ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Ghani, 2024 ABASC 48 **Date: 20240321**

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

Panel:	Tom Cotter Kari Horn Karen Kim
Representation:	Tom McCartney Matthew Bobawsky for Commission Staff
Submissions Completed:	February 27, 2024
Decision:	March 21, 2024

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I. INTRODUCTION

[1] On May 16, 2022, staff (**Staff**) of the Alberta Securities Commission (**ASC**) issued an amended notice of hearing (the **ANOH**) against Ali Ghani (**Ghani**), Summerside Development Trust (**Summerside DT**), Summerside Commercial Trust (**Summerside CT**), Prism Summerside Limited Partnership (**Summerside LP**), Prism Summerside Development Corp. (**Summerside DevCo**), and Prism Real Estate Investment Corporation (**PREIC**, and together with Ghani, Summerside DT, Summerside CT, Summerside LP, and Summerside DevCo, the **Respondents**).

[2] The matter proceeded to a six-day hearing commencing on October 31, 2022 (the **Merits Hearing**). After considering the evidence and Staff's written submissions on the merits, we found that the Respondents breached s. 93 of the *Securities Act* (Alberta) (the **Act**) by perpetrating a fraud on Summerside DT investors, as alleged in the ANOH. We issued a decision with our reasons for that finding on November 7, 2023, cited as *Re Ghani*, 2023 ABASC 150 (the **Merits Decision**).

[3] The proceedings then moved into this, their second phase, to determine what orders (if any) ought to be made against the Respondents as a result of their misconduct. On January 17, 2024, Staff provided written submissions on sanction and costs (the **Staff Submissions**), a bill of costs summarizing Staff's time expended and disbursements incurred in investigating and prosecuting this matter (the **Bill of Costs**), and the following evidence in support of the Staff Submissions:

- a certificate issued under s. 218 of the Act on January 17, 2024 (the **218 Certificate**), appending:
    - a May 8, 2012 offering memorandum issued by Broadmoor Commercial Plaza Development Corp. and filed with the ASC on July 5, 2012;
    - a May 8, 2012 offering memorandum issued by Horizon Commercial Development Corp. and filed with the ASC on July 5, 2012;
    - an April 18, 2011 offering memorandum issued by Heritage Plaza Developments Inc. and filed with the ASC on June 14, 2011; and
    - an August 1, 2008 offering memorandum issued by Prism Place Development Ltd. and filed with the ASC on October 22, 2008;
- an affidavit sworn by Ilan Handlesman on November 28, 2023 and filed with the Court of King's Bench of Alberta on December 14, 2023 (the **Handlesman Affidavit**); and
- a spreadsheet entitled, "Proven Expenses Allocated between [Summerside DevCo] and PREIC" (the **Expense Allocation Spreadsheet**).

[4] In addition, Staff referred to a number of cases and a July 15, 2010 settlement agreement and undertaking between Ghani and the ASC (the **Ghani SAU**).

[5] The Respondents were served with the Merits Decision and given an opportunity to provide submissions on sanction and costs, but none were received.

[6] On February 27, 2024, we held a brief hearing for the purpose of receiving evidence and oral submissions on sanction and costs from the parties (the **Sanction Hearing**). The Respondents

were provided with notice of the Sanction Hearing, but neither attended nor were represented. Staff investigative accountant Danielle Bertrand appeared to give *viva voce* evidence about preparing the Expense Allocation Spreadsheet. The 218 Certificate and the Handlesman Affidavit were also entered into evidence.

[7] Staff seek the following orders under the Act:

(a) as against Ghani:

(i) a resignation order pursuant to s. 198(1)(d);
(ii) various permanent market-access bans pursuant to ss. 198(1)(b), (c), (c.1), (e), (e.1), (e.2), and (e.3);
(iii) monetary sanctions pursuant to ss. 198(1)(i) and 199, including:
a. a disgorgement order of $3,434,566 on a joint and several basis with Summerside DevCo;
b. a disgorgement order of $873,071.76 on a joint and several basis with Summerside DevCo and PREIC; and
c. an administrative penalty of $325,000 on a joint and several basis with all of the other Respondents; and
(iv) costs of $174,758.01 pursuant to s. 202(1), also on a joint and several basis with all of the other Respondents;

(b) as against Summerside DevCo:

(i) various permanent market-access bans pursuant to ss. 198(1)(b), (c), (c.1), (e.1), (e.2), and (e.3);
(ii) monetary sanctions pursuant to ss. 198(1)(i) and 199, including:
a. a disgorgement order of $3,434,566 on a joint and several basis with Ghani;
b. a disgorgement order of $873,071.76 on a joint and several basis with Ghani and PREIC; and
c. an administrative penalty of $325,000 on a joint and several basis with all of the other Respondents; and
(iii) costs of $174,758.01 pursuant to s. 202(1), also on a joint and several basis with all of the other Respondents;

(c) as against Summerside DT, Summerside CT, and Summerside LP:

