

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Ghani, 2023 ABASC 150

Date: 20231107

**Ali Ghani, Summerside Development Trust, Summerside Commercial Trust,
Prism Summerside Limited Partnership, Prism Summerside Development Corp. and
Prism Real Estate Investment Corporation**

Panel:	Tom Cotter Kari Horn Karen Kim
Representation:	Tom McCartney Petter Hurich for Commission Staff
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I. INTRODUCTION

[1] In a notice of hearing issued on February 1, 2022 (**NOH**), staff (**Staff**) of the Alberta Securities Commission (**ASC**) alleged that Ali Ghani (**Ghani**), Summerside Development Trust (**Summerside DT**), Summerside Commercial Trust (**Summerside CT**), Prism Summerside Limited Partnership (**Summerside LP**), Prism Summerside Development Corp. (**Summerside DevCo**), and Prism Real Estate Investment Corporation (**PREIC**, and together with Ghani, Summerside DT, Summerside CT, Summerside LP, and Summerside DevCo, the **Respondents**) breached s. 93 of the *Securities Act* (Alberta) (the **Act**) by perpetrating a fraud on Summerside DT investors.

[2] The NOH was amended on May 16, 2022 (**ANOH**) to revise Staff's allegation concerning the amount of money the Respondents misappropriated.

[3] We were satisfied on the basis of two Affidavits of Service and the representations of the parties' counsel that all of the Respondents were served with the NOH, and that through their counsel, the Respondents received Staff's disclosure. With the agreement of counsel, we scheduled the hearing of the allegations (the **Hearing**) to commence on October 31, 2022. Staff later advised that they had provided the Respondents' counsel with the ANOH and certain supplemental disclosure.

[4] On the first day of the Hearing, the Respondents' counsel made an application to withdraw because he had been unable to obtain instructions from his clients. Staff did not oppose the application, and we issued an order permitting counsel to withdraw.

[5] The Hearing proceeded over six days from October 31, 2022 to November 7, 2022, and Staff called six witnesses who testified and introduced documentary evidence: Shawn Taylor (**Taylor**), a Staff investigative lawyer; Danielle Bertrand (**Bertrand**), a Staff investigative accountant; **PK**, a senior officer of exempt market dealer Raintree Financial Solutions (**Raintree**); **GK**, a director and shareholder of real estate investment firm Fateh Developments Inc. (**Fateh**); **NO**, a Summerside DT investor; and **RS**, a former employee who reported to Ghani.

[6] None of the Respondents appeared to call evidence or defend the allegations, but because we were satisfied by their previous counsel that they were aware of the Hearing dates, we proceeded in their absence.

[7] Following the conclusion of the Hearing, we received Staff's written submissions on the merits of the allegations in the ANOH. The Respondents were given an opportunity to respond to Staff's submissions, but nothing was received. Staff did not request the opportunity to make oral submissions, so we proceeded to determine the allegations based on the evidence adduced at the Hearing and Staff's written submissions.

[8] For the reasons set out below, we have concluded that Staff proved the allegations in the ANOH.

II. PRELIMINARY ISSUES

A. Standard and Onus of Proof

[9] In ASC enforcement proceedings, Staff have the onus to prove their allegations on a balance of probabilities, based on evidence that is "clear, convincing and cogent" (*Re North America Frac Sand, Inc.*, 2022 ABASC 110 at para. 105; see also *F.H. v. McDougall*, 2008 SCC 53 at paras. 40, 46, and 49).

B. Inferences

[10] ASC hearing panels may draw inferences, if they are supported by the evidence (*Frac Sand* at para. 106). In certain instances, we may also draw adverse inferences against a party when it fails to adduce contrary evidence (*Dwyer v. Mark II Innovations Ltd.*, 2006 CanLII 9406 at para. 4; *Re Hutchinson*, 2019 ONSEC 36 at para. 76).

C. Credibility

[11] Even though the Respondents did not participate in the Hearing, we were still required to determine the credibility of witnesses and the reliability of the evidence led. In doing so, we considered the source of the evidence, its consistency with other reliable evidence, and whether the evidence made sense in the overall circumstances (*Re Aitkens*, 2018 ABASC 27 at para. 52). In the context of witness credibility, the correct approach was set out in *Faryna v. Chorny*, [1951] B.C.J. No. 152 (BCCA) (at para. 11):

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

[12] We found the witnesses who testified at the Hearing to be both credible and reliable. Where there were uncertainties in their testimony, they were attributable to the passage of time rather than to any attempt to deceive.

[13] Although he did not appear at the Hearing to testify, investigative Staff interviewed Ghani under oath and in the presence of his legal counsel on two occasions, July 26, 2021 and October 6, 2021. The transcripts of those interviews were admitted into evidence (collectively, the **Ghani Interview**). The evidence also included an affidavit Ghani swore for a class action court proceeding (the **Class Action**) on January 23, 2018 (the **Ghani Affidavit**), which touched on matters relevant to this proceeding. Where we refer to Ghani's evidence in these reasons, we are referring to the Ghani Interview or the Ghani Affidavit.

[14] Staff argued that Ghani's evidence during the Ghani Interview was "untruthful, inconsistent, misleading, and obfuscating". We agreed with Staff's assessment in certain respects we address in these reasons, and generally relied on Ghani's evidence only where it addressed non-controversial matters or amounted to admissions against the Respondents' interests.

III. BACKGROUND

A. The Parties

1. Ghani

[15] Ghani is an individual who resided in Calgary during some or all of the **Relevant Period**, defined by Staff as January 2013 to April 2018.

[16] During the Ghani Interview, Ghani said that he and his father, Dr. Abdul Ghani (**Ghani Sr.**), founded "Prism" in approximately 2005 or 2006, although other evidence suggested that it was founded as early as 2000. "Prism", the "Prism Group", and the "Prism Group of Companies" are terms that were variously used in the evidence to describe collectively a number of individual entities under the exclusive or primary control of either or both Ghani and Ghani Sr., and include the other Respondents. Most if not all of these entities were involved in commercial and residential real estate development in Alberta.

[17] Evidence was adduced at the Hearing that indicated there was a company named Prism Group of Companies Inc., registered in Alberta on May 4, 2011 with Ghani as its sole director and voting shareholder. However, references to "Prism" or the "Prism Group" in these reasons are references to the group of Prism entities and not to any particular entity within the group.

[18] Marketing documents in evidence indicated that the Prism Group had an office at 1935 – 32 Avenue N.E. in Calgary (the **Prism Office**), and identified Ghani as either Prism's president or its chief executive officer (**CEO**). Ghani Sr. was identified as its chief financial officer. Other marketing material identified Ghani as president of the "Prism Group of Companies" and the "Prism Team", while Ghani Sr. was not mentioned at all.

[19] Ghani Sr. died before the NOH was issued, apparently in early 2020.

2. Summerside DT

[20] Summerside DT was a mutual fund trust created by a declaration of trust dated January 4, 2013 (the **Declaration of Trust**). Its head office address was the Prism Office.

[21] Ghani and Ghani Sr. were the trustees of Summerside DT during some or all of the Relevant Period.

[22] Summerside DT issued an offering memorandum dated January 5, 2013 (the **OM**) for the distribution of Class "A" trust units (the **Summerside DT Units**) to the public for \$1,000 per block of 10. Two very similar versions of the OM were in evidence at the Hearing, but only one version was filed with the ASC (on January 3, 2014). Neither Staff nor Ghani were able to identify which version was provided to investors, and Ghani suggested that more than one version may have been used to solicit subscriptions for Summerside DT Units. The OM Ghani gave to investor NO and excerpted in a December 4, 2014 email to NO appeared to be the filed version. For simplicity, when we refer to the OM in these reasons, we are referring to the filed version. The portions cited herein were not materially different between one version and the other.

[23] Raintree agreed to offer the Summerside DT Units to its clients, and recommended that Summerside DT retain Fundamental Research Corp. (**Fundamental Research**) to conduct

research and due diligence on the offering. Fundamental Research issued a report on the Summerside DT project in April 2013 (the **Fundamental Research Report**).

[24] According to the OM, Summerside DT was to use the funds raised from the offering to acquire units in Summerside CT.

3. Summerside CT

[25] Summerside CT was a limited purpose trust created by a trust indenture also dated January 4, 2013 (the **Trust Indenture**). The notice address for Summerside CT was the Prism Office.

[26] Ghani Sr. was the trustee of Summerside CT during some or all of the Relevant Period.

[27] The OM stated that Summerside CT intended to use the funds from the sale of its trust units to acquire Class "A" limited partnership units in Summerside LP.

4. Summerside LP

[28] Summerside LP was created pursuant to a partnership agreement dated December 13, 2012 (the **Partnership Agreement**), and was registered in Alberta on the same date. Its principal office was also the Prism Office. Summerside DevCo was its general partner, and Prism Urban Development Inc. (**Prism Urban Development**) was its initial limited partner.

[29] While Ghani suggested that Prism Urban Development was owned by Ghani Sr., a corporate search of that company and other documents in evidence indicated that it was incorporated in Alberta on October 17, 2012, and that at least as of November and December 2012, Ghani was its sole owner and director.

[30] The OM stated that Summerside LP would use the funds raised from the sale of its LP units to acquire and develop a parcel of land at 903 – 40 Street S.W., Edmonton (defined in the OM as the "Lands").

5. Summerside DevCo

[31] Summerside DevCo was incorporated in Alberta on November 22, 2012, and its registered office was the Prism Office. While Ghani and another individual were its directors at the time of incorporation, by December 4, 2012, that individual was replaced by Ghani Sr., and Ghani and Ghani Sr. were Summerside DevCo's officers and directors through the Relevant Period. Ghani and Ghani Sr. were also Summerside DevCo's majority owners through their respective family trusts.

[32] During the Ghani Interview, Ghani agreed that he and his father were the "principals" of Summerside DevCo.

[33] According to Summerside DevCo's Servus Credit Union bank records for its account ending in 6814 (**Servus**, and **Servus Account 6814**; for simplicity, in these reasons we use Servus Account 6814 to refer to both the account with that number and its predecessor accounts ending in 1821 and 6673), Ghani was president and the account's sole signing authority. Other evidence

indicated that Ghani Sr. was the company's Secretary or Secretary/Treasurer. Ghani was also the sole signing authority on Summerside DevCo's Royal Bank of Canada (**RBC**) account ending in 1722 (**RBC Account 1722**).

[34] As mentioned, Summerside DevCo was the general partner of Summerside LP. The relationship was governed by a Management and Administrative Services Agreement (the **Summerside LP Services Agreement**) dated December 15, 2012.

6. PREIC

[35] PREIC was incorporated in Alberta on April 16, 2008, and had its registered office at Ghani's home in Calgary.

[36] Corporate searches showed that as of June 2008, Ghani was PREIC's sole director but that as of January 1, 2013, Ghani and Attiya Ghani – both of the same residential address – were its directors. They also showed that Attiya Ghani owned 100 percent of its voting shares. By at least August 5, 2014, however, Ghani was PREIC's sole director and voting shareholder; he appears to have remained in those capacities through the rest of the Relevant Period.

[37] According to banking records in evidence from First Calgary Financial (**First Calgary**), Ghani was initially PREIC's sole officer (president), director, and shareholder, as well as the sole signing authority on its account ending in 9197 (**First Calgary Account 9197**). Another individual was added as a signing authority in 2010, but by July 31, 2017, the signing authorities were Ghani and Ghani Sr.

[38] Banking records in evidence for PREIC's Servus account ending in 6048 (**Servus Account 6048**) – opened on November 30, 2016 – identified Ghani as PREIC's sole director and officer (president).

[39] In the Ghani Affidavit, Ghani described PREIC as an "affiliate that was traditionally used as a clearing house for all inter-entity transactions". During the Ghani Interview, he explained further that PREIC funded most Prism projects. To purchase land for a specific development, for example, one of the entities involved in the development would borrow money from PREIC.

[40] More about this financial structure will be said later in these reasons.

B. The Summerside Project

[41] One of the Prism Group's real estate projects – and that which was the focus of this matter – was the construction of a strip mall on the land described in the OM, located in an Edmonton neighbourhood known as Summerside (**Summerside Plaza** or the **Summerside Project**). The OM stated that the investment objective was to provide income for distribution from Summerside Plaza tenants, and generate a capital gain on the eventual sale of the property to a third party.

[42] According to land title certificates, the development land was purchased for \$5,000,000 on December 17, 2012. Summerside DevCo was the registered owner even though the OM stated that PREIC was the original purchaser. Two mortgages held by IMOR Capital Corp. (**IMOR**) – one for \$2,750,000 and one for \$1,000,000 – were registered on the same date.

[43] According to the Fundamental Research Report, the balance of the purchase price for the land was paid with a \$1,250,000 loan from "management", which was to be repaid from the proceeds of the Summerside DT offering. Fundamental Research reported that if the offering proceeds were sufficient, they would also be used to discharge the IMOR mortgages, and funding for construction would be borrowed as necessary. Fundamental Research estimated that Summerside Plaza construction would cost approximately \$21,400,000.

[44] The IMOR mortgages were discharged on February 28, 2014 and replaced with other mortgages: \$14,500,000 held by KV Capital Inc. (**KV Capital**) and discharged on October 8, 2015, and \$17,100,000 held by Servus, registered on August 27, 2015 and discharged on December 12, 2017.

[45] After the land was purchased, development of Summerside Plaza began. It was at least partially complete and began leasing to tenants in the spring or summer of 2015. A "grand opening" was held on June 5, 2015.

[46] On September 27, 2016, Summerside DevCo entered into an Offer to Purchase and Interim Agreement to sell Summerside Plaza to an unrelated numbered company for \$24,000,000, with a contemplated closing date of October 31, 2016. The sale was delayed for reasons that were not clear on the evidence, and an Amending Agreement was executed on November 3, 2016 (the **Amending Agreement**).

[47] The Amending Agreement indicated that the numbered company had assigned its rights under the Offer to Purchase and Interim Agreement to Fateh, with a new closing date of November 30, 2016. It provided that in addition to the \$1,000,000 deposit paid under the original Offer to Purchase and Interim Agreement, Fateh would pay another \$1,000,000 deposit, and the full \$2,000,000 would be both non-refundable and immediately releasable to Summerside DevCo. Summerside DevCo was authorized to apply the money to the payment of outstanding debts. Three additional amending agreements followed in November 2016, each providing for another \$1,000,000 deposit that was non-refundable and immediately releasable to Summerside DevCo to pay debts.

