DECISION OF A PANEL APPOINTED PURSUANT TO *THE FINANCIAL AND CONSUMERS AFFAIRS AUTHORITY OF SASKATCHEWAN ACT*

In the Matter of

The Securities Act, 1988

and

In the Matter of

Ronald James Aitkens, also known as Ron Aitkens,

1252064 Alberta Ltd.,

1330075 Alberta Ltd.,

Harvest Capital Management Inc., and

Harvest Group GP Corporation

Hearing held:	**May 22, 23, 24, 28 and 29, 2018**
Panel:	**Peter Carton (Chairperson)** **The Honorable Eugene Scheibel (Panel Member)**
Appearances:	**Nathanial Day and Sonne Udemgba (Counsel for Staff of the Financial and Consumer Affairs Authority of Saskatchewan)** **No one appeared on behalf of the Respondents, Ronald James Aitkens, also known as Ron Aitkens, 1252064 Alberta Ltd., 1330075 Alberta Ltd., Harvest Capital Management Inc., and Harvest Group GP Corporation**
Date of Decision:	**December 5, 2018**

I. INTRODUCTION

[1] This was a hearing on the merits (the "**Hearing**") before a Hearing Panel appointed pursuant to section 17 of *The Financial and Consumer Affairs Authority of Saskatchewan Act* (the "**Panel**") to consider whether Ronald James Aitkens, also known as Ron Aitkens, ("**Aitkens**"), 1252064 Alberta Ltd., 1330075 Alberta Ltd., Harvest Capital Management Inc., and Harvest Group GP Corporation (collectively, the "**Respondents**") contravened sections 27, 44(2), 44(3.1), 55.1, 55.11, 58(1), and 80.1(2) of *The Securities Act, 1988,* S.S. 1988-89, c. S-42.2 (the "**Act**").

II. THE RESPONDENTS

[2] The Respondent, Aitkens, is a resident of [redacted], Alberta and was at all relevant times the sole director and shareholder in 1252064 Alberta Ltd, 1330075 Alberta Ltd and Harvest Capital Management Inc.

[3] The Respondent, 1252064 Alberta Ltd., ("**1252064**") is a business corporation incorporated pursuant to the laws of the Province of Alberta. The registered office of 1252064 was at all relevant times #4 – 4002 9th Avenue North, Lethbridge, Alberta.

[4] The Respondent, 1330075 Alberta Ltd., ("**1330075**") is a business corporation incorporated pursuant to the laws of the Province of Alberta. The registered office of 1330075 was at all relevant times #4 – 4002 9th Avenue North, Lethbridge, Alberta.

[5] Harvest Capital Management Inc. ("**Harvest Capital**") is a business corporation incorporated pursuant to the laws of the Province of Alberta. The registered office of Harvest Capital was at all relevant times #4 – 4002 9th Avenue North, Lethbridge, Alberta.

[6] Harvest Group GP Corporation ("**Harvest Group**") is a business corporation incorporated pursuant to the laws of the Province of Alberta. The registered office of Harvest Group GP Corporation was at all relevant times 1200 – 700 – 2nd Street SW, Calgary Alberta. The directors of Harvest Group at all relevant times were Aitkens, [redacted] of Calgary, Alberta, and [redacted] of Lethbridge, Alberta. The sole shareholder in Harvest Group was at all relevant times Harvest Group Development Trust.

III. HISTORY OF PROCEEDINGS

[7] A Statement of Allegations dated August 30, 2013 was filed by Staff of the Financial and Consumer Affairs Authority of Saskatchewan ("**Staff**") against Aitkens, Legacy Communities Inc., Spruce Ridge Capital Inc., Spruce Ridge Estates Inc., Railside Capital Inc., Railside Industrial Park Inc., 1252064, 1330075, Harvest Capital, and Harvest Group.

[8] On November 4, 2013, an Order was made by the Panel discontinuing the Statement of Allegations as against Spruce Ridge Capital.

[9] Staff filed an amended Statement of Allegations dated February 10, 2016 against Aitkens, 1252064, 1330075, Harvest Capital, and Harvest Group (the "**Amended Statement of Allegations**"). A Notice of First Appearance in connection with the Amended Statement of Allegations was issued on January 5, 2017.

[10] The first appearance in this matter was held on February 24, 2017. The Merits Hearing was initially scheduled to commence on May 15, 2017. On April 21, 2017 the commencement of the Merits Hearing was adjourned to September 18, 2017.

[11] On August 25, 2017, the Panel held a conference call to hear an application by Aitkens for an adjournment of the Merits Hearing and denied the application. On September 18, 2017 the Panel heard a further application by Aitkens for an adjournment of the Merits Hearing on the grounds that disclosure had not been timely. Counsel for the Respondents made submissions. The Panel granted Aitkens' application for an adjournment and the commencement of the Merits Hearing was adjourned to commence on May 22, 2018.

[12] On November 29, 2017, The Honourable Larry Kyle, who was member of the Panel appointed to hear this matter, resigned from his role as a Supplementary Member of the Financial and Consumer Affairs Authority of Saskatchewan (the "**Authority**"). The two remaining Panel members, Chairperson Peter Carton and The Honourable Eugene Scheibel, continued to constitute a quorum of the Panel pursuant to subsection 17(6) of *The Financial and Consumer Affairs Authority of Saskatchewan Act* and the matter proceeded with the two remaining members of the Panel.

[13] On May 14, 2018, the Panel heard a subsequent request for an adjournment by Aitkens and determined that it was in the public interest to allow the Merits Hearing to proceed as scheduled on May 22, 2018.

[14] On May 17, 2018, the Panel received a letter from Aitkens repeating his request for an adjournment of the Merits Hearing scheduled to commence on May 22, 2018. In his letter to the Panel, Aitkens indicated that he would not be attending the Merits Hearing set to commence on May 22, 2018 and that he did not have time to prepare or attend the Merits Hearing. On May 18, 2018, the Panel responded to Aitkens by letter dated May 18, 2018 indicating that Aitkens did not identify any change in circumstances from those that were before the Panel on May 14, 2018 when he made his submissions for an adjournment. The Panel's letter to Aitkens concluded with the following:

> **Please note that if you do not attend the hearing, the hearing will proceed in your absence in accordance with subsection 9(15) of *The Securities Act, 1988* and the Panel will render its decision as though you were present at the hearing.**

[15] The Merits Hearing was held on May 22, 23, 24, 28 and 29, 2018.

IV. THE FAILURE OF THE RESPONDENTS TO APPEAR AT THE HEARING

[16] None of the Respondents appeared at, or participated in, the Merits Hearing in person or by counsel. No materials were filed on behalf of the Respondents and no evidence was submitted to the Panel on behalf of the Respondents.

[17] Subsection 9(15) of the Act and section 8.1 of Saskatchewan Policy Statement 12-602 *Procedures on Hearings and Reviews*, provide that a Panel may proceed in the absence of a party where that party has been given notice of the hearing.

[18] Subsection 9(15) of the Act provides:

> **9**(15) Notwithstanding that a person who or company that is directly affected by a hearing or review is neither present nor represented at the hearing or review, where notice of the hearing or review has been sent to that person or company in accordance with subsection (2), the Commission, Chairperson or the Director, as the case may be, may proceed with the hearing or review and make or give any decision as though that person or company were present.

[19] Subsection 9(2) of the Act provides:

> **9**(2) Except where otherwise provided in this Act, notice in writing of the time, place and purpose of the hearing or review shall be sent to:
>
> (a) the person who or company that is the subject of the hearing or review; and
>
> (b) any person who or company that, in the opinion of the Commission, the Chairperson or the Director, as the case may be, is substantially affected by the hearing or review.

[20] Section 8.1 of Saskatchewan Policy Statement 12-602 *Procedures on Hearings and Reviews* provides:

> **Failure to Participate**
> **8.1** If a Notice of Hearing has been sent to a party and the party does not attend the hearing, the Panel may proceed in the party's absence and that party is not entitled to any further notice in the proceeding.

[21] Staff filed affidavits of sending and service and the following material was filed with the Registrar to establish that the Respondents were sent and provided with:

1. The Notice of First Appearance and Amended Statement of Allegations (affidavit of service from [redacted], dated January 23, 2017);

2. The Notice of First Appearance and Amended Statement of Allegations served on Harvest Group (affidavit of service from [redacted], dated February 7, 2017);

3. The Notice of Hearing (affidavit of sending from [redacted], dated April 17, 2017);

4. Order setting Hearing Dates (affidavit of sending from [redacted], dated May 9, 2017);

5. Witness List (email filed with the Registrar, dated August 31, 2017);

6. Order setting dates for Merits Hearing to commence on May 22, 2018 (Notice from Registrar, dated October 2, 2017);

7. Decision of the Panel dated May 14, 2018 denying Respondents' request for an adjournment of the hearing and advising the Respondents in writing of the time and place of the Merits Hearing (Notice from Registrar, dated May 14, 2018);

8. Brief of Law dated May 9, 2018, Book of Authorities and Solicitor's Affidavit sworn May 9, 2018 (affidavit of sending from Nathanial Day, dated May 14, 2018);

9. Letter from Aitkens to the Panel, dated May 17, 2018; and

10. The Panel's response to Aitkens dated May 18, 2018, indicating that that the Merits Hearing would be proceeding on May 22, 2018.

[22] The affidavits of service and sending filed in these proceedings and Aitkens' communication with Staff and the Registrar satisfy us that the Respondents received proper notice of the proceeding and were well aware of the time and place of the Merits Hearing. Further, we note that at the time the dates for the Merits Hearing were set on September 18, 2017, the Respondents were represented by counsel and their counsel was aware that the Merits Hearing was scheduled to commence on May 22, 2018. In the circumstances, we are satisfied that we are entitled to proceed in the absence of the Respondents in accordance with subsection 9(15) of the Act and section 8.1 of Saskatchewan Policy Statement 12-602 *Procedures on Hearings and Reviews*.

V. STAFF'S ALLEGATIONS

[23] In the Amended Statement of Allegations, Staff alleges that during the period in or around July 2005 to in or around December 2012, the Respondents committed various breaches of the Saskatchewan securities laws in connection with the following three projects:

- securities of Legacy Communities Inc. (bonds and shares) issued in connection with a land development west of Calgary (the "**Legacy Project**");

- securities of Spruce Ridge Capital Inc. (bonds) and Spruce Ridge Estates Inc. (shares) issued in connection with a land development south of Calgary (the "**Spruce Ridge Project**"); and

- securities of Railside Capital Inc. (bonds) and Railside Industrial Inc. (shares) issued in connection with the development of a commercial business park located near Millet, Alberta (the "**Railside Project**").

[24] Specifically, Staff alleges that during the period in or around July 2005 to in or around December 2012:

(a) The Respondents traded securities without being registered to trade securities contrary to clause 27(1)(a) of the Act;

(b) The Respondents distributed securities without the filing of a prospectus contrary to subsection 58(1) of the Act;

(c) The Respondents perpetrated a fraud on investors contrary to section 55.1 of the Act;

(d) The Respondents made misleading and untrue statements contrary to subsection 44(3.1) and section 55.11 of the Act;

(e) The Respondents gave a written undertaking relating to the future value of a security contrary to subsection 44(2) of the Act;

(f) The Respondents failed to amend the Offering Memoranda as a result of a material change in the affairs of the issuer contrary to subsection 80.1(2) of the Act.

[25] Staff alleges that at all relevant times, Aitkens was the sole directing mind of each of the 1252064, 1330075, Harvest Capital and Harvest Group (collectively referred to as the "**Corporate Respondents**") and that each of the Corporate Respondents was acting on the direction of, or as agent, representative and/or alter ego of, Aitkens, with his full knowledge and consent.

[26] Staff further allege that:

- in relation to the Legacy Project, the Respondents raised, from in and around 2005 to 2008, approximately $4,168,600.00 from the solicitation and sale of securities in Legacy Communities Inc. (bonds and shares) to residents of Saskatchewan;

- in relation to the Spruce Ridge Project, the Respondents raised, from in and around 2007 to 2009, approximately $4,177,585.77 from the solicitation and sale of securities in Spruce Ridge Capital Inc. (bonds) and Spruce Ridge Estates Inc. (shares) to residents of Saskatchewan; and

- in relation to the Railside Project, the Respondents raised, in and around 2008, approximately $2,059,957.90 from the solicitation and sale of securities in Railside Capital Inc. (bonds) and Railside Industrial Inc. (shares) to residents of Saskatchewan.

VI. THE MERITS HEARING AND EVIDENCE

[27] The Merits Hearing commenced on May 22, 2018 and concluded on May 29, 2018. During the Merits Hearing, Staff called seven witnesses. Staff's witnesses included three Staff members: Staff investigator [redacted], Staff Senior Securities Analyst [redacted], and Staff Deputy Director of Corporate Finance [redacted].

[28] Staff also called the following witnesses at the Merits Hearing:

- a Saskatchewan investor, whom we have identified as Investor 1 to protect his privacy interests;
- [redacted] of the firm Ernst & Young Inc., which acted as the Court-appointed monitor in restructuring and insolvency proceedings involving Legacy Communities Inc., Spruce Ridge Capital Inc., Spruce Ridge Estates Inc., Railside Capital Inc., Railside Industrial Inc., 1252064, and 133075;
- [redacted], the former Chief Executive Officer for the Harvest Group of companies from September 2011 to December 2012; and
- [redacted], the Development Manager of the Spruce Ridge Project.

[29] Staff introduced into evidence a number of documents. Among the exhibits entered in evidence by Staff are the corporate profiles for the various entities from the Alberta Corporate Registration System, Alberta Securities Commission and Saskatchewan Form 45-106F1 filings, copies of court filings and the Ninth Report of the Monitor, dated August 30, 2013, from the proceedings regarding Legacy Communities Inc., Spruce Ridge Capital Inc., Spruce Ridge Estates Inc., Railside Capital Inc., Railside Industrial Park Inc., 1252064, 1330075 and Harvest Capital under the *Companies' Creditors Arrangement Act*, copies of the offering memoranda, promissory notes, brochures, executive summaries, purchase and sale agreements, management services agreements, and additional agreements from the various transactions and bank records.

[30] On May 29, 2018, following the completion of the evidence phase of the Merits Hearing, Staff provided closing arguments. Staff filed written submissions on July 3, 2018, along with a Book of Authorities. The Respondents did not file any materials for the Merits Hearing.

VII. THE STANDARD OF PROOF

[31] The standard of proof in this hearing is the civil standard of proof on a balance of probabilities. In *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 49 ("*McDougall*"), the Supreme Court of Canada held:

> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[32] The Court also held that the "… evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall, supra* at para. 46).

VIII. HEARSAY EVIDENCE

[33] Subsections 9(6) and (7) of the Act provide:

> **9**(6) In the case of a hearing or review, evidence shall be received that, in the opinion of the Commission, the Chairperson or the Director, as the case may be, is relevant to the matter being heard.
>
> (7) The legal and technical rules of evidence do not apply to a hearing or review.

[34] Therefore, all relevant evidence, including hearsay evidence, is admissible provided that the rules of natural justice and procedural fairness are observed. We have determined the weight, if any, to give to any hearsay evidence before us, by examining its content and considering indicators of its reliability, such as its consistency with other evidence before us.

IX. ISSUES

[35] Staff's allegations raise the following issues for consideration:

1. Did the Respondents trade in securities without registration in breach of clause 27(1)(a) of the Act (for the time period from July 2005 to September 27, 2009) and subsection 27(2) of the Act (for the time period from September 28, 2009 to December 2012)?

2. Did the Respondents engage in a distribution of securities without a prospectus in breach of subsection 58(1) of the Act?

3. Did the Respondents engage in fraud in breach of section 55.1 of the Act?

4. Did the Respondents contravene the misrepresentation provisions in subsection 44(3.1) (for the time period July 2005 to June 30, 2007) and section 55.11 of the Act (for the time period July 1, 2007 to December 2012)?

5. Did the Respondents contravene subsection 44(2) of the Act?

6. Did the Respondents contravene subsection 80.1(2) of the Act?

X OVERVIEW OF THE EVIDENCE PRESENTED REGARDING THE THREE PROJECTS

A. Overview of the Legacy Project

Aitkens

[36] The documentary evidence indicates that Aitkens was a director of Legacy Communities Inc. since its inception in 2005 and that his experience in the investment industry began in 1994 at which time he started selling life insurance and providing estate planning services to individuals in Southern Alberta (Exhibit P-15, Tab B, Affidavit of Ron Aitkens, sworn on February 11, 2011 in the matter of the *Companies' Creditors Arrangement Act* and in the matter of Legacy Communities Inc., Airdrie Capital Corporation and Airdrie Country Estates Inc., para. 3).

[37] In his Affidavit, Aitkens indicates that his expansion into the real estate investment business led him to incorporate Foundation Capital Corporation ("FCC") and Harvest Capital through which commercial real estate investment opportunities were offered to investors. He also indicates that he was involved, through various corporate entities including FCC and Harvest Capital in syndicating approximately 25 commercial and/or retail real estate development and other investment opportunities in Alberta and Ontario (Exhibit P-15, Tab C, Affidavit of Ron Aitkens, sworn on February 11, 2011 in the matter of the *Companies' Creditors Arrangement Act* and in the matter of Legacy Communities Inc., Airdrie Capital Corporation and Airdrie Country Estates Inc. para. 4).

Legacy Communities Inc.

[38] The corporate records in evidence (Exhibit P-9, Tab "E" Alberta Corporate Registration Search) indicate that:

- Legacy Communities Inc. ("**Legacy**") was incorporated in Alberta on June 7, 2005;
- the registered office of Legacy was 420 – 1021 10th Avenue SW Calgary, Alberta;
- the directors of Legacy were Aitkens and [redacted] of Burlington, Ontario; and
- the voting shareholders of Legacy were Aitkens with 40% percent of the voting shares and Eyelogic Systems Inc. ("**Eyelogic**") with 60% of the voting shares.

Purchase of the Legacy Lands

[39] The lands which are the subject of the Legacy Project consist of approximately 500 acres located four miles west of the Calgary city limits, on Highway 8, in close proximity to the Glencoe Golf and Country Club and Elbow Valley Estates ("the **Legacy Lands**") (Exhibit P-15, Legacy, Tab B, Affidavit of Ron Aitkens, sworn February 11, 2011, para. 8).

[40] On May 14, 2005, Aitkens on behalf of a company to be incorporated entered into a Commercial Real Estate Purchase Contract (the "**Legacy Contract**") with 921888 Alberta Ltd. and 1109411 Alberta Ltd. (**"1109411"**) for the purchase of parcels of the Legacy Lands, shares in 1109411 and all of 1109411's rights and obligations pursuant to an Options to Purchase Agreement between [redacted] and [redacted], effective July 31, 2004, regarding the remaining Legacy Lands (the "**Options Agreement**"). The total purchase price for the Legacy Contract was $27,000,000. Although there are contradictions in the Legacy Contract regarding the breakdown of the purchase price, page 7 of the Legacy Contract provides that the purchase price was to be paid as follows: $8,900,000 seller financing, $12,500,000 other value, $5,600,000 to be paid by the buyer (Exhibit P-2, Tab "Legacy Lands").

[41] The Options Agreement provided that 1109411 would buy 100 acres from the [redacted] on or before August 15, 2009 for $3,500,000. It also provided that the remainder of the lands could be purchased by 1109411 for a total sum of $9,000,000 if it exercised its option to do so by July 31, 2017. (Exhibit P-2, Tab "Legacy Lands", Options to Purchase Agreement made effective the 31st day of July, 2004 between [redacted] and [redacted] and 1109411)

Legacy's Offering Memoranda

[42] Legacy issued its first Offering Memorandum on July 15, 2005 ("**OM #1**"), pursuant to which it sought to raise between $2,000,000 and $35,000,000 (Exhibit P-2, Tab OM #1). OM #1 offered securities for sale in the form of Units, which were comprised of one (1) Class B Non-Voting Common Share and one (1) 6% fixed rate cumulative, redeemable, retractable bond. Each Unit was priced at $100, and the minimum subscription was $10,000 (100 Units). The final closing date for the sale of the Units was July 15, 2006. The bonds were RRSP eligible and redeemable on December 31, 2011. Eyelogic was given voting control of Legacy's voting shares under a Management Services Agreement between Legacy and Eyelogic, dated July 20, 2005, to ensure the bonds issued were qualified RRSP investments (the "**Legacy Eyelogic Agreement**") (Exhibit P-2, Tab "Eyelogic Agreement").

