelli, Marketing Director Beyer and sales staff such as Petersen. The Accused also kept this information from Legacy's only other director, and nominal Treasurer, Dr. Jank. None of them were aware of these transfers until after the *CCAA* process began.

[217] The Accused also deliberately omitted to notify Legacy investors through the normal channels. Having previously found that the letter to investors (exhibit 58), was never sent, it is clear that no communication was ever provided on the subject of Legacy's investment in several unrelated and highly risky ventures. Even if exhibit 58 was genuine, even if it had been prepared, sent and actually received by Legacy investors, it was far too late to add legitimacy to the use of the funds.

[218] The offering memorandum exemption employed to raise Legacy funds forbade the kind of notice that exhibit 58 contemplates. A new offering memorandum would have had to been prepared. A new subscription would have had to been specifically sought for the additional uses the Legacy money was put to. These steps were never taken.

[219] The Accused committed the *actus reus* of fraud by knowingly transferring the dedicated Legacy funds and placing them in other investments. These acts were deceitful and false since they were purposely hidden from Legacy staff and investors. Even if that were not the case, they certainly amounted to "other fraudulent means" as defined in Canadian criminal jurisprudence. The diversion of Legacy funds was unauthorized on the objective standard. Any reasonable person, having read the detailed Legacy OMs, would recognize this. Objectively, those funds were put to personal uses when the Accused directed them through his private companies. As previously observed, this practice left Legacy with all the risk and the costs while only 125 stood to gain from the opportunity of those investments. Any reasonable individual would characterize these dealings as dishonest.

(B) Deprivation

[220] Deprivation has also been established. *Actual* monetary deprivation occurred, through the sums of money depleted from Legacy's bank account. This was Legacy investor money that was removed. It also created a *risk* of deprivation or prejudice.

[221] It is self-evident that not every investment succeeds. Many fail, even when those who pursue them do so with honesty, skill and genuine diligence. Some only succeed in the long or very long term. Even if the investments the Legacy funds were diverted to looked promising and lucrative, they could not have been a guarantee. Substantial risk of deprivation or prejudice was involved in the very act of removing the dedicated funds for other purposes. The deprivation came the very moment the funds were removed, so did the risk of deprivation.

[222] The Legacy investors were prepared for risk, a specific kind of risk. These risks were carefully disseminated to investors in all three of the OMs. A drop in the market price of the specific property or the failure to receive development approval were chief among these known risks. These risks were the price of doing business. Deprivation resultant from these carefully described risks could not be characterized as coming from dishonest acts.

[223] Conversely, the risks from the Accused's actions *did* come from dishonest acts. Money was channelled to projects which had inherently different economic conditions, conditions which were never contemplated in the Legacy investor material. No investor signed up for these risks when they invested in Legacy. The Panama investment was a perfect example.

(C) *Mens Rea*, Subjective Knowledge of the Prohibited Acts and Their Consequences

[224] The Accused's actions also satisfy the *mens rea* component for fraud. The Accused subjectively knew about and authorized the transfer of Legacy money. He was keenly aware of the terms and conditions of the Legacy offering yet willingly authorized the transfer to other projects nevertheless. He did so despite having his staff prepare marketing material for Legacy which said nothing about these other investments being included in the Legacy offering. He further signed statements in the Legacy OMs establishing that they contained no misrepresentations.

[225] The Accused used direct transfers to accomplish the diversion of funds. Where necessary, he wrote cheques.

[226] The Accused appreciated the consequences of his actions. I find the Accused *knew* the transfers would deprive Legacy and its investors of the funds necessary to complete that specific project. In the alternative, I find that he was aware that it *could* place Legacy and its investors at unacceptable risk of deprivation. Simply by removing money from the Legacy bank account, the Accused made it much less likely that Legacy would achieve its goals. He also knew that it made it impossible to pay interest on the upcoming bonds with Legacy-generated funds. He also knew, or ought to have known, that the projects the funds were diverted to were inherently inconsistent with the objectives Legacy investors had earlier agreed upon.