[48] The sale of Summerside Plaza was further delayed by court proceedings, and the parties entered into a Loan Agreement dated December 1, 2016 (the **Loan Agreement**). Because the transaction had not closed in November 2016 as contemplated, the Loan Agreement provided that the parties had agreed to treat the \$6,850,000 Fateh paid in deposits as a loan payable by Summerside DevCo, with interest at the rate of one percent per month or 12 percent per year. According to GK, Fateh had borrowed the money to pay the deposits, and wanted to earn interest during the period the closing was delayed.

[49] Ultimately, the parties entered into a new Purchase Agreement dated July 19, 2017 (the **Purchase Agreement**). It provided that the \$24,000,000 purchase price would be paid by way of the \$6,850,000 in deposit funds, "[c]redit for interest as set out in the Loan Agreement", and the balance by wire transfer, bank draft, or solicitor's trust cheque on closing. In addition, the parties were each to pay one-half of Avison Young's commission of \$300,000, and Summerside DevCo

was to pay Fateh's legal fees associated with the closing delay and preparation of the Purchase Agreement.

[50] Like the original Offer to Purchase and Interim Agreement, the Purchase Agreement included a two-year rental guarantee whereby Summerside DevCo would reimburse Fateh for any rent not paid by Summerside Plaza tenants in that period (the **Rental Guarantee**). GK testified that Fateh wanted this provision because it had paid a premium for the property based on the fact that Summerside Plaza was already leased out and had an operating business with cash flow, but it was still a new plaza with tenants who did not have a consistent history of paying rent.

[51] On December 12, 2017, a new land title certificate for Summerside Plaza was issued in Fateh's name.

C. Related Entities

[52] In addition to the Respondent entities, a number of other Prism companies were referenced in the evidence. We list here only those that are relevant to the allegations in the ANOH and mentioned in these reasons.

1. Horizon Development Corp.

[53] Horizon Development Corp. was involved in an Edmonton real estate project known as The Horizon, which was under development at the same time that the Respondents were developing Summerside Plaza. Ghani was identified as the president of Horizon Development Corp.

[54] The evidence included a corporate search for Horizon Commercial Development Corp., with a registered office at the Prism Office. As it was unclear whether Horizon Development Corp. and Horizon Commercial Development Corp. were different companies, we refer to both collectively as **Horizon**. The corporate search indicated that at least as of January 1, 2013, Ghani was one of Horizon's three directors.

2. Broadmoor Commercial Plaza Development Corp.

[55] Broadmoor Commercial Plaza Development Corp. (**Broadmoor**) was involved in the Broadmoor Heritage Plaza project in Sherwood Park, which was also under development at the same time as Summerside Plaza.

[56] The evidence indicated that Ghani was the president of Broadmoor, and corporate searches showed that through the Relevant Period, its registered office was the Prism Office. During the same period, Ghani and Ghani Sr. were among its directors, and at least as of April 23, 2018, a Prism company, Prism Fund Corp. located at Ghani's home address, owned 46 percent of Broadmoor's voting shares.

[57] PK testified that he believes both The Horizon and the Broadmoor project ultimately failed and went into receivership or bankruptcy.

3. Heritage Plaza Developments Inc.

[58] Heritage Plaza Developments Inc. (**Heritage**) was involved in developing a property in Cochrane known as Mountain Ridge Plaza, also at the same time that Summerside Plaza was under development.

[59] According to documentary evidence, Ghani was Heritage's president. A corporate search dated April 23, 2018 listed its registered office as Ghani's home address, and Ghani as its sole director and voting shareholder. However, in an affidavit Ghani Sr. swore on January 4, 2018 for a court proceeding (the **Ghani Sr. Affidavit**), Ghani Sr. stated that he was also a Heritage director.

4. Prism Place Development Ltd.

[60] Prism Place Development Ltd. (**Prism Place**) was involved in a project called Prism Place in Calgary. During the Relevant Period, it appears that its registered office was the Prism Office.

[61] Bank records and corporate searches indicated that for at least some portion of the Relevant Period, Ghani was Prism Place's president and sole director, Ghani Sr. was its vice-president, and both Ghani and Ghani Sr. had signing authority over its account. As of May 14, 2013, Prism Developments Inc. was its sole voting shareholder.

5. Prism Developments Inc.

[62] Prism Developments Inc. (**Prism Developments**) was incorporated in Alberta on July 21, 2006, and through the Relevant Period, its registered office was Ghani's home address. During the same period, Ghani or both Ghani and Ghani Sr. were its officers and directors. Initially, the sole voting shareholder was Ghani Sr., but later in the Relevant Period the sole voting shareholder was Ghani.

[63] Both Ghani and Ghani Sr. were shown as signing authorities on Prism Developments' First Calgary bank account.

6. Prism Westmount Development Corp.

[64] Prism Westmount Development Corp. (**Prism Westmount**) was involved in the Westmount Heights project in Edmonton, and had its registered office at the Prism Office. Its directors, officers, and bank signing authorities included Ghani (as president) and Ghani Sr., and a corporate search indicated that the Ghani and Ghani Sr. family trusts owned 67 percent of its voting shares.

7. Prism Income Fund GP I Inc.

[65] Over the Relevant Period, Prism Income Fund GP I Inc. (**Prism Income I**) had its registered office at two addresses in Calgary, including the Prism Office. Initially, two of its three directors were Ghani and Ghani Sr., and the Ghani and Ghani Sr. family trusts together owned 91 percent of its voting shares. On May 31, 2017, Ghani became the sole director and voting shareholder.

D. Staff's Allegations

[66] In the ANOH, Staff alleged that between August 30, 2013 and May 7, 2014, approximately \$4,250,000 was raised from the sale of Summerside DT Units to approximately 207 investors, more than half of whom were Alberta residents.

[67] Staff further alleged that the Respondents represented to investors that their investment funds would be used to acquire land and develop Summerside Plaza. Summerside Plaza would then generate income for distribution from tenants, as well as a return on investment once the property was sold to a third party. The distributable cash would be used:

- first, to satisfy any outstanding debts;
- second, to pay Summerside DevCo's expenses;
- third, to repay investment capital; and
- fourth, to pay a return to investors of at least 10 percent per annum – or, if the proceeds exceeded the amount that would allow a minimum 10 percent return, they would be split with 70 percent paid to investors and 30 percent paid to Summerside DevCo.

[68] Staff alleged that Summerside DT investors were not repaid their invested capital, nor did they receive any returns. Instead, the Respondents misappropriated approximately \$3.6 million of the net sale proceeds for the benefit of Ghani, his family, and other entities he controlled. This included funds used without the investors' authorization to:

- repay debts unrelated to the Summerside Project;
- repay debts related to other businesses controlled by Ghani and his family;
- pay construction costs and other expenses unrelated to the Summerside Project;
- purchase equipment for businesses unrelated to the Summerside Project;
- purchase at least three vehicles;
- pay rent to landlords unrelated to the Summerside Project;
- make payments to entities under Ghani's direction and control; and
- make payments to or on behalf of entities that were not related to the Summerside Project, but in which Ghani had an interest.

[69] Staff therefore alleged that the Respondents directly or indirectly engaged or participated in an act, practice, or course of conduct relating to securities that they knew or ought to have known may perpetrate a fraud on Summerside DT investors, contrary to s. 93 of the Act. In addition, Staff

alleged that Ghani was the guiding mind of the other Respondents such that his knowledge was their knowledge, and he authorized, permitted, or acquiesced in their misconduct.

IV. EVIDENCE

[70] As mentioned, six witnesses testified at the Hearing. While we reference certain testimony and documentary evidence throughout these reasons, we summarize some additional important evidence below.

A. Witnesses

1. PK

[71] At the time of the Hearing, PK was Raintree's CEO, but between 2012 and 2017, he was its managing director of corporate finance. He testified that shortly after he joined Raintree, it decided to offer two Prism Group investments, Horizon and Broadmoor. Shortly after that, Ghani approached Raintree to offer several more investments, including the Summerside Project.

[72] According to PK, Raintree had some concerns about Prism's ability to deliver on another five projects when it already had several in progress. As a result, it agreed only to take on the Summerside Project, because Raintree staff viewed it as the most favourable. Fundamental Research was retained to do research and due diligence on the Summerside Project, and produced the April 2013 report mentioned earlier.

[73] The Fundamental Research Report included the following information:

- Under "Expected Returns", the report stated that after investors received repayment of their capital, the distributable cash flow would be split with 70 percent paid to investors and 30 percent paid to "management". It further explained that the 70-30 split would only apply after all debts were satisfied and investors had received a return of 100 percent of their capital.
- There was no annual management fee for the offering, as management's compensation would come from its 30 percent share of the profits. However, the report noted that eight percent of the funds raised would be paid as selling commissions and fees, and that the Prism Group also intended to collect two percent of the funds raised as a marketing or advertising fee.
- The total cost of the project including the purchase price of the land was estimated to be approximately \$26,400,000. Colliers, a commercial real estate firm, had estimated that the completed project would be worth approximately \$49,900,000 "based on more optimistic inputs/assumptions", but Fundamental Research estimated that it would be worth approximately \$36,580,000.

[74] The Fundamental Research Report also provided a summary of all of Prism's past projects, including the nine that were in progress at the time – either under development or at the capital-raising stage. Among those shown as in progress were the Prism Place, Heritage, Broadmoor, Horizon, Summerside, and Prism Westmount projects. Of the seven completed projects, Fundamental Research expressed a significant concern that Prism management had only provided

data confirming that investors had received returns on two. In April 2013 email correspondence to Raintree, Fundamental Research described this as "a huge red flag", and said that Prism management appeared to be "disorganized".

[75] To address some of their concerns with the Summerside Project, PK said that Raintree asked that additional terms be added to the offering to enhance the investor return-to-risk ratio, and create alignment between management's interests and the investors' interests. One such term was to require that investors' capital be returned before any profit share with management. Another was the introduction of a 10 percent per annum "hurdle rate", described as the minimum return that would be paid to investors before management could participate in any profits. Raintree also asked that Ghani invest \$500,000 in the same Summerside DT Units that were offered to investors. According to PK, Ghani agreed to do so, but PK was not sure whether that investment was actually made.

[76] The investment distribution allocation was set out in a March 2013 email Prism's legal counsel sent to Ghani and Fundamental Research staff, which Ghani later provided to PK:

Pursuant to your request, I can advise that the OMs are drafted such that from cash flow in any fiscal year, the cash flow will be first delegated to the paying of expenses, interest accrues redemptions [sic] as provided in the Trust Indenture, repayment of the amounts due to Unitholders as a repayment of the principal amount invested and a reserve and the balance, if any[,] is then distributed between the General Partner and the Partners on a predetermined proportion.

Simple really: everything due and owing is paid and anything over and above goes to Management 30% and to the Unitholders 70%[.]

[77] An August 2013 Raintree term sheet for internal use set out the 70-30 profit split, and explained that if investor returns did not meet the minimum 10 percent hurdle rate, management would not be entitled to any profit share. PK testified that this was consistent with his understanding of how returns were to be calculated and paid. The term sheet also provided that management had invested \$500,000 in Summerside DT Units in addition to their \$1,250,000 loan towards the land purchase, but that management's money was "First in Last Out": they would not be paid until Summerside Plaza was sold and investors had received both their principal and interest. Apart from the two percent marketing and administration fee, the term sheet stated that no management fees were payable, and that the principals were not taking salaries.

[78] PK testified that in the fall of 2016, Raintree learned through third-party sources that Heritage's project was in *Companies' Creditors Arrangement Act* proceedings. Raintree therefore started to try to gather information about the other Prism projects for which it had raised funds, including having its legal counsel draft a December 2016 letter to Ghani demanding information. PK testified that initially, Ghani was communicative, but as time went on he became evasive and then completely non-responsive. Because Ghani did not respond to the December 2016 letter, another letter was sent in January 2017 accusing Ghani of making misrepresentations to Raintree about the condition and financial performance of the Horizon project, noting that Horizon had gone into bankruptcy. The covering email said that Raintree had also learned that Heritage's project was in foreclosure.

[79] According to PK, by spring 2017, Raintree had concluded that they could no longer trust Ghani to keep them informed. They retained a financial consultant and legal counsel to evaluate what action they could take and what they could do to mitigate what they thought was likely to be a total loss of the invested capital they had raised for various Prism projects. With one of Raintree's staff as the representative plaintiff, the Class Action was brought in August 2018 against Ghani, Ghani Sr., Broadmoor, Horizon, Heritage, Prism Place, PREIC, and the entities involved in the Summerside Project.

2. NO

[80] NO was the only Summerside DT investor Staff called to testify at the Hearing. He lodged a complaint with the ASC in May 2018.

[81] NO testified that he was not introduced to the Summerside Project by Raintree. He had invested with Prism previously, and was therefore what Ghani described as a "private" or "in-house" investor. He initially heard about the Summerside Project from RS, though he said he exchanged emails and had telephone conversations with Ghani about it before deciding to invest, and considered Ghani his main contact at Prism. In December 2014, he invested \$50,000 in Summerside DT, signed a subscription agreement, and received a certificate for 500 Summerside DT Units from Ghani.

[82] NO's written complaint to the ASC documented his efforts to communicate with Ghani in late 2016 and 2017 about the status of his investment and when he could expect to receive his returns. In October 2016, Ghani told him that Summerside Plaza had been sold and NO would receive his returns in the first quarter of 2017. In January 2017, Ghani told him in an email that the sale had fallen through and they were looking for a new buyer (information that was false, as there was an extant deal with Fateh). Subsequent emails advised that a new buyer had been found, and gave various closing dates. NO spoke to Ghani by telephone on November 17, 2017, and was told that he would be paid out in the first quarter of 2018.

[83] NO did not receive payment as promised, and Ghani stopped returning his calls and replying to his emails in December 2017. He concluded his complaint:

I learned through some online research that the Raintree Financial Group in Edmonton had invested a large sum of money in the Summerside Development Trust. I phoned them and spoke with one of the principals in Feb[ruary] 2018. The man I spoke with told me that Ali Ghani had sold the Summerside property and had absconded with the profits and had no intention of paying out the Raintree Financial Group on their investment. He told me that the ASC and the RCMP were investigating Ali Ghani.

3. RS

[84] In addition to RS's Hearing testimony, the evidence included a copy of an affidavit RS swore on November 20, 2020 in support of a court application and a copy of the transcript of his sworn investigative interview by Staff on November 18, 2021, at which he was represented by counsel (the **RS Interview**). His evidence was consistent throughout.

