Court of King's Bench of Alberta

Citation: R v Aitkens, 2026 ABKB 95

Date: 20260211
Docket: 13115169S1
Registry: Calgary

Between:

His Majesty the King

Crown/Respondent

- and -

Ronald James Aitkens

Accused/Appellant

Reasons for Decision
of the
Honourable Justice G.H. Poelman

I. Introduction

[1] The accused, Mr. Aitkens, appeals his convictions and sentence for regulatory offences under the *Securities Act*, R.S.A. 2000 c. S-4. The offences related to capital raised by Legacy Communities Inc. ("Legacy"), a company created to acquire and pursue development of a 503-acre parcel of land just west of Calgary ("the Lands"). The accused was a director of Legacy and its president.

[2] Legacy was part of a group of companies controlled by the accused, known as the Harvest Group. It included Foundation Capital Corporation ("Foundation Capital"), Harvest Capital Management Inc. ("Harvest Capital"), 1252064 Alberta Ltd. ("125") and 1330075 Alberta Ltd. ("133").

[3] Legacy raised capital using an offering memorandum exemption available under the *Act* for the purpose of acquiring and developing the Lands. It raised over $35 million from approximately 1400 investors under offering memoranda dated July 1, 2005, September 15, 2006 and October 29, 2007. Investors purchased units consisting of non-voting shares in Legacy and bonds maturing December 31, 2011.

[4] The accused diverted approximately $10.7 million of the money raised for the Legacy project to other companies he controlled and projects not identified in the offering memoranda.

[5] Between 2007 and 2011, Legacy acquired the Lands and attempted to obtain planning approval needed for residential development. The necessary approval was not obtained, the project stalled and Legacy became insolvent. In December 2011, the accused pursued restructuring of Legacy and other Harvest Group companies under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). *CCAA* proceedings for related companies were initiated in June 2012. Ernst & Young acted as court-appointed monitor for all of the companies under *CCAA* protection.

[6] The monitor conducted a detailed review of Legacy's financial activities, followed by an investigation by the Alberta Securities Commission ("Commission"). The accused originally was charged with six offences under the *Act*, three of which remained when the matter was tried in Provincial Court (now Court of Justice). Count 3 alleged that the accused made misleading statements in the offering memoranda to solicit investments for the Legacy project, contrary to section 92(4.1) of the *Act*. Count 4 alleged a further breach of the same section by omitting to state a necessary fact relevant to two investment agreements (found to be non-authentic by the trial judge). Finally, count 5 alleged a breach of section 93(b), being a general fraud provision precluding conduct an accused knows or reasonably ought to know may perpetrate a fraud on any person or company.

[7] On this appeal, the accused alleges procedural unfairness during the *voir dire*, inadmissible evidence being allowed at trial, failure to apply the correct standard of proof and errors in failing to stay one of the convictions at sentencing.

[8] The proceedings in the Court of Justice were lengthy and complex, beginning on January 14, 2015. The trial began on April 16, 2018, and involved many stages, including *voir dires*, trial evidence, various applications, argument and decision following trial, further applications and then sentencing. The decisions of the learned trial judge to which I will refer have been reported as 2019 ABPC 30 ("*voir dire* decision"); 2019 ABPC 51 ("reopening of *voir dire* decision"); 2020 ABPC 129 ("trial decision"); 2022 ABPC 48 ("reopening case decision"); and 2024 ABCJ 169 ("sentencing decision").

II. Overview of Proceedings and Rulings

[9] The accused was charged in 2013. His trial commenced in April 2018. The charges were prosecuted by counsel for the Commission; the accused was represented through trial until conviction by Mr. Shamsher Kothari.

[10] The trial involved *voir dire* evidence and arguments as well as trial evidence. By the time of the *voir dire* ruling on February 8, 2019, the only *voir dire* issue remaining was the admissibility of banking records for 125 and Legacy. Following the *voir dire* ruling, there was an unsuccessful application by the accused to reopen the *voir dire*.

[11] After all of the evidence was called, with some witnesses needing to be recalled, the trial decision was issued on July 20, 2020. New counsel, retained after the conviction, brought an application to reopen the trial to present fresh evidence. This was dismissed, and ultimately (after the accused being not available and then failing to appear) sentencing concluded with the sentencing decision on August 15, 2024.

III. Procedural Fairness in *Voir Dire* Process

A. Introduction

[12] The accused argues that the *voir dire* process was fundamentally unfair in two respects.

[13] First, he argues that as part of his notice under the *Canadian Charter of Rights and Freedoms*, he complained about a breach of his section 7 rights for not receiving disclosure, particularly a "will-say" statement, from Neil Narfason, the monitor who would be testifying in the *voir dire* and as part of the trial. He argues that his rights were infringed because the disclosure application was not fully addressed and decided before the *voir dire* on admissibility of documents (which involved evidence from Mr. Narfason) was held.

[14] Second, he alleges that the trial judge erred on evidentiary issues in the *voir dire*, in two respects. First, he used evidence called for the "trial proper" as part of the evidence on which he determined the *voir dire* issues of admissibility of banking records. Second, he allowed evidence from the *voir dire* to be incorporated into the trial proper without consent or having it called twice.

[15] I will deal with these in turn.

B. Disclosure Application

[16] The *voir dire* began with a number of discrete issues. The accused's *Charter* notice alleged breaches of sections 7, 11(c) and 13 of the *Charter*. For present purposes, most relevant is the alleged section 7 breaches concerning failure to disclose documents related to the anticipated evidence of Mr. Narfason, which ultimately were reduced to a will-say statement. The other alleged *Charter* breaches were not pursued. In addition, the Crown used the *voir dire* to seek a ruling that bank records of 125 and Legacy were admissible at trial.