[43] Legacy issued its second Offering Memorandum on September 15, 2006 ("**OM #2**"), pursuant to which it sought to raise between $0 and $25,000,000 (Exhibit P-2, Tab OM #2). OM #2 offered securities for sale in the form of Units, which were comprised of one (1) Class B Non-Voting Common Share and one (1) 6% fixed rate redeemable, retractable bond. Each Unit was priced at $100, and the minimum subscription was $10,000 (100 Units). The final closing date for the sale of the Units was August 31, 2007. The bonds were RRSP eligible and redeemable on December 31, 2011. RRSP eligibility was drawn from Eyelogic's control of Legacy's voting shares pursuant to the Legacy Eyelogic Agreement.

[44] Legacy issued its third and final Offering Memorandum on October 29, 2007 ("**OM #3**"), pursuant to which it sought to raise between $0 and $11,000,000 (Exhibit P- 2, Tab "OM #3"). OM #3 offered securities for sale in the form of Units, which were comprised of one (1) Class B Non-Voting Common Share and one (1) 6% fixed rate redeemable bond. Each Unit was priced at $100, and the minimum subscription was $10,000 (100 Units). The final closing date for the sale of the Units was November 30, 2007, or another such date as the Issuer may determine. The

bonds were RRSP eligible and redeemable on December 31, 2012. Once again, RRSP eligibility was drawn from Eyelogic's control of Legacy's voting shares pursuant to the Legacy Eyelogic Agreement.

Amounts Raised in Legacy Project

[45] The documentary evidence submitted by Staff indicates that the three offering memoranda issued by Legacy were utilized to raise approximately $25,720,301.70 from Alberta residents (Exhibit P-2, Tab "ASC Filings") and $4,168,600.00 from Saskatchewan residents (Exhibit P-2, Tab "45-106F1") between October 27, 2005 and September 23, 2008. In total, Legacy raised approximately $35,418,346 from a total number of 1476 investors through the three offering memoranda (Exhibit P-15, Tab "Legacy", "B" at para 20) ("the **Legacy Funds**").

Description of the Legacy Project

[46] The Legacy Project was described in the Executive Summary as providing a "world class real estate investment opportunity, this pristine 503 acre development site is riverside property on the Elbow River, four miles west of Calgary and a short distance to Kananaskis Country" (Exhibit P-2, Tab "Exec. Summary" at page 3). The Executive Summary also indicates "This investment is intended to position the investor in an area which has tremendous opportunity for growth and increased land values… Explosive appreciation can take place when bare land is developed into residential property as cities expand". (Exhibit P-2, Tab "Exec. Summary" at page 5).

Description of use of Legacy Lands

[47] OM #1 further indicates that the highest and best use of the Legacy Lands is for redesignation and development into rural residential subdivisions (Exhibit P-2, Tab "OM #1", Part 1.3.1(a)). OM #2 states that Legacy intends to employ 1 of 4 different strategies, 3 of which involve redesignation or development of the Legacy Lands (Exhibit P-2, Tab "OM #2", Part 2.2.2). OM #3 described Legacy as being in the business of "purchasing, subdividing, developing and selling the [Legacy Lands]" (Exhibit P-2, Tab "OM #3", Part 2.1).

The FCC Agreements

[48] In conjunction with the issuance of the three above offering memoranda, Legacy entered into management services agreements with FCC wherein FCC agreed to provide marketing, advertising, sales services and management services to assist Legacy in relation to the offerings (the "**FCC Agreements**") (Exhibit P-2, Tab "FCC Agreements"). The FCC Agreements, dated July 15, 2005, September 15, 2006, and October 29, 2007, respectively, were signed by Aitkens on behalf of both parties and contained identical terms, including the following:

> RECITALS:
>
> B. The Issuer intends on focusing as an intermediary private real estate lender by providing bridge and mezzanine financing (the Loans") for acquisitions, developments and interim financing requirements of real estate developers, home

owners, private companies, public companies, and individuals (the Borrowers). The Issuer anticipated that the Loans will be high yield and short term in nature. The Issuer may be compensated by any one of or any combination of commitment fees, interest, equity, and Profit participation with respect to loans advanced to the Borrowers.

Use of Legacy Funds

The HCMI Agreement

[49] On December 15, 2005, Legacy entered into an Investment Agreement with Harvest Capital (the "**HCMI Agreement**") (Exhibit P-2, Tab "HCMI Agreement"). The HCMI Agreement was signed by Aitkens on behalf of both parties and contained the following provision:

> **REASON FOR THE AGREEMENT**
>
> 1/Legacy Communities Inc. has raised capital on behalf of investors in order to invest in certain properties in the Calgary area. This property has approximately 503 acres and is in close proximity to the City of Calgary on Highway 8.
>
> 2/The purchase contract has a certain amount of flexibility, in that it includes a long term Option to Purchase, which must be exercised by July 2017.
>
> 3/There is a potential risk that just investing all of the capital in the 503 acres may offer more risk than necessary. If the property goes down in value the bonds would be worth less than the original investment.
>
> 4/Legacy Communities Inc. believes that spreading the capital to other investments may help to lower the risk. For this reason when writing the Offering Memorandum, there was a clause that was included in the Offering Memorandum under "Reallocation. The Issuer intends to spend the net proceeds as stated. The Issuer will reallocate funds only for sound business reasons."
>
> 5/Any capital that will be invested on behalf of Legacy Communities Inc. will be under the same terms as the Offering Memorandum.
>
> 6/Legacy Communities Inc. has an obligation to pay 6% interest to its investors as well as a 30% profit interest in the deal.

Promissory Notes

[50] Between 2007 and 2008, a series of promissory notes were issued to Legacy:

- a Promissory Note dated September 24, 2007, pursuant to which Harvest Capital promised to pay Legacy $4,924,880, plus interest (Exhibit P-2, Tab "Promissory Notes"). The Promissory Note states that its purpose is to invest capital in a piece of property located on Isla del Rey, Panama, and is for "the express purpose of investing principal for Legacy Communities Inc". The Promissory Note is signed by Aitkens on behalf of Harvest Capital;

- a Promissory Note dated September 24, 2007 pursuant to which Harvest Capital, thorough its affiliate, 1252064, promised to pay Legacy $7,002,800 plus interest (Exhibit P-2, Tab "Promissory Notes"). The Promissory Note states that it is for "the express purpose of investing principal for Legacy Communities Inc". The Promissory Note is signed by Aitkens on behalf of all of the parties;

- a Promissory Note dated December 20, 2007, pursuant to which Harvest Capital, though its affiliate, 1252064, promised to pay Legacy $2,723,000 plus interest (Exhibit P-2, Tab "Promissory Notes"). There is a contradiction in this Promissory Note as the amount is written to be both $2,608,723 and $2,723,000. The Promissory Note states that its purpose is to invest capital in a piece of property located by Balsam Lake, Ontario and is for "the express purpose of investing principal for Legacy Communities Inc". The Promissory Note is signed by Aitkens on behalf of Harvest Capital;

- a Promissory Note dated December 20, 2007, pursuant to which Harvest Capital, through its affiliate, 1252064, promised to pay Legacy $2,608,633 plus interest (Exhibit P-2, Tab "Promissory Notes"). The Promissory Note states that its purpose is for "the express purpose of investing principal for Legacy Communities Inc". The Promissory Note is signed by Aitkens on behalf of all of the parties;

- a Promissory Note dated June 27, 2008, pursuant to which Harvest Capital, through its affiliate, 1252064, promised to pay Legacy $1,350,000 plus interest (Exhibit P-2, Tab "Promissory Notes"). The Promissory Note states that its purpose is to invest capital in a shopping centre in Red Deer, Alberta, known as Liberty Crossing, and is for "the express purpose of investing principal for Legacy Communities Inc". The Promissory Note is signed by Aitkens on behalf of 1252064;

- a Promissory Note dated June 27, 2008, pursuant to which Harvest Capital, through its affiliate, 1252064, promised to pay Legacy $1,100,000 plus interest (Exhibit P-2, Tab "Promissory Notes"). The Promissory Note states that its purpose is for "the express purpose of investing principal for Legacy Communities Inc". The Promissory Note is signed by Aitkens on behalf of all of the parties; and

- a Promissory Note dated December 30, 2008, pursuant to which Harvest Capital, through its affiliate, 1252064, promised to pay Legacy $590,000 plus interest (Exhibit P-2, Tab "Promissory Notes"). The Promissory Note states that its purpose is to invest capital in a shopping centre in Red Deer, Alberta, known as Liberty Crossing, and is for "the express purpose of investing principal for Legacy Communities Inc.". The Promissory Note is signed by Aitkens on behalf of 1252064.

[51] [redacted] testified that in accordance with the corporate bank records for Legacy which were tendered in evidence by Staff (Exhibits P-12, Tab "A") the amounts shown on the promissory notes do not directly coincide with any transfers made by Legacy on the dates indicated on the promissory notes.

Transfers from Legacy to 1252064

[52] The documentary evidence presented by Staff (Exhibit P-11 and Exhibit P-12) establishes that the following transfers were made from Legacy to one of Aitkens' personal companies, 1252064:

Date	Amount
September 24, 2007	$4,664,880.00
October 3, 2007	$400,000.00
November 14, 2007	$5,300,000.00
November 20, 2007	$100,000.00
January 15, 2008	$150,000.00
TOTAL:	**$10,614,880.00**

Transfers back from 1252064 to Legacy

[53] The documentary evidence presented by Staff (Exhibit P-11 and Exhibit P-12) establishes that the following money was transferred back to Legacy from 1252064:

Date	Amount
April 14, 2008	$400,000.00
August 19, 2009	$200,000.00
TOTAL:	**$600,000.00**

Transfers from Legacy to 1330075

[54] The documentary evidence presented by Staff (Exhibit P-12 and Exhibit P-13) also establishes that the following transfers were made from Legacy to another one of Aitkens' personal companies, 1330075, none of which was returned:

Date	Amount
March 6, 2008	$1,500,000.00
April 7, 2008	$500,000.00
TOTAL:	**$2,000,000.00**

Panama Joint Venture Agreement

[55] On July 12, 2007, a Joint Venture Agreement was entered into between 1252064 and Punta Gorda Holding Corp. dated July 12, 2007 (the "Panama Joint Venture Agreement") (Exhibit P-2, Tab "Panama"). Under that Agreement, 1252064 was to pay Punta Gorda Holdings Corp. ("Punta") a total of $7,000,000 USD for the purpose of facilitating the development of 50 hectares of land located on Isla Del Rey.

[56] Staff tendered a wire transfer document into evidence (Exhibit P-2, Tab "Panama") showing that a total of $4,664,880 CAD was sent by 1252064 to Castro & Berguido International Inc., located in Panama, on September 26, 2007. The bank records tendered in evidence by Staff (Exhibit P-11 and P-12) show that on September 24, 2007, only two days prior to this transfer, a transfer in the same amount was made from Legacy to 1252064.

[57] [redacted] testified that for the purposes of the investment in Panama, Legacy Funds in the amount of $4,664,880 were transferred to Punta pursuant to the Panama Joint Venture Agreement. He also testified that the Legacy investors were never notified about the transfer of the Legacy Funds to Punta.

Purchase of Trout Farm Water Licence

[58] On October 2, 2007, Legacy entered into a "Purchase and Sale Agreement - Transfer of an Allocation of Water and Redesignation of Use Pursuant to the *Water Act*" with Allen's Trout Farm Inc. (Exhibit P-2, Tab "Actual Water License"). Pursuant to the Agreement, Legacy bought a water allocation of 500-acre-feet of water per year to be drawn from the Elbow River for $1,000,000.

Purchase of Granum Water Licence

[59] On September 23, 2008, 1330075 purchased from Ostrich Land Ltd ("**Ostrich**") certain lands located near Granum, in the Municipal District of Willow Creek, Alberta (the "**Granum Lands**") for a purchase price of $825,000. (Exhibit P-2, Tab "075 Water License", Transfer of Land).

[60] [redacted] testified that the reason that 1330075 purchased the Granum Lands from Ostrich was because Aitkens was interested in building a truck stop on the property.

[61] On October 15, 2008, a water licence attached to the Granum Lands (the "**Granum water licence**") was transferred from Ostrich to 1330075. The Granum water licence allowed the holder to take up to 184 acre-feet of water per year from the Willow Creek.

[62] On the same day, Legacy entered into a Purchase and Sale Agreement, whereby Legacy purchased the Granum water licence from 1330075 for $950,000 (Exhibit P-2, Tab "075 Water Licence", Purchase and Sale Agreement, dated October 15, 2008). Pursuant to the agreement, Legacy purchased the water rights alone and did not purchase the Granum Lands. The purchase price for the Granum water licence was payable as follows: $825,000 upon closing, while the remaining $125,000 was payable over the following three years.

[63] On July 27, 2010, the Granum Lands were transferred from 1330075 to Harvest Group for the consideration of one dollar (Exhibit P-2, Tab "075 Water Licence", Transfer of Land"). The Ninth Report of the Monitor, dated August 30, 2013, indicates as follows:

i. The money used to purchase the Granum Lands was advanced by Legacy. In return Legacy was charged an additional $125,000 and received only the right to water rights associated with the Granum Lands. The $125,000 is shown here as a Lift, however it was in fact never

> paid by Legacy and remains a receivable on 133's books and is unlikely to be recovered. The Granum Lands have since been transferred to HGGP [Harvest Group] for nominal consideration;
>
> (Exhibit P-19, Ninth Report of the Monitor, dated August 30, 2013, page 32).

[64] [redacted] and [redacted] testified that the Granum Lands were not on the same watershed as the Legacy Lands, and as such the Granum water licence could not be transferred to the Legacy Lands. [redacted] testified that the Granum Lands and the Legacy Lands were nowhere near each other, and, more importantly, were located on different watersheds. He suggested that at best, Legacy could take water from the Granum Lands and physically move that water to the Legacy Lands.

Legacy's Purchase of Liberty Crossing Partnership Units

[65] On February 3, 2009, Legacy became the registered owner of 59 Limited Partnership Units in the capital of the Liberty Crossing Limited Partnership (Exhibit P-2, Tab "Liberty Crossing").

Guiding Mind of Legacy, 1252064, 1330075, Harvest Capital and Harvest Group

[66] Staff submit that Eyelogic's involvement in Legacy as controlling shareholder was merely an "illusion". [redacted] testified that notwithstanding Eyelogic's control over the voting shares of Legacy, Aitkens had sole access to the bank account of Legacy and that Aitkens was the guiding mind of and controlled Legacy. The Legacy Eyelogic Agreement indicates that Eyelogic was given voting control of Legacy to ensure that the Bonds issued by Legacy qualified as Registered Retirement Savings Plan investments (Exhibit P-2, Tab "Eyelogic Agreement").

[67] While the offering memoranda referred to Eyelogic's role as including organizing the annual shareholder meeting and voting its shares at shareholder meetings, [redacted] testified that Eyelogic did not organize a single shareholder meeting for Legacy. [redacted] also testified that Aitkens directed the actions of Legacy. All of the contracts entered into by Legacy such as the Promissory Notes (Exhibit P, Legacy, Tab "Promissory Notes"), the acquisition of a Water Licence by Legacy ("Exhibit P, Legacy, Tab "Actual Water License"), the HCMI Agreement (Exhibit P, Tab "HCMI Agreement") and the FCC Agreement (Exhibit P, Tab "FCC Agreement") were all executed by Aitkens on behalf of Legacy. There was also other evidence confirming that Aitkens directed the actions of Legacy and was responsible for making the decisions at Legacy.

[68] The documentary evidence and testimony of [redacted] and [redacted] also support Staff's allegation that at all relevant times, Aitkens was the sole directing mind of each of 1252064, 1330075, Harvest Capital and Harvest Group and that each of the Corporate Respondents was acting on the direction of, or as agent, representative and/or alter ego of, Aitkens, with his full knowledge and consent. The evidence presented by Staff indicates that Aitkens had sole access to the bank accounts and executed the various agreements and transfers on behalf of the Corporate Respondents. We accept Staff's allegation that Aitkens was the guiding mind of each of the Corporate Respondents, 1252064, 1330075, Harvest Capital and Harvest Group.

[69] 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. Similarly, "authority over the acts of a corporation generally rests, ultimately, with its directors and officers – who in consequence will bear responsibility for having approved or condoned (authorized, permitted or acquiesced in) those Acts" (See *Aurora, Re*, 2011 ABASC 501 at para. 199). Therefore, directors and officer of corporations may be held responsible for, or to have authorized, permitted and acquiesced in the conduct of corporate respondents. This concept is reflected throughout the Act.

B. Overview of the Spruce Ridge Project

[70] The entities and individuals involved in the Legacy Project, Spruce Ridge Project and Railside project were connected in various ways. A number of the individuals and entities involved with the Legacy Project were also connected with the Spruce Ridge Project and Railside Project. The evidence established that the three projects involved members of the same management and sales teams and many of the investors invested in multiple offerings associated with more than one of the projects. As well, the offering memoranda pursuant to which funds were raised were similarly structured (Exhibit P-15, Spruce Ridge, Tab "B", Affidavit of Ronald Aitkens sworn on August 23, 2012, para. 7).

Spruce Ridge Lands

[71] The lands which make up the Spruce Ridge Project consist of seven separate parcels of land totalling approximately 923 acres in the Municipal District of Foothills, located five miles southwest of the City of Calgary boundary in close proximity to the intersection of Highway 22 and Highway 22x (the "**Spruce Ridge Lands**") (Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 26).

Spruce Ridge Capital

[72] The corporate records in evidence (Exhibit P-9, Tab "F" Alberta Corporate Registration Search for Spruce Ridge Capital Inc.) indicate that:

- Spruce Ridge Capital Inc. ("**Spruce Ridge Capital**") was incorporated in Alberta on September 6, 2007;
- the registered office of Spruce Ridge Capital was 605, 2303 - 4th Street SW Calgary, Alberta;
- the sole director of Spruce Ridge Capital was Aitkens; and
- the voting shareholders of Spruce Ridge Capital were Aitkens with 40% percent of the voting shares and Eyelogic with 60% of the voting shares.

Guiding Mind of Spruce Ridge Capital

[73] [redacted] testified that notwithstanding Eyelogic's control over the voting shares of Spruce Ridge Capital, Aitkens had sole access to the bank account of Spruce Ridge Capital and that Aitkens was the guiding mind and controlled Spruce Ridge Capital. The documentary evidence filed indicates that Eyelogic was given voting control of Spruce Ridge Capital to ensure that the Bonds issued by Spruce Ridge Capital qualified as Registered Retirement Savings Plan investments (Exhibit P-6, Spruce Ridge Capital, Tab "OM", page 2).

[74] [redacted] testified that although the documents provided that Eyelogic's role included organizing the annual shareholder meeting and voting its shares at shareholder meetings, Eyelogic did not organize a single shareholder meeting for Spruce Ridge Capital (Exhibit P-6, Spruce Ridge Capital, Tab "OM", page 2).

[75] Based on all of the evidence before us, we find that Aitkens was the guiding mind of Spruce Ridge Capital at all relevant times.

Spruce Ridge Estates Inc.

[76] The corporate records in evidence (Exhibit P-9, Tab "F" Alberta Corporate Registration Search for Spruce Ridge Estates Inc.) indicate that:

- Spruce Ridge Estates Inc. ("**Spruce Ridge Estates**") was incorporated in Alberta on September 6, 2007;
- the registered office of Spruce Ridge Estates was 605, 2303 - 4th Street SW Calgary, Alberta;
- the directors of Spruce Ridge Estates were Aitkens and [redacted] of Burlington, Ontario; and
- the sole voting shareholder of Spruce Ridge Estates was Aitkens.