(i) various permanent market-access bans pursuant to ss. 198(1)(b), (c), (c.1), (e.1), (e.2), and (e.3);
(ii) pursuant to s. 199, an administrative penalty of $325,000 on a joint and several basis with Ghani and PREIC (we assume that the omission of Summerside DevCo was an error); and
(iii) costs of $174,758.01 pursuant to s. 202(1), also on a joint and several basis with Ghani and PREIC (we assume that the omission of Summerside DevCo was an error); and

(d) as against PREIC:

(i) various permanent market-access bans pursuant to ss. 198(1)(b), (c), (c.1), (e.1), (e.2), and (e.3);
(ii) monetary sanctions pursuant to ss. 198(1)(i) and 199, including:
a. a disgorgement order of $873,071.76 on a joint and several basis with Ghani and Summerside DevCo; and
b. an administrative penalty of $325,000 on a joint and several basis with all of the other Respondents; and
(iii) costs of $174,758.01 pursuant to s. 202(1), also on a joint and several basis with all of the other Respondents.

[8] Based on the record of the proceedings in this matter, our findings in the Merits Decision, the Staff Submissions, the Bill of Costs, Staff's argument at the Sanction Hearing, and the evidence Staff tendered in relation to sanction and costs, we find that it is in the public interest to order certain permanent market-access bans against the Respondents, to order them to pay an administrative penalty on a joint and several basis, and to order Ghani, Summerside DevCo and PREIC to pay disgorgement on a joint and several basis. In addition, we are ordering the Respondents to pay the majority of the costs claimed in the Bill of Costs, also on a joint and several basis.

[9] The following are our reasons for these determinations.

II. MERITS DECISION – OVERVIEW

[10] In addition to our analysis and conclusions, the Merits Decision includes our discussion of the relevant facts and law, and should be read in conjunction with this decision. However, for ease of reference, we summarize the most significant points below.

[11] During the relevant period (January 2013 to April 2018), Ghani was a founder and the guiding mind of a number of Alberta real estate development corporations and entities known collectively as **Prism** or the **Prism Group**.

[12] The Prism Group included the other named Respondents, most of which were created to raise funds, acquire a parcel of land in Edmonton's Summerside neighbourhood, and develop a suburban strip mall on the land. In the Merits Decision, we described this as the **Summerside Project**; the strip mall is known as **Summerside Plaza**. After development, premises at Summerside Plaza were leased to a variety of businesses, including an Anytime Fitness gym (**Anytime Summerside**) and a car and pet wash (the **Prism Car Wash**).

[13] Capital was raised from the public to finance the Summerside Project pursuant to an offering memorandum issued by Summerside DT in January 2013 (the **Summerside OM**). Investors purchased trust units of Summerside DT for $1,000 per block of 10.

[14] According to the Summerside OM, Summerside DT intended to use the funds raised to acquire units in Summerside CT. In turn, Summerside CT would use the funds to acquire limited partnership units in Summerside LP. Through its general partner, Summerside DevCo, Summerside LP would use the funds to purchase the land and develop Summerside Plaza.

[15] Also according to the Summerside OM, the investment objective for the project was to provide income from Summerside Plaza tenants for distribution, and to generate a capital gain on the eventual sale of the property to a third party. After the payment of debts and expenses relating to the Summerside Project and return of the investors' capital, the proceeds were to be split between investors and management on a 70-30 basis, as long as investors received a minimum return of 10 percent interest per annum.

[16] Ghani described the sixth Respondent, PREIC, as the Prism entity "that was traditionally used as a clearing house for all inter-entity transactions", and which funded most of the Prism Group's real estate projects. Prism's practice was to direct money raised by individual project entities to PREIC, which then used it to pay expenses or to fund other Prism projects as needed. When those projects received funding or generated income, the money was to be repaid to PREIC.

[17] Prism had several other development projects underway at the same time as the Summerside Project.

[18] On occasion, a project entity loaned or paid funds directly to another Prism entity, or paid expenses on another project's behalf. Ghani explained that if that happened, it was an error – all funds were supposed to go through PREIC. If a project needed funds and PREIC did not have them, PREIC was to borrow them from another project that had money available and then disburse it, such that at any given time, Ghani said PREIC "had money coming in and out from different projects".

[19] The inter-company loans were undocumented, but Ghani claimed that they were tracked on spreadsheets. However, he acknowledged that the spreadsheets were no longer available by the time he was interviewed by Staff investigators, and none were produced or entered into evidence at the Merits Hearing. In an affidavit Ghani swore for a different legal proceeding, Ghani also acknowledged that funds from Summerside DevCo's bank accounts were "likely . . . used to pay obligations of affiliates" in accordance with Prism's long-standing practice, and that he was unable to provide an accounting.

[20] Prism's practice of directing project funds through PREIC and disbursing them to other projects as needed was not disclosed to Summerside DT investors. To the contrary, during a marketing presentation in August 2013, Ghani stated:

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

[21] Summerside Plaza was at least partially finished and began leasing to tenants in 2015. It held a "grand opening" on June 5, 2015.