[17] Some of the issues on appeal relate to whether applications or concerns brought by the accused were not pursued or abandoned, only to be raised again on appeal. Thus, there are a few brief legal points to address.

[18] With limited exceptions, it is for counsel to make decisions on evidentiary issues at trial – often done expressly but sometimes by implication. If there is to be an objection, it must be made at trial to give opportunity for a procedural error to be corrected; it is too late to object on appeal: *R v Cross*, 2006 ABQB 682 at paras 26-27 (*per* Slatter J., later J.A.); *R v Singh*, 2024 ABCA 109 at paras 32-33. This presumes that the accused's consent or acquiescence was informed, especially where he or she is self-represented: *R v Cochrane*, 2018 ABCA 80 at paras 21-23.

[19] The ground of appeal concerning section 7 of the *Charter* (improper or untimely disclosure) turns on whether that application remained alive or was abandoned by the accused. A review of the trial record is necessary for this purpose.

[20] The record indicates that the accused initially sought and expected a ruling on the disclosure issue before the rest of the *voir dire* was completed. For example, on April 16, 2018, Mr. Kothari indicated several times that he expected testimony of Mr. Narfason in a *voir dire* to give a foundation for the disclosure issue, and to get a ruling on that point before proceeding with Mr. Narfason's testimony on other *voir dire* and trial issues (tr at 12-13 and 30-31). The Crown (counsel for the Commission) seemed to be of the same impression (for example, tr at 30). The trial judge, however, ruled that Mr. Narfason's evidence could go beyond the section 7 issue (tr at 17 and 30-31).

[21] The trial judge and counsel may not have been of the same understanding as to what procedure would be employed in and following their exchanges on April 16. They were *ad idem* on the *voir dire* addressing multiple issues (tr at 30-31) but Mr. Kothari still wanted to cross-examine Mr. Narfason on disclosure and get a ruling on that point (see also tr at 110-12).

[22] Mr. Narfason's testimony was interrupted before cross-examination to accommodate other witnesses – including a witness who testified only for purposes of the trial, not the *voir dire* – all with accused consent: for example, tr April 16, 2018 at 41; April 17 at 1-2.

[23] There was further in-court discussion on Mr. Narfason disclosure issue (April 16, 2018, tr at 113-14) with the trial judge alerting counsel that they could not expect him to give mid-trial rulings on a complex case and encouraging them to attempt to resolve disclosure issues by meeting (tr at 113-15).

[24] Over the next several days, counsel had discussions, as appears from the record. Mr. Kothari stated, in part, as follows:

> . . . [W]ith respect to the disclosure issue, my friend is aware of what I was asking for. He's made some inquiries into it. And it appears that it just requires some clarification during cross-examination. It appears that there wasn't additional materials. And I'll go over that with Mr. Narfason. Obviously, he's going to most likely relay to me what he's relayed to Mr. Young. And if that's the case, then the disclosure aspect would be non-existent anymore, Sir. . . .
>
> So, essentially, if all goes as planned, there may not be any constitutional *Charter* arguments that you would have to rule upon. It would just come down to then admissibility of certain materials, and that would be very focused in terms of simple rules of evidence and the – the testimony that you have before you. . . . [April 19, 2018 tr at 118-19.]

[25] Mr. Narfason resumed his testimony on April 27, 2018. After direct examination concluded, Mr. Kothari sought a brief adjournment to address the fact that Mr. Narfason had testified to some things that were new to him and a will-say statement had not been provided. He wanted to consult with his client about these matters. The court gave him the option of adjourning to another day so he could be more "fully instructed." However, after a brief adjournment, Mr. Kothari indicated he was prepared to proceed with his cross-examination and did so.

[26] The evidence of Mr. Narfason was not concluded so a new date was set for June 15, 2018 to conclude it. There were no further discussions on that date about lack of disclosure.

[27] On October 3 and 4, 2018, the trial judge heard argument on the *voir dire* issue of whether banking records for 125 and Legacy were admissible at trial. In the course of

submissions, Mr. Kothari reiterated his concern about the lack of a will-say statement (October 3, 2018 tr at 14-15). However, counsel were agreed that argument and the decision could first proceed on the admissibility of documents issue. The disclosure issue would be adjourned so that additional evidence would be before the court (tr at 18-19).

[28] On October 19, 2018, there was discussion in court about matters that would be pursued and those that would no longer be pursued – the particular issues not being well identified. Counsel for both parties, however, advised the court that there would be no restriction on the ability of the trial judge to deliver the *voir dire* decision on admissibility of documents. There was discussion about dates for a decision on that and for outstanding *Charter* applications to be addressed.

[29] The case resumed on February 8, 2019, for the trial judge to deliver his *voir dire* decision on admissibility of documents. He briefly advised that his decision was that the documents were admissible and distributed written reasons. Counsel then advised that February 11 and 12, 2019, which had been set aside for the *Charter* arguments, would be vacated. Crown counsel and an agent for Mr. Kothari advised that two applications, including the section 7 Mr. Narfason disclosure application, were abandoned (tr at 4).

[30] Following the February 8, 2019 *voir dire* decision, the case resumed on February 25, 2019 to deal with a motion by the accused to reopen the *voir dire* on an issue relating to the admissibility of documents. After argument, there was an adjournment and the reopening case decision was delivered orally that afternoon. No reference was made to the disclosure issue except for the trial judge's observation during the course of his oral decision that February 11 and 12 had been set "to do with an allegation of a *Charter* violation for an alleged disclosure irregularity and other matters" and that one week before the hearing date, "counsel for Mr. Aitkens informed the Provincial Court that as a result of discussions between counsel, those hearings would no longer be required" (February 25, 2019, tr at 15).