[85] RS began working as a leasing agent for Ghani and the Prism Group in approximately the summer of 2009. Thereafter, he both leased and sold property for several Prism projects, and Ghani

promised to pay him commissions in addition to a modest salary. However, Ghani never paid the commissions, and instead told RS to be patient, as he would ensure that RS was compensated for his efforts later.

[86] RS testified that Ghani owed him approximately \$1,000,000 in commissions on various deals. In lieu of those commissions, in approximately late 2014, Ghani offered to fund two Anytime Fitness franchises – one at Summerside Plaza and one at Heritage's Mountain Ridge Plaza in Cochrane (**Anytime Summerside** and **Anytime Cochrane**, respectively) – for RS to own and operate. This was an oral arrangement that was never documented in writing, but RS saw it as benefitting both parties: he would become a business owner, and Ghani would add tenants for two of Prism's projects.

[87] Initially, the arrangement proceeded as agreed: Ghani or one of his companies paid the costs of establishing Anytime Summerside and Anytime Cochrane – which amounted to approximately \$1,000,000 – and RS owned them through his numbered company, **162 Alberta**. Anytime Summerside opened in or about August 2015, and Anytime Cochrane opened in early 2016.

[88] In about late 2015, Ghani approached RS and offered to loan him money to open additional Anytime Fitness locations and some Freshii restaurant franchises. According to RS, the loans were not documented and repayment terms were not discussed.

[89] Between approximately October 2015 and March 2017, 162 Alberta entered into franchise agreements and opened four additional Anytime Fitness gyms. They were referred to in the evidence by their Edmonton addresses: **Anytime 55** (on 55 Avenue), **Anytime 28** (on 28 Avenue), **Anytime 114** (on 114 Avenue), and **Anytime 61** (on 61 Avenue). A fifth was opened in Airdrie by RS's other numbered company, **200 Alberta**. 162 Alberta also opened an Anytime Fitness gym in Okotoks (**Anytime Okotoks**), but it performed poorly and was closed in 2019.

[90] In October 2015, 162 Alberta entered into franchise agreements for two Freshii restaurants in Edmonton, one on 167 Avenue (**Freshii Newcastle**) and one on 104 Avenue (**Freshii Brewery**). RS estimated that Freshii Newcastle opened in the summer of either 2017 or 2018, and that Freshii Brewery opened in early 2017.

[91] For a short time, 162 Alberta also attempted to operate other businesses located at Summerside Plaza: a frozen yogurt store called Spoon Me, an Activebody Nutrition shop, and a tanning salon next to Anytime Summerside. According to RS, Ghani paid the costs to set up the Spoon Me restaurant, but it was open for less than a year when it again failed and closed. The Activebody Nutrition shop also failed.

[92] RS's evidence was that beginning in about the fall of 2016, Ghani began to take over the financial management of both 162 Alberta and 200 Alberta – ostensibly until he was repaid the loans he had made to open the Anytime Fitness and Freshii franchises. Thereafter, Ghani took control of the companies, including bookkeeping, banking, payroll, taxes, and payments to vendors and lessors. RS's role was reduced to handling the work to open and manage the Anytime Fitness gyms, but under Ghani's direction. Ghani forwarded all of the Anytime Fitness telephones to his

personal cell phone number, but his communications with gym members and employees generated complaints, as did his failure to pay employees.

[93] According to RS, by July 2018, Ghani had positioned himself as 162 Alberta's and 200 Alberta's sole owner and operator, and considered RS to be a "regional manager". Despite this, RS's name remained associated with the businesses, and by the summer of 2019, he became concerned about the liabilities that had accrued after Ghani assumed control (including unpaid GST, income tax, and employee payroll remittances).

[94] Because he understood that as his companies' director and shareholder, he would be responsible for all of the companies' liabilities, in June 2019, RS agreed to transfer ownership of 162 Alberta and 200 Alberta to Ghani's mother and make her their sole director "in exchange for being absolved of all potential personal liability". Ghani's mother's name was used rather than Ghani's because of the complaints that had been made about him to Anytime Fitness's head office. However, as far as RS was aware, Ghani's mother had no actual involvement in operating 162 Alberta, 200 Alberta, or any of their businesses.

[95] By October 2020, Anytime Fitness's head office asked for verification that Ghani had no ownership interest in 162 Alberta or 200 Alberta. Ghani therefore agreed that RS should be reinstated as sole director and shareholder of the two companies. RS remained anxious about his involvement because Ghani had not taken any steps to ensure that RS was protected from liabilities – including liability for what RS considered to be fraudulent claims Ghani had made for government benefits relating to the COVID-19 pandemic. As a result, in November 2020, RS sought legal advice and applied for a court-appointed receiver for both companies (the **Receivership Proceedings**).

[96] RS eventually regained control of both companies and was reinstated as their sole shareholder and director. This was largely because Anytime Fitness's head office was concerned about the complaints it had received about Ghani, and because the companies were at risk of defaulting on their franchise agreements. When the receivership ended in early 2021, RS was in control and Ghani was responsible for all outstanding government liabilities. According to the receiver's report, RS and a numbered company associated with Ghani's mother entered into a settlement that required the numbered company to pay \$612,789 to the receiver for unpaid GST and repayment of relief amounts that had been improperly obtained while Ghani was overseeing financial management.

B. Ghani

[97] While evidence from the Ghani Interview and the Ghani Affidavit is mentioned elsewhere in these reasons, we summarize here some additional pertinent evidence.

[98] First, Ghani addressed the financial relationships among the various Prism entities. He explained that Prism's practice was to direct money raised by specific project entities through PREIC, which he described as Prism's "funding arm". PREIC then disbursed funds as needed by the projects until the projects raised their own funds and could repay PREIC. Where banking records disclosed payments made directly from one project entity's account for an expense relating to a different project – for example, a payment from a Summerside DevCo account for an expense

related to Heritage or Broadmoor – Ghani said an error had been made, as such payments should always have flowed through PREIC. If PREIC did not have the funds available to make a necessary payment at a given time, then PREIC should have borrowed money from a project that had available funds and loaned it to the project that needed them, as PREIC "had money coming in and out from different projects".

[99] Ghani acknowledged that the inter-company loans were undocumented, but he claimed that the fund flow among the Prism entities was tracked by an accountant or in spreadsheets that he, Ghani Sr., or other Prism office staff managed. He was unable to produce any such records at the time of the Ghani Interview, as he said he no longer had access to them due to legal proceedings.

[100] Ghani explained the financial structure further:

. . . in the way we ran everything, was Prism -- [PREIC] was the -- call it "the parent company" or "the funding arm" or whatever you want to call it. "The master" or whatever the right word is. It funded all the projects. So if the bank account for that project had money, it would definitely use those cheques to pay for that project, but if they didn't, [PREIC] would go ahead and write the cheque, and we would get reimbursed at a later point if the funds ever came in. If they didn't, it's -- it's our loss, for lack of a better word, if the funds never came back. But if it did, the projects ever had fund [sic], there would be a reimbursement back to [PREIC], and then [PREIC] would lend it out to whoever needed the money, whichever project was in dire need for the funds.

[101] Ghani denied that Prism commingled funds from different projects, because the lending among them was to go through PREIC. During the Ghani Interview, he stated:

We never commingled the funds. Every project is a standalone. But when money is needed, it would go to [PREIC] and then get borrowed from there. So it would be a loan, not -- it shouldn't ever go between one project to the other. It should come to [PREIC] -- [PREIC] and then be borrowed out or lent out or go from there. There should always be that relationship. And then [PREIC] always had a loan relationship with each company. More often than not, we were owed money -- [PREIC] was owed money from the different projects. It was very rare that [PREIC] actually owed money to the projects. It was usually the other way around.

[102] Ghani further maintained that when Summerside Plaza was sold, there was money owed by the Summerside Project to PREIC, which is why some of Fateh's purchase deposit funds were paid to PREIC (as discussed later in these reasons).

[103] This was also addressed in the Ghani Affidavit:

As indicated above, there were a number of payments made to credit card accounts of Prism Developments . . . and there were a number of payments made to [PREIC]. As has been advised previously, [Prism Developments] is an affiliate that paid common area maintenance expenses for Summerside and other Prism-related projects, and [PREIC] is another affiliate that was traditionally used as a clearing house for all inter-entity transactions. In recent years, as the Alberta economy suffered and our family's various real estate projects suffered and, in a number of cases, failed, we have not kept current in the preparation of proper financial records to detail, record and reconcile the many inter-entity transactions. The third party accountants, Kenway Mack Slusarchuk Stewart LLP, are owed considerable fees, and so depending upon the entity financial statements and related records have not been prepared since 2014, 2015 or 2016. We have produced previously the financial statements that are available.

In the result, it is very likely that payments referenced in this and the preceding paragraph that were received by [Prism Developments] or [PREIC] were used to pay obligations of affiliates, as has been customary practice for many years. I am unable, however, to provide a reconciled, current state of accounts among Summerside and these affiliates, whether [r]espondents [to the Class Action] or otherwise. Plainly some entities are net debtors of other entities, and some are net creditors, as has generally been the case from time to time. I simply do not know at this time what the state of those accounts is. I do know that my father Abdul Ghani and I are net creditors overall, each to the extent of millions of dollars.

[104] Despite his denial in the Ghani Interview that funds were commingled, the Statement of Defence to the Class Action filed on behalf of Ghani and Ghani Sr.'s estate in February 2021 stated the contrary: "PREIC was [used] as a clearing house for all transactions among the Prism Entities. Funds were commingled among the Prism Entities as we tried to pay expenses for the projects and keep them all going." Generally, Ghani's defence to the Class Action appears to have been that the real estate projects failed due to the economy, and there was no misappropriation of funds or fraud. One paragraph of the Statement of Defence stated that those who lost money on their investments did so "because the Alberta real estate market got weak and the Prism Entities['] projects all got sold at a loss". While some creditors received part of what they were owed, "there was no money left over for the investors".

[105] During the Ghani Interview, Staff asked Ghani whether Prism's practice of directing funds through PREIC was communicated to Summerside DT investors. He replied that the OM disclosed that funds from associated parties would be involved, such as the \$1,250,000 loan from management.

[106] The second point of note from Ghani's evidence related to Prism's use of credit cards. He acknowledged that he, Ghani Sr., PREIC, and Prism Developments all held credit cards that were used to pay expenses for various Prism projects – including Summerside – but he could not identify any particular card or cards that were used to pay expenses for the Summerside Project. He asserted that like the inter-company loans, expenses paid by credit card were tracked, and when the relevant project had funds available, either the credit card bills were paid or PREIC was reimbursed for paying them. In the Ghani Affidavit, Ghani identified several credit card payments in 2016 as reimbursements for expenses directly relating to the Summerside Project. However, if any records tracking credit card payments and expenditures existed, they were not in evidence.

[107] The final point from Ghani's evidence that we mention here is his unequivocal denial that he, PREIC, or any of his other companies ever invested in 162 Alberta, had any ownership position in it, controlled its business records, or were in any way involved in its operations. According to Ghani, RS's evidence to the contrary was untrue, and any records indicating that he, his mother, or his father had any involvement in 162 Alberta were inaccurate. This included government corporate registry search records that showed Ghani or Ghani Sr. as 162 Alberta's "Authorized Representative", listed Ghani's home address as 162 Alberta's registered office address, and named Ghani's mother as 162 Alberta's sole director and voting shareholder.

[108] The documentary evidence included a record of proceedings before the Subdivision and Development Appeal Board of the Town of Okotoks, dated April 17, 2018 (the **Okotoks Record of Proceedings**), which concerned the town's decision not to permit certain signage at the plaza where Anytime Okotoks was located. The document stated that Ghani appeared in support of the

appeal on behalf of Anytime Okotoks, and identified himself as the owner of Anytime Okotoks and seven other Anytime gym locations in Alberta: five in Edmonton, one in Airdrie, and one in Cochrane.

[109] When asked about the Okotoks Record of Proceedings during the Ghani Interview, Ghani said that he made the appearance as a favour at the request of the landlord, Halcor Development Corporation (**Halcor**). He agreed to speak on behalf of certain tenants, as Prism had a partnership with Halcor and was involved in that plaza's development. He denied knowing whether 162 Alberta owned the Anytime gym at that location.

C. The OM

[110] The OM was signed and certified by Ghani and Ghani Sr. as Summerside DT's trustees. It contained disclosure concerning two issues relevant to this matter: the formula for distributions to investors, and the stated use of the capital raised.

[111] Several sections of the OM disclosed that after payment of expenses, satisfaction of all debts, and return of investors' capital, profits from the sale of Summerside Plaza would be distributed on a 70-30 basis. As explained in the Fundamental Research Report, 70 percent was to be payable to investors and 30 percent was to be payable to the general partner (i.e., Summerside DevCo), provided that investors received a minimum return of 10 percent per annum from the date of subscription to the date of payout. For example, the OM stated:

Once there is distributable cash from the development of the Project, (other than debt obligations which need to be satisfied) then remaining distributions shall be made as to seventy (70%) percent to the Trust Unitholders and thirty (30%) percent to the General Partner. In the event investors[] total return does not exceed 10% in the scenario of a 70%/30% profit share, a preferred return of ten (10%) percent (non-compounding, cumulative) will be distributed to each Trust Unitholder in priority to profit participation of the General Partner.

[112] Interim distributions were also contemplated, and the OM explained that payable expenses were those relating to the business of the "Partnership" – i.e., Summerside LP:

The General Partner shall, from time to time, and at least once in each fiscal year of the Partnership, determine the amount of cash which, in its opinion, is required to be retained by the Partnership for reserves, to meet operating expenses, to comply with such limits or restrictions as may be agreed to between the General Partner and its lender(s) or contained in any loan agreement(s) and to make allowances for contingencies and working capital and may in its discretion distribute the balance, if any, of the cash on hand of the Partnership (the "Distributable Cash") in the following manner:

- a) first, to the General Partner in an amount in respect of a fiscal year that may be payable from time to time during the fiscal year, equal to those expenses, as determined by the General Partner, that relate to the administration and other activities of the Partnership that have been incurred by the General Partner on behalf of the Partnership. Such expenses may include, but are not limited to, compensation expenditures for those employees of the General Partner that relate to the business of the Partnership, office and administration expenses and any other expenditures related to the Partnership's business;
- b) secondly, to the holders of Class "A" Limited Partnership Units, an amount equal to the repayment of LP capital originally invested; and
- c) thirdly, the balance of the Distributable Cash remaining shall be split with thirty (30%) percent being paid to the General Partner and the balance of seventy (70%) percent being paid through the Class "A" Limited Partnership Units.