[22] In the fall of 2016, Summerside DevCo and an unrelated numbered company entered into a $24,000,000 sale agreement for Summerside Plaza, scheduled to close at the end of October 2016. The sale did not close as expected, and the purchaser transferred its interest to Fateh Developments Inc. (**Fateh**). Title to Summerside Plaza was transferred to Fateh on December 12, 2017.

[23] The Prism real estate projects ongoing at the time – including Summerside Plaza – were ultimately sold at a loss, and investors received neither a return of their investment capital nor payment of any returns.

[24] Based on the Respondents' banking records and other evidence, Staff prepared a detailed source and use of funds analysis that, *inter alia*, analyzed how the Respondents used the proceeds realized from the sale of Summerside Plaza.

[25] Of the $24,000,000 purchase price, approximately $17,100,000 was used to pay out mortgages. The remainder represented Fateh's deposit funds, which were either paid to Summerside DevCo in cash installments, or were credited to Fateh pursuant to other agreements between the parties. $6,096,573 from Fateh was deposited to the relevant Summerside DevCo bank accounts between August and December 2016 (the **Sale Proceeds**).

[26] $2,000,000 was used to fund a two-year rental guarantee (the **Rental Guarantee**) that was a term of the sale agreement between Summerside DevCo and Fateh, and to pay interest due to Fateh under a separate loan agreement.

[27] The majority of the Rental Guarantee fund was used to pay rent on behalf of two Summerside Plaza tenants that consistently failed to pay their own rent to Fateh during the first two years that it owned the property: Anytime Summerside and the Prism Car Wash. Both were businesses in which Ghani or his family had a personal interest. Although there was no evidence that either Anytime Summerside or the Prism Car Wash was unable to pay rent when due, neither did so until after the Rental Guarantee fund was depleted. Fateh estimated that $1,013,622 was paid from the fund on account of those two tenants.

[28] In the result, we concluded that the Respondents had used a total of $3,434,566 from the Sale Proceeds for purposes unrelated to the Summerside Project and undisclosed to Summerside DT investors. This sum included the $1,013,622 paid in rent on behalf of Anytime Summerside and the Prism Car Wash, as well as amounts that we found had been: (i) used to pay costs related to non-Prism entities in which Ghani or his family had an interest, and that were unrelated to the Summerside Project; (ii) transferred to or paid for the benefit of other non-Respondent Prism entities; (iii) used to purchase three personal vehicles; and (iv) paid toward credit card debt that Ghani said was "likely" related to "obligations of affiliates" other than the Respondent entities.

[29] The remaining expenditures from the Sale Proceeds either related to the Summerside Project, or there was insufficient evidence to determine their purpose.

[30] In the final portion of the Merits Decision, we applied the law on securities fraud and s. 93 of the Act. We concluded that Staff had established all of the necessary elements to prove that the Respondents perpetrated a fraud on Summerside DT investors, as alleged in the ANOH. They misappropriated $3,434,566 of the funds realized from the sale of Summerside Plaza for the benefit of other businesses and entities without authorization or disclosure to the investors, resulting in a total loss of their investments.

[31] Given Ghani's position as the guiding or directing mind of the Respondent entities, we also found that his knowledge and conduct was their knowledge and conduct, and that all of the Respondents were therefore liable for the fraud.

III. SANCTIONS

A. General Principles

[32] As mentioned, Staff seek sanction orders under ss. 198 and 199 of the Act. Costs are discussed later in these reasons.

[33] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, the Supreme Court of Canada (**SCC**) confirmed that orders under s. 127 of the *Securities Act* (Ontario) – the Ontario equivalent of our s. 198 – are intended to be protective and preventive, not punitive or remedial (at para. 42; see also para. 43). In other words, such orders should be directed toward preventing future harm to the capital market, which may include barring those whose past conduct "is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" (*ibid.* at para. 43). This is in accordance with the ASC's mandate to protect investors and foster a fair and efficient capital market in which the public can have confidence (*Re Homerun International Inc.*, 2016 ABASC 95 at para. 12).

[34] Both specific and general deterrence are relevant considerations for hearing panels when formulating an appropriate sanction order: specific deterrence is directed at preventing similar misconduct in the future by the respondents then before the panel, and general deterrence is directed at preventing similar misconduct by others (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 4, 52, 55, and 60-62). As the SCC recognized in *Cartaway*, the weight to be given to each is within the hearing panel's discretion and will vary depending on the circumstances, but neither should be given unreasonable weight (at para. 64).

[35] Section 198 of the Act provides that ASC hearing panels have the discretion to make a variety of orders if they consider that it is in the public interest to do so. The orders available include – but are not limited to – those sought by Staff in the Staff Submissions, and would restrict or restrain a respondent's ability to participate in capital market activities in certain capacities, either permanently or for a specified duration. We agree with the panel in *Re Planned Legacies Inc.*, 2011 ABASC 278, which explained (at para. 42):

> . . . participation in the Alberta capital market is a privilege not a right. Those who exercise the privilege of access to the Alberta capital market are to adhere scrupulously to all requirements of Alberta securities laws. Those who do not do so are subject to losing that privilege and facing other consequences.