[31] Likewise, in subsequent court attendances over many days, including further evidence, final argument, new counsel, an application to call fresh evidence and reopen the trial (which was denied after evidence and argument), and a sentencing hearing, the section 7 disclosure argument was never raised. It came up again only on this appeal, with second new counsel.

[32] From my review of the record, I conclude that the disclosure application was expressly and finally abandoned on February 8, 2019. Mr. Kothari was represented by an agent that day, but clearly he had instructions and it further appears that Crown counsel was aware before court that such a decision had been made by the defence. As noted, it was never raised again. If the accused wished to revisit the issue, he could have applied to do so on a number of occasions before proceedings before the trial judge were concluded.

[33] It is also significant that the abandonment came after the disclosure issue had been aired numerous times and after Mr. Kothari had elected to proceed with cross-examination of Mr. Narfason rather than adjourn for further consideration of his position. This was not surprising, because he had adverted to the possibility of abandoning the application as early as April 19, 2018 (tr at 118-119).

[34] For these reasons, the ground of appeal that the trial judge erred in law by dealing with the section 7 disclosure issue unfairly to the prejudice of Mr. Aitkens has no merit.

C. *Voir Dire* Evidence

1. Introduction

[35] The accused submits that the trial judge erred in two respects with respect to evidence called in the *voir dire*. First, he allowed evidence from the *voir dire* to be incorporated into the trial without having it called twice and without consent of the accused. Second, he used evidence only called for the trial as part of the record to determine the *voir dire* issues.

[36] A *voir dire* decision must be based on evidence called in the *voir dire*, unless the parties consent: *R v Conway*, 1997 CarswellOnt 5076 (C.A.); [1997] O.J. No. 5224 at para 48; and, implicitly, *R v Wruck*, 2020 ABCA 270 at paras 90-96. The accused must know the case he has to meet.

[37] Likewise, *voir dire* evidence cannot be read in at trial evidence without consent: *R v Gauthier*, [1977] 1 S.C.R. 441 at 453, quoted in *Cochrane* at para 17; *Cochrane* at paras 17-27. This takes into account that an accused may allow or want some evidence called at a *voir dire*, or put forward in a less rigorous fashion, than would be in his interests at trial.

[38] Thus, on this ground of appeal as on the last one, the record must be reviewed to determine whether there was consent on these two points.

2. *Voir Dire* Evidence Incorporated into the Trial

[39] Court convened on February 8, 2019 for the trial judge to deliver the *voir dire* decision. It was done by both a brief oral statement of the decision and provision of written reasons.

[40] The trial judge indicated that because of his ruling the *voir dire* exhibits ought to become full exhibits but, partly because Mr. Kothari was represented by an agent on that day, he proposed to set the matter over to allow counsel to digest his decision and then the Crown could make an application to enter the documents into trial (February 8, 2019, tr at 3).

[41] On February 25, 2019, the court reconvened. Mr. Kothari had submitted an application to reopen the *voir dire* for further argument on the implications of the reasons for decision on the "hearsay motion," which was decided based on the documents in possession rule. Later that day, the motion was dismissed (tr at 14-25). Following the ruling, at the trial judge's invitation, the Crown applied for the three contested sets of documents and other *voir dire* evidence to be admitted into the trial. Mr. Kothari said nothing and accordingly the *voir dire* documents were marked as trial exhibits (tr at 25).

[42] In my view, there was tacit consent for the evidence to be admitted at trial. This is the usual procedure. On February 8, the trial judge indicated he expected an application to this effect in due course; that application was made and granted on February 25. In this context, no reasonable inference other than consent, or at least acquiescence, can be drawn from Mr. Kothari's silence.

3. Use of Trial Evidence in Deciding the *Voir Dire*

[43] As noted above, the *voir dire* and trial proceeded concurrently. Some witnesses gave evidence relevant only to trial, but also germane to the *voir dire* issues. Other witnesses were called for trial purposes only.

[44] Whether trial evidence generally could be used to decide the *voir dire* issues came up in various ways during the proceedings. Counsel for the Crown reviewed them in detail and at length on this appeal. There are three stages that are most important in my view.

[45] First, there was a lengthy exchange between the trial judge and both counsel on April 25, 2018 (tr at 78-86). The trial judge indicated his understanding that "going from memory, I think the general rule is that the Court can use evidence from other parts of the trial, to make its ruling, on a *voir dire*, if those other parts of the trial are relevant in some fashion, to the issues to be heard in the *voir dire*, even though that evidence wasn't in a *voir dire*. . . . The Court can look at other evidence to decide the issues that are within the four corners of the *voir dire*. Do you take a different view, Mr. Kothari" (tr at 83).

[46] Mr. Kothari responded to this question with "no, I - -" (tr at 83) but was then interrupted by the trial judge. There were further exchanges between the court and Mr. Kothari, after which Mr. Kothari indicated he was "fine proceeding in that fashion" (tr at 85, 86). Some of the discussion involved the analogy of *voir dires* held in impaired driving trials. However, there is some ambiguity over what, if anything, was agreed to during these exchanges, because the discussion had the persons talking over each other and also included the topic of how questioning would be conducted.

[47] Second, there were later discussions that clarified the above. During the *voir dire* argument both the Crown and Mr. Kothari refer to evidence not part of the *voir dire*, particularly including the accountant Mark McCarthy (for example, October 3, 2018, tr at 6, 15, 17 and 18). During the April 25, 2018 discussions, it was confirmed that Mr. McCarthy's evidence was not part of the *voir dire* (tr at 82-83). Evidence from Mr. McCarthy was also referred to in the accused's written *voir dire* brief (at paras 18 and 28). Thus, evidence from outside the *voir dire* was relied on by both counsel in arguing the *voir dire* issue of admissibility of banking documents.