[227] Pursuing opportunities for commercial properties, such as Railside, did not come with the assurances implicit in the attractively situated 503-acre parcel that Legacy tempted its investors with. Purchasing land in Granum, Alberta was similarly misguided. Legacy received only water rights, which it didn't need and which would not add to its value. Mysteriously, Legacy also paid more for those water rights than the entire purchase of the Granum lands, inclusive of those water rights.

[228] The Panama investment was the most egregious example of all. I take judicial notice of the fact that Panama is located thousands of kilometers from the Legacy site. The country of Panama represents an entirely different political, economic and legal risk for Legacy investors. Narfasson said as much when he criticized that investment:

> *"A Yes. In those various capacities, yes. I – I – I –I could just add that lending money from Legacy to 125 at – at a – at a – at a low interest rate for Panamanian related investment is not – doesn't make economic logic to – to – to Ernst and Young. You know? Investing down in Panama, we would expect high-risk. Therefore there – you're – you're going to price – you're going to price that reflecting risk, including*

the money transferred to 125, did not reflect any risk premium of money going to Panama.

Q What do you mean by risk premium?

A Well the fact that you're in a foreign jurisdiction and – and – and clearly what's happened is – is we're still trying to recover funds from Panama, here we are six years later. Since – since I became involved and – and – the – that's just exactly why you would expect a higher – higher risk rating on it, or risk premium on it, because – because of – things like that happen in countries like that."
(transcript, April 27, 2018 at pp. 14-15)

[229] Even assuming that the promissory notes or Investment Agreements were genuine, the interest rates authorized to be paid to Legacy in return through those agreements were wildly inadequate to cover the risk assumed in those investments, especially Panama.

[230] The Legacy funds diverted to Panama went into a trust account in that jurisdiction. It went missing almost immediately. The funds had still not been recovered when Narfasson testified and criticized the investment in April of 2018, over 10 years later.

[231] I come to the conclusion that the Accused must have appreciated that his alternate investments made with Legacy funds were risky in nature. He subjectively knew that they put Legacy and its investors in probable, if not actual danger of deprivation. There is no other reasonable conclusion to come to.

[232] As made abundantly clear in *Théroux*, it is irrelevant whether the Accused intended his actions to turn out negatively for Legacy. It is no defence that he may have hoped the other investments succeeded or that he believed that what he was doing was prudent. It is also irrelevant that he may have believed that he was putting Legacy's best interests forward in an effort to pay the bond rate. Fraud is not excused in such cases as Justice McLachlin observed in *Théroux*:

> *"Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practice fraud, its mens rea cannot be cast so narrowly as this."*
> (*R v Théroux*, supra, at p. 24)

[233] The Accused intentionally engaged in the prohibited acts of transferring the funds, without the pre-arranged consent of Legacy investors. He knowingly put the company and its investors at risk of economic deprivation. He also deprived them in actuality.

Additional Defences

[234] The Accused raised several arguments in defence of these matters which warrant special consideration. These included the discrepancy in total invested funds (between the section 218 certificate and the other accounting evidence), the argument that the Accused had a colour of right to use the funds as he did, the argument that there was no evidence as to a change in the market value of Legacy, an argument that the Accused never personally profited from his activities and finally, that he had an obligation to re-allocate funds in order to fulfill Legacy's promise to repay the bond interest.

[235] I will deal with each of these defences separately. I also note that these defences are applicable to counts 3 and 4. While I have grouped my consideration of these defences under count 5, I accept the generality of their application as arguments raised by the Accused on the whole of the evidence. I will apply them as such.

a) The Section 218 Certificate

[236] The Accused argued that there has been no appropriation of Legacy funds. The Accused referenced the section 218 certificate admitted into evidence under tab 1 of exhibit 1 in support of that conclusion. Section 218 of the *ASA* permits a certificate to be entered into evidence containing statements about registration and filings made to the ASC, its Executive Director or its Secretary. The permitted material can include registrations of any person or company, filings or documents, decisions of the ASC or "information from any banks, records, documents or files of the Commission in the form of an extract or description" *ASA* section 218 (c) (ii).