Provided the balance of Distributable Cash remaining results in Trust Units earning greater than 10% per annum for the period from the date of subscription for a Trust Unit to the date of payout when the Trust Units are finally redeemed, the balance of Distributable Cash remaining shall be split with thirty (30%) percent being paid to the General Partner and the balance of seventy (70%) percent being paid through the Class "A" Limited Partnership Units. Otherwise, the balance of Distributable Cash shall be paid to the Class "A" Limited Partnership Units.

[113] Even though the OM stated that development of Summerside Plaza would "ultimately provide income for distribution from the tenants" in addition to a potential capital gain on the sale of the property, Ghani denied that that was ever the intention, because the rental income was needed to service the mortgage debt. Similarly, despite the clear statements in the OM about the 70-30 profit split, Ghani said that he did not recall where they landed on the profit split for the Summerside Project, because at one point it was discussed that the split would be 50-50, and possibly even 70 percent to management and 30 percent to investors.

[114] As to the use of the funds raised, the OM included a table setting out the "anticipated and estimated" use of the proceeds of the offering. Assuming a maximum offering of \$7,500,000, the table showed that an estimated \$600,000 (or eight percent) would be paid in selling commissions and fees, \$150,000 (or two percent) would be paid to PREIC in marketing fees, and \$100,000 would be paid in offering costs, including legal and accounting services.

[115] A note to the table indicated that the proceeds of the offering would be insufficient to complete the Summerside Project, and that additional financing from other sources would be required. Another note stated that PREIC had agreed to subscribe for 5,000 Summerside DT Units. When asked whether that investment had been made, Ghani said that he thought it had, but did not recall how.

[116] The next section of the OM, "Use of Available Funds", stated that after offering costs, Summerside DT would use the remaining \$6,650,000 to acquire units in Summerside CT, which would use the funds to acquire Summerside LP units. Summerside LP would then use the funds to:

- pay certain mortgage and lender fees in the total amount of \$308,750;
- pay out a "Related Party Loan" of \$1,250,000;
- pay out the existing mortgages in the total amount of \$3,750,000;
- pay "Soft Costs" of \$1,000,000; and
- provide a working capital reserve of \$341,250.

[117] During the Ghani Interview, Ghani was asked about some of the information in the OM and its preparation. He acknowledged that he was responsible for providing the information about the business and the planned development, although some of that information could have come from Colliers or other third-party consultants. He also contended that Ghani Sr. was more involved

in working with the lawyers, the accountant, and Raintree to prepare the OM than he was, because Ghani Sr. was in Calgary where the lawyers were located while he (Ghani) was in Edmonton working directly on Prism's development projects.

[118] Ghani suggested that it was Ghani Sr. who provided the information for the "Use of Available Funds" table, and that he did not recall what the "Related Party Loan" was for other than that it would have involved a "sister" company and may have concerned the Summerside land purchase. He explained that the "Soft Costs" included anything other than construction costs – for example, architectural and legal fees.

[119] Ghani was asked to confirm the OM disclosure that he and his father would not receive any compensation from Summerside DT or any related parties. He thought that they had not, but said that while he was not certain, the financial statements would confirm it either way.

[120] The OM stated that Summerside DT was not a reporting issuer and thus was not obligated to provide continuous disclosure, but investors would receive annual audited financial statements. When asked during the Ghani Interview whether investors were ever given audited financial statements, Ghani again said that he was not sure, because Ghani Sr. and Prism's accountants handled that. PK said that he did not think audited annual financial statements were ever provided, and that when he asked Ghani about them, he did not receive a reply. Staff testified that other than those appended to the OM, they did not see any audited financial statements for Summerside DT or any evidence that such statements existed.

D. Constatting Documents

[121] The constating documents that established and governed the entities involved in the Summerside Project also included certain relevant information.

1. Declaration of Trust

[122] The Summerside DT Declaration of Trust provided for the powers of the trustees (i.e., Ghani and Ghani Sr.) and the distribution of trust assets, defined in the document as the "Fund Assets".

[123] "Fund Assets" included:

. . . all monies, properties and other assets as are at such time held by the Fund or by the Trustee on behalf of the Fund including, without limitation:

- (i) the Initial Contribution [defined as the \$100 paid by the settlor to the initial trustee to settle the trust at its inception];
- (ii) all funds or property realized from the issuance or sale of [Summerside DT] Units or any other Securities of the Fund from time to time;
- (iii) all Securities held by the Fund or by the Trustee on behalf of the Fund;
- (iv) any proceeds of disposition of any of the foregoing property; and
- (v) all income, interest, dividends, return of capital, profit, gains and accretions and all substituted assets, rights and benefits of any kind or nature whatsoever arising directly or

indirectly from or in connection with or accruing to such foregoing property or such proceeds of disposition . . .

[124] The "Unitholders" were defined as the holders of the Summerside DT Units and the beneficiaries of the trust. The units themselves were described as the Class "A" units offering "a profit participation element after all debt obligations have been paid". Later in the document, it was stated that the Summerside DT Units were "entitled to share in up to fifty (50%) percent of the profit participation once the project is completed and sold to a third party", and that profit would be calculated after the payment of all expenses.

[125] A section entitled, "Powers and Authorities of the Trustee" gave the trustees broad powers, described as "full, absolute and exclusive power, control and authority over the assets of the Fund and over, and management of, the affairs of the Fund". They were also permitted "to do all acts and things, as in the sole discretion and judgment of the Trustees are necessary or incidental to, or desirable for, carrying out the Fund". A specific list of powers permitted the trustees, *inter alia*:

- (a) to supervise the activities and manage the investments and affairs of the Fund;
- (b) to borrow money upon the credit of the Fund and the assets of the Fund;
- . . .
- (f) to effect payments of distributions from the Fund to Trust Unitholders . . . ;
- (g) . . . ; and
- (h) to exercise all powers which are necessary or useful to carry on the purpose and activities of the Fund, to promote or advance any of the purposes for which the Fund is formed and to carry out the provisions of the Declaration of Trust.

[126] In addition, the trustees were to be remunerated for their services in such amounts as they determined from time to time, plus expenses.

[127] Two provisions of the Declaration of Trust stipulated that annual financial statements would be provided to Summerside DT Unitholders, but neither required that the financial statements be audited.

2. Trust Indenture

[128] The Summerside CT Trust Indenture defined the "Beneficiary" of the trust as Summerside DT, and required that any income of the trust be paid to that beneficiary. The powers of the trustees set out in the Trust Indenture were similar to the powers provided for in the Summerside DT Declaration of Trust.

[129] It appeared that a precedent trust indenture was used and unadapted in certain places, as, for example, it referred to the trust raising funds for investment in securities of an entity called the Lethbridge Limited Partnership, and carrying out the operations of a seismic services company – neither of which is relevant to this matter. We consider it an example of the carelessness with which important Prism business records were prepared and maintained.

3. Certificate of Limited Partnership

[130] The Certificate of Limited Partnership in evidence was dated December 13, 2012. It provided that the limited partners were entitled to a return of a "fifty (50%) percent share of the net proceeds upon dissolution of the Partnership", but also to a "90% share of the net profits by reason of contribution".

[131] The certificate was amended March 9, 2015 by deleting the 50 percent and 90 percent provisions, and inserting new provisions that profits and losses of the partnership were to be "shared or borne, as the case may be, in a ratio or according to a formula that is established by resolution of the Partners", and that the limited partners were "entitled to 70% share of the net profits pro rata and 30% to the General Partner [sic]".

[132] Both the Certificate of Limited Partnership and the Notice to Amend were signed by Ghani on behalf of all parties.

4. Partnership Agreement

[133] Like the Summerside CT Trust Indenture, the Partnership Agreement appeared to have been based on a precedent that was unadapted in certain places: it defined "Commercial Trust" as the Lethbridge Urban Commercial Trust and referred to the Lethbridge Urban Development Trust, neither of which is relevant to this matter. Like the Certificate of Limited Partnership, the Partnership Agreement provided for execution by Ghani on behalf of both parties, DevCo and the initial limited partner, Prism Urban Development.

[134] The Partnership Agreement stated that units in Summerside LP had the right to receive allocations of income and loss as provided in the agreement. Another provision indicated that subject to availability after allowance for reserves, distributable cash would be paid:

- (i) first, to DevCo for expenses related to "the administration and other activities of the [p]artnership" that it had incurred "on behalf of the [p]artnership", including compensation for DevCo employees "that relate to the business of the [p]artnership", office and administration expenses, and "any other expenditures related to the [p]artnership's business";
- (ii) second, to the holders of partnership units in "an amount required to pay the accrued but unpaid interest" allocated to the units; and
- (iii) third, to DevCo and to partnership unit holders, split on a 50-50 basis.

[135] The Partnership Agreement included a section describing DevCo's powers and obligations as the general partner, including a list of the activities it was authorized to undertake in connection with the business of the partnership. The same section included a prohibition against commingling the funds and assets of the partnership with the funds or assets "of the General Partner or of any other Persons", broadly defined to include natural persons, trusts, corporations, and other such entities.

5. Services Agreement

[136] Under the Summerside LP Services Agreement – which provided for execution by Ghani on behalf of both parties – DevCo as "Manager" was entitled to be reimbursed for its expenses, defined as:

. . . the amount in aggregate representing all expenditures and costs incurred in the management and administration of the interests of [Summerside] LP, including, without limitation:

- (i) all reasonable costs and expenses relating to the activities of [Summerside] LP and paid directly to third parties by or on behalf of [Summerside] LP and to respective Affiliates; and
- (ii) all reasonable costs and expenses incurred by the Manager specifically for [Summerside] LP including, without limitation, auditing, accounting, bookkeeping, rent and other leasehold expenses, legal, land administration, travel, telephone, data processing, reporting, executive and management time, salaries, bonuses and all of those costs and expenses incurred by the Manager in discharging its obligations under this Agreement.

[137] In addition to expenses, the agreement provided that DevCo was entitled to a management fee of "thirty (30%) percent of the profits realized from the business to be carried on by [Summerside] LP".

[138] DevCo's duties under the agreement included authorizing and paying Summerside LP's operating expenses, and preparing and providing Summerside LP's annual audited financial statements.

E. Summerside Project Marketing Materials

[139] Additional information concerning the Summerside Project was provided in several PowerPoint and webinar-style presentations.

[140] One such presentation appeared to have been dated August 15, 2013. Ghani said that he thought Prism had created it for investors, and acknowledged that he would have been involved in providing some of its content. He also acknowledged that he would have approved it before it was used.

[141] This presentation confirmed some of the information set out in the OM: Summerside DT investors were to receive 70 percent of the profits from the project (with the remaining 30 percent payable to management), or 10 percent simple interest per year, whichever was greater. A seven percent selling commission plus a one percent administration fee would be paid to the selling agents, while PREIC would receive a two percent marketing and administrative fee to a maximum of \$150,000. Management's interests and investors' interests were said to be aligned, as management was investing in the same Summerside DT Units. Further, management's money would be "first in & last out", no management fees other than the maximum \$150,000 payable to PREIC would be charged, and the "[p]rincipal(s)" would not take salaries, because they would only get paid after the project was sold and investors received their principal and interest.

[142] Ghani confirmed that the references to "management" and "[p]rincipal(s)" meant himself and Ghani Sr.

[143] Prism prepared additional presentations explaining the investment, some intended to inform Raintree and its sales staff so they could explain it to their clients, and some apparently intended for prospective investors. Ghani acknowledged that he was involved in preparing some content, and that he approved the final product. He also spoke during certain audio-visual presentations.

[144] The presentations were consistent in stating:

- there was "[v]ery strong alignment" between management's interests and investors' interests, and that management had a "[p]roven ability to **preserve investor capital** in difficult market conditions" (original emphasis);
- after return of all investment capital, profits would be split with 70 percent to investors and 30 percent to management, if investors received a minimum return of 10 percent interest per annum;
- a seven percent selling commission plus a one percent administrative fee was payable, as well as a two percent marketing and administration fee for PREIC up to a maximum of \$150,000;
- management's money would be "first in and last out", and included both the \$1,250,000 loan to purchase the Summerside land and management's \$500,000 investment in Summerside DT Units; and
- the principals were not drawing a salary, and would only be paid upon the sale of the project "**after** the investor receives their principal and interest" (original emphasis).

[145] During one presentation from August 2013, Ghani stated that:

... each project is independently owned and independently syndicated and an independent investor group. So it's not in a fund where if one goes down it brings the other projects down. It's only going to be isolated to that project itself.

[146] Other promotional documents similarly advertised "70% Profit Participation", and a 70-30 profit split in favour of investors. Both PK and Ghani said that they believed Prism prepared the documents, and Ghani again acknowledged that he would have been primarily responsible for their content.

[147] In a December 4, 2014 email Ghani sent to NO when he was considering an investment in the Summerside Project, Ghani stated that he was attaching certain information that Raintree had prepared "to give all investors". An attached three-page Raintree term sheet noted the 70 percent profit share for investors, as well as the total of eight percent in fees payable to Raintree and the two percent payable to PREIC as a marketing fee. The term sheet also indicated that nothing would be paid out until the project was completed, at which time both principal and interest would be paid.

F. Source and Use of Funds Analysis

1. Scope

[148] Based on the Respondents' banking information and other evidence, Bertrand prepared a source and use of funds analysis (the **S&U Analysis**) for the period from January 1, 2013 to December 31, 2017: the date the Summerside DT offering opened to the end of the calendar year in which Summerside Plaza was sold to Fateh. The S&U Analysis was primarily concerned with: (i) the amount of funds raised from Summerside DT investors and how the Respondents used those funds; and (ii) the amount of funds the Respondents received from Fateh on the sale of Summerside Plaza and how the Respondents used those funds.

[149] For simplicity, we have rounded all numbers to the nearest dollar.

2. Summerside DT Offering and Other Funds

(a) Summerside DevCo – Sources

(i) Amount Raised from Summerside DT Investors

[150] Staff calculated that between approximately August 30, 2013 and May 7, 2014, a total of \$4,257,600 was raised from the sale of Summerside DT Units to investors, including Alberta residents. However, other records in evidence suggested other amounts.

[151] For example, Summerside DT filed three reports of exempt distribution (**REDs**) with the ASC in January and February 2014, each signed by Ghani. Since the REDs only reflected a total of \$1,538,500 raised, it appeared that not all of Summerside DT's distributions were properly reported. PREIC's ostensible \$500,000 investment was included on one of the REDs, but Staff indicated there was no evidence in the banking records to confirm that this amount was paid to Summerside DT.