[48] Finally, in the written brief submitted by the Crown on behalf of the Commission before the *voir dire* oral arguments, the following was stated at paragraph 4:

> All of the Crown, defence and the court agree trial testimony and exhibits can be used to make *voir dire* admissibility and other rulings.

No objection to this statement was made on behalf of the accused in writing or during the *voir dire* hearing.

[49] Thus, I conclude that the accused agreed that the *voir dire* decision could be based not only on evidence called in the *voir dire* but on trial evidence that had been called up to the date of the *voir dire* ruling.

IV. Admissibility of Banking Documents

A. Introduction

[50] By the time the *voir dire* was argued on October 3 and 4, 2018, the only matter to be decided was the admissibility of three groups of documentary evidence: banking records for 125, banking records for Legacy and reports by Ernst & Young. (The reports were not the focus of much argument; they were based on the banking records, the focus of the *voir dire* proceedings.)

[51] As noted by the trial judge, the Crown could have used a convenient, straightforward procedure to have the banking records admitted under section 41 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18, typically with an affidavit from a bank official (*voir dire* decision at paras 12-14). For reasons not explained to the trial judge, the Crown did not follow this procedure.

B. Document in Possession Rule

[52] Instead, the Crown tendered the documents under the "documents in possession" rule or, in the alternative, under the principled approach to hearsay rule, requiring proof of necessity and reliability.

[53] The trial judge summarized the content of the rule primarily by relying on *R v Wood*, 2001 NSCA 38. First, he approved a passage from *Phipson on Evidence* (M.N. Howard *et al.*, eds., 15th ed., 2000) stating as follows:

> Documents which are, or have been, in the possession of a party will, as we have seen, generally be admissible against him as *original (circumstantial) evidence* to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as *admissions* (i.e. exceptions to the hearsay rule) to prove the *truth* of their contents, if he has in any way *recognized*, *adopted*, or *acted upon them*. [At para 30-10, original emphasis.]

The trial judge then reviewed the facts in *Wood* and its expanded description of the *Phipson* version of the rule. Finally, he reviewed a handful of other cases applying the documents in possession rule.

[54] It is argued on Mr. Aitkens's behalf that the trial judge erred by relying on *Wood* because it was factually distinct. (No issues seem to be taken with its statement of the law.) Thus, it is necessary to review the facts in *Wood*.

[55] *Wood* involved a lawyer charged with several counts of theft or conversion of trust monies. At trial, copies of banking statements and other documents (such as client ledgers) which the accused was required to keep under legal profession rules were admitted into evidence. The Court of Appeal rejected the argument that these hearsay documents were improperly admitted.

[56] The court differentiated between two types of documents. "Category 1 documents" were obtained by the Law Society-appointed auditor directly from Mr. Wood. His actual possession was established by the fact they were records he was required to maintain and he personally supplied them to the auditor on request. Likewise, he "recognized, adopted or acted on" the documents by providing them to the auditor.

[57] "Category 2 documents" were obtained by the auditor from files of Mr. Wood's accounting firm, under written permission given by Mr. Wood. They were also found to be in Mr. Wood's possession because they "were, as a result of Mr. Wood's actions and to his knowledge, in the actual possession or custody of the accounting firm" (para 120). Mr. Wood recognized, adopted or acted upon the documents by authorizing their release to the auditor to satisfy his legal obligations to the Law Society. The authorization made the accounting firm Mr. Wood's agents for the purposes of responding to the auditor's requirements. Thus, the documents obtained from the accounting firm at Mr. Wood's direction stood in the same position

as the category 1 documents and therefore were admissible for the truth of their contents (para 123).

[58] In determining that Mr. Wood had possession of the documents that actually were in the possession or custody of his accounting firm, the court also referred to section 4(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, which states that "a person has anything in possession when he . . . knowingly has it in the actual possession or custody of another person."

[59] As the accused in this case points out, *Wood* involved a person while this case involves two corporations. Of itself, this is not a ground to ignore its holdings. It is Mr. Aitkens who is accused and thus the required possession of documents must be brought home to him personally, in accordance with the principles set out in *Phipson* and the cases.

[60] There is no error of law in the trial judge's description of the documents in possession rule from *Phipson* and *Wood*. The *Phipson* statement of the rule has been approved in other cases, such as *R v Bridgman*, 2017 ONCA 940 at paras 67-71; and *R v Turlon*, 1989 CarswellOnt 96 (C.A.); [1989] O.J. No. 524 at para 11. I turn, then, to how the rule was applied by the trial judge in this case.

[61] The trial judge found that Mr. Aitkens possessed the banking documents "actually or, at the very least, constructively" (*voir dire* decision at para 74). This was based upon finding that the accused had ownership and control of the two companies (most importantly, Legacy). The evidence upon which he relied was voluminous. I refer to the following as important examples:

a) The offering memoranda identified Mr. Aitkens as director and president of Legacy and president of other companies. He is identified as the largest shareholder in Legacy and the only person whom investors may contact to cancel their investment.

b) Legacy, 125 and Mr. Aitkens all operated out of the same Lethbridge address on 9th Avenue North, the place to which the Royal Bank sent the banking documents. The long-time external accountant for Mr. Aitkens and his corporate entities was Mark McCarthy. His office was in Lethbridge and he received or picked up banking records with Mr. Aitkens's knowledge and permission from the 9th Avenue address.

c) Ron Beyer, marketing director for Foundation Capital since 2006 (a company with a management contract for Legacy and others) had a long association with Mr. Aitkens going back to the late 1980s. He testified that Mr. Aitkens owned both Foundation Capital and Harvest Capital; that Legacy was a part of Foundation Capital; that Mr. Aitkens controlled the investment funds; and that Mr. Aitkens initiated the *CCAA* process.