[36] In addition, s. 198(1)(i) of the Act empowers a panel to order a respondent to pay to the ASC "any amounts obtained or payments or losses avoided" by non-compliance with Alberta securities laws. Orders under this subsection are typically referred to as "disgorgement" orders, and are intended to remove the financial benefit realized by a respondent as a result of the misconduct at issue, thereby removing the incentive for the misconduct to be repeated by the respondent or by others.

[37] Section 199 provides that if an ASC hearing panel has found that a person or company has contravened Alberta securities laws, they may impose an administrative penalty of up to $1,000,000 per contravention if it is in the public interest. A panel may issue such an order "notwithstanding the imposition of any other penalty or sanction on the person or company",

including a disgorgement order. This is because the two types of monetary orders have different purposes: disgorgement is concerned with the specific financial benefit a respondent has obtained, while an administrative penalty is a direct financial consequence for the misconduct. In *Re Rustulka*, 2021 ABASC 15, the panel stated (at para. 112):

> Without the addition of an administrative penalty, a respondent [subject to a disgorgement order who has been] found to have contravened Alberta securities laws would only face the prospect of having to repay the financial benefit obtained. This would have an insufficient deterrent effect in itself, as the respondent would at worst "break even" – that is, he or she would be no worse off financially than if he or she had not broken the law in the first place (see *Walton* [*v. Alberta (Securities Commission)*, 2014 ABCA 273; leave denied [2014] S.C.C.A. No. 476] at para. 156). An administrative penalty ensures that there is also a direct financial consequence to the offender, to send the message to both that offender and others that there is a serious risk in choosing not to comply with legislative and regulatory requirements.

[38] The Alberta Court of Appeal (**ABCA**) has cautioned that while both specific and general deterrence are "legitimate considerations", sanctions must still be "proportionate and reasonable" for each respondent in light of both the circumstances of the case and the respondent's individual circumstances (*Walton* at para. 154; see also *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54). According to the ABCA, this is because, "[t]he pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual [respondent]" (*Walton* at paras. 154 and 165).

[39] That said, the courts have also recognized that financial penalties "ought not to be so low that they amount to nothing more than another cost of doing business" (*Brost* at para. 54) or "a 'licensing fee' for the offence" (*Walton* at para. 165). If sanctions are too low, they may "communicate too mild a rebuke to the misconduct" and "the opposite to deterrence may result" (*Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 21).

[40] We must therefore analyze the circumstances before us carefully to arrive at a package of sanctions that is "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156). Appropriate orders will be those that achieve specific and general deterrence and mitigate the risk of future misconduct by the respondent or by others. The panel in *Homerun* explained (at para. 14):

> The determination in a particular case of whether deterrence is required and, if so, the type and extent of sanctions appropriate for that purpose, will turn on the circumstances of the misconduct and of the particular respondent, and on an assessment of the risk posed to investors and the capital market by a particular respondent or by others who might be minded to emulate the respondent's misconduct.

[41] To guide our analysis of the circumstances, the potential risks, and the deterrent measures that may be necessary to mitigate those risks, we have reference to certain categories of factors set out in the relevant case law (*Spaetgens v. Alberta (Securities Commission)*, 2018 ABCA 410 at para. 31). The factors applied by ASC hearing panels in recent decisions were established in *Homerun* (at paras. 20, 22, 28, 35, 39-44, and 46):

- *the seriousness of the respondent's misconduct* – which includes consideration of:
    - the nature of the misconduct;

- whether the misconduct was planned and deliberate, the result of recklessness, or simply inadvertent; and
- the degree of harm the misconduct caused, or to which it exposed individual investors and the capital market in general;

- *the respondent's pertinent characteristics and history* – including:

  - educational background;
  - work experience;
  - history of registration or other capital market participation;
  - any disciplinary history; and
  - any claim of impecuniosity;

- *any benefit sought or obtained by the respondent*; and

- *any mitigating or aggravating considerations* – i.e., any other relevant circumstances that do not fit within any of the other factors but may bear on our conclusions about risk, and thus the extent and nature of the specific and general deterrent measures required; this may include:

  - any efforts by the respondent to address the harm caused, such as efforts to pay financial restitution to investors;
  - "[p]ersuasive indications that a respondent appreciates the wrong done, and its seriousness", accepts responsibility, and feels remorse – although the absence of such indications is merely neutral rather than aggravating, since respondents are entitled to defend themselves and deny responsibility;
  - reasonable reliance on faulty professional advice;
  - cooperation with Staff during an investigation and hearing, which might demonstrate an appreciation of the wrongdoing and acceptance of responsibility; and
  - expressions of contempt for the victims of the misconduct or the law itself.

[42] We also have reference to the sanctions imposed in comparable past decisions. Although it is generally recognized that other cases will not involve identical facts and circumstances and may therefore be of somewhat limited utility, they nonetheless assist us in assessing the proportionality of the sanctions we consider (*Homerun* at para. 16). However, we are not bound by the results in other cases and may deviate from them if we consider it to be in the public interest (*Maitland* at para. 19).