Guiding Mind of Spruce Ridge Estates

[77] [redacted] testified that Aitkens had sole access to the bank account of Spruce Ridge Estates and that Aitkens was the guiding mind and controlled Spruce Ridge Estates. Staff submit and we accept that the evidence is clear that Aitkens was the guiding mind of Spruce Ridge Estates at all relevant times.

[redacted]

[78] [redacted] testified that he first came to know Aitkens in 2006 when he approached Aitkens about the development of land he had under contract through his company, Tantalus Projects Ltd. ("**Tantalus**"). He testified that his role in the Spruce Ridge Project was that of

Development Manager (Exhibit P-7, Tab E, Materials Provided by [redacted], dated May 15, 2012).

Purchase of Spruce Ridge Lands from Tantalus

[79] On April 16, 2007, Tantalus and/or its nominee/assignee entered into an Agricultural Real Estate Purchase Contract with [redacted] for the purchase of the Spruce Ridge Lands ("the **Spruce Ridge Lands Purchase Contract**") (Exhibit P-6, SRE Purchase). The purchase price for the Spruce Ridge Lands was $18,932,775. The contract included an obligation to sell 58.8 acres back to [redacted] at a price of $20,500 per acre. (Exhibit P-6, SRE Purchase). Tantalus was owned by [redacted] (Exhibit P-7, Tab E, Materials Provided by [redacted], dated May 15, 2012).

Purchase of Spruce Ridge Lands by 1330075 from Tantalus

[80] In August 2007, the Spruce Ridge Lands Purchase Contract was assigned by Tantalus to 1330075 (Exhibit P-6, Spruce Ridge Estates, SRE Purchase, Assignment Agreement and Exhibit P-7, Tab E, Materials Provided by [redacted], dated May 15, 2012).

Purchase of Spruce Ridge Lands by Spruce Ridge Estates from 1330075

[81] On September 28, 2007, Spruce Ridge Estates acquired the Spruce Ridge Lands from 1330075 pursuant to a purchase agreement. Pursuant to the terms of the purchase agreement, Spruce Ridge Estates agreed to purchase the Spruce Ridge Lands from 1330075 for $64,715,000 (Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 39).

Spruce Ridge Capital Offering Memorandum

[82] Spruce Ridge Capital issued an Offering Memorandum on October 1, 2007 ("**SRC OM**"), pursuant to which it sought to raise between $1,000,000 and $85,500,000 (Exhibit P-6, Spruce Ridge Capital, Tab "OM"). The SRC OM offered securities for sale in the form of 6% fixed rate redeemable bonds. Each bond was priced at $100, and the minimum subscription was $10,000 (100 bonds). The final closing date for the minimum offering was December 31, 2007.

[83] The bonds were RRSP eligible and redeemable on December 31, 2012. Part 2.2 of the SRC OM indicates that "Voting Control of the Corporation by Eyelogic is to ensure that the Bonds issued pursuant to this Offering are a qualified Registered Retirement Savings Plan ("RRSP") investment (Exhibit P-6, Spruce Ridge Capital, Tab OM, page 2).

[84] Part 2.12 of the SRC OM indicates that Spruce Ridge Capital "has entered into an agreement with Eyelogic dated October 1st, 2007" and that "as of the date of this Offering, Eyelogic owns 60% of the issued and outstanding Class A Preferred shares in the Corporation" (Exhibit P-6, Spruce Ridge Capital, Tab OM, page 8 and Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 40).

Spruce Ridge Estates Offering Memorandum

[85] Spruce Ridge Estates issued an Offering Memorandum on October 1, 2007 ("**SRE OM**"), pursuant to which it sought to raise between $700 and $42,150. The SRE OM offered securities for sale in the form of Class B Non-Voting Common Shares. Each share was priced at $0.01. Investors acquired an entitlement to purchase Spruce Ridge Estates shares by first purchasing Spruce Ridge Capital bonds. An investor's entitlement to purchase Spruce Ridge Estates shares depended on at what point during the offering they bought Spruce Ridge Capital bonds. As more investors bought Spruce Ridge Capital bonds, each new investor would receive fewer shares of Spruce Ridge Estates per bond: starting at a ratio of seven Spruce Ridge Estates shares per Spruce Ridge Capital bond at the beginning of the offering, which was reduced to three Spruce Ridge Estates shares per Spruce Ridge Capital bond at the end of the offering. The final closing date for the minimum offering was December 31, 2007.

The FCC Agreements

[86] In conjunction with the issuance of the SRC OM and the SRE OM, Spruce Ridge Capital and Spruce Ridge Estates both entered into Management Services Agreements with FCC on October 1, 2007, wherein FCC agreed to provide marketing, advertising, sales services and management services to assist them in relation to the offerings (Exhibit P-6, Tab "FCC Agreements"). The FCC Agreements were signed by Aitkens on behalf of both parties and contained identical terms, including the following:

> RECITALS:
>
> B. The Issuer intends on focusing as an intermediary private real estate lender by providing bridge and mezzanine financing (the Loans") for acquisitions, developments and interim financing requirements of real estate developers, home owners, private companies, public companies, and individuals (the Borrowers). The Issuer anticipated that the Loans will be high yield and short term in nature. The Issuer may be compensated by any one of or any combination of commitment fees, interest, equity, and Profit participation with respect to loans advanced to the Borrowers.

Amounts Raised in Spruce Ridge Project

[87] A total of approximately $49,264,586 was raised pursuant to the SRC OM from a total of 1867 investors (Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 31). A total of $28,799.32 was raised pursuant to the SRE OM (Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 35).

[88] The documentary evidence submitted by Staff indicates that, in total, the SRC and SRE OM were used to raise approximately $49,293,385.32 and that of that amount approximately $4,177,585.77 came from Saskatchewan investors (Exhibit P-6, Tab "Spruce Ridge Capital", "F45-106F1" and also Tab "Spruce Ridge Estates", "F45-106F1).

Description of the Spruce Ridge Project

[89] The Spruce Ridge Project was described as being a real estate development including "destination developments such as an 18-hole PGA class golf course, convention meeting oriented hotel, and other supporting amenities" (Exhibit P-6, "Brochure").

Description of Use of Proceeds in OM

[90] The SRC OM and the SRE OM contained very clear direction as to what investor funds would be spent on (Exhibit P-6, Tab "Spruce Ridge Capital", "OM", page 1 and (Exhibit P-6, Tab "Spruce Ridge Estates", "OM", page 1).

[91] Part 1.2 of the SRC OM indicates that investment dollars would go towards either: allowing Spruce Ridge Estates to purchase the Spruce Ridge Lands; working capital; or to pay for administrative and operating expenses incurred by the Corporation (Exhibit P-6, Tab "Spruce Ridge Capital", "OM", page 1).

[92] Part 1.2 of the SRE OM similarly states that all of the raised funds are to be put towards the purchase of the Spruce Ridge Lands (Exhibit P-6, Tab "Spruce Ridge Estates", "OM", page 1).

Use of Spruce Ridge Project Funds

Transfers from Spruce Ridge Capital to Spruce Ridge Estates to 1330075

[93] As previously noted, on September 28, 2007, Spruce Ridge Estates acquired the Spruce Ridge Lands from 1330075 for the purchase price of $64,715,000 (Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 39). The documentary evidence presented by Staff (Exhibit P-12 and Exhibit P-13) establishes that a long series of transfers were made from Spruce Ridge Capital to Spruce Ridge Estates to 1330075:

Date	Amount (SRC to SRE)	Amount (SRE to 1330075)
November 19, 2007	$850,000	$845,000.00
December 5, 2007	$1,023,800.00	$1,000,000.00
December 21, 2007	$1,000,000.00	$1,000,000.00
January 25, 2008	$1,000,000.00	$1,000,000.00
February 4, 2008	$2,000,000.00	$2,000,000.00
February 22, 2008	$2,000,000.00	$2,000,000.00
March 3, 2008	$3,100,000.00	$3,100,000.00
March 6, 2008	$1,200,000.00	$1,200,000.00
March 13, 2008	$1,300,000.00	$1,300,000.00
April 1, 2008	$1,500,000.00	$1,500,000.00
April 24, 2008	$2,500,000.00	$2,400,000.00
April 30, 2008	$1,260,000.00	$1,260,000.00
May 2, 2008	$100,000.00	$100,000.00
May 7, 2008	$250,000.00	$250,000.00

May 13, 2008	$100,000.00	$100,000.00	
May 23, 2008	$200,000.00	$200,000.00	
May 27, 2008	$2,000,000.00	$2,000,000.00	
May 29, 2008	$3,600,000.00	$3,600,000.00	
June 10, 2008	$2,500,000.00	$2,500,000.00	
June 27, 2008	$2,000,000.00	$2,000,000.00	
July 17, 2008	$100,000.00	$100,000.00	
July 18, 2008	$2,000,000.00	$2,000,000.00	
August 12, 2008	$3,000,000.00	$3,000,000.00	
August 14, 2008	$2,750,000.00	$2,750,000.00	
August 19, 2008	$1,000,000.00	$1,000,000.00	
September 8, 2008	$1,800,000.00	$1,800,000.00	
September 24, 2008	$250,000.00	$249,000.00	
October 2, 2008	$700,000.00	$700,000.00	
November 10, 2008	$100,000.00	$100,000.00	
November 26, 2008	$1,400,000.00	$1,400,000.00	
February 2, 2009	$1,500,000.00	$1,500,000.00	
March 9, 2009	$100,000.00	$75,000.00	(Mar 10, 2009)
April 27, 2009	$100,000.00	$90,000.00	
TOTAL:	**$44,283,800.00**	**$44,119,000.00**	

Transfers back from 1330075 to Spruce Ridge Estates

[94] Of the total amount of $44,119,000 which Spruce Ridge Estates transferred to 1330075, the bank records show that $364,000 of that above amount was transferred back to Spruce Ridge Estates by 1330075, resulting in a net total of $43,755,000.

Transfers from Spruce Ridge Capital to 1330075

[95] The evidence presented by Staff (Exhibit P-11 and Exhibit P-12) establishes that the following transfers were made from Spruce Ridge Capital to 1330075, none of which were returned:

Date	**Amount**
July 18, 2008	$2,000,000.00

Transfers from Spruce Ridge Estates to 1252064

[96] The bank records (Exhibit P-11 and Exhibit P-12) show that the following transfers were made from Spruce Ridge Estates to 1252064:

Date	**Amount**
November 26, 2008	$1,400,000.00
April 27, 2009	$90,000.00
TOTAL:	**$1,490,000.00**

Transfers back from 1252064 to Spruce Ridge Estates

[97] The bank records (Exhibit P-11 and Exhibit P-12) show that the following money was transferred back to Spruce Ridge Estates from 1252064:

Date	**Amount**
July 9, 2008	$50,000.00
August 20, 2010	$100,000.00
TOTAL:	**$150,000.00**

Mortgages

[98] On October 26, 2008, Spruce Ridge Estates granted a mortgage to Spruce Ridge Capital in exchange for $50,000,000 to be lent by Spruce Ridge Capital to Spruce Ridge Estates. The mortgage was signed by Aitkens on behalf of Spruce Ridge Estates (Exhibit P-6, "Spruce Ridge Estates", Tab "SRE/SRC Mortgage").

[99] On the same day, Spruce Ridge Estates granted a mortgage to 1330075 in exchange for $44,715,000 to be lent by 1330075 to Spruce Ridge Estates. The mortgage was signed by Aitkens on behalf of Spruce Ridge Estates (Exhibit P-6, "Spruce Ridge Estates", Tab "SRE/075 Mortgage").

[100] [redacted] testified that although approximately $1,500,000 was spent on commissioning studies and reports and negotiations related to the development of the Spruce Ridge Lands, no development ever took place on the Spruce Ridge Lands.

C. Overview of the Railside Project

[101] A number of individuals and entities involved with the Legacy Project and the Spruce Ridge Project were also connected with the Railside Project.

Railside Lands

[102] The lands which make up the Railside Project consist of two parcels of land totalling approximately 304 acres located alongside the Canadian Pacific Railway's north-south mainline within the town of Millet, approximately 40 kilometres south of Edmonton, Alberta (the "**Railside Lands**") (Exhibit P-15, Railside, Tab B, Affidavit of Ronald Aitkens, sworn on March 15, 2012, para. 26).

Railside Capital

[103] The corporate records in evidence (Exhibit P-9, Tab "G" Alberta Corporate Registration Search for Railside Capital Inc.) indicate that:

- Railside Capital Inc. ("**Railside Capital**") was incorporated in Alberta on February 6, 2008;

- the registered office of Railside Capital was #4, 4002 – 9th Avenue North, Lethbridge, Alberta;

- the sole director of Railside Capital was Aitkens; and

- the voting shareholders of Railside Capital were Aitkens with 40% percent of the voting shares and Eyelogic with 60% of the voting shares.

Guiding Mind of Railside Capital

[104] [redacted] testified that notwithstanding Eyelogic's control over the voting shares of Railside Capital, Aitkens had sole access to the bank account of Railside Capital and that Aitkens was the guiding mind and controlled Railside Capital. The evidence submitted by Staff indicates that Eyelogic was given voting control of Railside Capital to ensure that the Bonds issued by Railside Capital qualified as Registered Retirement Savings Plan investments (Exhibit P-14, Railside Capital, "OM", Part 2.2 on page 2). We find that Aitkens was the guiding mind of Railside Capital at all relevant times.

Railside Industrial Park Inc.

[105] The corporate records in evidence (Exhibit P-9, Tab "G" Alberta Corporate Registration Search for Railside Industrial Park Inc.) indicate that:

- Railside Industrial Park Inc. ("**Railside Industrial**") was incorporated in Alberta on February 6, 2008;

- the registered office of Railside Industrial was #4, 4002 – 9th Avenue North, Lethbridge, Alberta;

- the sole director of Railside Industrial was Aitkens; and

- the sole voting shareholder of Railside Industrial was Aitkens.

Guiding Mind of Railside Industrial

[106] The testimony of [redacted] indicated that Aitkens had sole access to the bank account of Railside Industrial and that Aitkens was the guiding mind and controlled Railside Industrial. We find that Aitkens was the guiding mind of Railside Industrial at all relevant times.

Railside Capital Offering Memorandum

[107] Railside Capital issued an Offering Memorandum on March 3, 2008 ("**RSC OM**"), pursuant to which it sought to raise between $1,125,000 and $35,000,000 (Exhibit P-14, Railside Capital, Tab "OM"). The RSC OM offered securities for sale in the form of 7% fixed rate

redeemable bonds. Each bond was priced at $100.00 and the minimum subscription was $10,000.00 (100 bonds). The final closing date for the minimum offering was March 31, 2008.

[108] The bonds were RRSP eligible and redeemable on April 30, 2012. Part 2.2 of the RSC OM indicates that "Voting Control of the Corporation by Eyelogic is to ensure that the Bonds issued pursuant to this Offering are a qualified Registered Retirement Savings Plan ("RRSP") investment" (Exhibit P-14, Railside Capital, Tab "OM", page 2).

[109] Part 2.12.2 of the RSC OM indicates that Railside Capital "has entered into an agreement with Eyelogic dated March 3, 2008" and that "as of the date of this Offering, Eyelogic owns 60% of the issued and outstanding Class A Preferred shares in the Corporation" (Exhibit P-14, Railside Capital, Tab OM, page 8 and Exhibit P-15, Railside, Tab B, Affidavit of Ronald Aitkens, sworn on March 15, 2012, para. 21).

Railside Industrial Offering Memorandum

[110] Railside Industrial issued an Offering Memorandum on March 3, 2008 (the "**RSIP OM**"), pursuant to which it sought to raise between $1,125 and $35,000 (Exhibit P-14, Railside Industrial Park, Tab "OM"). The RSIP OM offered securities for sale in the form of Class B Non-Voting Common Shares. Each share was priced at $0.10. The final closing date for the minimum offering was March 31, 2008.

Amounts Raised in Railside Project

[111] A total of approximately $34,199,100 was raised pursuant to the RSC OM from a total of 1482 investments (Exhibit P-15, Railside, Tab B, Affidavit of Ronald Aitkens, sworn on March 15, 2012, paragraph 13 and also Exhibit P-18, [redacted], Tab "A", Seventh Report of the Monitor, para 31 on page 8). The documentary evidence submitted by Staff indicates that in total the RSC and RSIP OM were used to raise approximately $34,199,100 and of that amount approximately $2,059,957.90 came from Saskatchewan investors (Exhibit P-14, Tab "Railside Capital", "45-106F1" and also Tab "Railside Industrial Park", "45-106F1").

Description of the Railside Project

[112] The Railside Project was described as being the acquisition and continued development of a commercial business park known as the Railside Lands (Exhibit P-14, Tab "Brochure" and also Exhibit P-14, Tab "Executive Summary").

Description of Use of Proceeds in OM

[113] The RSC OM and RSIP OM indicated that funds would be spent entirely on the Railside Project. Part 1.2 of the RSC OM contains a breakdown of how the net proceeds are to be spent (Exhibit P-14, Tab "Railside Capital", "OM", page 1). Similarly, Part 1.2 of the RSIP OM similarly contains a breakdown of how the net proceeds are to be spent (Exhibit P-14, Tab "Railside Industrial Park", "OM", page 1).

[114] Part 2.7 of the RSIP OM similarly states that:

> Development of Business
>
> To facilitate the acquisition of the Lands, the Corporation has arranged to borrow funds from RSCI. See Item 2.11.2 Loan Agreement with Railside Capital Inc.
> Upon acquisition of the Lands, the Corporation intends to continue with the development of the lands.
>
> (Exhibit P-14, Tab "Railside Industrial Park", "OM", page 6).

The FCC Agreement

[115] Railside Industrial entered into a Management Services Agreement with FCC on March 3, 2010 (Exhibit P-14, Railside Industrial Park, Tab "FCC Agreements"). The Agreement was signed by Aitkens on behalf of both parties and contained the following:

> RECITALS:
>
> B. The Issuer intends on focusing as an intermediary private real estate lender by providing bridge and mezzanine financing (the Loans") for acquisitions, developments and interim financing requirements of real estate developers, home owners, private companies, public companies, and individuals (the Borrowers). The Issuer anticipated that the Loans will be high yield and short term in nature. The Issuer may be compensated by any one of or any combination of commitment fees, interest, equity, and Profit participation with respect to loans advanced to the Borrowers.

Use of Railside Project Funds

Purchase of Railside Lands by Railside Industrial from 1252064

[116] On February 11, 2008, Railside Industrial purchased the Railside Lands from 1252064, pursuant to a Commercial Real Estate Purchase Contract (Exhibit P-14, "Railside Industrial Park", Tab "RSP Purchase – 064"). The purchase price for the Railside Lands was $22,500,000.

Mortgage

[117] On June 30, 2008, Railside Industrial granted a mortgage to Railside Capital in exchange for $34,199,100 to be lent by Railside Capital to Railside Industrial. The mortgage was signed by Aitkens on behalf of Railside Industrial (Exhibit P-14, "Railside Industrial Park", Tab "RSP/RSC Mortgage).

Promissory Note

[118] A Promissory Noted dated July 1, 2008 was issued by Railside Industrial, pursuant to which Railside Industrial promised to pay Railside Capital on or before April 30, 2012, the sum of $34,199,100 plus interest at the rate of 7.5 % per annum. The Promissory Note was signed by Aitkens on behalf of Railside Industrial.

XI ANALYSIS OF THE EVIDENCE AND THE ALLEGATIONS OF STAFF

1. Did the Respondents trade in securities without registration in breach of clause 27(1)(a) of the Act (for the time period from July 2005 to September 27, 2009, 2008) and subsection 27(2) of the Act (for the time period from September 28, 2009 to December 2012)?

Registration Requirement: Section 27

[119] The registration requirement found in section 27 of the Act is one of the cornerstones of the regulatory framework of the Act. Registration serves an important gate-keeping function by ensuring that only properly qualified and suitable individuals are permitted to be registrants and to trade with or on behalf of the public. Registration requirements impose proficiency, good character and ethical standards on individuals and companies trading in and advising on securities.