d) Olaf Pederson, a selling agent for Foundation Capital, described Mr. Aitkens being in charge at Foundation Capital and Legacy and the person who assured Mr. Pederson everything would be alright when rumours began to circulate.

e) Frank Lonardelli, a sophisticated and experienced investor with his own real estate development company, was recruited by Mr. Aitkens as CEO of Harvest Group. He was employed in this role from September 2010 until December 15, 2011. He testified that Mr. Aitkens controlled and directed

what happened at Legacy. Despite his position, Mr. Lonardelli did not have access to financial statements of any of the companies and did not have signing authority; instead, Mr. Aitkens was the only person in control of the bank accounts.

f) Mr. McCarthy, the external accountant, has known Mr. Aitkens since the 1990s. By 2007 to 2011, about 40 to 50 percent of his accounting practice was for Mr. Aitkens's group of companies, including Legacy. He received the financial and banking documents directly from the Legacy office with Mr. Aitkens's consent. These were sometimes sent to Mr. McCarthy's office or he would pick them up at Mr. Aitkens's Lethbridge office. Occasionally Mr. McCarthy and Mr. Aitkens would meet and discuss matters. At their meetings, Mr. Aitkens confirmed information that only the account holder or controller of the projects could know.

g) Mr. McCarthy continued his bookkeeping and accounting duties for Legacy until the project went into *CCAA* protection. When that process began, he forwarded financial records, invoices, commission payments and all of the accounting information he had to Mr. Narfason. Before doing so, he personally audited the RBC statements for Legacy and 125 and reconciled the total amount of funds raised by the Legacy investment.

h) Mr. Narfason, a senior partner at Ernst & Young, acted as monitor in the *CCAA* proceedings. He described the accused as the "management of the company" from whom Ernst & Young sought information. He had numerous meetings with Mr. Aitkens, who answered questions in a way that confirmed he knew about the investments that had been made. Mr. Narfason received the bank statements from either an administrative assistant who worked for Harvest Group or from Mr. McCarthy. The reason for Ernst & Young receiving these records was to further the *CCAA* process. From Mr. Narfason's point of view, the accused controlled, owned, operated and managed Legacy and 125.

[62] From such evidence, the trial judge concluded that the accused was in actual or constructive possession of the banking records. The records were sent to the accused's Lethbridge office. After receiving and becoming aware of their contents, he passed them on to Mr. McCarthy for him to complete the accounting, tax and bookkeeping duties necessary for the operations of these companies. The documents later became important for the insolvency protection process.

[63] The accused took the decision to place the corporate entities into *CCAA* protection and, in the process, overruled Mr. Lonardelli who was CEO of Harvest Group. Only someone with full authority, the trial judge concluded, could take such a step and the decision by itself was strongly indicative of ownership and control over Legacy and 125. Thus, he concluded that the doctrine of documents in possession was satisfied.

[64] The accused has not satisfied me that the findings of the trial judge that the accused was in possession of the banking records for purposes of the documents in possession rule was in error. He acted on legally correct grounds, and there are no palpable or overriding errors of fact underlying his decision. The findings were available on the evidence before him.

[65] Having come to the conclusion that the accused possessed the documents, the trial judge found them admissible for the purpose of showing his knowledge of their contents and the transactions to which they related. Thus, the records were capable of establishing the accused's knowledge of the flow of funds through Legacy and 125, on which there was also *viva voce* testimony from Messrs. Beyer, Lonardelli, McCarthy and Narfason.

[66] The final aspect of the documents in possession rule is whether the accused recognized, adopted or acted upon the documents. This aspect is necessary for them to be treated as admissions to prove the truth of their contents as an exception to the hearsay rule.

[67] Again, the trial judge held that this requirement was satisfied on the evidence, for reasons I summarize as follows:

a) The accused transferred the financial records to his external accountant, Mr. McCarthy, for accounting and bookkeeping purposes, meeting regularly with him to discuss these matters. He adopted and acted upon the documents to effect these purposes.

b) The accused chose to put companies he controlled into the *CCAA* protection process and he participated in that process. In doing this he was required to make documents available to Ernst & Young as the monitor; documents came from administrative staff at Harvest Group and the accountant Mr. McCarthy.

[68] These were findings available on the evidence. There was no palpable and overriding error in coming to these conclusions.

[69] Having applied all elements of the documents in possession rule, the trial judge concluded that the banking records were admissible under the documents in possession exception the hearsay rule. Likewise, the monitor's reports, based on the banking documents, were proved. All documents would therefore be admissible in trial. There was no error of law or fact in reaching these conclusions.

C. Principled Exception to Hearsay

[70] The trial judge also briefly addressed the alternative argument for admissibility of the documents, the principled approach to the rule against hearsay. He found the requirements for this test were not met because necessity was not established. The Crown had available section 41 of the *Alberta Evidence Act* and chose not to pursue it. Thus, he did not proceed with the reliability assessment.

[71] This part of the *voir dire* decision has not been appealed.

D. Authentication

[72] As a new ground of appeal, it is now argued that the bank statements are not admissible because they fail to satisfy the electronic records provision in the *Alberta Evidence Act*. The authorities relied on are cases where the documents were possessed by the accused in electronic form, or were records of electronic communications allegedly authored by the accused – in contrast to this case, where the accused possessed the bank statements in paper form.

[73] *Viva voce* evidence at trial confirms the transmission of copies of the bank records. The electronic records provisions were not raised at trial. Nevertheless, the point will be briefly considered.