[237] The material entered into evidence, pursuant to the certificate filed at tab 1 of exhibit 1 includes:

i) That the Accused was not registered with the Executive Director of the ASC or otherwise registered as a salesperson of securities in the province of Alberta, for the period October 1, 2005 – December 21, 2011.

ii) That no prospectus or preliminary prospectus in accordance with the provisions of the *ASA* was ever filed in respect of Legacy.

iii) That three Offering Memoranda were filed with the ASC in respect of Legacy, these were dated July 15, 2005, September 15, 2006 and October 29, 2007.

iv) That certain "reports of exempt distribution" were filed with respect to the Legacy offerings during the period October 1, 2005 – December 21, 2011. These are listed and organized into a rudimentary spreadsheet which included the date of the distribution, the number of securities purchased and the price for that purchase.

[238] The total investment revealed in the spreadsheet part of the certificate is $25,720,201.70. The Accused maintains that this was in fact, the total sum of all funds invested into Legacy by the public. The Accused went on to argue that this entire amount had actually been spent on legitimate Legacy related costs. The Accused pointed to the Ninth Report of the Monitor, filed August 30, 2013 (listed at tab 3 of exhibit 40), and the appendix demonstrating Legacy's "Sources and Uses of Funds" (tab "G" of exhibit 40). These reveal that operating and administration expenses, commissions of sales agents and management fees (all of which are permissible under the Legacy OMs), totaled over $26.8 million.

[239] The Accused argues that these figures demonstrate that there has been no fraud, and no misrepresentation in the Legacy OMs, as all the money was spent as set out in those documents.

[240] I do not accept this argument for multiple reasons. First, the section 218 certificate is comprised of the Legacy distributions that were *filed* with the ASC. That does not mean that those filings were *accurate*. It is the responsibility of Legacy's management to make those filings under the *ASA*. There may well be errors associated with this process. If so, those errors do not lie at the feet of the ASC, they rest with Legacy.

[241] Indeed, there was further evidence received by this Court that demonstrates that the amounts contained in the section 218 certificate were not accurate. I accept and adopt that evidence. I prefer that evidence over the amounts revealed in the certificate. This includes the reconciliation of total Legacy investments prepared by its external accountant, McCarthy. Where the evidence of the filing of Legacy, contained in the section 218 certificate conflicts with McCarthy's figures, I accept McCarthy's amounts as accurate. McCarthy used Legacy banking records to conclude that, as of July of 2011, over $35.4 million of Legacy securities had been sold. This was demonstrated in exhibit 43 which I accept as accurate. It was also what McCarthy testified to in his *viva voce* evidence.

[242] The Monitor, also using banking records, came to the same conclusion, although a very slightly different amount, of the total bondholder investment in Legacy. The Monitor concluded that $35.2 million had been invested by 1475 investors (tab 3, exhibit 40 p. 11, and Appendix "B"). I conclude that *at least* 35.2 million was invested by Legacy. I further find that the number of actual investors was 1475, as uncovered by the Monitor.

[243] Further, simply because some money harvested from investors was used for its intended purposes does not mean that the remaining Legacy funds are to be treated as available for ready investment in other random opportunities. This would be true even if Legacy had a surplus in its accounts after considering investor contributions and legitimate expenses. Legacy was not a slush fund to be raided when an attractive business opportunity was spotted. Extra funds realized by Legacy, if they ever materialized, would ultimately be needed to pay the interest due to bondholders. Legacy was a single-purpose investment vehicle and all funds needed to go towards the business plans outlined by its OMs.

[244] For these reasons, I reject the Accused's argument based on the section 218 certificate.

b) Colour of Right

[245] I do not accept the Accused's submission that he was the largest single investor in Legacy or that he could do as he liked with his portion of that investment. First, there was no tangible evidence put before the Court as to exactly how much the Accused invested in the project, if anything. While the OMs make it clear that the Accused had the largest block of shares, which included voting shares, it was not entirely clear what kind of investment backed these shares and at what price. The Accused's argument is predicated on the fact that he owned exactly the value of Legacy that he ultimately re-directed to the prohibited investments. There is no such evidence.