Importance of Registration in the Regulatory Context

[120] Participants who engage in the securities industry do so voluntarily and for their own profit. In exchange for the privilege of participating in the Saskatchewan capital markets, individuals and companies must comply with Saskatchewan's securities laws. Compliance is paramount, ensuring the protection of the public and the integrity of the capital markets.

[121] In *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3, the Supreme Court of Canada stated at para 77:

> [77] . . . [A]lthough activity in the securities sphere is of immense economic value to society generally, it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust. Participants must conform with the extensive regulations and requirements set out by the provincial securities commissions...

Section 27: Prior to September 28, 2009

[122] As the Act was amended on September 28, 2009, it is appropriate to consider the wording of the Act both before and after the amendment came into effect.

[123] Prior to September 28, 2009, subsections 27(1) and (2) of the Act read:

> **Registration for trading**
> **27**(1) Subject to the regulations, no person or company shall:
>
> (a) trade in a security or exchange contract unless the person or company is:
> (i) registered as a dealer; or

(ii) registered as a salesperson, a partner or an officer of a registered dealer and is acting on behalf of the dealer;

(b) Repealed.

(c) act as an adviser unless the person or company is:
(i) registered as an adviser; or
(ii) registered as an employee, as a partner or as an officer of a registered adviser and is acting on behalf of the adviser;

and, where the registration is subject to terms and conditions, the person or company complies with those terms and conditions.

(2) Repealed.

Section 27: On and after September 28, 2009

[124] On September 28, 2009, subsections 27(1) and (2) of the Act were amended to read:

Registration for trading
27(1) In this section:

(a) "chief compliance officer" means chief compliance officer as defined in the regulations;

(b) "ultimate designated person" means ultimate designated person as defined in the regulations.

(2) No person or company shall:

(a) act as a dealer or underwriter unless the person or company:
(i) is registered as a dealer; or
(ii) is registered as a representative of a registered dealer and is acting on behalf of the dealer;

(b) act as an adviser unless the person or company:
(i) is registered as an adviser; or
(ii) is registered as a representative of a registered adviser and is acting on behalf of the adviser; or

(c) act as an investment fund manager unless the person or company is registered as an investment fund manager.

[125] The predecessor provision clause 27(1)(a) of the Act prohibits a person or company from "trading in a security" if not registered to do so, unless an exemption applies. This provision is relevant to the Respondents alleged trading without registration between July 2005 and September 2009.

[126] The successor provision subsection 27(2) of the Act prohibits a person or company from acting as a "dealer" or "adviser" if not registered to do so, unless an exemption applies.

[127] On September 28, 2009, the definition of "dealer" in clause 2(1)(n) of the Act was amended to read:

> (n) **"dealer"** means a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities or exchange contracts as principal or agent";

[128] As part of the same amendments to the Act, a definition of "adviser" was added in clause 2(1)(a.1) to read:

> (a.1) **"adviser"** means a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising another as to the investing in or the buying or selling of securities or exchange contracts"

[129] By virtue of the reference to "trading in securities" in the definition of "dealer", the successor provision subsection 27(2), like the predecessor provision clause 27(1)(a), refers to a trade or trading in a security.

[130] The term "trade" is defined broadly in clause 2(1)(vv) as follows:

> (vv) **"trade"** includes:
>
> > (i) any transfer, sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in subclause (iv), a transfer, pledge, mortgage or encumbrance of securities for the purpose of giving collateral for a bona fide debt;
> > . . .
> >
> > (v) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of anything mentioned in subclauses (i) to (iv);

[131] The successor provision subsection 27(2) is relevant to the Respondents alleged trading without registration after September 2009. It imposes a "business trigger" test as a result of the reference in the definition of "dealer" to "engaging in or holding himself, herself or itself out as engaging in the business of trading in securities". Section 1.3 of Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**CP31-103**") offers guidance on the concept of "engaging in the business", citing such indicia as:

- engaging in activities similar to those of a registrant;
- directly or indirectly carrying on such activities with repetition, regularity or continuity;
- being, or expecting to be, remunerated or compensated for such activities; and
- directly or indirectly soliciting securities transactions.

[132] "Security" is broadly defined in clause 2(1)(ss) of the Act. At all relevant times, the definition of security has included any bond or share.

[133] The definition of "trade" in clause 2(1)(vv) of the Act is also broadly defined and includes the following five different categories of "acts in furtherance" of trading: (1) an act; (2) an advertisement; (3) a solicitation; (4) any conduct; or (5) a negotiation. The definition of trade includes not only a "sale or disposition of a security for valuable consideration" but also "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of a trade. Solicitation or direct contact with investors is not required for an act to constitute an act in furtherance of a trade. A range of activities may constitute acts in furtherance of a trade, including providing promotional material about an investment, advertising that proposes selling securities and accepting investor's money.

[134] Accordingly, to find a contravention of section 27, we must conclude from the evidence that:

- there was a security as defined in the Act;
- there was a trade as defined in the Act in relation to that security;
- in respect of an activity on or after September 28, 2009, the person or company engaged in or held itself out as engaging in the business of trading in securities; and
- the person was not registered and no exemptions from the requirements to be registered were available.

[135] The evidence is that three offering memoranda were issued by Legacy and circulated by Aitkens between 2005 and 2007. Legacy issued approximately 41,686 redeemable bonds and non-voting shares in Legacy to residents of Saskatchewan from October 27, 2005 to September 23, 2008. (Exhibit P-2, Tab "45-106F1"). In total, approximately $4,168,600 was raised from Saskatchewan residents under these three offering memoranda (Exhibit P-15, Tab "Legacy", "B" at para. 20).

[136] [redacted] testified that Aitkens approved the wording in the brochures, executive summaries and the three offering memoranda. We concluded earlier from all of the evidence that Aitkens was the guiding mind of and controlled Legacy. He directed the actions of Legacy and authorized, permitted and acquiesced in the conduct of Legacy at all relevant times.

[137] The evidence is that an offering memorandum was issued by Spruce Ridge Capital on October 1, 2007 and circulated by Aitkens. Spruce Ridge Capital issued approximately 41,743 fixed rate, renewable, redeemable, retractable bonds in Spruce Ridge Capital to residents of Saskatchewan from November 8, 2007 to March 2, 2009 (Exhibit P-6, Tab "Spruce Ridge Capital, "45-106F1").

[138] The evidence is that an offering memorandum was issued by Spruce Ridge Estates on October 1, 2007 and circulated by Aitkens. Spruce Ridge Estates issued approximately 238,577

Class B non-voting shares in Spruce Ridge Estates to residents of Saskatchewan from November 8, 2007 to March 2, 2009 (Exhibit P-6, Tab "Spruce Ridge Estates", "F45-106F1).

[139] In total, approximately $4,177,585.77 was raised from Saskatchewan investors under the Spruce Ridge Capital and Spruce Ridge Estates Offering Memoranda (Exhibit P-6, Tab "Spruce Ridge Capital", "F45-106F1" and also Tab "Spruce Ridge Estates", "F45-106F1).

[140] [redacted] testified that brochures and executive summaries were circulated to Spruce Ridge investors, the contents of which were approved by Aitkens. [redacted] testified that Aitkens approved the wording in the brochures, executive summaries and the three offering memoranda. We concluded earlier from all of the evidence that Aitkens was the guiding mind of and controlled Spruce Ridge Capital and Spruce Ridge Estates. He directed the actions of these entities and authorized, permitted and acquiesced in the conduct of Spruce Ridge Capital and Spruce Ridge Estates at all relevant times.

[141] The evidence is that an offering memorandum was issued by Railside Capital on March 3, 2008 and circulated by Aitkens. Railside Capital issued approximately 20,579 fixed rate, renewable, redeemable, retractable bonds in Railside Capital to residents of Saskatchewan from April 14, 2008 to November 14, 2008 (Exhibit P-14, Tab "Railside Capital", "45-106F1").

[142] The evidence is that an offering memorandum was issued by Railside Industrial on March 3, 2008 and circulated by Aitkens. Railside Industrial issued approximately 20,579 Class B non-voting shares in Railside Industrial from April 14, 2008 to November 14, 2008 (Exhibit P-14, Tab "Railside Industrial Park", "45-106F1").

[143] The evidence is that, in total, approximately $2,059,957.90 came from Saskatchewan investors under the Railside Capital and Railside Industrial Offering Memoranda (Exhibit P-14, Tab "Railside Capital", "45-106F1" and also Tab "Railside Industrial", "45-106F1).

[144] [redacted] testified that Aitkens approved the content for the brochures, executive summaries and offering memoranda related to Railside Capital and Railside Industrial. We concluded earlier from all of the evidence that Aitkens was the guiding mind of and controlled both Railside Capital and Railside Industrial. He directed the actions of these entities and authorized, permitted and acquiesced in the conduct of Railside Capital and Railside Industrial at all relevant times.

[145] The Panel also heard testimony from Investor 1 regarding his purchase of securities in the amount of $10,000 in Spruce Ridge Capital (bonds) and Spruce Ridge Estates (shares). There is no doubt and, we find, that the bonds and shares issued by Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial were "securities" as defined in the Act.

[146] The evidence is that none of the Respondents nor Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital or Railside Industrial were ever registered to trade securities in Saskatchewan. Aitkens has never been registered as a dealer pursuant to the Act.

[147] We conclude that Aitkens engaged in activities or a course of conduct that constituted "trading" or "acts in furtherance" of a trade and engaged or held himself out as engaging in the business of trading securities without being registered. In carrying out these activities during the time period from July 2005 to March 2009, Aitkens contravened clause 27(1)(a) of the Act and there were no registration exemptions available to him, as discussed below.

Exemptions

[148] Once Staff has established that the Respondents have traded without registration, the onus shifts to the Respondents to prove that an exemption from those requirements was available in the circumstances (*Re Euston Capital Corp., 2007 ABASC 75, Re Lydia Diamond Exploration of Canada Ltd. (2003), 26 O.S.C.B. 2511, and Re Ochnik (2006), 29 O.S.C.B. 3929*).

[149] In June, 2006, the exemptions to the registration requirement were removed from the Act, and restated in the regulations. At that time, the opening statement was amended to read, "Subject to the regulations". It continued to read this way from June 1, 2006 until September 27, 2009.

[150] The Respondents did not participate in the hearing and did not establish that they qualified for any exemptions in National Instrument 45-106 – *Prospectus and Registration Exemptions* ("NI 45-106").

[151] We conclude that there is no evidence before the Panel to show that any exemption to the registration requirement was available.

2. Did the Respondents engage in a distribution of securities without a prospectus in breach of subsection 58(1) of the Act?

Prospectus Requirement: Section 58

[152] At all relevant times, section 58 has prohibited the distribution of securities if no prospectus has been filed with the Authority and receipted by the Director.

[153] A prospectus is fundamental to the protection of the investing public because it ensures that prospective investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed decision. The prospectus requirements of the Act play a significant role in the overall scheme of investor protection. [*Re Limelight Entertainment Inc. et al (2008)*, 31 OS.C.B 1727, para. 139].

[154] Section 58 reads as follows:

> **Prospectus required**
> **58**(1) No person or company shall trade in a security on the person's or the company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:
>
> (a) a preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it; and
>
> (b) a prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it.

[155] The definition of "distribution" is set out in clause 2(1)(r) of the Act. Clause 2(1)(r) reads as follows:

> (r) "**distribution**", where used in relation to a trade in a security, means a trade:
>
> (i) in a security of an issuer that has not been previously issued;

[156] Therefore, to find a contravention of subsection 58(1), we must conclude from the evidence that:

- there was a security as defined in the Act;
- there was a trade as defined in the Act in relation to that security;
- there was a distribution as defined in the Act of that security; and
- a prospectus was not filed and receipted for that distribution of securities and no exemption from the requirement to file the receipted prospectus was available.

[157] As established above in the Panel's discussion of clause 27(1) and subsection 27(2) of the Act, Aitkens engaged in trades and/or acts in furtherance of a trade, as defined in the Act. Therefore, the trading element of the first part of the definition of "distribution" under the Act has been met.

[158] The second element of the definition is that the securities in question have not been previously issued. The evidence in this case is clear that securities had not been previously issued and, as such, the trades of securities engaged in by Aitkens related to "distributions" as defined in the Act.

[159] The evidence established that none of the Respondents, nor Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital, or Railside Industrial ever filed a preliminary prospectus or prospectus with the Authority in relation to the distributions.

Exemptions

[160] A number of exemptions from the requirement to file a prospectus. Some of the key exemptions are:

- the "accredited investor" exemption (the **AI Exemption**), available where an individual investor satisfies specified monetary thresholds for financial assets, net income or net assets (National Instrument 45-106 *Prospectus and Registration Exemptions* (**NI 45-106)**, section 2.3);

- the "family, friends and business associates" exemption (the **Relational Exemption**), available for certain close relationships (a specified family member, "close personal friend" or "close business associate") between the investor and certain senior officials of the issuer (NI 45-106, section 2.5);

- the "offering memorandum" exemption (the **OM Exemption**), for which the requirements include an offering disclosure document from the issuer that complies with prescribed requirements, and a signed risk acknowledgement from the investor (NI 45-106, section 2.9); and

- the "minimum amount" exemption (the **Minimum Amount Exemption**), which requires a minimum cash investment of $150,000 (NI 45-106, section 2.10).

[161] While there are exemptions from the requirement to file a prospectus, those who seek to rely on an exemption from the requirements must make a "reasonable, serious effort – or take whatever steps were reasonably necessary – to satisfy themselves that the exemption was available" at the time of the trade or distribution of the security (*Re Robinson*, 2013 ABASC 203 at para. 151).

[162] It is insufficient to assume or hope that an exemption was available at the time of the trade or distribution of the security. Nor is it sufficient that some, but not others, of the trades within a distribution qualify for a claimed exemption (*Cloutier*, Re, 2014 ABASC 2 at para. 308).

[163] In discussing the purpose of the exemptions from the registration and prospectus requirements, the Alberta Securities Commission in *Arbour Energy Inc. Re*, 2012 ABASC 131, stated at paras. 737 and 738:

> [736] These exemptions have been crafted to eliminate some of the investment's risk by stipulating terms that address attributes of the individual investor (such as investor sophistication, financial resources or relationship to the issuer), address the nature of the security itself, or provide alternative sufficient information about the offering and the issuer to enable eligible investors to make informed investment decisions.
>
> [737] Because the exemptions relieve compliance from two of the fundamental requirements of the Act, the issuer or a person seeking to rely on an exemption to trade and distribute securities is responsible for ensuring that the exemption is available for each particular trade or distribution at

> the time of the trade or distribution, and ensuring strict compliance with all of the requirements, conditions and restrictions associated with the relied-on exemption (*Re InstaDial Technologies Corp.*, 2005 ABASC 965 at para. 61; *Re Euston Capital Corp.*, 2007 ABASC 75 at paras. 103, 115-17, 119; and *Re Bartel*, 2008 ABASC 141 at para. 115).

[164] Accordingly, once Staff have established that a respondent has engaged in a distribution without filing a prospectus, the onus shifts to the respondent to demonstrate the availability of, applicability of, and strict compliance with the conditions of, a claimed exemption. In *Aurora, Re,* 2011 ABASC 501, the Alberta Securities Commission held at para 133:

> [133] While gleaning the information necessary to assess whether someone is an eligible investor may require some investigation into the personal affairs or status of others, the law is clear: the burden of ensuring that the offering memorandum (or any other) registration or prospectus exemption is available for a particular trade or distribution lies not with the investor, but with the issuer or other person seeking to rely on the exemption (*Re InstaDial Technologies Corp.*, 2005 ABASC 965 at para. 61; *Re Euston Capital Corp*., 2007 ABASC 75 at paras.103, 115-117, 119; and *Re Bartel*, 2008 ABASC 141 at para. 115). Moreover, the issuer or other person claiming to rely on the registration or prospectus exemption has the onus of proving that the exemption was available at the time of each trade or distribution made without registration or a prospectus.

[165] The Respondents did not participate in the hearing and did not establish that they qualified for any exemptions from the prospectus requirements.

[166] [redacted] testified and the documentary evidence indicates that reports of trades (45-106F1 filings), with respect to distributions made under the offering memoranda related to Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial were filed with the Authority by Aitkens on December 28, 2011. In making these filings, it appears Aitkens relied on either the Offering Memorandum exemption from the requirement to file a prospectus, or described the status of the investors as "eligible investors".

[167] The offering memorandum exemption requires an issuer to, *inter alia*, provide a purchaser of securities with a copy of an offering memorandum in the prescribed form prior to the purchaser agreeing to purchase the securities. The issuer must also file a copy of the offering memorandum and the required forms within 10 days of the end of any distribution made using the exemption.

[168] It is Staff's position, that the offering memorandum exemption was not available to the Respondents. Staff assert that the offering memoranda contained serious misrepresentations regarding, among other things, the business of Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial, as well as, how and where investment dollars would be spent. Staff also assert that with respect to a filed offering memorandum, there has always been a requirement as set out in subsection 80.1(2) of the Act to amend the offering memorandum if there has been a material change in the affairs of the issuer.

[169] In *Shire International Real Estate Investments Ltd., Re*, 2011 ABASC 608, the Alberta Securities Commission considered the availability of the offering memorandum exemption and concluded at paras 210-212:

> [210] The offering memorandum exemption is a departure from the basic requirements, under Alberta securities laws, for distributions of securities, obviating the need for a vetted prospectus on conditions designed to provide investors with an alternative basis on which to make reasonably informed investment decisions – the offering memorandum itself.
>
> [211] Used responsibly, this exemption can serve the interests of both investors and those who seek investment capital. Used irresponsibly, as in the present case, identifiable investors are placed in jeopardy or directly harmed – deprived of the ability to base an investment decision on reasonably accurate, reliable disclosure. That jeopardy or harm has broader ramifications: misuse of the exemption in one instance can undermine the willingness of directly-affected investors to participate in other prospectus-exempt offerings (or, potentially, in offerings of any description) – and their concern can spread to friends, family, acquaintances and strangers who come to learn of the negative experience. Such impaired investor confidence – in prospectus-exempt offerings, or in the capital market generally – in turn jeopardizes the ability of law-abiding businesses to raise money legitimately.
>
> [212] In short, the misrepresentation-laden Impugned OMs, for which the Respondents were variously responsible, were contrary to the spirit and intent of the offering memorandum exemption. The conduct of each Respondent, as regards the misrepresentations found in the Impugned OMs, was clearly contrary to the public interest, and we so find.

[170] Similarly, in *Aurora, Re*, 2011 ABASC 501 at para 168, the Alberta Securities Commission found that an offering memorandum containing misrepresentations and deficiencies was not consistent with the spirit of the exemption. At para 168, the Commission held:

> [168] For the reasons given, we find that the Impugned OMs were gravely deficient in material respects. Important requirements of Form F2 were breached. The consequence was that the Impugned OMs misrepresented the investments – important facts about certain principals, the use of invested money, and indeed the fundamental nature of the business model touted – the documents were being used to sell. Informing prospective investors about such things – to help them make informed investment decisions – is the very purpose of an offering memorandum. The Impugned OMs would have left even (perhaps especially) careful readers not just poorly informed, but positively misinformed about the investments offered. Not only the letter, but the very spirit, of the offering memorandum exemption was flouted. It was, therefore, unavailable for distributions of Units of LPs 1 through 5 and 8 made in reliance on the Impugned OMs. (see also *Rogers Oil & Gas Inc., Re*, 2012 ABASC 137 at paras 21 and 28; and *Solara Technologies Inc.* and *William Dorn Beattie*, 2010 BCSECCOM 163 at paras 145-149)

[171] We find that there is no evidence before us to establish that the offering memorandum exemption was available to the Respondents. The Respondents have not met the burden of proving the availability of any prospectus exemption as referred to in *Aurora.*

[172] Furthermore, the testimony of Investor 1 establishes that he was not an "eligible investor" as described in the reports of trades filed by Aitkens on December 28, 2011.

[173] Based on the entirety of the evidence before us, we are satisfied that many of the trades and distributions made by Aitkens were made without an available exemption from the prospectus requirements. Accordingly, we find that Aitkens engaged in distributions of securities without receipted prospectuses, in breach of subsection 58(1) of the Act.