[74] A party tendering an electronic record must prove its authenticity by "evidence capable of supporting a finding" that the record is what it is claimed to be: section 41.3. Where the best evidence rule applies, it is satisfied by proof of the integrity of the electronic records system: sections 41.4-41.5. The electronic records provisions exist alongside and do not modify other rules of evidence: section 41.2(1).

[75] The *Alberta Evidence Act* electronic records provisions are similar to their equivalents in the *Canada Evidence Act*, R.S.C. 1985, c. C-5, sections 31.1-31.8. It has been held that these provisions simply codify the low common law threshold for authentication: *R v Durocher*, 2019 SKCA 97 at paras 79-94; *R v Ball*, 2019 BCCA 32 at paras 65-70; and *R v Martin*, 2021 NLCA 1 at paras 30-43 and 46-47. This low burden can be proved by direct or circumstantial evidence: *R v Kalai*, 2020 NSSC 351.

[76] Mr. Narfason testified that Ernst & Young received the bank statements from Harvest Group in paper form with handwritten notations on them (which other evidence confirmed was Mr. McCarthy's). A staff member entered copies of the bank statements into Ernst & Young's computer system. Mr. Narfason and his staff relied on the digital copies to analyze the sources and use of Legacy funds. He testified that Ernst & Young staff did not alter source documents and doing so would be a serious breach of their policy (April 16, 2018, tr at 46-48 and 73-75; April 27, 2018, tr at 10-12 and 45-46 and 49; June 15, 2018, tr at 2-5). Ernst & Young later copied the digital files to a CD and provided the CD to the Commission. Mr. Narfason testified that the banking records accurately depicted the digital copies he and his team relied on in their work (June 15, 2018 tr at 4-5).

[77] I find that the trial judge did not err in not referring to and specifically applying the electronic records provisions of the *Alberta Evidence Act*. As noted on behalf of the accused, the authentication provisions require "evidence capable of supporting a finding that the electronic record is" what it purports to be: section 41.3 of the *Alberta Evidence Act*. The trial judge had some evidence, particularly from Mr. Narfason, capable of supporting a finding that the bank records were what the Crown claimed them to be: copies of paper bank statements made by Ernst & Young from those provided by or on the instructions of the accused. The evidence also established the integrity of Ernst & Young's electronic records system and that the digital copies were made and stored in the usual and ordinary course of business. There was ample evidence to support authentication of these documents.

E. Threshold Reliability

[78] The accused also argues that the banking records were inadmissible for the truth of their contents; they could be admissible only for the fact that they were received by the *CCAA* monitor. His argument, in written form, is that "third party documents simply received by a party who is not the author, cannot meet the threshold reliability standard": factum at para 85. The authority relied upon is of no assistance, merely dealing with an attempt to introduce a document on a summary judgment motion without supporting evidence.

[79] Threshold reliability would be a requirement, as the trial judge noted, if the principled exception to the hearsay rule were applied. Here, the bank statements were admitted under a

traditional hearsay exception where there is no need to consider necessity and threshold reliability. For example, in *R v Schneider*, 2022 SCC 34, the hearsay exception relied upon was a party admission and "party admissions are admissible without reference to necessity and reliability" (at para 55). *R v Khelawon*, 2006 SCC 57 at para 60, confirmed that the traditional exceptions to the hearsay rule, which operated without necessity and reliability criteria, continued to be available.

[80] Thus, applying a threshold reliability test would be improper in the context of the documents in possession exception to the hearsay exclusionary rule.

V. Burden of Proof

[81] The accused submits that the trial judge failed to apply the criminal burden of proof and especially erred in interpreting the offering memoranda reallocation clause in accordance with Commission decisions rather than focusing on a colour of right defence.

[82] The trial judge was alive to the burden of proof issue. He noted that alleged offences under the *Act* could be tried in an administrative forum or the criminal forum of a court, either (by their current names) the Court of Justice or King's Bench (trial decision at para 14). The offences could be classified, according to their nature, as criminal, quasi-criminal or regulatory (at paras 14-15). He concluded that all extant charges were criminal in their classification and thus had the dual requirements of *actus reas* and *mens rea* in their proof (at paras 17-21).

[83] Based on this classification, he confirmed the application of the basic and fundamental principles of criminal law: the accused was presumed to be innocent and the Crown bore the burden of proving every element of each alleged offence beyond a reasonable doubt. That burden remained on the Crown throughout the trial (at paras 22-24).

[84] However, the accused submits that the trial judge failed to apply this burden when considering this so-called reallocation clause. Addressing the argument requires an overview of the offering memoranda and regulatory context.

[85] The trial judge correctly noted that securities laws provide two fundamental protections for investors: the investment dealer registration requirement and the prospectus. Registration ensures that those in the business of trading in securities meet standards of proficiency, integrity and solvency. The prospectus ensures that investors have the information needed to make informed decisions. A prospectus provides full, true and plain disclosure of all material facts relating to the securities on offer and is vetted by the regulator. A prospectus is required for every distribution of securities, unless an exemption applies: *Act*, sections 110-21.

[86] At the relevant time the offering memorandum exception relieved Alberta issuers from the prospectus and dealer registration requirements. It allowed distribution of securities in maximum amounts or to investors meeting certain income thresholds under an alternative disclosure document, the offering memorandum (the regulations are cited in the trial decision at paras 54 and 55). The form and content of an offering memorandum was prescribed by the regulations. Detailed disclosure about the securities on offer, the business of the issuer, the intended use of proceeds of the offering and material risk factors was required. Unlike a prospectus, an offering memorandum was not vetted by the regulator before delivery to purchasers. An offering memorandum was filed after the close of the distribution to which it pertained.