B. Application to this Case

[43] In applying the foregoing sanction factors to the present circumstances, Staff focused on Ghani because he was the guiding mind of all of the other Respondents. We agree that this approach is appropriate (see *Homerun* at para. 33).

1. Seriousness

[44] As argued by Staff, fraud is serious misconduct – probably the most serious category of securities law misconduct proscribed by the Act because it involves both deceit and the risk of

pecuniary loss to its victims (*Homerun* at para. 23; *Re Optam Holdings Inc.*, 2015 ABASC 996 at para. 31).

[45] In this case, the Respondents' misconduct was deliberate. Ghani knew what Summerside DT investors were told and not told about how funds would be used, and he knew how the funds were actually managed, contrary to those representations. He concealed the latter despite his awareness that this activity could result in investor losses. Summerside DT investors were therefore induced to make investments based on false or incomplete information, including information that would have fundamentally altered their perception of the risk involved. The risk of an investment is one of the primary elements investors consider.

[46] The harm the Respondents' misconduct caused to the investors was extensive: they lost all of their investment funds. In addition, the capital market as a whole was harmed because fraud is antithetical to investor protection and capital market integrity. In *Re Arbour Energy Inc.*, 2012 ABASC 416, the panel stated (at para. 80):

> Investment fraud is reprehensible and completely unacceptable capital-market misconduct; instances of fraud in the capital market severely threaten the public's confidence and sense of fairness in the whole of our capital market. A high level of both specific and general deterrence is required against each Respondent on the basis of our fraud findings alone.

[47] It is axiomatic that securities fraud undermines public confidence in the capital market, to the detriment of capital-market participants who operate within the law.

[48] In the Merits Decision, we also described at some length RS's involvement with Ghani and Prism, and the negative impact it had on his businesses and reputation.

[49] Concluding their submissions on this factor, Staff argued that the serious and deliberate nature of the misconduct and the harm it caused suggest that severe sanctions are appropriate in this case. We agree. This was very serious misconduct that implies a heightened future risk of similar misconduct by the Respondents and any other observers who might decide to emulate it. This in turn calls for deterrence that will drive home the point that "findings of fraud will attract the most severe sanctions" (*Re Reeves*, 2011 ABASC 107 at para. 20; see also *Homerun* at para. 26).

2. Characteristics and History

[50] As explained in *Homerun* (at para. 27), "[a] respondent's characteristics and history may be important indicators of the degree of risk posed and, in turn, the extent of deterrence required". They may also be relevant to assessing the proportionality of the sanction orders contemplated.

[51] Staff argued that the following characteristics and aspects of Ghani's personal history suggest a higher risk of future misconduct, and therefore a higher need for stringent deterrent sanctions:

- his relatively young age (the evidence indicates that he was born in 1976 and will be 48 years old this year) – in Staff's submission, he may pose a higher risk of future market misconduct than someone past the age of retirement, and his ability to earn an income in the future is not restricted by his age;

- his extensive and relevant capital market experience from his involvement in numerous projects that raised funds from the public (see, for example, the offering memoranda for various Prism entities appended to the 218 Certificate); and

- his 2010 settlement with the ASC as reflected in the Ghani SAU, from which he knew that the securities industry is highly regulated, and the corollary that if securities laws are not followed carefully, there is a risk of enforcement action.

[52] Staff acknowledged the relevance of the Respondents' present financial situation, which the Handlesman Affidavit and some of its exhibits suggest are straitened. According to the affidavit evidence:

- all of the Respondent entities have been subject to formal insolvency proceedings or dissolution, and have no assets;

- Ghani delivered a statutory declaration dated March 31, 2021 (the **Declaration**) that stated that neither he nor PREIC controlled any funds or accounts, and a sworn financial statement of debtor dated October 2, 2021 (the **Ghani Statement of Debtor**) that stated that as of that date, he had no assets; and

- a November 2, 2023 Personal Property Registry search report showed that as of that date, Ghani had $3,649,391.10 in judgments registered against him.

[53] In Staff's submission, however, both the Declaration and the Ghani Statement of Debtor are dated and should be given diminished weight unless Ghani submits more recent information. Staff also noted that there is no evidence whether Ghani currently has any income, so the evidence concerning the amount of the judgments registered against him should likewise be given diminished weight.

[54] We agree with Staff that Ghani's age is not suggestive of a diminished risk of future misconduct as it was in *Re Fauth*, 2019 ABASC 102 or *Re Magneson*, 2022 ABASC 101, aff'd. 2023 ABCA 348. In those cases, the individual respondents were 71 and 83 years old respectively at the time of sanctioning. Because of their advanced age, the panels found that those respondents were less likely to reoffend, and also that they were less likely to be able to earn future income that could be used to pay monetary sanctions.