[152] Some investors used registered accounts to subscribe for Summerside DT Units, in which case the subscriptions were processed through Olympia Trust Company (**Olympia Trust**). Olympia Trust issued cheques to Summerside DT in the total amount of \$2,388,900 between November 2013 and May 2014.

[153] Raintree provided a list of the Summerside DT investors from whom it received funds and subscription agreements, totalling \$4,134,700. According to Raintree, that figure was comprised of \$2,266,000 invested in registered accounts through Olympia Trust, plus \$1,868,700 in non-registered investments. PK estimated that approximately \$4.1 million was raised, but Staff submitted that Raintree was probably unaware that some investors (such as NO) purchased Summerside DT Units after the offering closed, or were repeat Prism investors (those described by Ghani as "private" or "in-house" investors) and purchased directly from Summerside DT.

[154] In a November 24, 2014 email, Ghani advised NO that as of that date, a total of \$4,927,600 had been raised for the Summerside Project, which included \$4,134,700 from Raintree investors, \$292,900 from "in house" investors, and the \$500,000 from Prism. Because the offering had already closed, Ghani offered to sell NO \$50,000 in units from Prism's holdings, and stated that another investor had been offered the same deal.

[155] To reconcile the discrepancies, Bertrand relied on the banking records as the best evidence of the investor funds received and deposited to the Respondents' bank accounts. She was able to confirm \$4,357,600 in investments from the bank documents, including NO's \$50,000 investment and the other \$50,000 investment made after the OM offering period (and outside of Raintree and Olympia Trust).

[156] From the bank records, Bertrand identified another \$405,000 from "possible" investors made after the OM offering period and deposited to DevCo's Servus Account 6814 between June 27, 2014 to October 9, 2015. She classified them as "possible" investors where amounts in round numbers were deposited in approximately the same time period as other possible investments, and where the cheque memos indicated "investment".

(ii) Additional Deposits

[157] The banking records in evidence showed that all of the \$4,257,600 raised from confirmed Summerside DT investors during the OM offering period was deposited to Summerside DevCo's Servus Account 6814. Servus Account 6814 had a balance of \$0.00 at the time of the first investor deposit on August 30, 2013.

[158] During the same period, another \$188,669 from other sources was deposited to Servus Account 6814. This included \$172,417 transferred from one of Servus Account 6814's predecessor accounts to the other, the original source of which was unclear. The other \$16,252 was comprised of deposits classified as "Unknown" in the S&U Analysis and a very small amount in credit union profit-sharing income.

(iii) Related-Party Loan

[159] As mentioned, the Summerside DT OM disclosed that \$1,250,000 of the funds raised from Summerside DT investors would be used to repay a related-party loan. Staff could not confirm whether the loan was documented or that the sum of \$1,250,000 was ever advanced to the Summerside Project, and no such loan was reflected in the audited financial statements attached to the OM. However, amounts owing to related parties were documented in Summerside LP's 2013 and 2014 financial statements.

[160] Summerside LP's 2013 balance sheet showed a liability of \$1,235,347 due to PREIC, and its 2014 balance sheet indicated that that debt had been repaid. Instead, the balance sheet and the notes to the 2014 financial statements indicated that PREIC then owed Summerside LP a debt of \$1,695,562.

[161] Summerside LP's 2015 unaudited and unreviewed financial statements showed that the amounts due to and from related parties increased over the prior year, but did not include notes to explain which parties were involved.

[162] Other than as recorded in the 2014 financial statements, repayment of the \$1,250,000 was not clearly recorded in any of the documents in evidence. Staff postulated that Summerside DevCo may have repaid it with amounts it transferred to Horizon.

(b) Summerside DevCo – Uses**(i) Transfers from Summerside DevCo to PREIC**

[163] Between October 11, 2013 and May 5, 2014, \$3,254,060 was transferred from Summerside DevCo's Servus Account 6814 to PREIC's First Calgary Account 9197. Apart from the \$188,669 from other sources noted above, the money transferred originated from confirmed Summerside DT investors. Virtually every time Servus Account 6814 built up a balance from invested capital, Summerside DevCo transferred funds to PREIC, leaving a relatively insignificant balance until the next deposit of invested capital.

[164] The notes on some of the cheques and bank drafts transferring funds from Summerside DevCo to PREIC indicated that the payments were for commissions (\$405,580) or reimbursements (\$1,457,250). Others had no memo (\$920,750) or simply indicated they were for First Calgary Account 9197 (\$470,480).

[165] Ghani was asked about a number of the payments from Summerside DevCo to PREIC during his interview. Some he was unable to explain, particularly where there was no notation on the payment indicating its purpose. He thought that the cheques or drafts indicating that they related to commissions were intended for Raintree, and the funds simply went through PREIC instead of being paid directly from Summerside DevCo. He said that he could not remember exactly why it was handled that way, but suggested that it was at Raintree's request, perhaps for tax reasons.

[166] According to Ghani, payments with a notation that they were reimbursements or a return of money were to reimburse PREIC or other Prism entities for funds they advanced to purchase the Summerside land or pay other early costs of the Summerside Project, incurred before Summerside DT raised any funds. He said that he could not recall which entity provided the \$1,250,000 related-party loan disclosed in the Summerside DT OM, but that it should have been PREIC as the Prism Group's "funding arm", especially for projects at their initial stages.

(ii) Other Payments from Servus Account 6814

[167] Other than the payments to PREIC and small amounts for bank fees and charges, only a handful of other payments were made from Summerside DevCo's Servus Account 6814 during this period:

- (a) a \$11,646 mortgage or loan payment to KV Capital, but the evidence did not indicate whether it related to the Summerside Project or another Prism project;
- (b) a \$15,000 payment to a consultant, but it was again unclear whether this related to the Summerside Project or another Prism project;
- (c) \$16,280 paid to unidentifiable recipients, purpose unknown;
- (d) a \$1,000,000 bank draft payable to Horizon, which Ghani thought was to repay Horizon for a loan it made to purchase the Summerside land; and
- (e) a \$130,310 payment to RS, apparently as payment of an invoice – but the entire amount was redeposited to Servus Account 6814 within two months.

[168] Servus Account 6814's closing balance was \$18,887 on May 7, 2014.

(c) PREIC – Sources

[169] On October 11, 2013, the date that it received the first deposit from Summerside DevCo, PREIC's First Calgary Account 9197 had an opening balance of \$10,415.

[170] In addition to the funds from Summerside DevCo, between October 21, 2013 and May 12, 2014, \$356,336 from other sources was deposited to First Calgary Account 9197. This was comprised of:

- (a) \$351,042 from Prism Developments, Prism Income I, and Prism Place;
- (b) \$2410 from a source Staff classified as "Unknown" in the S&U Analysis; and
- (c) \$2884 from Ghani.

(d) PREIC – Uses

(i) Summerside Project Expenditures

[171] According to the S&U Analysis, \$991,939 of the funds raised or realized from the other sources mentioned was clearly spent on the Summerside Project. The full amount was paid from PREIC's First Calgary Account 9197 between October 2013 and May 2014, and included:

- (a) \$106,875 in mortgage and interest payments to IMOR;
- (b) \$330,776 in commission payments to Raintree;
- (c) \$314,138 paid to Dialog, a design company; and
- (d) \$181,741 paid to the City of Edmonton for landscaping estimates and building permit applications.

[172] In each case, the cheques included memos indicating that the payments specifically related to the Summerside Project.

(ii) Expenditures for Other Prism Entities and Projects

[173] In addition to the \$1,000,000 paid directly from Summerside DevCo's Servus Account 6814 to Horizon, \$1,907,867 of the funds deposited to PREIC's First Calgary Account 9197 was directed to other Prism projects and entities. This included:

- (a) \$682,760 paid to Horizon or for the benefit of the Horizon project in Edmonton; most of the cheques included a memo indicating that the funds were reimbursements or repayments of borrowed funds, and Ghani explained that they were likely either loans from PREIC to Horizon, or PREIC repaying loans that Horizon had made to PREIC;
- (b) \$388,290 transferred to Prism Place (offset in part by \$122,900 Prism Place later transferred back to PREIC);
- (c) \$285,925 paid to Prism Westmount or for the benefit of the Westmount Heights project in Edmonton, which included \$227,924 in mortgage payments; and
- (d) \$137,500 paid to Broadmoor or for the benefit of the Heritage Plaza project in Sherwood Park, including \$52,500 for a Shoeless Joe's restaurant franchise fee and

\$5000 for a deposit on a Freshii restaurant franchise. When Ghani was asked about these payments, he confirmed that there is neither a Shoeless Joe's nor a Freshii at Summerside Plaza.

(iii) Other Uses

[174] It was not possible to determine from the available evidence whether the remainder of the funds were paid toward the Summerside Project or other identifiable Prism projects. Staff therefore assigned the remaining expenditures to broad categories. The more significant amounts included:

- (a) \$275,166 in credit card payments;
- (b) \$200,000 paid to a law firm;
- (c) \$92,150 paid to consultants;
- (d) \$85,550 for miscellaneous expenses such as postage, salaries, and taxes; and
- (e) \$24,625 paid toward mortgages and loans.

[175] The Ghanis also received a few relatively small amounts: on October 17, 2013, PREIC issued a \$15,000 cheque to Ghani Sr. with the memo, "Consulting Fees", and Ghani received a net amount of \$8116 in transfers from First Calgary Account 9197.

[176] On May 12, 2014, the closing balance in First Calgary Account 9197 was \$23.54.

3. Summerside Plaza Sale Proceeds

(a) Amounts Received by Summerside DevCo

[177] As mentioned, Summerside Plaza sold for \$24,000,000, and approximately \$17,100,000 of the proceeds was used to pay out mortgages on the property.

[178] The remainder of the purchase price was comprised of the deposit funds Fateh either paid to Summerside DevCo, or for which Fateh received credit under the agreements between the parties. The deposit ostensibly totalled \$6,850,000, but only \$6,096,573 was ever received in Summerside DevCo's bank accounts, in installments: between August 9 and December 16, 2016, \$4,996,573 was deposited to its Servus Account 6814, and \$1,100,000 was deposited to its RBC Account 1722.

[179] From the remaining \$753,427, \$650,000 was paid to legal counsel to discharge certain debts – amounts owing to the City of Edmonton for property taxes, Avison Young, Jack's Pizza, White Knight Construction, and a law firm. Avison Young was involved in selling Summerside Plaza, and Jack's Pizza is or was a tenant at the plaza. According to RS, White Knight Construction did the tenant improvement work for Anytime Summerside, but also Anytime Cochrane, Anytime 55, and the Spoon Me frozen yogurt store.

[180] The final \$103,427 was withheld as interest owing to Fateh under the Loan Agreement.

[181] In addition to the Fateh deposit funds, between October 5 and December 16, 2016, \$248,302 from other sources was deposited to Servus Account 6814, comprised of:

- (a) \$103,665 from PREIC;

- (b) \$106,909 from other Summerside DevCo Servus accounts (the source of which was not apparent from the available evidence);
- (c) \$19,965 from Heritage; and
- (d) \$17,763 in rent from a Summerside Plaza tenant.

[182] The total amount of money deposited to Summerside DevCo's accounts in the relevant time frame was therefore \$6,344,875.

(b) Uses

[183] The funds Summerside DevCo received from the sale of Summerside Plaza (and the additional \$248,302 from other sources) were disbursed as follows: (i) to fund the \$2,000,000 Rental Guarantee provided for in the Purchase Agreement; (ii) to pay costs associated with certain non-Prism entities in which Ghani had an interest; (iii) transfers to other Prism entities; and (iv) to pay other costs not clearly associated with the Summerside Project or any other identifiable Prism project.

[184] Consistent with the use of the Summerside DT investor funds, Summerside DevCo transferred a large portion of the deposit money – \$2,275,000 – from its Servus Account 6814 to PREIC's First Calgary Account 9197 in November and December 2016. On the date of the first deposit to First Calgary Account 9197, the account was overdrawn by \$84.81, and there were no other deposits from any other sources between November 28 and December 30, 2016.

[185] Of the \$1,100,000 that was deposited to Summerside DevCo's RBC Account 1722, Staff was only able to analyze the use of \$1,000,000. At the time of the \$100,000 deposit, there was already a substantial balance in the account (including the proceeds of a business equipment loan from RBC), and Staff could not separate the \$100,000 deposit from the loan funds to determine how it was spent. By contrast, at the time of the \$1,000,000 deposit on November 15, 2016, the balance in RBC Account 1722 was only \$207.10, and there were no other deposits before the \$1,000,000 was spent or transferred out of the account on November 15 and 16, 2016.

(i) Rental Guarantee and Loan Interest

[186] The Purchase Agreement contained several clauses governing the Rental Guarantee, including:

- 8.1 The Vendor [i.e., Summerside DevCo] shall execute as a Closing Document a rental guarantee for a term of twenty[-]four (24) months commencing on the Closing Date (the "Rental Guarantee"). Such Rental Guarantee will confirm that the Vendor will be responsible for providing the Purchaser [i.e., Fateh] with a rental guarantee of the rents being paid . . . under the Leases if the tenants are unwilling or unable to pay such rents when due.
- 8.2 Within five (5) Business Days of each month where rent is due under any of the Leases, if such rent has not been paid in full by the tenant(s), the Purchaser shall request in writing that, the Vendor will pay to the Purchaser any shortfall between the rent due and the amount of rent collected by the Purchaser in the normal course from tenants in occupancy in the Property during that month.

[187] The parties agreed that \$2,000,000 from Fateh's deposit funds would be paid back to Fateh to satisfy Summerside DevCo's Rental Guarantee obligation. The money was to be held by Fateh's legal counsel in trust, from which Fateh could draw in the event that any Summerside Plaza tenants did not pay rent when due during the two-year Rental Guarantee period. Ghani's legal counsel described this as "effectively a price reduction" that Fateh demanded after the initial sale did not close as contemplated, and explained in correspondence that the demand had been based on:

(a) advice from the realtor that the property could be had for less, (b) a recognition that the rental guarantee, unsupported by security or a personal covenant, was essentially worthless, since the vendor would likely have few assets post-closing, and (c) the failure of a couple of tenancies at the property.

[188] During the Ghani Interview, Ghani said that by the time Summerside Plaza was sold, a number of the tenancies had failed and Fateh was concerned that this would adversely affect projected revenue. Ghani further explained that this was also one of the reasons the Purchase Agreement was subject to several amendments – tenancies were failing and liens were registered on title.