[87] Directors, officers and promoters of the issuer were required to certify in writing that the offering memorandum did not contain a misrepresentation. If the certificate ceased to be true after the offering memorandum was delivered to a purchaser, the issuer could not accept an agreement to purchase securities until it provided an updated, newly-certified offering memorandum.

[88] All three of Legacy's offering memoranda disclosed that Legacy intended to acquire the Lands and seek approval for development. Each offering memorandum contained a "use of proceeds section," requiring a breakdown of how net proceeds of the offering would be used for those objectives. These sections were followed by "reallocation" clauses stating that Legacy intended to use the funds as stated and would reallocate only for sound business reasons. As noted above, the use of proceeds and reallocation sections were part of the required form and content provisions under the regulations governing the offering memorandum exemptions. At trial, the accused argued that the reallocation clauses allowed him to use proceeds of the Legacy offerings for transactions other than the Lands.

[89] The trial judge held that if this interpretation were correct, the detailed project-specific disclosure in the rest of the document would be meaningless. He concluded that the reallocation clauses should be read narrowly and in the context of the other clauses outlining the purpose of the investment. The reallocation clauses were secondary to the use of net proceeds clauses that preceded them. The only reasonable interpretation of the offering memoranda was that the proceeds of the offering would be used in relation to the specified project. Any reallocation permitted under the offering memoranda would have to be "connected in scope and purpose to the originally stated plan" (trial decision at paras 164-70, 177 and 258-63).

[90] In support of his conclusion, the trial judge considered a Commission decision, *Re Shire International Real Estate Developments Ltd*, 2011 ABASC 608 at paras 183-95 where a panel interpreted a similar reallocation clause in a similar factual scenario. He referred to other Commission decisions for the principles of securities regulation and the importance of use of proceeds disclosure generally (trial decision at para 167).

[91] The accused argued that the trial judge erred in his approach, by adopting the Commission's interpretation of the reallocation clause; in concluding that it provided no defence; and in failing to turn his mind to whether there was a reasonable doubt that the accused believed he had a colour of right to remove the funds.

[92] This argument ignores the fact that the trial judge did not merely adopt the Commission's decisions. He arrived at his own interpretation of the reallocation clause, which he articulated clearly and in detail, noting that it was consistent with the Commission decisions. I find no error in this approach.

[93] The form of colour of right argument raised on this appeal was not, as far as I can determine from the record, made before the trial judge. Rather, there the argument was that the accused was justified by being the largest single investor and that he only withdrew his own funds (trial decision at paras 245-50). The trial judge dismissed those arguments, and his findings on them are not challenged. They were not significant. The whole thrust of the defence argument at trial was that the accused had the authority to act as he did, based on the reallocation clauses and as corroborated by a purported February 1, 2008 letter to investors (trial decision para 38.viii and xi).

[94] For completeness, I will address the new argument on colour of right provisionally, on the possibility that it should have been addressed.

[95] "Colour of right," as observed in *R v Simpson*, 2015 SCC 40, most commonly is invoked in relation to the offence of theft under section 322 of the *Criminal Code* which prohibits the taking or conversion of an object "fraudulently and without colour of right": at para 31. However, the defence is available more generally; *Simpson* was a not theft case, nor was *R v Manuel*, 2007 BCCA 178, where it was raised also.

[96] The approved statement of the colour of right defence is as follows:

> Colour of right as a correct statement consists of an erroneous belief on the part of the accused that he has a legal right to act as he did . . . to fundamental conditions govern colour of right. First, the error must concern a conception of private law: the accused believes that the law recognizes his right to act as he did. Secondly, the right the accused believes he has must be a "legal right" and not simply a moral right. A legal right, that is a right recognized at private law – for example, a right to possession ("gage"), a right of retention. The accused acts under a colour of right if he erroneously thinks he can rely on this right in the circumstances. The claim of a merely "moral" right does not constitute colour of right. Belief in a "moral" right is not based on a conception of law. It rather consists of the affirmation by the accused of his right to act as he does despite the law.

The statement comes from Fourtin and Viau, *Traité de droit pénal général* (Les éditions) Thémis Inc., 1982) at 128; adopted in *R v Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que.); *Manuel* at para 7.

[97] Thus, the defence involves looking at the accused's subjective belief, however that might be determined. The accused did not testify and thus in this case there is no direct evidence on his subjective intention, as was also the case in *Simpson* (at para 33).

[98] Notwithstanding that colour of right looks to an accused's subjective belief, reasonableness of the belief is not irrelevant. "The unreasonableness of a belief when objectively considered does not necessarily destroy the honesty of the belief," it has been held, "but unreasonableness may be considered along with other evidence in determining whether the Crown has established that these articles were taken without colour of right": *R v Hewson*, [1979] 2 S.C.R. 82 at 98.

[99] Having looked at what colour of right means, it must be considered how it operates within the criminal burden of proof. That was addressed in *Simpson* as follows:

> To put the defence of colour of right into play, an accused bears the onus of showing that there is an "air of reality" to the asserted defence – i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right . . . . Once this hurdle is met, the burden falls on the Crown to disprove the defence beyond a reasonable doubt. [At para 32, citations omitted.]