[55] By contrast, at 48, Ghani still has many years ahead of him to work or find other ways to generate income, and he may be tempted to re-enter the capital markets – a risk that we must forestall. While we acknowledge the evidence before us of the Respondents' impecuniosity at certain points in time, circumstances can change, especially for a relatively young man.

[56] There was no evidence that Ghani had any formal securities-related education, but we agree with Staff that his capital-market experience is extensive given the number of Prism projects he was involved in over the course of many years. In the Ghani SAU, he admitted that he was responsible for various misrepresentations made in advertising, on a website, and by an agent to a prospective investor. While a settlement agreement is not the same as a sanction imposed after a

hearing, Ghani paid $35,000 to settle allegations against him that made it clear that securities laws governing disclosure and non-disclosure of material information will be strictly enforced.

[57] That Ghani did not heed the lessons he should have learned from the Ghani SAU in July of 2010 suggests that he presents an ongoing risk that must be mitigated by strong deterrence (*Homerun* at paras. 29-30). In any event, it should be obvious to anyone that deceiving investors through misrepresentation or fraud is wrong, and the absence of formal capital markets education is not a moderating factor (*ibid.* at para. 31).

[58] Despite the fact that some of evidence of the Respondents' financial circumstances is dated, in the absence of evidence to the contrary, we accept that the Respondents are likely impecunious at this time. As discussed later in these reasons, we took that into account when determining the appropriate and proportionate amount of the monetary sanctions we are ordering. However, we also take into account Ghani's relative youth and his prospects for earning an income in the future, which tempers concerns about his present inability to pay sanction and costs orders.

[59] In sum, we find that Ghani's fraud in view of his extensive capital-market experience – including the Ghani SAU – are aggravating factors that suggest he poses a significant risk of future misconduct that we must address with appropriate protective and preventive measures. The Respondents' present impecuniosity is somewhat mitigating *vis-à-vis* our monetary orders.

[60] We discern nothing about the Respondents' personal characteristics that suggests a reduced need for general deterrence to dissuade others from similar behaviour.

3. Benefit Sought or Obtained

[61] In *Homerun*, the panel observed that generally, the greater the benefit sought or obtained from market misconduct, the greater the risk of future misconduct and the need for deterrence (at para. 38).

[62] Staff argued that the Respondents' misappropriation of such a large sum of money is an aggravating factor calling for strong specific and general deterrence. Staff also pointed out that Ghani directed funds to businesses in which he had a personal interest, purchased several vehicles, and paid credit card debt. This, Staff submitted, calls for "very serious sanctions" to deter the Respondents and any others who might want to replicate their misconduct.

[63] We agree that Ghani sought and obtained a personal benefit from the fraud in this case, especially the amounts misappropriated for other businesses in which he or his family had a personal interest, and the funds used to purchase three personal vehicles. This is a significantly aggravating factor that calls for meaningful sanctions to effect both specific and general deterrence.

[64] It could be argued that not all of the benefit of the funds misappropriated accrued to Ghani because he was using at least some of the money for other Prism projects in which members of the public had invested. However, we find that the success of other Prism projects was also to Ghani's benefit as the directing mind of the entire Prism Group.

[65] Moreover, as we stated in the Merits Decision, Summerside DT investors would have expected the risks associated with the Summerside Project, but they had no reason to expect that

they would be assuming the risks of several other projects as well. The Respondents deceived investors by not disclosing how the Prism Group allocated funds. Summerside DT investors were harmed by the commingling of funds and their indiscriminate disbursement to unrelated projects.

[66] We found that the Respondents used a total of $3,434,566 from the Summerside Plaza Sale Proceeds for purposes unrelated to the Summerside Project. That is a significant benefit that may tempt the Respondents and others to engage in future fraud. They must be dissuaded from doing so by severe sanctions that will send the message that such conduct is completely unacceptable in our capital market and will carry grave consequences, including measures to remove the benefit of misappropriated amounts.

4. Other Mitigating or Aggravating Considerations

[67] Staff submitted that other than as discussed above, there are no additional mitigating or aggravating considerations apparent in this matter. Since the Respondents did not participate in the Merits Hearing, there is no evidence whether Ghani recognizes the seriousness of the misconduct found. Staff therefore submitted that here, this factor is neutral.

[68] We reach the same conclusion. We are not aware of any efforts by the Respondents to ameliorate the harm caused, and their absence from the Merits Hearing means we have no evidence that they appreciate the seriousness of their wrongdoing, accept responsibility, or feel any remorse. Ghani cooperated with Staff during their investigation by attending his investigative interviews, but nothing that he said in those interviews demonstrated acceptance of responsibility.

[69] Accordingly, while there are no further aggravating considerations, there are likewise no mitigating considerations that might have called for moderation in sanctioning. This factor is neutral, and does not bear on our conclusions about risk or the necessary specific and general deterrent measures.