3. Did the Respondents engage in fraud in breach of section 55.1 of the Act?

Section 55.1:

[174] Section 55.1 of the Act prohibits every person or company from committing fraudulent acts relating to securities.

Section 55.1: Prior to July 1, 2007

[175] Section 55.1 was amended in 2007. Prior to the amendment, the provision stated:

> **Fraudulent and misleading transactions prohibited**
> **55.1** No person or company shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or exchange contracts that:
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract; or
>
> (b) defrauds any person.

Section 55.1: On and after July 1, 2007

[176] On July 1, 2007, section 55.1 was amended to read:

> **Fraud and market manipulation – prohibition**
> **55.1** No person or company shall, directly or indirectly, engage or participate in any act, practice or course of action relating to securities or exchange contracts that the person or company knows or reasonably ought to know:
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract; or
>
> (b) perpetrates a fraud on any person or company.

[177] The main change to the provision as a result of the July 2007 amendments was to include the requisite knowledge element of "knows or reasonably ought to know" in the provision. The provision was subsequently amended effective February 10, 2016, to replace the phrase "exchange contracts" with "derivatives or underlying interests in derivatives".

Legal Framework of Fraud

[178] The Act does not define "fraud" but in *R v Théroux*, [1993] 2 SCR 5 ("***Théroux***"), the Supreme Court of Canada enunciated the elements of fraud. The offence requires proof of a guilty act (*actus reus)* and a corresponding guilty mind (*mens rea*).

[179] In *Théroux*, the Court stated at page 15:

> ***The Actus Reus of Fraud***
>
> Since the *mens rea* of an offence is related to its *actus reus*, it is helpful to begin the analysis by considering the *actus reus* of the offence of fraud. Speaking of the *actus reus* of this offence, Dickson J. (as he then was) set out the following principles in *Olan* (*R v. Olan*, [1978] 2 S.C.R. 1175):
>
> (i) the offence has two elements: dishonest act and deprivation;
> (ii) the dishonest act is established by proof of deceit, falsehood or "other fraudulent means";
> (iii) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

[180] In *Théroux*, the court further stated at page 20:

> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> (i) subjective knowledge of the prohibited act; and
>
> (ii) subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.

Actus Reus: Dishonest Act

Deceit or falsehood

[181] The Court noted that the "dishonest act" can manifest itself in a number of different ways.

> "Deceit" or "falsehood" is established when it is proved that the person represented a certain situation was something other than what it really was (*Théroux*, at page 17).

[182] Exactly what constitutes a lie or a deceitful act for the purpose of the *actus reus* is judged on the objective facts (*Théroux*, at page 16) (See also see *R v Fast*, 2014 SKQB 84 at para. 212).

[183] Fraud is an offence of general scope capable of encompassing a wide range of dishonest commercial dealings (*Théroux*, at page 14).

Other fraudulent means

[184] The "other fraudulent means" category of a dishonest act is therefore also determined objectively by reference to what a reasonable person would consider to be a dishonest act (at para. 14).

[185] In *Re Arbour Energy Inc.*, 2012 ABASC 131 ("***Arbour***") at paras. 979-80, it was noted:

> "Other fraudulent means" is the catch-all concept, designed to capture a wide range of dishonest commercial acts which appear to be neither deceit nor falsehoods but, when viewed objectively, would be considered dishonest acts by a reasonable person. Examples of conduct found to constitute "other fraudulent means" include personal use of corporate money, failure to disclose important facts, unauthorized diversion or taking of money or property, and the unauthorized use of investor money (*Théroux*, at page 16-17; and *R. v. Currie*, [1984] O.J. No. 147 (C.A.)).

[186] Similarly, in *R v Briltz* (1983), 24 Sask R 120 (WL) at para. 3, "other fraudulent means" was held to include means which are not in the nature of a falsehood or deceit, and encompasses all other means which can be properly characterized as dishonest (*R v. Zlatic*, [1993] 2 S.C.R. 29 ("***Zlatic***") at para 31 citing *Olan*, supra at p.1180).

[187] "Other fraudulent means" includes the non-disclosure of important facts (*Zlatic*, supra at para 31; and *Théroux*, supra at pages 16 and 27*).*

[188] In *Théroux*, the court stated at page 16:

> In a number of subsequent cases, courts have defined the sort of conduct which may fall under this third category of other fraudulent means to include 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.
>
> *R. v. Black and Whiteside* (1983), 1983 CanLII 3493 (ON CA), 5 C.C.C. (3d) 313 (Ont. C.A.); *R. v. Shaw* (1983), 1983 CanLII 3584 (NB CA), 4 C.C.C. (3d) 348 (N.B.C.A.); *R. v. Wagman* (1981), 1981 CanLII 3122 (ON CA), 60 C.C.C. (2d) 23 (Ont. C.A.); *R. v. Rosen* (1979), 1979 CanLII 2867 (ON SC), 55 C.C.C. (2d) 342 (Ont. Co. Ct.); *R. v. Côté and Vézina (No. 2)* (1982), 1982 CanLII 3874 (QC CA), 3 C.C.C. (3d) 557 (Que. C.A.); *R. v. Hansen* (1983), 1983 ABCA 68 (CanLII), 25 Alta. L.R. (2d) 193 (C.A.); *R. v. Geddes* (1979), 1979 CanLII 2854 (MB CA), 52 C.C.C. (2d) 230 (Man. C.A.); *R. v. Currie*; *R. v. Bruce* (1984), 5 O.A.C. 280, and *R. v. Kirkwood*, *supra*.

Unauthorized diversion of funds

[189] In *R v. Olan*, [1978] 2 SCR 1175 ("***Olan***"), the Supreme Court of Canada considered the meaning of "other fraudulent means" in the context of an unauthorized diversion of funds. The case involved a takeover transaction. In the course of the takeover transaction, the new, post-takeover board of directors transferred the target company's securities portfolio for a loan. The Crown argued that the target company had been defrauded. The court held using the assets of the corporation for personal purposes rather than *bona fide* for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of the corporation.

[190] We agree with Staff's submissions that the relevant question is whether the diversion of funds at issue could reasonably be thought to serve personal rather than *bona fide* business ends.

[191] In *R. v. Currie* (1984), 5 O.A.C. 280 ("***Currie***"), the accused solicited investments in a factoring scheme which would purchase the accounts receivable of a company known as "Water-Eze Products Ltd". Investor funds specifically invested for the scheme, however, were diverted by the accused to an aviation company known as "Aerobec" (*Currie, supra*, at para. 7). The

Ontario Court of Appeal rejected the argument that the accused had implied general discretionary power to invest the funds and noted that it was "clear that the investors responded to a very specific investment proposal" (*Currie*, *supra*, at para. 15). The fraud convictions were upheld.

[192] As noted above, where it is alleged that the *actus reus* of a particular fraud is "other fraudulent means", the existence of such means will be determined by what reasonable people consider to be dishonest dealing (*Théroux*, at page 15; *Zlatic, at para 19*; *R v Eizenga*, 2011 ONCA 113, at para 81).

Deprivation

[193] The second branch of the *actus reus* of fraud, "deprivation", is "established by proof of detriment, prejudice or risk of prejudice to the economic interests of the victim caused by the dishonest act" (*Théroux*, page 15). In establishing deprivation, it is not necessary to prove that an accused ultimately profited or received economic benefit or gain from the conduct or that actual deprivation or actual economic loss occurred (*Théroux*, page 15).

[194] The element of "deprivation" is satisfied on proof of:

(i) actual loss to the victim;

(ii) prejudice to the victim's economic interest; or

(iii) merely the risk of prejudice to the economic interests of a victim even though no actual loss has been suffered.

(*Théroux*, pages 16, 17 and 27)

Mens rea

[195] *Mens rea* refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent: those who do not understand or intend the consequences of their acts (*Théroux*, at page 17).

[196] The test for a "guilty mind" is whether the respondent subjectively appreciated the consequences of the prohibited act, at least as a possibility. In applying this subjective test, the court looks to the accused's intention and the facts as the accused believed them to be (*Théroux*, at para. 18).

[197] The *mens rea* element requires proof that the person involved "had subjective awareness of the person's prohibited act and that such act placed another's or others' economic interests at risk" (*Arbour*, at para. 982). This subjective awareness can be inferred from the totality of the evidence (*Alberta Securities Commission v. Brost*, 2008 ABCA 326, at para. 48). In the case of a corporation, "it need only be proved that the corporation's directing minds knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud" (*Arbour* at para. 985).

[198] A person is not saved from conviction because he believes there is nothing wrong with what he is doing. The question is whether the respondent subjectively appreciated that certain consequences would follow from his or her acts, not whether the respondent believed the acts or their consequences to be moral (*Théroux*, at page 19).

[199] It is not necessary to show, in all cases, precisely what thought was in the accused's mind at the time of the criminal act (*Théroux*, at page 20). In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference (*Théroux*, at page 20).

[200] Regarding the offence of fraud, the prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may consist in merely placing another's property at risk (*Théroux,* at page 21). The *mens rea* would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood, or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk (*Théroux,* at page 21). If this is shown, the crime is complete.

[201] The fact that the accused may have hoped that the deprivation would not take place, or may have felt that there was nothing wrong with what he was doing, provides no defence (*Théroux*, at page 21). In other words, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the *actus* of the offence, the proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaking constitute a criminal offence.

[202] This applies as much to the third head of fraud, "other fraudulent means", as to lies and acts of deceit. Although "other fraudulent means" have been broadly defined as means which are "dishonest", it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them (*Théroux* at page 22). The "dishonesty" of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the *actus reus* of the offence can be made out of particular facts (*Théroux* at page 22). That established, it need only be determined that an accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence *(Théroux* at page 22).

[203] The respondent must have subjective awareness, at the very least, that his conduct will put the property or economic expectations of others at risk (*Théroux*, at page 26). As noted above, this does not mean that the trier of fact must be provided with a mental snapshot proving exactly what was in the respondent's mind at the moment the dishonest act was committed. In certain cases, the inference of subjective knowledge may be drawn from the facts (*Théroux*, at page 26). The respondent may introduce evidence negating that inference, such as evidence that

his deceit was innocent, or evidence of circumstances which led him to believe that no one would act on his deceitful or dishonest act.

A. Legacy Communities Inc.

[204] Staff submit that the Respondents committed fraud with respect to how investments in Legacy were handled. In support of this allegation, Staff point to the following:

- The investors were told that their funds would be spent on the Legacy Project, but the Respondents subsequently diverted investment dollars to other companies and projects without the approval or knowledge of the investors.
- These diversions were done with the full knowledge of Aitkens, who knew that the transfer of funds away from Legacy put the investors' pecuniary interests at risk.
- These acts constituted fraud by "other fraudulent means".

Misrepresentations in the Legacy marketing material

[205] Staff focused on the following misrepresentations in the Legacy marketing materials:

- An Executive Summary (Exhibit P-2, Tab "Executive Summary") was prepared for Legacy, and approved by Aitkens, which was circulated to its investors;
- The Executive Summary described the Legacy project as providing a "world class real estate investment opportunity" with plans to subdivide and build residences on the 503 acre site to be offered for sale (at pages 3-5). While page 6 of the Executive Summary indicated three different "Profit Strategies", which include buying and holding the land, the testimony of [redacted] explained that the "Profit Potential" found on page 7 would only have been possible if the Legacy Lands were subdivided and developed; and
- There was no mention in the Executive Summary that funds would be diverted to other projects or companies.

Misrepresentations in the Legacy offering memoranda

[206] Staff also relied on the following misrepresentations in the Legacy offering memoranda:

Offering Memorandum #1 (Exhibit P-2, Tab "OM #1") released on July 15, 2005

- Page 4 of the document states that the highest and best use of the Legacy Lands is re-designation and development into rural residential subdivisions;
- Part 3.2 speaks to the use of the proceeds raised by OM #1. They were to be used in the acquisition of the Legacy Lands, for pre-development and planning expenses to attempt to obtain land use re-designation of the lands, and to possibly develop the lands. There was no indication in Part 3.2 that any of the net proceeds would be sent to other companies or used in other projects; and
- Part 4.2.5 of OM #1 specifically states in no uncertain terms that: All monies raised will be committed to the purchase of the Legacy Communities Inc. lands and usage in

pre-development and planning to attempt to obtain land use re-designation of the Legacy Communities Inc. lands and possibly develop the lands. […]

Offering Memorandum #2 (Exhibit P-2, Tab "OM #2") released on September 15, 2006

- Parts 1.1 and 1.2 outline how the net proceeds are to be spent. The entirety of the net proceeds is stated to be used in the following three specific areas: further acquisition of the Legacy Lands; development reserve; and reserve to pay management, administration, and operating expenses;
- Part 2.7 of OM #2 states that "[s]ubject to otherwise disclosed offering costs, commissions, and management fees, all monies raised will be committed to the Corporation's investment objectives". The investment objectives are found in Parts 2.5 and 2.6;
- Part 2.5 contains Legacy's long term goals, which were to employ one of the strategies outlined in Part 2.2.2:
  - Hold the land in anticipation of an increase in value and sell without re-designation/entrance into the proposed ASP.
  - Receive re-designation approvals/entrance into the proposed ASP and sell the lands to a third party developer.
  - Receive re-designation approvals/entrance into the proposed ASP and enter into a joint venture agreement with a real estate developer to develop the lands into a residential community.
  - Receive re-designation approvals/entrance into the proposed ASP and develop the lands as a residential community; and
- Legacy's short term objective is found in Part 2.6, which was to "[r]aise up to $25,000,000 and invest the net proceeds as outlined in Item 1.2 – **Use of Net Proceeds**" [emphasis original]. Nowhere is there an indication that investment dollars will be sent to other companies or spent on other projects.

Offering Memorandum #3 (Exhibit P-2, Tab "OM #2") released on October 29, 2007

- Parts 1.1 and 1.2 state how the net proceeds are to be spent, this time specifying the following five areas: payment of the remainder of the Option Price; payment of a portion of the estimated design and engineering, planning, taxes, insurance, legal, and other costs; project management fees over the proceeding 12 months; payment of fees to Eyelogic Systems Inc.; and unallocated working capital;
- Part 2.1 describes the business of Legacy, and states that it was formed to purchase, subdivide, develop, and sell the Legacy Lands; and
- There was no indication that investment dollars will be sent to other companies or spent on other projects.

Diversions to 1252064

[207] Staff submit that despite the representations in the Executive Summary and the three offering memoranda regarding how Legacy investors' money was to be spent, significant funds were diverted away from Legacy to Aitkens' personal company of 1252064. The evidence is clear that the following transfers were made from Legacy to 1252064:

Date	Amount
September 24, 2007	$4,664,880.00
October 3, 2007	$400,000.00
November 14, 2007	$5,300,000.00
November 20, 2007	$100,000.00
January 15, 2008	$150,000.00
TOTAL:	**$10,614,880.00**

[208] Only some of this money was transferred back to Legacy from 1252064 as follows:

Date	Amount
April 14, 2008	$400,000.00
August 19, 2009	$200,000.00
TOTAL:	**$600,000.00**

[209] We are satisfied that the above transfers were made from Legacy to 1252064 and from 1252064 to Legacy in accordance with the above listed transactions.

Diversions to 1330075

[210] Staff submit that diversions were also made from Legacy to 1330075, another one of Aitkens' personal companies. In particular, the evidence is clear that the following transfers were made from Legacy to 1330075, none of which was returned:

Date	Amount
March 6, 2008	$1,500,000.00
April 7, 2008	$500,000.00
TOTAL:	**$2,000,000.00**

[211] Based on the evidence, we are satisfied that the above transfers were made from Legacy to 1252064 in accordance with the above listed transactions.

Diversion to Panama

[212] There was also evidence that Aitkens transferred $4,664,880 of Legacy funds for the purpose of an investment in lands located in Panama. The transfer was made pursuant to a Joint Venture Agreement between 1252064 and Punta dated July 12, 2007. Under that Agreement, 1252064 was to pay Punta a total of $7,000,000 USD for the purpose of facilitating the development of 50 hectares of land located on Isla Del Rey.

[213] There is clear evidence that a wire transfer in the total amount of $4,664,880 CAD was sent by 1252064 to Castro & Berguido International Inc., located in Panama, on September 26, 2007. Two days prior to this, a transfer of that same amount was made from Legacy's bank account to 1252064. [redacted] and [redacted] testified that the money was never returned to Legacy's investors and that the money was never recovered. [redacted] testimony confirmed

that Legacy investors were never told that money could be transferred to other projects, never agreed to this transfer, nor were they ever told that it took place.

[214] Based on the evidence in its entirety, we find that Legacy funds in the amount of $4,664,880 CAD were transferred to 1252064 and then transferred by 1252064 to Castro & Berguido International in Panama.

Diversion to Pay for the Granum Water Licence

[215] There is also clear evidence that another transfer of Legacy funds was made with respect to the purchase of a water licence attached to property located near Granum, Alberta.

[216] On September 23, 2008, 1330075 bought the Granum Lands from Ostrich for the sum of $825,000. [redacted] testified that the reason for the purchase of this land was because Aitkens was interested in building a truck stop on the property.

[217] The evidence is that the Granum water licence was transferred from Ostrich to 1330075 on October 15, 2008. That same day, 1330075 and Legacy entered into a Purchase and Sale Agreement, whereby Legacy would purchase the water licence from 1330075 for $950,000. Of that amount, $825,000 was payable upon closing, while the remaining $125,000 was payable over the following three years.

[218] The testimony of [redacted] and the Ninth Report of the Monitor dated August 30, 2013 confirmed that "the money used to purchase the Granum Lands was advanced by Legacy" (Exhibit P-19, Ninth Report of the Monitor, at page 32).

[219] Accordingly, based on this evidence, we are convinced that Legacy funds were transferred to 1330075 to purchase the Granum water licence. The evidence is also clear that on July 27, 2010, the Granum Lands were transferred from 1330075 to Harvest Group for the consideration of one dollar (Exhibit P-2, Tab "075 Water Licence", "Transfer of Land" and Exhibit P-19, Ninth Report of the Monitor dated August 30, 2013, at page 32).

[220] Staff assert that the fraudulent nature of this diversion of Legacy funds becomes apparent when the implications for Legacy investors are examined. The primary issue with the transfers is that the water licence purchased by Legacy and the transfer of the Granum Lands to Harvest Group provided absolutely no benefit to the Legacy investors.

[221] [redacted], [redacted], and [redacted], all testified that the water licence could not be transferred to the Legacy Lands, the Granum Lands and the Legacy Lands were nowhere near each other, and, more importantly, the Granum Lands and Legacy Lands were located on different watersheds.

[222] Staff contend that the transfer of the Granum water licence did not allow Legacy to pull more water from its watershed, but that, at best, it allowed Legacy to physically move water from the Granum Lands to the Legacy Lands, which they assert would be a nonsensical proposition.

[223] Staff also allege that the purchase price of the Granum water licence was "beyond unreasonable". Legacy bought the Granum water licence for the full value of the Granum Lands, plus an additional $125,000. The Granum Lands were initially transferred between two arms-length companies who, presumably, knew the market value of the property and the associated water licence. Staff contend that it is not possible that, less than a month later, the water licence alone would be worth more than the land itself to a company that could not even benefit from the licence.

[224] Staff also point out that despite the amount paid for the water licence alone, Legacy did not gain title to the Granum Lands and that Legacy already had a water licence attached to the Legacy Lands which it purchased from Allen's Trout Farm Inc. on October 2, 2007.

[225] Staff take the position that the end result of this is absurd and that as a result of the purchase Legacy held a water licence it did not need and could not transfer. Staff suggest that the absurdity becomes more apparent when it is remembered that Legacy paid more for the Granum Water Licence than what the land it was attached to was worth.

[226] Staff assert that Legacy's purchase of the water licence only starts to make sense if you look at it from the perspective of Aitkens as he is the only party that saw any real benefit from the sale. Due to Legacy's purchase of the licence, in less than one month he completely recouped the money he paid for the Granum Lands and still retained title of the Granum Lands. On top of that, he stood to make another $125,000.00 over-and-above the purchase price just on the sale of the water licence alone.