[189] The \$2,000,000 was paid back to Fateh in three installments on November 16 and 22, 2016.

[190] However, only a portion of the \$2,000,000 was actually made available for the Rental Guarantee, because some of it was ascribed to interest due to Fateh under the Loan Agreement. Staff was unable to determine why loan interest was paid from the Rental Guarantee fund, but calculated the amount as follows:

Agreed rate of interest on the \$6,850,000 deposit per the Loan Agreement, clause 2.1: 1 percent per month (or 12 percent per annum), commencing December 1, 2016:

$$\$6,850,000 \times 1 \text{ percent} = \$68,500$$

$$\$68,500 \times 12.5 \text{ months (December 2016 to closing December 12, 2017)} = \$856,250$$

$$\$856,250 \text{ less the } \$103,427 \text{ previously withheld for loan interest} = \$752,823 \text{ in interest due to Fateh on closing}$$

[191] \$2,000,000 less \$752,823 is \$1,247,177, but according to a trust ledger from Fateh's legal counsel, \$1,246,492 was the sum actually deposited to counsel's trust account on October 26, 2017 (a difference of \$685 that we do not consider material).

[192] GK testified that no Summerside Plaza tenants paid rent to Fateh in December 2017, when it first assumed ownership of the property. The Rental Guarantee fund was therefore drawn down for the first time on December 6, 2017, in the amount of \$168,263. When Fateh inquired about the December payments, the tenants told them they had already made their payments for that month to Prism.

[193] According to GK, Anytime Summerside and a business named Prism Car and Pet Wash (the **Car Wash**) – apparently held by a numbered company associated with Ghani's mother – were the two Summerside Plaza tenants that consistently failed to pay rent. Fateh estimated that the Rental Guarantee fund was drawn down on account of those two tenants in the total amount of approximately \$1,013,622 over the two-year Rental Guarantee period. In other words, 81 percent of the available sum of \$1,246,492 was paid from the Rental Guarantee fund on their behalf, leaving only \$232,870 (19 percent) available to be paid on account of all other Summerside Plaza tenants over a two-year period.

[194] In a letter to Staff, Fateh advised that the entire Rental Guarantee fund was exhausted before the expiry of the two-year period. GK testified that there was never a month in which every tenant paid, and noted that neither Anytime Summerside nor the Car Wash paid rent until after the Rental Guarantee fund was exhausted.

(ii) Probable Costs of Non-Prism Entities

[195] As described previously, RS's numbered companies – 162 Alberta and 200 Alberta – held several Anytime Fitness gym and Freshii restaurant franchises, and a few other businesses at Summerside Plaza. According to RS, Ghani assumed financial management of the businesses between approximately the fall of 2016 through the fall of 2020, when RS resumed control after commencing the Receivership Proceedings.

[196] The evidence was that during the period Ghani was in control, \$2,146,087 of the Summerside sale proceeds was spent on expenses primarily related to the 162 Alberta and 200 Alberta businesses – described by Staff in the S&U Analysis as "Probable Costs of Non-Prism Entities". Some was paid from a Summerside DevCo account, and some from a PREIC account after PREIC received the above-mentioned \$2,275,000 from Summerside DevCo. The disbursements included payments to construction companies that built out the franchise premises, landlords of the franchises not located at Prism-owned developments, equipment suppliers, and payroll service providers. They were summarized in the S&U Analysis, and the purpose of some of the payments was addressed by other evidence:

<u>Amount</u>	<u>Payee</u>	<u>Purpose</u>
\$594,099	Canbian Inc.	<p>Ghani Affidavit: "Tenant improvement work" (project not identified)</p> <p>Ghani Interview: "should . . . be" Summerside tenant work, but no records available to substantiate</p> <p>RS evidence: tenant improvement construction for Anytime 28 and Anytime 114; did not think Canbian Inc. did any work at Summerside Plaza</p> <p>Cheque to Canbian for \$28,104 December 15, 2016 with the memo, "Millwoods"</p>

<u>Amount</u>	<u>Payee</u>	<u>Purpose</u>
\$439,096	FE Construction Ltd.	<p>Ghani Affidavit: "Tenant improvement work" (project not identified)</p> <p>Ghani Interview: "should . . . be" Summerside tenant work, but no records available to substantiate</p> <p>RS evidence: tenant improvement construction for Anytime 61, Freshii Brewery, Freshii Newcastle; did not think FE Construction Ltd. did any work at Summerside Plaza</p>
\$300,000	Dentons Canada LLP	Ghani Affidavit: "To discharge builder's lien (construction of carwash [sic])"
\$253,785	Halcor	RS evidence and other documentary evidence: landlord – Anytime Okotoks
\$145,694	Amalgamated Food Equipment	<p>Ghani Affidavit: "Equipment purchase for Freshii Cochrane (Heritage Plaza) – not Prism Summerside"</p> <p>Ghani Interview: related to Heritage Plaza or Horizon</p>
\$135,550	Amnor Professional Centre Inc.	<p>Ghani Affidavit: "Affiliate expense for rent – not Prism Summerside"</p> <p>Ghani Interview: not related to Summerside Plaza</p> <p>RS evidence: landlord – Anytime 55</p>
\$129,498	Ceridian Canada Payroll Trust	<p>RS evidence: Ceridian Canada Payroll Trust took over payroll for the Anytime Fitness gyms and Freshii restaurants in late 2016/early 2017</p> <p>Ghani Interview: each project had its own employees for property management and security; at least some of these payments may have related to the employees at Summerside Plaza, but he was not sure</p>
\$121,045	Key Equipment Finance	<p>Key Equipment Finance invoices issued to 162 Alberta, at the Prism Office address</p> <p>Ghani Affidavit: "Purchase of equipment of failed frozen yogurt tenant" (project not identified)</p> <p>Ghani Interview: Prism bought the equipment from the failed frozen yogurt tenant at</p>

<u>Amount</u>	<u>Payee</u>	<u>Purpose</u>
		Summerside Plaza (Spoon Me); ultimately, another restaurant tenant expanded its space and took over the equipment RS evidence: Key Equipment Finance leased equipment for Anytime Fitness gyms
\$10,743	Spherical Capital Inc.	Ghani Affidavit: "Purchase of equipment of failed tanning salon tenant" (project not identified) Ghani Interview: Prism bought the equipment from failed tanning salon tenants to take over the businesses, but they eventually failed again – may have been at Summerside Plaza or another Prism project
\$8323	Equipment Leasing Account (RBC)	Ghani Affidavit: "RBC lease payment" (project not identified)
\$7560	Newcastle Centre GP Ltd.	RS evidence and documentary evidence: landlord – Freshii Newcastle
\$693	Snap Financial	Ghani Affidavit: "Finance company fees re failed tanning salon tenant" (project not identified)

(iii) Inter-company Transfers

[197] \$229,763 was transferred to or paid on behalf of other Prism entities, some from a Summerside DevCo account and some from a PREIC account. These disbursements were also summarized in the S&U Analysis, and their purpose was sometimes disclosed in other evidence:

<u>Amount</u>	<u>Prism Entity</u>	<u>Purpose</u>
\$108,403	Broadmoor	Ghani Affidavit: \$3116 paid to IMOR was "Reimbursement of lender's legal fees (Broadmoor Plaza) – not Prism Summerside"; \$24,783 paid to Star Fitness was "Tenant improvement allowance (Broadmoor Plaza) – not Prism Summerside"; \$60,505 paid to Ace Liquor was "Tenant improvement allowance (Broadmoor Plaza) – not Prism Summerside" Ghani Interview: "Broadmoor-related expenses" \$20,000 cheque dated December 18, 2016 had the memo, "Landscaping Broadmoor"
\$91,538	Prism Developments	Cheques issued to Prism Developments or transfers to a Prism Developments account

<u>Amount</u>	<u>Prism Entity</u>	<u>Purpose</u>
\$24,603	Prism Westmount	Cheque payable to Canbian with the memo, "Westmount"
\$5158	Prism Income I	Ghani Affidavit: "Servus mortgage" Transfers to a Prism Income I account
\$60	Prism Place	Transfers to a Prism Place account

(iv) Other Uses

[198] \$223,894 was spent on vehicles: \$94,322 was paid to Glenmore Audi on November 28, 2016, and on February 14, 2017, \$72,834 was paid to Lexus of Calgary, and \$56,737 was paid to Woodridge Ford. During the Ghani Interview, Ghani addressed the payment to Glenmore Audi, explaining that he wore out his previous vehicle driving between Calgary and Edmonton so frequently on Prism business and needed to replace it, and acknowledging that it was "not a Summerside expense". He was not asked about the other vehicles.

[199] \$824,293 was paid to law firms between October and December 2016. The Ghani Affidavit addressed a few of the payments, but apart from one cheque, Ghani simply stated that the payments were for legal fees without indicating if they applied to a Prism project, or if so, which one. The one exception was a \$5000 cheque that included the memo, "Legal fees . . . Summerside sale", which was repeated in the Ghani Affidavit.

[200] \$96,747 was paid to Servus in December 2016 on the mortgage loans made to Summerside LP. In the Ghani Affidavit, Ghani identified several other payments as Servus mortgage payments, but the bank records indicated that those were transfers to Prism Income I (as accounted for above) and to another Summerside DevCo account.

[201] A total of \$10,441 was transferred from Servus Account 6814 to other Summerside DevCo accounts in November 2016, and \$10,000 was transferred from PREIC's First Calgary Account 9197 to Summerside DevCo RBC Account 1722 in December 2016.

[202] The remaining funds were spent on miscellaneous expenses that Staff were unable to ascribe to a particular Prism project. These included credit card payments, and payments to a signage company, commercial realtors, an architectural consultant, and insurers. The S&U Analysis summarized them in general categories, and their purpose was sometimes disclosed by other evidence:

<u>Amount</u>	<u>Expense Category or Payee</u>	<u>Purpose</u>
\$388,493	Credit card payments	Ghani Affidavit: \$30,845 in reimbursements for legal fees paid; \$41,876 in "Reimbursements of payments of utilities and common area costs" (no project identified); another \$121,200 "likely" related to "obligations of affiliates"

<u>Amount</u>	<u>Expense Category or Payee</u>	<u>Purpose</u>
		No information was available concerning the reason for the remaining \$194,572 in credit card payments
\$66,430	Sixstream Signs Ltd.	Ghani Affidavit: \$46,440 in payments were for signage or a pylon sign (project not identified) Ghani Interview: clarified that the above payments were for signage at Summerside Plaza No information was available concerning the location for the remaining \$20,000 in signage
\$80,219	Miscellaneous bank drafts, email money transfers, wire transfers – recipients unknown	Ghani Affidavit: \$16,000 in transfers described as payments for "Underground Disposal – garbage removal" (project not identified)
\$48,090	Other miscellaneous (e.g., bank fees, utilities, salary)	Ghani Affidavit: <ul style="list-style-type: none"> • \$9979 paid to EPCOR was for electricity (no project identified) • \$8000 paid to BSI Construction was for "Maintenance" (no project identified) • \$4095 paid to Trace Associates was for a real property report (no project identified)
\$23,850	AromaTech Inc.	An excerpt from AromaTech Inc.'s LinkedIn profile in evidence stated that it is "a scent marketing company specializing in creating unique and memorable environments for hotels, casinos, gyms, banks, retailers, and other brands world wide"
\$23,940	Colliers Macaulay Nicolls Inc., Royal Park Realty	Ghani Affidavit: "Leasing commission" (no project identified)
\$12,000	RBC	No information available
\$11,768	PlanWorks Architecture Inc. (consulting fees)	Ghani Affidavit: "Architectural drawings" (no project identified)
\$9,033	Insurance	Ghani Affidavit: \$2459 paid to Aviva was for "Insurance" (no project identified)

V. FRAUD – THE LAW

[203] Because the Relevant Period defined by Staff covered January 2013 to April 2018, two versions of s. 93 of the Act potentially applied. Between June 8, 2005 and October 30, 2014, the section stated in part:

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

[204] Between October 31, 2014 and November 18, 2018, the section stated in part:

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

[205] Though the latter version is broader in scope, the test for fraud itself under the Act has not changed. As recently affirmed in *Re Ward*, 2022 ABASC 139 (at para. 277), ASC panels apply the test stated by the Supreme Court of Canada (SCC) in *R. v. Théroux*, [1993] 2 S.C.R. 5 (at para. 27). Staff must prove:

- the *actus reus*, which is established by proof of a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means" and proof of "deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk"; and
- the *mens rea*, which is established by proof of "subjective knowledge of the prohibited act" and "subjective knowledge that the prohibited act could have as a consequence the deprivation of another".

[206] In *Ward* (at para. 278), the panel noted that in *Théroux's* discussion of the *actus reus*:

... the SCC explained that an act of deceit or falsehood may include representing that "a situation was of a certain character, when, in reality, it was not", and that "other fraudulent means" may include other dishonest acts such as "the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property" (at para. 18).

[207] Because "deprivation" can include either actual loss or the risk of loss, Staff need not prove that the accused party profited from the fraud, or that investors suffered a specific loss (*Théroux* at paras. 17 and 19).

[208] In *Théroux*, the SCC explained that the *mens rea* is proved if the trier of fact is satisfied that the accused party had "subjective awareness that one was undertaking a prohibited act . . . which could cause deprivation in the sense of depriving another of property or putting that property at risk" (at para. 24). Staff can establish *mens rea* by proving that the accused "knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means", and "was aware that deprivation could result from such conduct" (at para. 39). In *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (at para. 48), the Alberta Court of Appeal confirmed that the requisite subjective knowledge can be inferred from the totality of the evidence.

[209] It is not necessary for Staff to prove that the accused party had the intent to act dishonestly or to defraud. The SCC stated (*Théroux* at para. 36):

A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. 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 practise fraud, its *mens rea* cannot be cast so narrowly as this.

[210] As another ASC panel concluded in *Re Arbour Energy Inc.*, 2012 ABASC 131 (at para. 976), "[o]nce the elements required for a finding of fraud have been established, a respondent's intention or motivation is irrelevant".

VI. STAFF ARGUMENT

[211] Staff did not allege or argue that the Respondents perpetrated a fraud with their immediate use of the capital raised from Summerside DT investors.

[212] Staff calculated that from the total amount of \$4,802,604 deposited to Summerside DevCo and PREIC accounts between August 30, 2013 and May 12, 2014 (\$4,257,600 from investors + \$545,004 from other sources), \$2,907,867 was paid to or for the benefit of other Prism projects and entities.