5. Outcomes in Other Proceedings

[70] In the Staff Submissions, Staff highlighted four past ASC decisions that they argued involved circumstances that were sufficiently similar to those in this case to provide guideposts for comparison and assist us in assessing proportionality:

- ***Fauth***, *supra*: The panel found that Fauth, the sole directing mind of the corporation involved, breached three sections of the Act by acting as a dealer when he was not registered with the ASC, making misrepresentations to investors about the security of the investment and the use of funds, and perpetrating a fraud. Over the span of approximately 10 years, he raised over $15,500,000, most of which was lost – he either loaned or gave money to himself, his family members, and related corporations, or he paid it to other investors in the manner of a Ponzi scheme.

  As mentioned, Fauth was 71 years old at the time he was sanctioned. He was retired, had health issues, and claimed impecuniosity. He had no sanction history, but he was a former registrant and had significant market and financial industry experience.

The panel issued a resignation order against him under s. 198(1)(d), and imposed permanent market-access bans under ss. 198(1)(b), (c), (e), and (e.3). Fauth was also ordered to disgorge the amount found to have been misappropriated (approximately $2,600,000), and to pay an administrative penalty of $400,000.

- ***Magneson***, *supra*: As in the present case, the hearing panel in *Magneson* found that the respondents – two corporations and their 83-year-old directing mind – perpetrated a fraud by making misrepresentations to investors about the intended use of their funds, and failing to disclose how the funds were actually used. They raised approximately $7,000,000, most of which was lost.

  The individual respondent was found to be educated and sophisticated, but he had no particular experience or training in the capital markets, and had no sanction history. He did not specifically claim impecuniosity, but the panel found that based on his age, he likely had a limited ability to earn an income in the future, and took that into account when assessing the administrative penalty.

  The panel issued a resignation order against the individual respondent under s. 198(1)(d) of the Act, and imposed permanent market-access bans against him under ss. 198(1)(b), (c), (c.1), (e), and (e.3). He was also ordered to disgorge the amount found to have been misappropriated (approximately $3,500,000), and to pay an administrative penalty of $300,000. Both monetary orders were made on a joint and several basis with the corporate respondent that was found to have been the vehicle for the fraud. That corporation was also made subject to permanent market-access bans under ss. 198(1)(b) and (c).

  The other corporate respondent – that which raised the investment funds – was made subject to market-access bans under ss. 198(1)(a), (b), and (c) until such time as both a preliminary prospectus and a prospectus were filed with the ASC and receipted. No monetary orders were made against it on the ground that it might affect the investors' chances of recovering funds.

- ***Re Aitkens***, 2019 ABASC 151: The primary individual respondent, Aitkens, and three corporate entities were found liable for making materially misleading omissions in certain offering memoranda. Aitkens and two additional corporate respondents were found liable for fraud. While the fraud findings were based on misappropriation of funds because they were not used as represented to investors, there was no evidence that Aitkens obtained a personal benefit. Rather, the evidence was that he simply did not realize what he could and could not do with money raised from the public.

  However, the panel still found that he had been "clearly cavalier with investors' money" and characterized the misconduct as "extremely serious". Over $80,000,000 had been raised for several different projects, and at least some of it was likely to have been lost.

The panel took into account that Aitkens, the guiding mind of the corporate respondents, was 64 years old at the time of sanctioning and had considerable experience in real estate syndication, but was "effectively bankrupt". He had also entered into a previous settlement agreement with the ASC concerning alleged misrepresentations and a different real estate development project than those at issue before the panel. Consistent with the approach we took above, the panel did not consider the settlement to be the same thing as a "previous sanction", but they concluded that it was evidence that the respondent knew or should have known that he was dealing in a highly regulated industry where great care should be taken to ensure all requirements are properly met. The panel also considered evidence that Aitkens had relevant capital-market experience.

Certain mitigating factors were present in the case that are not present here. The panel found that Aitkens recognized the seriousness of the misconduct, had made efforts to comply with securities laws by engaging professional advisors, and had made efforts to salvage the companies and at least some of the investors' money.

Aitkens was sanctioned with a resignation order under s. 198(1)(d) and permanent market-access bans under ss. 198(1)(b), (c), (c.1), (e), (e.2), and (e.3). An administrative penalty of $600,000 was imposed, but the panel noted that the amount was less than might have been ordered otherwise because of the permanent bans, the mitigating factors, and Aitkens' impecuniosity.

The corporate entities were also made subject to permanent bans under ss. 198(1)(a), (b), (c), (c.1), (e.2), and (e.3), but no monetary sanction orders were sought by Staff or made against them.

- ***Re Calmusky***, 2016 ABASC 9: Pursuant to an Agreed Statement of Facts and Joint Submission on Sanction with Staff, Calmusky admitted to breaching s. 93 of the Act by perpetrating a fraud. Approximately $1,093,600 had been raised from investors, and as guiding mind of the corporation involved, Calmusky either used the funds personally or paid them to family members.

  The panel noted that while Calmusky entered into a consent order with the corporation's receiver agreeing to pay $966,319, it was unlikely that investors would recover all of their funds. The panel also took into account that Calmusky had no sanction history, recognized the seriousness of his misconduct, and cooperated with both Staff and the receiver. However, it was aggravating that he had a taken a significant personal benefit.