[227] Staff submit that the Legacy investors did not know about their purchase of the Granum water licence with the use of their investment dollars, nor was the purchase approved by Legacy investors in any fashion.

The Reallocation of Funds for Sound Business Reasons Provision

[228] Each of the offering memoranda issued by Legacy contained a provision worded in the below fashion:

> Reallocation – We intend to spend the available funds as stated. We will reallocate funds only for sound business reasons.

[229] The meaning of a similarly worded "reallocation" provision in an offering memorandum was addressed by the Alberta Securities Commission in *Aitkens, Re*, 2018 ABASC 27 ("***Aitkens***"). In the Alberta proceeding, Aitkens contended that money was transferred away from certain projects so that it could be used for all of the entities in the "Harvest group of companies", which would benefit all of the entities as a whole – he therefore characterized such transfers as having been made for "sound business reasons". In particular, he stated that the particular projects benefited investors because this was the way holders of bonds in those projects could receive the promised interest payments for their bonds. In general, he stated that all of the entities in the "Harvest group of companies" benefited because strengthening the financial position of certain of those entities would make the conglomerate more attractive to

prospective outside purchasers. Aitkens' submissions relied on this testimony, stating that he believed he was able to transfer money among projects to help those with "an imminent need for cash" (*Aitkens*, at para 386).

[230] In considering Aitkens' argument regarding "sound business reason", the Commission relied on the analysis in *Re Shire International Real Estate Investments Ltd*., 2011 ABASC 608 ("***Shire***"). In Shire, the offering memoranda described the intention to use funds raised by the offering for real estate acquisition and development, but included reallocation clauses with virtually the same wording as those at issue in *Aitkens*. The individual respondent in *Shire*, relied on those reallocation provisions in an attempt to justify transfers made to related companies that were outside the use of proceeds provision set out in the offering memoranda. The argument the respondent made in *Shire* is summarized as follows:

> [112] Couch directed us to statements in the Impugned OMs […] that, despite the Bearspaw OMs' disclosure of the intended uses of the money raised, the money might still be "reallocate[d]" for "sound business reasons". The intended implications of these submissions, in our view, were that: […] investors under the Bearspaw OMs had fair warning that things might not go as described in the documents, and knew (or should have known) that their investments, and the handling of their invested money, depended on Couch's assessment from time to time of how to conduct the various businesses – of what would constitute "sound business reasons" . […]

[231] The conclusion by the Commission in *Shire* was that the reallocation or "sound business reasons" clause should not be construed so broadly. The Commission held at paras 188-195:

> [188] We reproduce again the "reallocat[ion]" warning from the Bearspaw OMs: "The Issuer intends to spend the net proceeds as stated. The Issuer will reallocate funds only for sound business reasons." Did this (as implied by Couch) give prospective investors fair warning of how she, and Bearspaw and Shire, would actually operate?
>
> [189] The warning was, admittedly, worded broadly. It did not specify precisely what alternative uses might be found for Bearspaw investor money. That said, it was not open-ended.
>
> [190] First, it must be read in context. That warning directly followed a fairly detailed discussion of how many dollars were to be spent on what aspects of the Bearspaw offering and business, most of that being the purchase and development of the Bearspaw Land. That, then, was the starting point for this reallocation disclosure.
>
> [191] Second, the reallocation statements were themselves limiting. The first statement reiterated what we think a reader would reasonably have assumed, that the intention was to do with the money what had just been disclosed in some detail. The second statement casts a reallocation as something exceptional, "only" to happen in certain circumstances.
>
> [192] Third, those certain circumstances were described as "sound business reasons". While not stated expressly, we think a reader would reasonably have inferred – and would have been entitled to infer – two things: (i) that the "business reasons" would have something to do with the business of Bearspaw, which (as discussed) was the purchase and development (and eventual resale) of the Bearspaw Land; and (ii) that the soundness of such exceptional business reasons would be assessed, in a businesslike way, with a view to their consistency with the interests of Bearspaw and its investors.

> [193] To place any broader interpretation on the reallocation disclosure would, in our view, render the mandatory "use of net proceeds" disclosure in the Bearspaw OMs devoid of any value or purpose.
>
> [194] We noted above the Bearspaw OMs' disclosure of various risk factors, including risks associated with new ventures or real estate generally. This disclosure did not, however, alert readers to the prospect that much Bearspaw investor money would be applied to purposes unrelated to the Bearspaw Land.
>
> [195] It follows, and we find, that the Bearspaw OMs' disclosure of potential reallocation, and of risk factors, did not give prospective investors reasonable warning that their money would be used for non-Bearspaw-Land purposes as, we found above, it in fact was.

[232] This same reasoning was adopted in *Aitkens* at para 390 and 391:

> [390] Similarly, we have found that investors' money raised under the SV OMs and HV OMs was used for purposes unrelated to working capital for the development of the SV Land and HV Land. As in *Shire*, the starting points here were the specific use of proceeds provisions stating that investors' money would be used for the purchase and development of the SV Land and HV Land. Also as in *Shire*, the reallocation provisions in the present case were cast "as something exceptional, 'only' to happen in certain circumstances" (*Shire* at para. 191). Further, we agree with the conclusion that a reasonable reader (here, of the SV OMs and HV OMs) would reasonably and rationally infer that the "business reasons" would relate to the purchase and development of the SV Land and HV Land, and that the soundness of such reasons would be assessed in a business-like manner and in the interests of the investors in the SV Project and HV Project.
>
> [391] We conclude that the SV OMs and HV OMs did not disclose to investors that their money would be used for purposes outside the scope of the use of proceeds disclosure in the those OMs.

Prohibited Acts resulting in deprivation to others

[233] We are satisfied that the transfers of funds were made to the various people and entities, as alleged and as established by the evidence tendered by Staff. We conclude that the transfers of Legacy funds were not in accordance with the disclosure provided to the Legacy investors and that the offering memoranda did not disclose to investors that their money would be used for purposes outside the scope of the use of proceeds disclosure in the offering memoranda. We accept [redacted]'s testimony and the evidence submitted by Staff regarding the use of the investor money, including transfers of property and the issuance of promissory notes to the personal companies of Aitkens, 1252064, 1330075, Harvest Capital and Harvest Group.

[234] In summary, we find that the actions of Aitkens, as the person who was the guiding and controlling mind of Legacy, 1252064, 1330075, Harvest Capital and Harvest Group included the following: failure to disclose important facts, the unauthorized diversion or taking of money or property and the unauthorized use of investor money. As all of these actions fall directly within the category of "other fraudulent means" as set out in *Arbour*, we are satisfied that there was a prohibited act.

Deprivation to the Legacy Investors

[235] There is compelling evidence of deprivation to Legacy investors in this case. Such deprivation includes exposure to risk of financial loss and actual financial loss. Legacy investors knew that much of their invested money would go towards the purchase of the Legacy Lands. The wording of the Legacy offering memoranda led investors to believe that the remainder of their money would be used for the development of the Legacy Lands. Investors were not told that their money might or would be used for other projects or transferred to other companies. A significant amount of Legacy project money was used for other purposes. This is clear from the documents tendered in to evidence and the testimony of [redacted], [redacted], [redacted], and [redacted]. Despite there being $9,324,049.09 in Legacy's bank account on November 5, 2007 there was only $8,530.93 in the account by December 1, 2011, without any development of the Legacy Lands. This misuse of investors' money increased the risk that the Legacy Project would fail for lack of development funds and contributed to Legacy's financial difficulties.

Aitkens' Knowledge of the Prohibited Acts Resulting in Deprivation to Legacy Investors

[236] As stated above, a respondent must knowingly or subjectively "undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation" (*Zlatic*, at para. 40).

[237] We concluded earlier that Aitkens was the guiding mind of Legacy, 1252064, 1330075, Harvest Capital and Harvest Group. There is no question that Aitkens knew about the diversions, and knew about the representations made to the Legacy investors in the marketing materials and the offering memoranda. We are satisfied that Aitkens was the person responsible for transferring funds and property and signing promissory notes and agreements on behalf of Legacy, 1252064, 1330075, Harvest Capital and Harvest Group. We are also satisfied that 1252064, 1330075, Harvest Capital and Harvest Group were also responsible as their "directing mind knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud". The evidence is clear and we find that Aitkens and 1252064, 1330075, Harvest Capital and Harvest Group (through their guiding mind, Aitkens) had the requisite knowledge of the prohibited acts. We have no doubt that and find that Aitkens, 1252064, 1330075, Harvest Capital and Harvest Group were fully aware that their prohibited acts would not only put investor money at risk but would also deprive investors of their money.

[238] We agree with Staff's submission that it is not necessary to prove that Aitkens intended to be dishonest or to cause a financial loss to others. As the Court noted in *Théroux*:

> [36][…]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. […]

[239] Based on the law and the analysis set out, we conclude that Aitkens, 1252065, 1330075, Harvest Capital and Harvest Group engaged in a course of conduct relating to securities that they knew perpetrated a fraud on Legacy investors in breach of section 55.1 of the Act.

B. Spruce Ridge Capital Inc. and Spruce Ridge Estates Inc.

[240] Staff also submit that the Respondents committed fraud with respect to how investments in Spruce Ridge Capital and Spruce Ridge Estates were handled. To summarize Staff's arguments as set out in more detail below, Staff allege that:

- investors were given specific indications that their funds would be spent on the Spruce Ridge project, but the Respondents subsequently diverted investment dollars to other companies;
- the unjustified inflation of the purchase price for the Spruce Ridge Lands resulted in the inability of Spruce Ridge Capital and Spruce Ridge Estates to develop the lands as represented in the offering memoranda;
- the diversions and the inflation of the purchase price were done by Aitkens, who knew that the transfer of funds away from Spruce Ridge and the inflated price put the investors' pecuniary interests at risk. These acts constituted fraud by "other fraudulent means".

Representations Made in the OMs and the Marketing Materials

The Brochure

[241] A brochure was circulated to Spruce Ridge investors, the contents of which were approved by Aitkens (Exhibit P-6, Tab "Brochure"). The Brochure made several representations with respect to the Spruce Ridge Project. It stated that Spruce Ridge "will include destination developments such as an 18 hole PGA class golf course, convention meeting oriented hotel, and other supporting amenities". The Brochure also included a path to maximize investor returns, which included development of the property.

The Executive Summary

[242] As with Legacy, an Executive Summary was prepared for the project, approved by Aitkens, and then circulated to the investors. The Executive Summary again stated that the Spruce Ridge Project included plans for a PGA Class 18 – 27 hole golf course, an executive hotel and executive convention facility, a wellness centre and retail sites, and other amenities and supporting services. Although page 8 of the Executive Summary refers to three "profit strategies", only one of which involves development, [redacted] testified that the gross profit of $460,114,000 listed on this same page, while wholly unrealistic, could only possibly be obtained if the land was developed.

Spruce Ridge Capital and Spruce Ridge Estates Offering Memoranda

[243] The offering memoranda for Spruce Ridge Capital and Spruce Ridge Estates contained very clear direction as to what investor funds would be spent on. Part 1.2 of the SRC OM indicated that investment dollars would go towards either: allowing Spruce Ridge Estates to purchase the Spruce Ridge Lands; working capital; or to pay for administrative and operating expenses incurred by the Corporation. Part 1.2 of the SRE OM similarly states that all of the

raised funds are to be put towards the purchase of the Spruce Ridge Lands. Part 2.6 of the SRC OM and Part 2.4.5 of the SRE OM repeat the same development inclusions as the Executive Summary. There is no indication that the investment dollars will be sent to other companies.

Diversions to 1252064

[244] Despite the representations in the Executive Summary and the SRE OM regarding how Spruce Ridge Estates investors' money was to be spent, significant funds were diverted away from Spruce Ridge Estates to Aitkens' personal company, 1252064. To summarize the information found in P-11 and P-12, the bank records show that the following transfers were made from Spruce Ridge Estates to 1252064:

Date	**Amount**
November 26, 2008	$1,400,000.00
April 27, 2009	$90,000.00
TOTAL:	**$1,490,000.00**

Transfers back from 1252064 to Spruce Ridge Estates

[245] The bank records (Exhibit P-11 and Exhibit P-12) show that the following money was transferred back to Spruce Ridge Estates from 1252064:

Date	**Amount**
July 9, 2008	$50,000.00
August 20, 2010	$100,000.00
TOTAL:	**$150,000.00**

Diversions to 1330075

[246] Despite the representations in the Executive Summary and the offering memorandum regarding how Spruce Ridge Capital investors' money was to be spent, significant funds were diverted away from Spruce Ridge Capital to Aitkens' personal numbered company, 1330075. To summarize the information found in P-11 and P-12, the following transfers were made from Spruce Ridge Capital to 1330075, none of which was returned:

Date	**Amount**
July 18, 2008	$2,000,000.00

Inflated Purchase Price on the Spruce Ridge Lands

[247] Staff allege that Aitkens also grossly inflated the purchase price payable by the Spruce Ridge investors for the Spruce Ridge Lands such that it posed a risk that the Spruce Ridge Project would fail for lack of development funds.

[248] On April 16, 2007, the original price for the Spruce Ridge Lands under the Tantalus Purchase Agreement was $18,932,775 ($20,512.22/acre). The Tantalus Purchase Agreement

was subsequently assigned to 1330075 and on September 28, 2007, Spruce Ridge Estates acquired the Spruce Ridge Lands from 1330075 for $64,715,000 (Exhibit P-15, Spruce Ridge, Tab B, Affidavit of Ronald Aitkens, sworn on August 23, 2012, para. 39).

[249] The documentary evidence presented by Staff (Exhibit P-12 and Exhibit P-13) establishes that a long series of transfers were made from Spruce Ridge Capital to Spruce Ridge Estates and then to 1330075. It would appear that the payments were made pursuant to the agreement between Spruce Ridge Estates and 1330075 for the purchase of the Spruce Ridge Lands. The transfers were as follows:

Date	**Amount (SRC to SRE)**	**Amount (SRE to 1330075)**
November 19, 2007	$850,000	$845,000.00
December 5, 2007	$1,023,800.00	$1,000,000.00
December 21, 2007	$1,000,000.00	$1,000,000.00
January 25, 2008	$1,000,000.00	$1,000,000.00
February 4, 2008	$2,000,000.00	$2,000,000.00
February 22, 2008	$2,000,000.00	$2,000,000.00
March 3, 2008	$3,100,000.00	$3,100,000.00
March 6, 2008	$1,200,000.00	$1,200,000.00
March 13, 2008	$1,300,000.00	$1,300,000.00
April 1, 2008	$1,500,000.00	$1,500,000.00
April 24, 2008	$2,500,000.00	$2,400,000.00
April 30, 2008	$1,260,000.00	$1,260,000.00
May 2, 2008	$100,000.00	$100,000.00
May 7, 2008	$250,000.00	$250,000.00
May 13, 2008	$100,000.00	$100,000.00
May 23, 2008	$200,000.00	$200,000.00
May 27, 2008	$2,000,000.00	$2,000,000.00
May 29, 2008	$3,600,000.00	$3,600,000.00
June 10, 2008	$2,500,000.00	$2,500,000.00
June 27, 2008	$2,000,000.00	$2,000,000.00
July 17, 2008	$100,000.00	$100,000.00
July 18, 2008	$2,000,000.00	$2,000,000.00
August 12, 2008	$3,000,000.00	$3,000,000.00
August 14, 2008	$2,750,000.00	$2,750,000.00
August 19, 2008	$1,000,000.00	$1,000,000.00
September 8, 2008	$1,800,000.00	$1,800,000.00
September 24, 2008	$250,000.00	$249,000.00
October 2, 2008	$700,000.00	$700,000.00
November 10, 2008	$100,000.00	$100,000.00
November 26, 2008	$1,400,000.00	$1,400,000.00
February 2, 2009	$1,500,000.00	$1,500,000.00
March 9, 2009	$100,000.00	$75,000.00 (Mar 10, 2009)
April 27, 2009	$100,000.00	$90,000.00
TOTAL:	**$44,283,800.00**	**$44,119,000.00**

[250] We are satisfied that the above listed funds were transferred from Spruce Ridge Estates to 1252064 based on the documentary evidence.

Transfers back from 1330075 to Spruce Ridge Estates

[251] Of the total amount of $44,119,000 which Spruce Ridge Estates transferred to 1330075, the bank records show that $364,000 of that above amount was transferred back to Spruce Ridge Estates by 1330075, resulting in a net total of $43,755,000.

[252] Staff contend that despite the above transfers, Spruce Ridge granted a mortgage to 1330075 for $44,715,000 dated October 26, 2008 which was signed by Aitkens. The result is that the Spruce Ridge investors, who had already paid $43,755,000 for the Spruce Ridge Lands, were now expected to pay an additional $44.715,000. This raised the purchase price for the Spruce Ridge Lands to $88,834,000 which was far in excess of the initial purchase price of $18,932,775.

[253] [redacted] testified to the impact of the above drains on Spruce Ridge Estate's funds. He explained that as Spruce Ridge's project manager, he began by commissioning a number of studies and reports on the Spruce Ridge Lands, and, as part of the early development process, he entered into negotiations for the building of a college on the Spruce Ridge Lands. In time, he saw success in these negotiations, and went to Aitkens for more money to cover the legal expenses required to finalize the deal. At this point approximately $1,500,000 had been spent on the Spruce Ridge Lands, leaving, in theory, around $10,000,000 left in working capital. To his surprise, Aitkens informed him that there was no money left in the Spruce Ridge account, thereby completely derailing the project. We also heard testimony that no development has taken place on the Spruce Ridge Lands.

The Reallocation of Funds for Sound Business Reasons Provision

[254] The Spruce Ridge Capital and the Spruce Ridge Estates offering memoranda contained the following "reallocation" provision:

> **1.3 Reallocation**
> "The Corporation intends to use the net proceeds of this Offering as stated. The Corporation will reallocate the net proceeds of this Offering only for sound business reasons."

[255] The meaning and proper use of this term has already been discussed above. While the term is broad, we note that the placement of the provision in the offering memorandum directly followed a detailed provision setting out a comprehensive breakdown of how many dollars were to be spent on what aspects of the Spruce Ridge Project. The first statement reiterated what an investor would reasonably have assumed, that the intention was to do with the money what had just been disclosed in some detail. The second statement casts a reallocation as something exceptional, "only" to happen in certain circumstances. Those certain circumstances were described as "sound business reasons". While not stated expressly, an investor would reasonably have inferred – and would have been entitled to infer – two things: (i) that the "business reasons" would have something to do with the business of Spruce Ridge, which was the purchase and development (and eventual resale) of the Spruce Ridge Land; and (ii) that the soundness of

such exceptional business reasons would be assessed, in a businesslike way, with a view to their consistency with the interests of Spruce Ridge and its investors (see *Aitkens*, supra, at para 386).

[256] We are satisfied that the transfers of funds were not in accordance with the disclosure provided to Spruce Ridge Capital and Spruce Ridge Estate investors. We accept the allegations of Staff regarding the use of the investor money, including transfers to 1252064 and 1330075. Most of the money received Spruce Ridge Capital and Spruce Ridge Estates was diverted to Aitkens' personal companies, with no reasonable prospect of recovery. In summary, we find that the actions of Aitkens, as the person who was the guiding and controlling mind of Spruce Ridge Capital, Spruce Ridge Estates, 1252064 and 1330075 included the following: failure to disclose important facts, the unauthorized diversion or taking of money or property and the unauthorized use of investor money. As all of these actions fall directly within the category of "other fraudulent means" as set out in *Arbour,* we are satisfied that there was a prohibited act.