[213] Staff also calculated that the Summerside Project received the benefit of \$2,786,943 in funding (the \$1,250,000 related-party loan + \$545,004 from other sources + \$991,939 PREIC paid for Summerside Project expenses from the investor funds and other deposits it received).

[214] Staff therefore concluded that the Summerside entities paid out more than they received (\$2,907,867 vs. \$2,786,943). In their submission, this meant that "the front end is a 'wash'" and Ghani could not legitimately claim that the Summerside Project owed money to PREIC or any other Prism entities at the time the sale proceeds deposits from Fateh were received in 2016.

[215] In support of their contention that PREIC and any other Prism entities that advanced funds for the Summerside Project were repaid in full by the time Summerside Plaza construction was completed – and well before Summerside DevCo began receiving Fateh's deposit funds in 2016 – Staff argued that the S&U Analysis captured "the vast majority" of the inter-company transactions related to the acquisition and development of the Summerside Project because it included all transactions from January 1, 2013 to December 31, 2017 in Servus Account 6814 and its predecessor accounts, RBC Account 1722, First Calgary Account 9197, and Servus Account 6048. They cited a project timeline in a February 2014 promotional presentation and other evidence that established that the Summerside Project was "in its infancy" in early 2013, and that Summerside Plaza was substantially complete when it had its grand opening in June 2015 – within the period covered by the S&U Analysis.

[216] According to Staff, the S&U Analysis showed that between January 1, 2013 and December 31, 2017, a total of \$4,809,009 in construction costs and \$370,976 in consulting fees

was paid from the accounts analyzed. During the same time frame, the Ghani family deposited \$715,358 to the accounts analyzed, but received \$952,612.

[217] While the first significant inflow of investor funds was deposited to Servus Account 6814 on October 10, 2013 and virtually all of it was transferred to PREIC the next day, Staff acknowledged that there was evidence that as of that date, the Summerside Project had already received both a \$1,250,000 loan from a related party and other funds to begin development. It was therefore plausible that as Ghani asserted, the Summerside Project owed money to PREIC or other Prism entities at the time Summerside DT began to receive funds from the public. Staff also acknowledged that the OM disclosed that investor funds would be used to acquire the land, pay out existing mortgages, pay back the \$1,250,000 loan, pay soft costs, and set up a working capital reserve.

[218] As a result, Staff acknowledged that they could not prove there were no debts owing to PREIC or other Prism entities when Summerside DevCo began to transfer investor funds to PREIC. Since there was also evidence indicating that \$991,939 was paid back to or on behalf of the Summerside Project between August 30, 2013 and May 12, 2014, Staff concluded that they could not establish that Summerside DT investors suffered any deprivation from how their investment funds were initially used.

[219] Staff's case was therefore focused on the use of the \$6,096,573 deposited to Summerside DevCo's bank accounts from the Summerside Plaza sale proceeds between October and December 2016 – less the \$2,000,000 Summerside DevCo repaid to Fateh for the Rental Guarantee fund and loan interest. They did not include any of the interest Summerside DevCo paid to Fateh under the Loan Agreement because in their submission, that obligation was tantamount to "a penalty for [the] shoddy business practices" that caused the sale not to close on time rather than a dishonest act that was part of the fraud.

[220] Staff argued that a large portion of the remaining \$4,096,573 should have been paid to Summerside DT investors in accordance with the distribution formula set out in the OM: repayment of their invested capital, plus a minimum 10 percent return or 70 percent of the profits realized from the Summerside Project, whichever was higher. They acknowledged that the constating documents in evidence contained different formulas for distribution, but submitted that the appropriate formula was that represented to investors in the OM and other marketing material, and corroborated by other evidence including the Fundamental Research Report, PK's testimony, and the emails among Raintree, Ghani, and Ghani's legal counsel.

[221] However, Staff argued, instead of using the proceeds of the sale to pay investors, Ghani used them improperly for purposes that were not authorized by the OM: to pay for other Prism projects and other businesses he owned, influenced, or controlled (including those related to the businesses under 162 Alberta's and 200 Alberta's purview), and to purchase three expensive vehicles.

[222] Staff contended that we should reject Ghani's evidence denying any involvement in 162 Alberta or 200 Alberta, and rely on the more credible evidence from RS and documents such as the Okotoks Record of Proceedings and Personal Property Registry searches that included the

Ghanis and the Prism Group as debtors in security agreements on leases for equipment. They pointed to Ghani's mother's company's agreement to pay a substantial amount to settle the Receivership Proceedings concerning 162 Alberta and 200 Alberta, and questioned whether the company would have done so if Ghani had not been involved.

[223] Staff concluded that \$2,586,201 was a "conservative estimate" of the total amount from the Summerside Plaza sale proceeds that was used for purposes undisclosed to investors and unauthorized by the OM. They also noted that most of the money set aside for the Rental Guarantee (\$1,013,622) was paid for the benefit of Anytime Summerside and the Car Wash, neither of which made any attempt to pay rent until the Rental Guarantee fund was depleted. In Staff's submission, Ghani's intention was "simply [to] drain [the Rental Guarantee] account for his own benefit, rather than to make *bona fides* [sic] efforts to pay the rent when it was due". As he diverted funds that would otherwise have been available to pay investors, Staff argued that the \$1,013,622 from the Rental Guarantee fund attributed to rent for Anytime Summerside and the Car Wash should be added to the other \$2,586,201, for a total of \$3,599,823 fraudulently converted by Ghani and the entities he controlled.

[224] When asked if investors were told about Prism's practice of directing funds among its projects through PREIC regardless of the source, Ghani initially suggested that it was disclosed in the OM, which stated that the Summerside Project would receive funds from "associated parties". This included the \$1,250,000 related-party loan, but Ghani also noted that following the Use of Available Funds table in the OM, there was a further comment about the use of funds from affiliates (a footnote that referred to "a revolving internal credit facility" and the possibility that funds may be borrowed from third parties). When asked again, however, he said that he did not think "this is something that had to be communicated" to investors because Prism owned all the projects and had invested in the Summerside Project before any money was raised from the public.

[225] Staff argued that this interpretation took "substantial liberty" with the information disclosed in the OM, and that investors would not have invested in Summerside DT if they had known the "true state of affairs": i.e., that funds would be commingled and disbursed for any Prism project that needed them. They noted that Ghani admitted in the Ghani Affidavit: (i) Prism had not kept track of the flow of funds among entities; (ii) it was "very likely" that some of the funds were "used to pay obligations of affiliates, as has been customary practice for many years"; (iii) he could not "provide a reconciled, current state of accounts among Summerside and these affiliates"; and (iv) he did not know "what the state of those accounts is".

[226] Staff emphasized that this evidence was contrary to what Ghani stated during the marketing presentation cited previously in these reasons: ". . . each project is independently owned and independently syndicated and an independent investor group. So it's not in a fund where if one goes down it brings the other projects down. It's only going to be isolated to that project itself."

[227] Staff refuted Ghani's assertion that despite the fact that the flow of funds was not tracked, he was certain that he and his father were "net creditors overall, each to the extent of millions of dollars". According to Staff, that assertion was not supported by the evidence concerning the Summerside Project, and neither was his assertion that Summerside Plaza sale proceeds were paid to PREIC because Summerside DevCo still owed PREIC money at the time.

[228] Because their fraud allegation concerned the period of time after October 2016, Staff relied on the later version of s. 93(b) of the Act set out above. They applied the *Théroux* test, and argued that they had proved the *actus reus*: corporate funds were diverted for unauthorized purposes, causing Summerside DT investors to be deprived of their invested capital and any returns. They argued that they had also proved *mens rea*: Ghani was the directing mind of all of the Prism entities, including the other Respondents, and knew or ought to have known (i) about the prohibited acts – i.e., the ways in which the Summerside Plaza sale proceeds were (mis)used, and (ii) that the prohibited acts could result in investor losses and deprivation.

[229] Staff argued that Ghani was responsible for the conduct of the Respondents and the other Prism entities involved because the preponderance of the evidence – including the testimony given by PK, GK, and RS – established that he was their guiding mind. They emphasized in particular that he had signing authority on the relevant entities' bank accounts and therefore signed all cheques and authorized all transfers, bank drafts, and other withdrawals.

[230] However, in their written submissions, Staff did not expressly seek a finding that the Respondents other than Ghani perpetrated a fraud on Summerside DT investors. Only Ghani in his personal capacity was mentioned.

VII. ANALYSIS

A. Ghani's Role

1. Respondent Entities

[231] In the ANOH, Staff alleged that all of the Respondents breached s. 93 of the Act and perpetrated a fraud on Summerside DT investors, and that as their guiding mind, Ghani authorized, permitted, or acquiesced in the Respondent entities' misconduct. Although Staff's written submissions restricted the request for a finding of fraud to Ghani alone, there was no indication either in the submissions or in the Hearing that they intended to withdraw the allegations against the other Respondents.

[232] Accordingly, we consider it necessary to address the liability of all of the Respondents. That inquiry begins by determining whether Ghani was the guiding mind of the Respondent entities as alleged in the ANOH.

[233] As Staff observed, during his interview, Ghani attempted to reduce the significance of his role with Prism and exaggerate Ghani Sr.'s role. He described his father as the one who was most heavily involved in the business's administration and finances (with the assistance of Prism's office administrator), while Ghani was the one on site in Edmonton overseeing the construction and development of Prism's projects. Staff argued that Ghani was "trying to shift some of the 'blame' to his deceased father".

[234] Despite Ghani's assertions, the preponderance of the evidence at the Hearing – including the testimony of the third-party witnesses – made it clear that Ghani was in control of Prism during the Relevant Period. The evidence included that:

- Ghani identified himself as one of the Prism Group's founders, and marketing materials identified him as the president or CEO of the Prism Group;
- Ghani acknowledged that he was involved in preparing and approving marketing materials, and he appeared on behalf of Prism in webinars;
- government corporate registry records and banking documents for the Prism entities showed that Ghani was: (i) a direct or indirect owner; (ii) an officer (usually president); (iii) either the sole director, or one of just a few directors (usually two or three); or (iv) some combination of the foregoing;
- Ghani was often the sole signatory for the Prism bank accounts, including Summerside DevCo's accounts;
- Ghani was Summerside DT's initial trustee, was involved in preparing its OM, and certified the OM with Ghani Sr.;
- Ghani signed the REDs filed on behalf of Summerside DT, and was a signatory on a number of other significant documents such as Summerside LP's Certificate of Limited Partnership, the Partnership Agreement, and the Services Agreement;
- Ghani acknowledged that he was one of the principals of Summerside DevCo and Summerside DT, and that he and his father were Summerside DT's "management";
- PREIC – described by Ghani as the "parent company" or the "master" of the Prism Group – listed Ghani's home address as its registered office address (as did some of the other Prism entities mentioned herein);
- GK testified that in negotiations for the sale of Summerside Plaza, Fateh dealt primarily with Ghani and had little, if anything, to do with Ghani Sr.;
- PK testified that Ghani was Raintree's primary contact at Prism, and that he considered Ghani to be Prism's controlling mind;
- NO, who invested in several Prism projects, testified that Ghani was his main contact at Prism; and
- RS testified that he considered Ghani to be the "boss" at Prism, and that in his experience, Ghani Sr. had a very minor administrative role with Prism and carried out none of the activities of an executive officer.

[235] In addition, in the Ghani Sr. Affidavit, Ghani Sr. deposed:

To my recollection, other than being a trustee of Summerside [DT] and a director of [Summerside DevCo] and of Heritage ..., I have never been a director or officer of any of the other [r]espondents [i.e., the respondents to the Class Action, Broadmoor, Heritage, Prism Place, PREIC, Summerside

DT, Summerside CT, Summerside LP, and Summerside DevCo]. I have no day to day involvement in the business of the [r]espondents. Ali [Ghani] looks after their day to day business, and I trust him to deal with such matters.

[236] In the same affidavit, Ghani Sr. also stated that he did not know anything about the receipt of deposit money from Fateh relating to the sale of Summerside Plaza or how it was spent, because he was not involved.

[237] We find that during the Relevant Period, Ghani was the guiding mind of the Respondent entities and the other Prism entities described herein. Each of the Respondent entities was an integral part of the Summerside Project. Summerside DT distributed the securities sold to raise funds from the public, and those funds were directed through Summerside CT to Summerside LP. Summerside LP was managed by Summerside DevCo, which used the funds to develop Summerside Plaza. PREIC also received and disbursed investor money, and both Summerside DevCo and PREIC received and disbursed the sale proceeds from Fateh.

[238] As stated in *Re Cloutier*, 2014 ABASC 2 (at para. 26): "[a] corporation can only conduct its activities through its guiding mind. As such, what its guiding mind did, knew or reasonably ought to have known can likewise be ascribed to the corporation." The same applies to trusts and limited partnerships. Our findings of liability set out below therefore apply to all of the Respondents, and we conclude that Ghani authorized, permitted, or acquiesced in the Respondent entities' misconduct as alleged.

2. 162 Alberta and 200 Alberta

[239] The ANOH included allegations that the Respondents wrongly converted funds to the use and benefit of other corporations and businesses controlled by Ghani and his family or in which Ghani had an interest. The evidence proved that this included not only other Prism entities and projects, but also 162 Alberta and 200 Alberta. Accordingly, we must determine whether Ghani controlled 162 Alberta and 200 Alberta at the relevant time.

[240] We agree with Staff that Ghani's evidence in this regard was untruthful. We preferred RS's evidence, which was consistent throughout his affidavit (sworn well before the NOH and the ANOH were issued), the RS Interview, and his testimony at the Hearing. RS's evidence was also corroborated by reliable documentary evidence and the outcome of the Receivership Proceedings. The documents that established a close connection among 162 Alberta, 200 Alberta, Prism, and the Ghanis included:

- April 2016 personal property registry search results pertaining to leased fitness equipment for Anytime Okotoks, which listed the Prism Office as 162 Alberta's address and Ghani and his parents among the indebted parties;
- August 2016 personal property registry search results pertaining to leased restaurant equipment, which listed the Prism Office as 162 Alberta's address and Ghani and the Prism Group among the indebted parties;

- a November 2016 invoice from Key Equipment Finance addressed to 162 Alberta at the Prism Office address, paid by Summerside DevCo and apparently related to leased equipment for Anytime 61;
- corporate registry records showing Ghani and Ghani Sr. as the agents and authorized representatives for 162 Alberta who filed its annual returns, listing Ghani's residential address as 162 Alberta's registered office address, and giving info@theprismgroup.ca as its email address;
- corporate registry records showing the change from RS as 162 Alberta's sole director and voting shareholder to Ghani's mother, consistent with RS's testimony;
- the Okotoks Record of Proceedings, stating that Ghani appeared and identified himself as the owner of Anytime Okotoks and seven other Alberta Anytime Fitness gyms, including the one owned by 200 Alberta in Airdrie; and
- the court-filed receiver's report in the Receivership Proceedings, which indicated that Ghani's mother's company agreed to pay \$612,789 to the receiver to settle the proceedings.