[246] However, even if I am wrong about that, the Accused's argument fails to recognize the required uses of Legacy funds. These uses were mandated by the "Use of Net Proceeds" and business strategies for Legacy made very clear in all three of the OMs.

[247] In reality, money could not be extracted from Legacy, regardless of who had contributed it, unless it complied with the "Use of Net Proceeds" conditions. Legacy funds, once they were formally invested by its purchasers, were not divided and apportioned by individual investors in the way the Accused suggests. All Legacy funds, and its investors, were in the same boat. The funds had been committed for the purposes of the Legacy lands and had to be used for the purposes specified in the OMs. The boat must float or sink based on the outcomes of Legacy attempting to reach its objectives as previously described. If Legacy's investors or its principals were permitted to act in this fashion, to quickly extract their funds on a whim, the terms of the offering memorandums would be rendered worthless.

[248] Additionally, money could not be withdrawn from Legacy, except through the very limited methods outlined in the OMs. All investors in Legacy were subject to resale and trading restrictions in respect of their investment. There was no evidence that the Accused extracted the funds by complying with these restrictions.

[249] Finally, the Accused's argument that he only withdrew *his* funds, and that he was entitled to do so, flies in the face of the evidence of his secrecy and the documents which were created to apparently justify the use of the funds. I agree entirely with the submissions of the Crown in this regard. If the Accused was justified in the removal of the disputed funds, why did he not reveal this until after the *CCAA* process began? There were no properly vetted director's resolutions or other documentation officially sanctioning these withdrawals. The Accused accomplished the withdrawals through his private corporations and told absolutely no one where the money had come from at the time he was doing it.

[250] Also, why were promissory notes prepared, pledging interest back to Legacy, in exchange for the removal of Legacy funds for investments such as Panama, Balsam Lake and Liberty Crossing? These notes (exhibits 50 and 51), were only uncovered in the *CCAA* process. Like the Investment Agreements, these promissory notes were dubious and duplicitous. Ultimately, they were never relied on by the Monitor as they were assumed to be inaccurate. I agree. That said, their presence is irreconcilable with any argument that the Accused had a legal entitlement to remove and use the funds as he saw fit. The Investment Agreements (exhibits 52 and 53), fall into the same category for all the reasons previously set out.

c) Market Price

[251] The Accused submitted that no evidence was led to support a detraction in the market price of the Legacy issuance. This argument applied to both Counts 3 and 5. I accept, that evidence of a lessening of market value is a required element of Count 3, and directly relevant to Count 5. However, I do not accept that expert financial evidence is required. The Court can infer that market value has been lessened especially in the circumstances of these events.

[252] Depleting funds from a corporation has an undeniable effect on its value. That is especially true of the multi-million dollar sums removed from Legacy. These transfers also made it specifically less likely Legacy would achieve its stated objectives. Funds for permits, construction costs and other items necessary for developing the lands were clearly affected by the removal of more than a quarter of Legacy's working capital. Lessening Legacy's operating funds clearly affected Legacy's value.

[253] Furthermore, the market value estimation has to be considered in light of the original investment decisions made by consumers. This is especially true when value is considered in the context of counts 3 and 4. Legacy represented a specific plan to attain, develop and resell certain property. I infer that investors purchased Legacy knowing this. Had the offering memoranda described a proposal to buy and re-sell foreign property, such as in Panama, investors would have placed much less value on the investment. Legacy could not have sold the offering for the amounts and bond interest rate returns surrendered in the present case. I infer that many of the investors who testified in this matter would not have contributed at all.

[254] This approach to the effect on a security's market price was taken in both *Mandyland* (supra, at paras 199-202), and *Arbour Energy*, (supra, at par 776). Once again, it is important to recall the objectives of the *ASA*. These are to ensure a fair and efficient market which investors

can be confident in. Investors must be put in the position to make "....reasonably informed investment decisions suitable to their needs and risk tolerances" (*Arbour Energy*, supra, at par 722, citing *Re Capital Alternatives Inc.*, 2007 ABASC 79 at par 57).