Deprivation to the Spruce Ridge Investors

[257] We find there is evidence of deprivation to the Spruce Ridge investors in this case. Such deprivation was exposure to risk of financial loss and actual financial loss. Investor 1 testified that he and his wife sustained significant financial losses. Spruce Ridge Capital and Spruce Ridge Estate investors knew that much of their invested money would go towards the purchase of the Spruce Ridge Lands. The wording of the Spruce Ridge Capital offering memoranda led investors to believe that the remainder of their money would be used for the development of the Spruce Ridge Lands. Investors were not told that their money might or would be transferred to other companies. Further, the purchase price of the Spruce Ridge Lands was significantly inflated. These acts resulted in the Spruce Ridge Project running out of money and as a result no development ever took place of the Spruce Ridge Lands. The Spruce Ridge Project failed for lack of development funds which negatively impacted the investments made in the Project. In summary, we find that the Respondents' prohibited acts found above caused deprivation within the meaning of *Théroux.*

Aitkens' Knowledge of the Prohibited Acts Resulting in Deprivation to Spruce Ridge Investors

[258] We found that Aitkens was the guiding mind of Spruce Ridge Capital, Spruce Ridge Estates, 1252064, and 1330075. [redacted] testified that Aitkens was the only person who had access to the bank accounts for those entities. [redacted] testified that Aitkens approved the wording in the Brochure, Executive Summary, Spruce Ridge Capital Offering Memorandum and the Spruce Ridge Estates Offering Memorandum. Aitkens signed the mortgage from Spruce Ridge Estates to 1330075. We find there is no question that Aitkens knew about the diversions, knew about the inflation of the purchase price, and knew about the representations made to the Spruce Ridge investors in the marketing materials and the offering memoranda. The evidence is clear and we find that Aitkens and 1252064 and 1330075 (through their guiding mind, Aitkens) had the requisite knowledge of the prohibited acts.

[259] We are satisfied that Aitkens was the person responsible for transferring funds from Spruce Ridge Capital, Spruce Ridge Estates, 1252064 and 1330075. We are also satisfied that 1252064 and 1330075 were also responsible as their "directing mind knew or reasonably ought

to have known that the acts of the corporation perpetrated a fraud". We have no doubt that and find that Aitkens and 1252064 and 1330075 were fully aware of that their prohibited acts would not only put investor money at risk but would also deprive investors of their money.

[260] Therefore, we conclude that Aitkens, 1252064 and 1330075 engaged in a course of conduct related to securities that they knew perpetrated a fraud on Spruce Ridge Capital and Spruce Ride Estate investors and breached section 55.1 of the Act.

4. Did the Respondents contravene the misrepresentation provisions in subsection 44(3.1) (for the time period July 2005 to June 30, 2007) and section 55.11 of the Act (for the time period July 1, 2007 to December 2012)?

Misrepresentation: Subsection 44(3.1) and Section 55.11

[261] Section 55.11 of the Act prohibits persons or companies from making misleading and untrue statements in certain circumstances. Section 55.11 reads:

> **Misleading and untrue statements – prohibition**
> **55.11**(1) No person or company shall make a statement if that person or company knows or reasonably ought to know that:
>
> (a) the statement either:
>
> (i) is misleading or untrue in a material respect and at a time and in the light of the circumstances under which it is made; or
> (ii) does not state a fact required to be stated or that is necessary to make the statement not misleading in a material respect and at the time and in the light of the circumstances under which it is made; and
>
> (b) the statement would reasonably be expected to have a significant effect on the market price or value of a security or derivative.

[262] Effective July 1, 2007, section 55.11 came into force and replaced subsection 44(3.1). Subsection 44(3.1) was in force from November 7, 1988 to June 30, 2007 and read:

> **Prohibition on representations**
> **44(**3.1) No person or company shall, with the intention of effecting a trade in a security or exchange contract, make a statement that the person or company knows, or ought to reasonably know, is a misrepresentation.

[263] Prior to July 1, 2007, "misrepresentation" was defined in the Act to mean:

> (cc) "**misrepresentation**" means:
>
> (i) an untrue statement of a material fact; or

(ii) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made;

[264] Prior to July 1, 2007, **"material fact"** was defined in clause 2(1)(z) of the Act to mean:

> "when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

[265] Misrepresentations have therefore been prohibited by the Act since at least November 7, 1988.

Legal Framework for Misrepresentations

[266] In *Aitkens*, the Alberta Securities Commission reviewed the law with respect to misrepresentations. The Commission noted that, at the relevant time, clause 92(4.1) of the Alberta *Securities Act* provided as follows:

> **92**(4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading, and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security or an exchange contract.
>
> (*Aitkens*, at para 133)

[267] While the wording of the misrepresentation provision is not identical to the misrepresentation provision in Saskatchewan's Act, it is very similar.

[268] The Commission also cited its previous decision in *Arbour Energy Inc.*, Re, 2012 ABASC 131 at para 753 for the relevant test for misrepresentation and noted that to establish a misrepresentation under subsection 92(4.1), Staff must prove:

> (a) a statement was made by a respondent;
>
> (b) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; and

(c) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security

(*Aitkens* at para 134).

[269] The Commission further explained that with respect to the last factor, the context or the circumstances must be considered since a significant fact for one issuer at a given point in time may not be significant for another (*Aitkens* at para 135, citing *Re Stan*, 2013 ABASC 148 at para 225).

[270] The Commission also commented on the element of materiality. While investors' evidence with respect to the impact the information may have had on their investment decisions may be considered, neither that evidence nor expert evidence on market price or value is required to meet the legal test (citing *Arbour* at paras 763-766; and *R v Zelitt*, 2003 ABPC 2 at paras 32-34, 56 WCB (2d) 486). This is because the Panel is an expert tribunal with the specialized knowledge and experience necessary to draw inferences as to the objective view of a reasonable investor (Aitkens at para 137, citing Arbour at para 765). As stated in Arbour, "[c]ommon-sense inferences […] may suffice in certain cases" (at para 764).

[271] The Commission went on to state that a hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. In other words, the determination is "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (*Aitkens* at para 138, citing *Arbour* at para. 765).

[272] The Commission noted that a panel can find a breach of the provision even in the absence of proof that any particular investor relied on any particular misrepresentation or omission (*Aitkens*, at para 139.

[273] In *Arbour*, the Commission stated at para. 768:

> [768] Securities regulation does not focus on what the market or investors do with mandated information provided to them. Rather, the objective of securities regulation is to oblige those who seek money from public investors and the capital market to provide current, truthful and accurate information in prescribed formats, which can then be used by those in the capital market as a basis for making reasonably informed investment decisions. That a particular investor or investors may not read or rely on such information in making investment decisions does not relieve an issuer of its obligations to provide accurate and reliable information, and to comply with Alberta securities laws when soliciting money from the public.

[274] Finally, the accurate disclosure of an issuer's intended use of investment funds is among the most important information an investor can and should be given. That is why such disclosure is mandated by law in securities offering documents. As stated in *Arbour*:

> [776] […] The use to which an issuer proposes to put money raised is obviously one of the most important factors considered by reasonable investors in deciding whether to invest in the issuer's securities. Such decisions would ultimately reasonably be expected to have a significant effect on the market price or value attributed to the securities. As this Commission noted in *Re Dobler*, 2004 ABASC 927 (at para. 220):
>
> > . . . Disclosure of the use of proceeds of an offering of securities has long been a key element of prospectuses and other offering documents, an element taken seriously by securities regulators and market participants. . . . The assumption underlying the requirement, and the seriousness with which it is taken, is that investors being asked to put money in a company, and market participants observing the process, care about how the money will be spent. Different proposed uses of proceeds may well affect investors' willingness to invest, and the prices they are willing to pay. . . .

A. Legacy Communities Inc.

Misrepresentations made in the offering memoranda and marketing materials

[275] We reviewed the offering memoranda and the marketing materials to determine whether they contained misrepresentations within the meaning of the Act. Staff take the position that there are three basic sources of misrepresentations that were made with respect to the Legacy project:

- the potential return on investment;
- the business of Legacy; and
- how and where investment dollars would be spent.

1. The Potential Return on Investment

[276] Staff submit that page 7 of the Executive Summary misrepresented the potential return on investment (ROI) that investors could expect on their investment dollars The Executive Summary provides two scenarios: one involving three lots per acre and another involving four lots per acre. Each scenario is accompanied by a ROI based on an investment purchase of 100 Units ($10,000.00). In the three lots per acre scenario, the Executive Summary states that the ROI will be approximately $39,717. The four lots per acre scenario is accompanied by a ROI of $44,000.00.

[277] Both scenarios give a ROI of approximately 400%. [redacted] testified at the hearing that this high level of return was in no way realistic. He stated that a normal return on investment in a development project is approximately 15-20%. [redacted] testified that the Executive Summary was intended to be a summary of the offering memoranda but that the ROI scenarios were not contained in the Legacy offering memoranda.

2. The Business of Legacy

[278] Staff assert that the Legacy Project was represented to investors as having certain limited business objectives related to the purchase and development of the Legacy Lands. However, the business of Legacy was significantly expanded beyond the business purposes disclosed in the offering memoranda.

[279] It is Staff's position that the clearest statements regarding Legacy's intended business are found in OM #2 and OM #3. Part 2.2 of OM #2 indicates that Legacy has been involved in the business of raising funds to fulfill its obligations under a purchase contract to obtain the Legacy Lands. As noted above, Part 1.2 also provides a comprehensive breakdown of how investor funds will be spent. Part 2.1 of OM #3 states the following:

> The Issuer [Legacy] was formed to carry on the business of purchasing, subdividing, developing and selling the Property either as an entirety (before or after subdivision or development) or by the sale of individual subdivided parcels and all other business ancillary or incidental to any of the foregoing. As of the date of this Offering Memorandum, the business conducted by the Issuer includes acquiring the Legacy Lands, the Option, offering the Units for sale pursuant to the Offerings dated July 15, 2005 and September 15, 2006 (collectively the "2005 and 2006 Offerings) [sic] in order to meet its obligations pursuant to the Purchase Agreement the [sic] Option Agreement and entering into certain agreements related to its business activities. See Item 2.10 – Material Agreements".

[280] We find that notwithstanding the foregoing statements, Legacy, under the direction of Aitkens, entered into several agreements which were either not disclosed, or not adequately disclosed, to the Legacy investors which contradicted the representations made in the offering memoranda regarding the business of Legacy. Legacy signed three separate Management Services Agreements dated July 15, 2005, September 15, 2006, and October 29, 2007, respectively. While the FCC Agreements were to some extent disclosed in Parts 1.8 and 4.3 of OM #1, there was no mention of the following Recital "B" of the FCC Agreements in Part 2.8 of OM #2, and Part 2.10 of OM #3:

> **RECITALS:**
> […]
> B. The Issuer intends on focusing as an intermediary private real estate lender by providing bridge and mezzanine financing (the Loans" [sic]) for acquisitions, developments and interim financing requirements of real estate developers, home owners, private companies, public companies, and individuals (the Borrowers), The Issuer anticipated that the Loans will be high yield and short term in nature. The Issuer may be compensated by any one of or any combination of commitment fees, interest, equity, and Profit participation with respect to loans advanced to the Borrowers.
> (the "Issuer's Business")' [sic]
> […]

[281] The above recital significantly expands the business of Legacy from the limited representations made in the offering memoranda. There is no indication in the offering memoranda that Legacy will provide "bridge and mezzanine financing" to allow other entities to

acquire, develop, or meet interim financing requirements. As far as Legacy investors knew, Legacy was simply focused on acquiring and developing the Legacy Lands. The failure of Aitkens to disclose this recital to the Legacy investors constitutes a misrepresentation given that it directly contradicts other statements made in the offering memoranda.

3. How and Where Investment Dollars Would be Spent

[282] All three of the Legacy offering memoranda include a breakdown of how the net proceeds will be spent. There is no indication in the offering memoranda that investor funds will be spent on anything other than the Legacy project.

[283] Contrary to this, Legacy entered into an Investment Agreement with Harvest Capital which contained the following terms:

> **REASON FOR THE AGREEMENT**
> […]
>
> 3/There is a potential risk that just investing all of the capital in the 503 acres may offer more risk than necessary. If the property goes down in value the bonds would be worth less than the original investment.
>
> 4/Legacy Communities Inc. believes that spreading the capital to other investments may help to lower the risk. For this reason when writing the Offering Memorandum, there was a clause that was included in the Offering Memorandum under " Reallocation [sic]. The Issuer intends to spend the net proceeds as stated. The Issuer will reallocate funds only for sound business reasons."
> […]

[284] The Investment Agreement directly contradicts the representations made in the Legacy offering memoranda regarding how investors' funds will be spent. The offering memoranda do not indicate that investment dollars may be spread to other investments. In addition, the evidence is that this Investment Agreement was never disclosed to Legacy investors.

[285] As outlined earlier, a series of Promissory Notes were executed by Aitkens which indicated that Legacy funds were to be sent to Harvest Capital, or an affiliate, for the purpose of investing in a number of projects unrelated to Legacy: a development in Isle Del Rey, Panama; a development at Balsam Lake, Ontario; and an investment in a shopping center located in Red Deer, Alberta. The evidence is clear that none of these Promissory Notes were ever disclosed to investors.

[286] Finally, we heard testimony that Legacy funds were actually sent by wire transfer by Aitkens to develop property in Panama. Once again, the evidence is clear that this transfer of funds was never disclosed to the Legacy investors.

The Materiality of the Misrepresentations

[287] The question to determine materiality is "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked' (*Aitkens*, at para 138, citing *Arbour*, at para. 765).

[288] Staff submit that the misrepresentations by the Respondents in this matter were material because it would have been important to a reasonable prospective Legacy buyer to know that their investment funds could be lent to other developers or spent on other projects unrelated to Legacy. Specifically, a reasonable prospective buyer would want to know if any their funds could be spent on anything contrary to how the Net Proceeds were said to be spent according to the offering memoranda.

[289] We find that there was an omission to disclose that Legacy intended to use the proceeds raised almost immediately for projects unrelated to the Legacy Project. We find that this was a material fact required to be disclosed or disclosed accurately. As noted in *Re Dobler,* 2004, ABASC 927 (at para. 220), the use to which an issuer proposes to put money raised is obviously one of the most important factors to be considered by reasonable investors in deciding whether to invest in the issuer's securities.

Aitkens' Knowledge of the Misrepresentations

[290] We find that Aitkens had full knowledge of the above misrepresentations. He was the guiding mind of Legacy. [redacted] confirmed in his testimony that Aitkens approved the wording in the Executive Summary and the Legacy offering memoranda. As well, there is clear and compelling evidence that Aitkens signed the FCC Agreements, the HCMI Agreement, and the Promissory Notes on behalf of all parties. Aitkens was the only person who had control of Legacy's bank account, and personally transferred Legacy funds to Panama. There is no question that Aitkens knew about the representations made to the Legacy investors in the Executive Summary and the Legacy OMs, and knew when he was engaging in conduct contrary to those representations.

[291] Based on the entirety of the evidence, we find that Aitkens made misrepresentations to Legacy investors in contravention of section 44(3.1) (for the time period July 2005 to June 30, 2007) and section 55.11 of the Act (for the time period July 1, 2007 to December 2012).

B. Spruce Ridge Capital Inc. and Spruce Ridge Estates Inc.

Misrepresentations Made in the OMs and the Marketing Materials

[292] There are four basic sources of misrepresentations that were made with respect to the Spruce Ridge project:

- the potential return on investment;

- the business of Spruce Ridge;
- how and where investment dollars would be spent; and
- the purchase price for the Spruce Ridge Lands.

1. The Potential Return on Investment

[293] Staff submit that page 8 of the Executive Summary misrepresented the potential return on investment (ROI) that investors could expect on their investment dollars (P-6, Tab "Executive Summary"). The Summary provides three Profit Strategies: buy and hold; subdivision; and subdivision and development. Below, the Executive Summary projects gross revenues of $716,248,000, projected expenses of $256,134,000, and gross profit of $460,114,000. The page ends with the statement that:

> Based on these projections for the average shareholder:
> $10,000 invested turns into approximately $ 42,000.00
> $50,000 invested turns into approximately $ 210,000.00

[294] Staff allege that both scenarios give a ROI of approximately 400%. [redacted] testified that this high level of return was in no way realistic. [redacted] testified that a normal return on investment in a development project is approximately 15-20%. [redacted] testified that although the Executive Summary was supposed to summarize the Spruce Ridge offering memoranda, the projected gross revenues were not contained in the SRC OM or the SRE OM.

2. The Business of Spruce Ridge

[295] Staff assert that the Spruce Ridge Project was represented to investors as having certain limited business objectives related to the purchase and development of the Spruce Ridge Lands. However, the business of Spruce Ridge was significantly expanded beyond the business purposes disclosed in the offering memoranda.

[296] Staff submit that both the SRC OM and the SRE OM contained representations that the business of each respective company was limited to the Spruce Ridge Project. Part 2.3 of the SRC OM stated that:

> **2.3 Our Business**
> **[…]**
>
> The Corporation is raising funds pursuant to this Offering for the purpose of loaning the majority of the net proceeds of this Offering to SRE (the "SRE Loan" or the "Loan") to allow SRE to acquire certain raw lands located Southwest of the city of Calgary, Alberta, in the Municipal District of Foothills (the "Lands"). See Items 2.4 SRE Purchase Agreement and 2.5 The Lands.

[297] Although Part 2.3 does say that the purpose is to loan "the majority of the net proceeds" to Spruce Ridge Estates, this is not an indication that any of the net proceeds would be transferred to other companies for purposes unrelated to the Spruce Ridge project. Part 1.2 contains a breakdown of how the net proceeds are to be spent, the entirety of which is indicated as being spent on the Spruce Ridge Project.

[298] The SRE OM contains similar representations in Parts 2.2 and 2.6:

> **2.2 Our Business**
> […]
> The Corporation has entered into a purchase agreement dated September 28th, 2007 (the "Purchase Agreement") with 1330075 Alberta Ltd. ("1330075"), a related party,* pursuant to which the Corporation has agreed to purchase certain raw lands located Southwest of the City of Calgary, Alberta, in the Municipal District of Foothills (the "Lands") for the purchase price of $64,715,000 plus GST if applicable (the "Purchase Price").
> […]
>
> **4.6 Development of Business**
> To facilitate the acquisition of the Lands, the Corporation has arranged to borrow funds from SRC. See Item 2.10.2 Loan Agreement with Spruce Ridge Capital Inc.
> Upon acquisition of the Lands, the Corporation will prepare and submit the ASP [Area Structure Plan] for the Lands, potentially develop the Lands as discussed in Item 2.4, eventually sell the Lands to a third party, and to provide a return to purchasers of Class B Shares pursuant to this Offering.

[299] We find that notwithstanding the foregoing statements, Spruce Ridge Estates, under the direction of Aitkens, entered into an agreement that was not disclosed to the Spruce Ridge investors and that contradicted the representations made in the offering memoranda regarding the business of Spruce Ridge. Spruce Ridge Estates signed a Management Services Agreement with FCC, dated October 1, 2007. The FCC Agreement was not disclosed in either the SRC OM or the SRE OM. The FCC agreement included the following recital which was not included in the SRC OM or the SRE OM:

> **RECITALS:**
> […]
> B. The Issuer intends on focusing as an intermediary private real estate lender by providing bridge and mezzanine financing (the Loans" [sic]) for acquisitions, developments and interim financing requirements of real estate developers, home owners, private companies, public companies, and individuals (the Borrowers), The Issuer anticipated that the Loans will be high yield and short term in nature. The Issuer may be compensated by any one of or any combination of commitment fees, interest, equity, and Profit participation with respect to loans advanced to the Borrowers.
> (the "Issuer's Business")' [sic]
> […]

[300] The above recital significantly expands the business of Spruce Ridge Estates from the limited representations made in the offering memoranda. There is no indication in the offering memoranda that Spruce Ridge Estates will provide "bridge and mezzanine financing" to allow other entities to acquire, develop, or meet interim financing requirements. As far as the Spruce Ridge investors knew, Spruce Ridge Estates was simply focused on acquiring and developing the Spruce Ridge Lands. The failure of Aitkens to disclose this recital to the Spruce Ridge investors directly contracts other statements in the offering memoranda and constitutes a misrepresentation under the Act.

3. How and Where Investment Dollars Would be Spent

[301] Both the SRC OM and the SRE OM contain a breakdown of how the net proceeds will be spent. There is no indication in the SRC OM that the Spruce Ridge Capital investor funds will be transferred to any company except Spruce Ridge Estates. There is also no indication in the SRE OM that the Spruce Ridge Estate investor funds will be transferred to any company other than 1330075.