[241] We do not believe Ghani's explanation for his appearance before the Okotoks Subdivision and Development Appeal Board in April 2018 (i.e., that he was doing a favour for Halcor, the landlord), as it does not account for what he told the board about his ownership of all of the Anytime Fitness gyms held by 162 Alberta and 200 Alberta.

[242] We also agree with Staff that a company owned by Ghani's mother would not have agreed to pay a substantial amount to settle the Receivership Proceedings if the Ghanis were not involved with RS's companies.

[243] We therefore accept RS's version of Ghani's involvement with 162 Alberta and 200 Alberta and reject Ghani's assertions. Ghani's version was at such odds with the documentary record and common sense that it led us to doubt the credibility of other evidence in the Ghani Affidavit and the Ghani Interview, except where it was corroborated by other reliable evidence or contrary to the Respondents' interests.

[244] We conclude that Ghani took control of 162 Alberta and 200 Alberta – likely because he or Prism (or both) had advanced significant amounts to open the franchises they operated. We therefore find that payments made by the Respondents for the use and benefit of 162 Alberta and 200 Alberta during the period Ghani controlled them (roughly mid-2016 through to the conclusion of the Receivership Proceedings) were payments to businesses in which he or his family had an interest.

B. Fraud

1. Conclusions – Source and Use of Funds

[245] We are satisfied that \$4,257,600 was raised from Summerside DT investors between August 30, 2013 and May 7, 2014, and that \$3,254,060 of that sum was transferred from

Summerside DevCo's Servus Account 6814 to PREIC's First Calgary Account 9197 between October 11, 2013 and May 5, 2014. Also between August 2013 and May 2014, Servus Account 6814 and First Calgary Account 9197 received a total of \$545,005 from other sources, primarily other Prism entities and accounts.

[246] We are also satisfied that there is sufficient evidence to conclude that the Summerside Project received a \$1,250,000 related-party loan to purchase the land before any money was raised from the Summerside DT offering. While we saw no documentation of the loan, the relevant land title certificates showed that the \$5,000,000 purchase price was paid with \$3,750,000 in financing from IMOR, and other documents (including the OM) indicated that the remainder was paid by "management" or a related entity. Summerside LP's financial statements for the year ended December 31, 2013 – which we consider reasonably reliable because they were prepared on a review engagement basis – confirmed that as of that date, \$1,235,347 was owing to PREIC. We find that sum sufficiently close to \$1,250,000 to conclude that it likely represented the remaining amount owing on the related-party loan at year end.

[247] The OM advised investors that depending on the amount of funds raised from the offering, the proceeds would be used to pay out the IMOR financing, as well as the related-party loan and certain other costs. A subsequent event note to Summerside LP's 2013 financial statements disclosed that the IMOR mortgages were repaid after year-end with financing from KV Capital. Summerside LP's 2014 financial statements – again prepared on a review engagement basis – showed that the \$1,235,347 owing to PREIC had also been repaid during the year. Together with the bank records showing the funds transferred from Servus Account 6814 to First Calgary Account 9197, the financial statements were sufficient to satisfy us that the debt was repaid from investor funds in a manner consistent with the OM disclosure.

[248] In addition, there is evidence that \$330,776 – representing the eight percent in commissions and fees disclosed in the OM – was paid to Raintree from the funds transferred to PREIC. Also consistent with the OM, PREIC was owed two percent in marketing and administration fees related to the offering, which would have amounted to approximately \$85,000. In addition to the \$330,776 paid to Raintree, the S&U Analysis and supporting bank records showed that PREIC used another \$661,163 to pay expenses directly related to the Summerside Project.

[249] The foregoing accounts for the use of approximately \$2,327,000 from the proceeds of the Summerside DT offering. The evidence indicated that the remaining amount of approximately \$1,930,600 was used for other purposes, primarily transfers to other Prism entities from either Servus Account 6814 or First Calgary Account 9197. As mentioned, Staff were prepared to accept that it was likely that the Summerside Project received funds from other Prism entities for expenses other than the land purchase that were incurred before the Summerside DT offering, and that the remaining proceeds of the offering were used to repay them. Therefore, Staff were of the view that all such debts had been fully repaid well before Summerside DevCo received the sale deposits from Fateh.

[250] We agree that that is a reasonable conclusion based on the available evidence and common-sense inferences. The Summerside Project was in its earliest stages in January 2013, shortly after the land was purchased in mid-December 2012. Construction could only have started after the land

purchase, and it was substantially complete by the time Summerside Plaza had its grand opening on June 5, 2015. According to the bank records, with the exception of less than \$20,000 paid by PREIC, the majority of the construction or consulting costs incurred after June 5, 2015 were paid directly from Summerside DevCo's accounts. Further, Summerside LP's financial statements suggested that once the \$1,235,347 owing to PREIC was repaid, Summerside LP was owed more by related parties than it owed to related parties in the two subsequent years for which financial statements were available. This included \$1,695,562 owed by PREIC as of December 31, 2014.

[251] The only evidence to the contrary was from Ghani, and as Staff pointed out, his position was unsupported by any other evidence. For the reasons previously stated, we did not find Ghani's evidence credible.

[252] We are therefore satisfied that Staff established that no debts were owing by the Summerside Project to the Ghanis or any other Prism entity by the time the sale deposits began to be paid in August 2016.

[253] Turning to the Summerside Plaza sale proceeds, we find that Fateh paid \$6,850,000 in deposits, \$6,096,573 of which was deposited to Summerside DevCo's accounts between August and December 2016. This was comprised of the initial \$100,000 that was deposited on August 9, 2016, plus the remaining \$5,996,573 that was deposited between October and December 2016. In addition, between October and December 2016, Summerside DevCo made some inter-account transfers, received a small amount in rent from a Summerside Plaza tenant, received \$19,965 from Heritage, and received \$103,665 from PREIC.

[254] We agree with Staff that the amount deducted from the deposits for interest under the Loan Agreement was a proper Summerside Project business expense, even if the interest obligation arose as a result of poor business practices that delayed closing.

[255] We make the following findings concerning the remaining funds:

- The \$2,000,000 repaid to Fateh for the Rental Guarantee was a proper Summerside Project business expense. However, we agree with Staff that the \$1,013,622 from the Rental Guarantee fund that was used for the rent obligations of Anytime Summerside and the Car Wash – businesses in which Ghani or his family had a personal interest at the time – should be carved out, as there was no evidence they were incapable of making rent payments as required. To the contrary, they were the only tenants that consistently failed to pay rent while money remained in the Rental Guarantee fund, but as soon as the fund was exhausted, they both began to pay.
- \$1,846,087 was spent on expenses related to the businesses owned and operated by 162 Alberta and 200 Alberta, in which we have already found that Ghani or his family had a personal interest at the time. We are satisfied from the evidence – including Ghani's own admissions – that none of these expenditures related to the Summerside Project.

This figure differs from the \$2,146,087 posited by Staff because there was insufficient evidence for us to conclude that the \$300,000 paid to Dentons Canada LLP to discharge a builder's lien related to construction of the Car Wash was not a proper Summerside Plaza construction expense. The Car Wash lease in evidence contemplated construction and improvement work by both the landlord and the tenant, and the lien documents filed by the lienholder indicated that the work was done for Summerside DevCo.

- The evidence – including Ghani's admissions – established that \$229,763 was transferred to or paid for the benefit of other Prism Group entities.
- \$223,894 was spent on vehicles. Even if some or all of the vehicles were purchased for the Prism Group's business, common sense dictates that they were not purchased for the sole benefit of the Summerside Project, especially since the Summerside Project was ready for sale by the time they were bought. Ghani did not contend otherwise when he was asked about the Audi purchase, and in fact conceded that it was "not a Summerside expense".
- Ghani admitted that \$121,200 in credit card payments likely related to other Prism entities, and not the Summerside Project.

[256] The total of the foregoing amounts that we have found did not relate to the Summerside Project is \$3,434,566.

[257] The remaining expenditures from the deposit funds either related to the Summerside Project, or there was insufficient evidence to determine their purpose.

2. Breach of Section 93 of the Act

[258] Because we have found that only the use of the Fateh deposits received in and after August 2016 is in issue, s. 93 as amended in October 2014 governs. Regardless, based on the nature of the allegations in the ANOH and our findings of fact, the test to be applied under either version of the section is the same.

[259] We are satisfied that Staff has proved the *actus reus* of fraud. They established that Ghani – and through him, the other Respondents – represented to Summerside DT investors that after payment of all expenses and debts related to the development and construction of Summerside Plaza and return of their investment capital, profits from the sale of the plaza would be split between investors and Prism management. Instead of using the amounts as represented, the Respondents used them as they saw fit to support other businesses and projects, and to pay unrelated costs.

[260] Despite Ghani's assertions to the contrary, Summerside DT investors were not informed that it was Prism's practice to commingle funds from its projects in the accounts of the "master" entity, PREIC, and then disburse them to other projects and expenses on an as-needed basis. Disclosing that the Summerside Project was the recipient of a related-party loan and that it may receive funds from associated parties or a revolving internal credit facility is not the same as what

occurred here: the indiscriminate commingling and disbursement of funds among all Prism sources, with inadequate or no effort made to track them.

[261] Although Ghani said that spreadsheets were used but that he no longer had access to them at the time of the Ghani Interview in the latter half of 2021, we find that the admissions in the Ghani Affidavit from January 2018 were closer to the reality that was consistent with other evidence in the Hearing: the Prism Group did not keep current in the preparation of proper financial records that would detail, record, and reconcile the many inter-entity transactions, Ghani could not provide a reconciled, current accounting of the inter-entity transactions, and he did not know what the state of the accounts was.

[262] We find that Ghani was likely also truthful when he told Staff during the Ghani Interview that he did not think Prism's practices in this regard had to be communicated to investors because Prism owned all of the projects and had invested money in the Summerside Project before any money was raised from the public. Prism was operated like a privately-held network of businesses that did not rely on funding from outside investors, and treated all receipts and disbursements as though they ultimately belonged to a single parent entity. We agree with Staff that if investors had been aware of this reality, they would have been less likely to invest because the risk involved was fundamentally different. They expected to assume the risk that the Summerside Project would fail – they had no reason to believe that they were assuming the risk that other Prism projects would fail and that amounts that should have otherwise been available to repay their capital and pay returns would be misappropriated for those projects.

[263] The documentary evidence described the anticipated uses of funds and the powers of the individuals and entities involved. Investors were told that expenses would be paid, but only those that were directly related to the Summerside Project. The OM, for example, addressed the payment of expenses of the "Partnership" – i.e., Summerside LP. The Partnership Agreement similarly indicated that it was expenses incurred in relation to "the administration and other activities of the [p]artnership" that would be paid to the general partner, Summerside DevCo, and listed the activities that Summerside DevCo was permitted to undertake – all in connection with the business of the partnership. The Summerside LP Services Agreement also contemplated that permitted expenses were solely those relating to the business of Summerside LP, even if paid to affiliates.

[264] In short, there was nothing in the evidence that would have alerted Summerside DT investors to the actual use of proceeds.

[265] We also find that Staff has established deprivation caused by the Respondents' prohibited acts. NO testified that he was not repaid his invested capital and did not receive any returns. Taylor testified that Staff interviewed eight to 10 other Summerside DT investors, and none were repaid their capital or received any returns. On behalf of Raintree – which raised most of the invested funds – PK testified that as far as he was aware, no Summerside DT investors received a repayment of capital or any payment of returns. And finally, none of the banking records in evidence for the period from January 1, 2013 to December 31, 2017 disclosed payments to investors.

[266] We are satisfied that Staff has proved that Ghani – and through him, the other Respondents – also had the requisite *mens rea* for a finding of fraud. As the guiding mind of Prism and all of its

affiliates, and as a signatory – if not the sole signatory – on the entities' bank accounts, we have no doubt that Ghani had subjective knowledge of what investors were told and not told about how funds would be managed, as well as the truth about how funds were actually managed. By his own admission, he was personally involved in creating and approving the OM and various marketing materials.

[267] During one presentation, Ghani demonstrated his subjective awareness that the Respondents' prohibited acts of commingling funds without disclosing their intention to do so could result in deprivation to the affected investors. His statement that each Prism project was independently owned with an independent investor group and that it was not "a fund where if one goes down it brings the other projects down" was evidence that he knew that commingling money from different projects could result in exactly what occurred here. Instead of retaining any surplus from the sale of Summerside Plaza for the benefit of Summerside DT investors, he distributed much of it to other projects that failed. In the end, nothing was left.

[268] Ghani also demonstrated his awareness that Prism's practice of moving money through PREIC could result in losses during the Ghani Interview. While explaining to Staff that PREIC would cover expenses for a project that needed money, he said that PREIC would be reimbursed later "if the funds ever came in", failing which, "it's our loss". We consider this an acknowledgement that he knew that funds disbursed by PREIC may never be repaid and thus not returned to their original source.

[269] It is true that the gains from the Summerside Project – and in particular, the \$3,434,566 that we have concluded was paid out for unrelated purposes – were insufficient to pay any returns to Summerside DT's investors. It was therefore irrelevant how profit was to be split between investors and management. However, the OM stated that after the payment of related expenses and debts, investors were to be repaid their capital before any division of profit. The funds misappropriated by the Respondents should have been applied for that purpose to mitigate the investors' losses.

VIII. CONCLUSION AND NEXT STEPS

[270] Staff has adduced sufficient clear, convincing, and cogent evidence to prove on a balance of probabilities that the Respondents breached s. 93 of the Act by perpetrating a fraud on Summerside DT investors. \$3,434,566 from the sale of Summerside Plaza was paid to or for the benefit of other businesses and entities without authorization or disclosure to the investors, resulting in a total loss of their investments.

[271] This proceeding will now move into a second phase for the determination of what, if any, orders for sanction or cost-recovery ought to be made against the Respondents in light of our findings.

[272] Staff and the Respondents are each directed to inform one another and the Registrar, in writing, not later than noon on **Friday, December 8, 2023**, of the following:

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

- (ii) their expected timing requirements and suggested dates.

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

November 7, 2023

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn

"original signed by"
Karen Kim