[255] For these reasons, I reject the argument that a significant effect on the market price or value of the Legacy security has not been proven by the Crown.

d) Lack of Personal Profit

[256] The Accused argued that he gained nothing from his activities with Legacy funds. He argued that he lived prudently and modestly and never benefitted personally or spent Legacy funds on frivolous personal indulgences.

[257] This is immaterial. The authorities make it clear that it is unnecessary to a finding of fraud that the party perpetrating it profit from their fraudulent transactions. It is equally unnecessary that there was actual loss suffered by any victim (*R v Zlatic*, supra, at pp. 48-49).

e) Bond Repayment, Re-allocation and Executive Discretion

[258] Finally, the Accused made several arguments that he was authorized, and indeed obligated, to use Legacy funds as he did. For convenience, I will address these arguments together.

[259] I reject the premise that the removal of Legacy funds was justified by the obligation to repay the bonds or the annual interest commitments. Regardless of these obligations, Legacy had a more basic obligation, to use the money as promised. If the Accused's argument were to succeed, it would justify the use of all exempt offering funds for almost any purpose when an issuer's debts were coming due. The purpose of the *ASA* is investor protection. This is achieved through the accuracy of the investments' described use of the money. Investors always took the risk that the project would stall for many specifically identified reasons, (for example, that planning approval might be denied). Aggravating those losses with the perils inherent in completely different investments was not the answer. They did not justify risking the funds in any random opportunity that might look attractive to Legacy's executives.

[260] The Accused further submitted that the re-allocation clauses permitted the investments. He also argued that Legacy investors were informed, in each of the OMs, that the issuer could decide, in its sole discretion, how to advance the business strategies of Legacy.

[261] First, as already discussed, the re-allocation clauses did not justify the uses the funds were ultimately put to. The previous examination of those clauses, read in the context of the entire Offering Memoranda, and the interpretation of "re-allocation" discussed in *Shire (Re),* supra, makes this point abundantly clear. Second, I agree that the management of the issuer had the sole discretion to decide which methods to use to best achieve its objectives. However, those objectives were the objectives referred to in the particular real-estate development the issuer was engaged in.

[262] In each OM, the "re-allocation" clause the Accused refers to, appears directly after a detailed description of the specific Legacy lands and the four declared strategies of Legacy. As previously mentioned, all of those strategies involved turning a profit on the resale of those

lands, whether by holding them and reselling without development, or obtaining the necessary development approvals and then reselling afterwards.

[263] Selecting the most appropriate options to achieve those objectives, in the sole discretion of the issuer, did not include pursuing any other opportunities. Accordingly, I do not accept that there was any authority for the Accused to use the funds as he did.

Conclusion on Count 5 (Perpetration of Fraud)

[264] I find that I am not persuaded by the defences raised by the Accused, as expressed above. None of these defences raises a reasonable doubt in my mind, neither individually nor collectively. Whether those defences originated in the evidence presented by the Accused, the Crown, or on the whole of the evidence I find that no reasonable doubt has been raised regarding the essential elements required for fraud.

[265] For all the above reasons, I find that the Crown has proven all of the essential elements for fraud, contained in section 93(b) of the *ASA*. Specifically, the Crown has proven, beyond a reasonable doubt, that the Accused engaged in acts and practices, in the course of his dealings in Legacy, that he knew, or reasonably ought to have known, would perpetrate a fraud on Legacy investors and also Legacy itself. In particular, I find that the actions and conduct of the Accused satisfied both the *actus reus* and *mens rea* components for fraud as defined by our Supreme Court. Additionally, a risk of deprivation and actual deprivation has been proven, beyond a reasonable doubt. Accordingly, I find the Accused guilty of count 5.

Conclusion

[266] For the reasons expressed above I find the Accused, Ronald James Aitkens guilty on count 3 and count 5. I find the Accused not guilty on count 4 only because of my earlier finding that the investment agreements (exhibits 52 and 53), are not genuine.

Dated at the City of Calgary, Alberta this 20th day of July, 2020.

L.W. Robertson

A Judge of the Provincial Court of Alberta

Appearances:

D. Young

C. Schulhauser

Alberta Securities Commission

S. Kothari

for the Defendant