[302] Contrary to this, on July 18, 2008, the evidence is that Spruce Ridge Capital sent $2,000,000 to 1330075, none of which was returned to Spruce Ridge Capital. Also, between July 9, 2008 and August 20, 2010 a net total of $1,340,000 was transferred from Spruce Ridge Estates to 1252064. None of these transfers were disclosed to the Spruce Ridge investors.

4. The Purchase Price for the Spruce Ridge Lands

[303] The SRC OM and the SRE OM state that the Spruce Ridge Lands were to be purchased by Spruce Ridge Estates from 1330075 for $64,715,000. The evidence shows that Spruce Ridge Capital transferred $43,755,000 to Spruce Ridge Estates presumably pursuant to that purchase agreement, but without disclosure to the investors Spruce Ridge Estates subsequently granted a mortgage to 1330075 for $44,715,000 on October 26, 2008. The result is that the Spruce Ridge investors were now required to pay an additional $44,700,000 for the Spruce Ridge Lands, totaling $88,834,000.

The Materiality of the Misrepresentations

[304] We find that there was an omission to disclose that Spruce Ridge Capital and Spruce Ridge Estates intended to use the proceeds raised for projects unrelated to the Spruce Ridge Project. We find that these were material facts required to be disclosed. We are of the view that the misrepresentations were material because they would have been important to a reasonable prospective investor in Spruce Ridge to know that their investment funds could be lent to other developers or spent on other projects unrelated to the Spruce Ridge Project. In particular, it is our view that a reasonable prospective buyer would want to know if any their funds may be used for anything contrary to the stated use in the offering memoranda. Further, we believe that a reasonable investor would have considered it material that the purchase price for the Spruce Ridge Lands was increased to approximately $88,000,000 from the initial price of approximately $64,000,000.

Aitkens' Knowledge of the Misrepresentations

[305] Aitkens had full knowledge of the above misrepresentations. He was the guiding mind of Spruce Ridge Capital, Spruce Ridge Estates, 1252064, and 1330075. [redacted] testified that Aitkens approved the wording in the Executive Summary, the SRC OM, and the SRE OM. There is clear and compelling evidence that Aitkens signed the FCC Agreements on behalf of all of the parties. [redacted] and [redacted] both testified that Aitkens was the only person who had control of the bank accounts of Spruce Ridge Capital, Spruce Ridge Estates, 1252064, and 1330075, signed all of the documentation and personally carried out the transfer of funds

between those companies. There is no question that Aitkens knew about the representations made to the Spruce Ridge investors in the Executive Summary and the offering memoranda, and knew when he was engaging in conduct contrary to those representations.

[306] We find that Aitkens made misrepresentations to Spruce Ridge Capital and Spruce Ridge Estates investors in contravention of subsection 44(3.1) (for the time period July 2005 to June 30, 2007) and section 55.11 of the Act (for the time period July 1, 2007 to December 2012).

C. Railside Capital Inc. and Railside Industrial Inc.

Misrepresentations Made in the OMs and the Marketing Materials

[307] Staff allege that there are two basic sources of misrepresentations that were made with respect to the Railside project:

- the potential return on investment; and
- the business of Railside.

1. Potential Return on Investment

[308] Staff submit that page 7 of the Executive Summary misrepresented the potential return on investment (ROI) that investors could expect on their investment dollars. The Executive Summary projects gross revenues of $78,000,000, projected expenses of $49,890,000, and gross profit of $28,110,000. The page ends with the statement that:

> Based on these projections:
> $25,000 invested turns into approximately $41,000 in 3 to 4 years.
> $100,000 invested turns into approximately $164,000 in 3 to 4 years.

[309] Both scenarios give a ROI of approximately 64%. According to [redacted], this high level of return was in no way realistic. [redacted] testified that a normal return on investment in a development project is approximately 15-20%. [redacted] testified that the Executive Summary was supposed to summarize the Railside offering memoranda but that the projected gross revenues were not contained in the RSC or RSIP OMs.

2. The Business of Railside

[310] Staff take the position that Railside was represented to investors as having certain limited objectives related to the purchase and development of the Railside Lands but that the business of Railside was significantly expanded beyond the representations made in the offering memoranda.

[311] Both the RSC OM and the RSIP OM included representations that the business of each respective company was limited to the Railside Project. Part 2.3 of the RSC OM stated that:

> **2.3 Our Business**
>
> […]

> The Corporation is raising funds pursuant to this Offering for the purpose of loaning the majority of the net proceeds of this Offering to RSIP (the "RSIP Loan" or the "Loan") to allow RSIP to acquire certain lands located adjacent to the eastern town limits of the Town of Millet, Alberta, in the County of Wetaskiwin (the "Lands"). See Items 2.4 RSIP Purchase Agreement and 2.5 The Lands.

[312] While Part 2.3 does say that the purpose is to loan "the majority of the net proceeds" to RSIP, this is not an indication that any of the net proceeds would be transferred to other companies for purposes unrelated to the Railside Project. In fact, Part 1.2 contains a breakdown of how the net proceeds are to be spent, the entirety of which is indicated as being spent on the Railside Project.

[313] The RSIP OM contains similar representations in Parts 2.2 and 2.5:

> **2.2 Our Business**
> […]
> The Corporation has entered into a purchase agreement dated February 11, 2008 (the "Purchase Agreement") with 1252064 Alberta Ltd. ("1252064"), a related party,* pursuant to which the Corporation has agreed to purchase certain lands located adjacent to the Town of Millet, Alberta, in the County of Wetaskawin (the "Lands") for the purchase price of $22,500,000 plus GST if applicable (the "Purchase Price").
> […]
>
> **2.5 Development of Business**
> To facilitate the acquisition of the Lands, the Corporation has arranged to borrow funds from RSCI. See Item 2.11.2 Loan Agreement with Railside Capital Inc.
> Upon acquisition of the Lands, the Corporation intends to continue with the development of the lands.

[314] Contrary to this, Railside Industrial, under the direction of Aitkens, entered into an agreement that was not fully disclosed to the Railside investors which contradicted the representations made in the offering memoranda regarding the business of Railside. Railside Industrial signed a Management Services Agreement with Foundation Capital Corporation dated March 3, 2010. The FCC Agreement was not fully disclosed in either the RSC OM or the RSIP OM and each OM failed to make any mention of Recital "B" in the Agreement:

> **RECITALS:**
> […]
> B. The Issuer intends on focusing as an intermediary private real estate lender by providing bridge and mezzanine financing (the Loans" [sic]) for acquisitions, developments and interim financing requirements of real estate developers, home owners, private companies, public companies, and individuals (the Borrowers), The Issuer anticipated that the Loans will be high yield and short term in nature. The Issuer may be compensated by any one of or any combination of commitment fees, interest, equity, and Profit participation with respect to loans advanced to the Borrowers.
> (the "Issuer's Business")' [sic]
> […]

[315] The above recital significantly expands the business of Railside Industrial from the limited representations made in the RSIP OM. There is no indication in the RSIP OM that Railside Industrial will provide "bridge and mezzanine financing" to allow other entities to acquire, develop, or meet interim financing requirements. As far as Railside investors knew, Railside Industrial was focused on acquiring and developing the Railside Lands. The failure of Aitkens to disclose this recital to the Railside investors constitutes a misrepresentation as it directly contradicts other statements made in the RSIP OM.

The Materiality of the Misrepresentations

[316] Staff submit and we agree that the misrepresentations were material because they would have been important to a reasonable prospective investor in Spruce Ridge to know that their investment funds could be lent to other developers or spent on other projects unrelated to Spruce Ridge. Specifically, a reasonable prospective buyer would want to know if any their funds could be spent on anything contrary to how the Net Proceeds were said to be spent according to the offering memoranda. Further, a reasonable investor would have considered it material that the purchase price for the Spruce Ridge Lands was raised to approximately $88,000,000 from the initial price of approximately $64,000,000.

Aitkens' Knowledge of the Misrepresentations

[317] We concluded that Aitkens had full knowledge of the above misrepresentations. He was the guiding mind of Railside Capital and Railside Industrial. He approved the wording in the Executive Summary, the RSC OM, and the RSIP OM. He also signed the FCC Agreement on behalf of all parties. There is no question that Aitkens knew about the representations made to the Railside investors in the Executive Summary and the RSC OM and the RSIP OM, and knew when he was engaging in conduct contrary to those representations.

[318] We find that Aitkens made misrepresentations to the investors in Railside Corporation and Railside Industrial in contravention of subsection 44(3.1) (for the time period July 2005 to June 30, 2007) and section 55.11 of the Act (for the time period July 1, 2007 to December 2012).

5. Did the Respondents contravene subsection 44(2) of the Act?

Written Undertakings: Subsection 44(2)

[319] Subsection 44(2) of the Act prohibits written undertakings relating to the future value of a security or derivative. Subsection 44(2) provides as follows:

> **Prohibition on representations**
> **44**(2) No person or company shall, with the intention of effecting a trade in a security or derivative, give any undertaking, written or oral, relating to the future value or price of that security or derivative.

[320] The difference between a "representation" and an "undertaking" was addressed by the Ontario Securities Commission in *Re Limelight Entertainment Inc. et al* (2008), 31 OS.C.B 1727, at paras. 164 to 171:

> [164] We agree that something less than a legally enforceable obligation can be an "undertaking" within the meaning of subsection 38(2), depending on the circumstances. We also accept Staff's submission that we should not take an overly technical approach to the interpretation of subsection 38(2) and that we should consider all of the surrounding circumstances and the Commission's regulatory objectives in interpreting the meaning of that section.
>
> [165] We found the decision in *Re National Gaming Corp*. (2000), 9 A.S.C.S. 3570 ("*National Gaming*") to be helpful on this issue. The Alberta Securities Commission (the "ASC") stated:
>
> > … an undertaking is a promise, assurance or guarantee of a future price or value of securities that can be reasonably interpreted as providing the purchaser with a contractual right against the person giving the undertaking if, for any reason, the value or price is not achieved.
> > (*Re National Gaming Corp.* (2000), 9 A.S.C.S. 3570, at p. 16)
>
> [166] In the same decision, the ASC also stated:
>
> > In interpreting subsection 70(3)(a), we are mindful of the fact that predictions relating to the future value or price of securities are commonplace in the securities industry, and are not prohibited by the Act. Predictions encompass a broad spectrum. They range from very general predictions about the entire market, to very specific predictions about the value or price of a particular security within a particular time frame. Some predictions are developed with extreme care, based on rigorous, professional research and scientific analysis based on sophisticated market theory. Other predictions may be based on no more than wishful thinking or guesswork. In our view, the shared element of all predictions is that they are merely opinions.
> > (*Re National Gaming Corp*. (2000), 9 A.S.C.S. 3570, at p. 16)
>
> [167] Finally, the ASC stated that in determining whether a representation amounted to an undertaking, the context of the statement must be considered, and the "undertaking" must be given a "functional interpretation" in keeping with the objective of protecting investors. Accordingly, the ASC held it was not necessary to show that all the elements of an enforceable contract existed. The ASC concluded in *National Gaming* that no undertaking with respect to future value was given in the circumstances.
>
> [168] In *Securities Law and Practice* (Borden Ladner Gervais LLP, *Securities Law and Practice*, 3rd ed., looseleaf (Toronto: Thomson Canada Limited, 2007) (WLeC)), it is stated that:
>
> > "the prohibition in s. 38(2) appears to be justifiably narrow since trading in securities is necessarily based on statements concerning the future value or price of securities; as long as they are not construed as undertakings, s. 38(2) would not be breached."

> [169] We agree with the approach of the ASC in *National Gaming* and the statement of the law from *Securities Law and Practice*.
>
> [170] In our view, a mere representation as to future value is not an "undertaking" within the meaning of subsection 38(2) of the Act. Prohibiting all representations as to the future value of securities would ignore the reality of the marketplace.
>
> [171] In this case, considering all of the circumstances, we do not believe that potential Limelight investors would have understood that the representations made to them as to the future value of Limelight shares amounted to a promise, guarantee or assurance of future value. The words used by the Limelight salespersons did not suggest that something more than a representation was being made or an opinion given. There is no evidence of any promise or assurance given to repurchase the securities or refund the purchase price if a certain value was not achieved. Accordingly, we do not view the representations as to future value given in this case to be "undertakings" within the meaning of subsection 38(2) of the Act.

[321] The issue of whether certain statements constituted an undertaking with respect to the future values of a security was also considered by the Ontario Securities Commission in *Re Aatra Resources Ltd. et al.* (1990), 13 O.S.C.B. 5109 ("***Aatra***"). In that case, the commission summarized the evidence it relied upon in finding that the respondent's representations were "undertakings" at para 22:

> And, despite the express prohibitions of section 37 of the Act, Mr. Kronis made express representations as to the future price of Aatra and Bayridge stock. On June 29, 1989, he told Mr. Carducci that "you'll probably be well over the $4.00 hump" in Bayridge "over the next 90 days", and that "that could be, you know, could take two days to go to $4.00". On August 16, 1989, he told Mr. Carducci that:
>
> > I would assure you, I will practically guarantee you that within the week you will see the stock one week from today I would say anywhere from twenty cents ($0.20) to fifty cents ($0.50) higher.
>
> And he told another investor that if his stock did not go up by 10¢ to 15¢ in the following 2 to 3 weeks, he did not have to pay for it – again, in breach of the express provisions of section 37. Once again, "overenthusiastic" or not, Mr. Kronis was clearly acting in breach both of the Act and of his obligations as a registrant under the Act.

[322] We accept and adopt the above analysis set out in *Limelight* and *National Gaming.*

A. Legacy Communities Inc.

[323] Staff assert that Legacy's Executive Summary contained written undertakings regarding the future value of securities sold by Legacy. The Summary provides two scenarios: one involving three lots per acre and another involving four lots per acre. Each scenario is accompanied by a ROI based on an investment purchase of 100 Units ($10,000.00). In the three lots per acre scenario, the Summary states that the ROI will be approximately $39,717. The four lots per acre scenario is accompanied by a ROI of $44,000.

[324] Staff submit that the Legacy Executive Summary was produced for the purpose of effecting a trade in securities. The evidence is that Aitkens approved the wording of the Legacy Executive Summary. The Executive Summary contains a written undertaking relating to the future value of Legacy securities.

B. Spruce Ridge Capital Inc. and Spruce Ridge Estates Inc.

[325] Staff take the position that Spruce Ridge's Executive Summary contained written undertakings regarding the future value of securities sold by Spruce Ridge. The Executive Summary projects gross revenues of $716,248,000, projected expenses of $256,134,000, and gross profit of $460,114,000. The page ends with the statement that:

> Based on these projections for the average shareholder:
> $10,000 invested turns into approximately $ 42,000.00
> $50,000 invested turns into approximately $ 210,000.00

[326] Staff submit that the Spruce Ridge Executive Summary was produced for the purpose of effecting a trade in securities. [redacted] testified that Aitkens approved the wording of the Spruce Ridge Executive Summary. The Executive Summary contains a written undertaking relating to the future value of Spruce Ridge Capital and Spruce Ridge Estate securities.

C. Railside Capital Inc. and Railside Industrial Inc.

[327] Staff take the position that Railside's Executive Summary contained written undertakings regarding the future value of securities sold by Railside. The Summary projects gross revenues of $78,000,000, projected expenses of $49,890,000, and gross profit of $28,110,000. The page ends with the statement that:

> Based on these projections:
> $25,000 invested turns into approximately $41,000 in 3 to 4 years.
> $100,000 invested turns into approximately $164,000 in 3 to 4 years.

[328] Staff submit that the Railside Executive Summary was produced for the purpose of effecting a trade in securities. The evidence is that Aitkens approved the wording of the Railside Executive Summary. The Executive Summary contains a written undertaking relating to the future value of Railside Capital and Railside Industrial securities.

[329] Taking into account the context in which the statements were provided and the objective of protecting investors, we find that Aitkens gave a written undertaking relating to the future value of securities with the intention of effecting a trade in securities in contravention of subsection 44(2) of the Act.

6. Did the Respondents contravene subsection 80.1(2) of the Act?

Material Change in Affairs: Subsection 80.1(2)

[330] Subsection 80.1(2) of the Act requires an offering memorandum to be amended if the distribution under the offering memorandum has not been completed and there is a material change in the affairs of the issuer. Subsection 80.1(2) provides as follows:

> **Obligation to deliver offering memorandum**
> **80.1**(2) If a person or company uses an offering memorandum in connection with a distribution of securities, the person or company shall amend the offering memorandum if:
>
> (a) the distribution of securities has not been completed; and
>
> (b) one of the following has occurred:
>
> (i) there is a material change in the affairs of the issuer;
>
> (ii) it is proposed that the terms or conditions of the offering described in the offering memorandum be altered; (iii) securities are to be distributed in addition to the securities previously described in the offering memorandum.

[331] The phrase "material change" is defined in clause 2(1)(y) of the Act as:

> 2(1)(y) **"material change"** means:
>
> (i) if used in relation to an issuer other than an investment fund:
>
> (A) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer; or
>
> (B) a decision to implement a change mentioned in paragraph (A) made by the directors of the issuer, or by senior management of the issuer who believe that confirmation of the decision by the directors is probable; or

[332] As outlined above, there were several material changes in the business, operations, or capital of Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial as money was transferred to Aitkens' private companies, investments were made in other projects, and as each of these corporations entered into various agreements which changed the scope of their business from that disclosed in the respective offering memorandum. The evidence is that these changes occurred before the distribution of securities under the respective offering memoranda were completed but that the required amendments to the respective offering memoranda were not made.

[333] We conclude based on the evidence that Aitkens, as the guiding mind of the of the issuers, Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial, contravened subsection 80.1(2) of the Act.

XII CONCLUSIONS AND NEXT STEPS

[334] For the reasons stated above, we found that:

- Aitkens breached clause 27(1)(a) of the Act by trading the securities of Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial without registration or exemptions;

- Aitkens breached subsection 58(1) of the Act by distributing securities of Legacy, Spruce Ridge Capital, Spruce Ridge Estates, Railside Capital and Railside Industrial without a prospectus or exemptions;

- Aitkens, 1252064, 1330075, Harvest Capital and Harvest Group breached section 55.1 of the Act by engaging in a course of conduct related to securities that they knew perpetrated a fraud on Saskatchewan investors;

- Aitkens breached subsection 44(3.1) (for the time period July 2005 to June 30, 2007) and section 55.11 of the Act (for the time period July 1, 2007 to December 2012) by making misrepresentations that he knew or ought to have known were untrue or misleading;

- Aitkens breached subsection 44(2) of the Act by giving a written undertaking relating to the future value of securities with the intention of effecting a trade in securities;

- Aitkens breached subsection 80.1(2) of the Act by failing to amend the Offering Memoranda as a result of a material change in the affairs of the issuer contrary to subsection 80.1(2) of the Act.

[335] Having found breaches of Saskatchewan securities laws by Aitkens, 1252064, 1330075, Harvest Capital and Harvest Group, as outlined above, this proceeding will move to the Sanctions Hearing to determine what, if any, orders for sanctions and costs ought to be made against the Respondents.

[336] We direct Staff to serve and file any written submissions that Staff wish to make on sanctions and costs by 4:00 p.m. on January 10, 2019.

[337] The Respondents shall serve and file responding written submissions on sanctions and costs by 4:00 p.m. on February 11, 2019.

[338] Staff shall serve and file reply written submissions on sanctions and costs, if any, by 4:00 p.m. on February 21, 2019.

[339] The hearing to determine sanctions and costs will be held at the Hearing Room of the FCAA, 7th Floor -1919 Saskatchewan Drive, Regina, Saskatchewan, on March 12, 2019 at 9:00 a.m. or such further or other dates as agreed by the parties and set by the Registrar.

[340] Upon the failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of the party and such party is not entitled to any further notice of the proceeding.

Dated at Regina, Saskatchewan this 5th day of December, 2018.

Peter Carton, Chairperson

The Honourable Eugene Scheibel