[100] The trial judge made a number of findings that would be germane to the determination of whether there could be an air of reality to a colour of right defence based on mistaken belief in what the reallocation clause allowed. These include the following:

a) A letter of February 1, 2008 on Foundation Capital letterhead, purportedly for signature by Dr. Bruce Jank and Ron Aitkens (but not signed) is addressed to investors. It includes an update on the Lands and also advises of the acquisition of water rights (which we know from other evidence was at Granum, Alberta), the purchase of a small water utility company and other matters. The first page of the letter states that "the Offering Memorandum allows the directors to invest funds that are not immediately required by the project for 'sound business reasons.' " If written and sent when it purports to be, this letter might be some evidence of a subjective belief justifying the accused's reliance on the reallocation clause. However, the trial judge found (after careful analysis and based on *viva voce* evidence) that it was not a genuine document (trial decision at paras 131-80). No investor recalled seeing it and Dr. Jank's evidence was rejected on a number of grounds. It had not been detected by the monitor, despite a careful review of all the records; it appeared first when the defence called evidence. Thus, it was a late fabrication seeking to justify diversion of funds.

b) In addition, the trial judge found that two purported investment agreements which the accused gave to the monitor when he was asked questions about diversion of funds were fabricated by the accused or at his direction. The agreements purport to give broad authority to invest investor funds in a wide range of poorly described opportunities and refer as justification to the reallocation clause. They came to light only after Mr. Narfason began questioning the accused about why Legacy funds went to projects such as Panama. No Legacy employee or investor had ever heard of the investment agreements – even Dr. Jank, Legacy's treasurer (trial decision at para 203).

c) The accused acted secretly in transferring Legacy funds to other projects through his personal corporations – corporations that would have realized any profits (trial decision at para 176, 215 and 249). These activities were not disclosed to other Legacy employees, including its CEO Mr. Lonardelli, its marketing director Mr. Beyer, sales staff such as Mr. Pederson, and Legacy's only other director and nominal treasurer, Dr. Jank (trial decision at para 216). These transactions came to light after the *CCAA* process was initiated.

d) The accused's reliance on the reallocation clause was expressed only to a few people, in private communications. These included Mr. Beyer, after he became aware following the *CCAA* process that Legacy funds were used in the Panama project (trial decision at para 107); Mr. Narfason, who became aware of the purported justification only when he confronted the accused about the Panama investment (trial decision at para 105); and Dr. Jank, who had some knowledge of the Panama investment but did not know Legacy funds were used for it until the *CCAA* proceedings (trial decision at para 127 and 139).

e) The trial judge found Legacy's offering memoranda were misleading and untrue; that the accused was responsible for the misleading and untrue statements; and he knew or reasonably ought to have known of their untruth (trial decision at para 163).

[101] Based on the foregoing, the trial judge did not err by not addressing the colour of right defence as now put forward. The accused, to paraphrase *Simpson*, bore the onus of showing an air of reality to the defence – some evidence upon which the trier of fact could be left in a state of reasonable doubt that he believed he had legal right to transfer Legacy funds to other projects through his personal corporations. First of all, such a belief would have been patently unreasonable for the reasons articulated by the trial judge (trial decision at para 163-70), and particularly for a sophisticated, experienced investor such as the accused. Second, the accused acted with secrecy and deception in transferring the funds and then attempting to cover up his wrongdoing. Finally, his ostensible reliance on the reallocation clause came too late to be consistent with him honestly relying on it when the transfers were made.

[102] Thus, the ground of appeal that the trial judge erred in not accepting a colour of right defence has no merit.

VI. Sentence

[103] After considerable delays, a sentencing hearing and decision were completed on August 15, 2024. The accused received a global sentence of four years imprisonment, allocated as 39 months on the fraud conviction and 9 months consecutive on the misrepresentation conviction (reduced to 40 months on the globality principle). Permanent capital market access restrictions were also ordered under section 194(6)(b) of the *Act*.

[104] On this appeal, the accused acknowledges that the amount of the sentence is not out of line with the authorities. He raises only one ground of appeal, namely that the misrepresentation conviction should be stayed leaving only the fraud conviction in place for sentencing.

[105] The argument is based on the principle in *R v Kienapple*, 1974 CanLII 14 (SCC). In brief, that principle holds that an accused cannot be convicted for more than one offence arising out of the same delict because otherwise he could be punished twice for essentially the same offence. Staying the misrepresentation charge would have minimal effect in this case, because of the global adjustment made by the trial judge; in effect, only one month would be removed from the sentence. (The sentence in its entirety has already been served.)

[106] The trial judge did not give reasons for imposing a consecutive sentence, although that is not challenged and is highly discretionary: *R v Roberts*, 2020 ABCA 334 at para 31. Nor did he give reasons for not applying the *Kienapple* principle and it is not clear whether it was argued.

[107] Quite apart from the fact that once again, it appears a new issue is raised on appeal, I am not persuaded that it was an error for the *Kienapple* principle not to be applied. The conviction was for two different offences: making misleading statements in offering memoranda, contrary to section 92(4.1) of the *Act*; and perpetrating a fraud relating to a security, contrary to section 93(b) of the *Act* (sentencing decision at para 1). While there are some legal similarities, the two offences involve different elements and steps, as elaborated at length in the trial decision (at paras 162 and 213).

[108] Further, while there is a similar series of events, the factual nexus is not complete. The misrepresentation conviction arose from making untrue and misleading statements in the third offering memorandum as to how the proceeds of the offering would be used (trial decision at paras 182-84). The fraud conviction was based on unauthorized diversion of funds raised under all three offering memoranda, to the economic detriment of investors (trial decision at paras 216-33). Abusing the offering memorandum exemption by using a false document to raise additional capital was distinct from the fraudulent misappropriation of Legacy funds.

[109] Thus, this ground of appeal is also without merit.

VII. Summary of Conclusions

[110] For the reasons given, I find no merit in all the grounds of appeal relating to the conviction and relating to the sentence. Therefore, the appeal is dismissed.

Heard on the 3rd day of October, 2025.
Dated at Calgary, Alberta this 11th day of February, 2026.

G.H. Poelman
J.C.K.B.A.

Appearances:

William Tran and Amanda Goodwin
for the Crown/Respondent

Brendan Miller
for the Accused/Appellant