  The panel issued a resignation order under s. 198(1)(d), permanent market-access prohibition orders under ss. 198(1)(b), (c), (c.1), (e), (e.1), (e.2), and (e.3), and imposed a $100,000 administrative penalty. Disgorgement was not ordered because of the consent order with the receiver.

[71] Based on these decisions, Staff argued that cases involving findings of fraud typically result in sanction orders that include permanent market-access bans, disgorgement of the approximate

amount misappropriated or misapplied, and, for frauds involving more than $1,000,000, administrative penalties ranging from $100,000 to $600,000. Relying in particular on *Magneson* and *Fauth*, Staff argued that the Respondents' misconduct in this matter falls in the middle to higher end of the range.

[72] We generally agree with Staff's observations based on the cited decisions, except that we do not find *Calmusky* particularly helpful. There were a number of important distinguishing facts, including the comparatively modest amount raised and misappropriated, the consent order with the receiver, and the Agreed Statement of Facts and Joint Submission on Sanction between the parties. In our view, the respondent's cooperation – obviating the need for a full hearing – was likely a significant factor behind Staff making the joint submission on the agreed terms.

[73] *Aitkens* is somewhat more comparable, although it involved misconduct in addition to fraud. Moreover, no personal benefit was taken, and it does not appear that disgorgement was considered – which may have led the panel to impose a higher administrative penalty.

[74] *Fauth* and *Magneson* are the most similar to the present circumstances. More money was raised from investors in those cases, but the amounts found to have been misappropriated by the respondents are similar. There are other important differences, however, including that Fauth was found to have breached two additional sections of the Act, and both Fauth and Magneson were well past the age of retirement. As mentioned, it is clear from the decisions that the individual respondents' age had a direct impact on the sanctions ordered.

[75] Nonetheless, the decisions confirm that in cases involving fraud, severe measures are ordered to effect specific and general deterrence. As stated in *Fauth* (at para. 62), "[o]rders aimed at deterring recidivism and sending the message that wrongdoers will not be permitted to benefit from breaching the Act are appropriate" in circumstances such as these. The decisions also assist us in assessing the proportionality of the sanctions we have decided to impose.

C. Conclusions on Appropriate Orders

1. Market-Access Bans

[76] Staff argued that market-access prohibitions should address the capacities in which a respondent acted in perpetrating the misconduct at issue. Since Ghani was a trustee of Summerside DT, an officer and director of Summerside DevCo (Summerside LP's general partner), the directing mind of all of the other Respondents – including the entities that issued securities (Summerside DT, Summerside CT, and Summerside LP) – and acknowledged that he was involved in preparing and approving marketing materials, Staff submitted that the bans they seek against the Respondents are appropriate.

[77] Further, Staff argued, in light of the seriousness of a finding of fraud, the amount of investor money misappropriated, and Ghani's capital market experience, the bans should be permanent in the interest of specific and general deterrence and public protection.

[78] Against all of the Respondents, Staff seek permanent bans that would prohibit the Respondents from:

- trading in or purchasing securities or derivatives (s. 198(1)(b));

- relying on any exemptions contained in Alberta securities laws (s. 198(1)(c));
- engaging in investor relations activities (s. 198(1)(c.1));
- advising in securities or derivatives (s. 198(1)(e.1));
- becoming or acting as a registrant, investment fund manager, or promoter (s. 198(1)(e.2)); and
- acting in a management or consultative capacity in connection with activities in the securities market (s. 198(1)(e.3)).

[79] In addition, Staff seek an order directing Ghani to resign all positions he currently holds as a director or officer of any issuer or other type of entity specified in s. 198(1)(d) of the Act, and prohibiting him from becoming or acting as a director or officer (or both) of any issuer or other type of entity specified in s. 198(1)(e).

[80] Given the seriousness of the misconduct in this case – including that it was deliberate, involved deceit, resulted in significant investor losses, and may undermine public confidence – we are of the view that the Respondents pose an ongoing risk to the public and the Alberta capital market. This is particularly so for Ghani, who is young enough to engage in future misconduct. He realized a substantial personal benefit from his actions, and did not heed the intended message from the Ghani SAU: non-compliance with securities laws will not be tolerated, and will result in enforcement action.

[81] Moreover, the Summerside Project was not a "one-off" venture for Ghani or the Prism Group. He and various Prism entities have extensive experience in capital-raising for real estate developments and may be tempted to re-start the business at a later date. They have shown that they cannot be trusted to comply with securities laws. We are also concerned that others who have seen the ease with which Ghani and Prism raised funds for multiple projects may be tempted to act in a similar manner for personal gain.

[82] We therefore agree with Staff that to effect the necessary specific and general deterrence, those involved in defrauding the investing public must be permanently banned from future participation in our capital market in all of the capacities that might give them access to investors and investor funds. The Respondents have lost the privilege of participation in our capital market, which we will formalize by making the permanent prohibition orders sought. The director and officer bans against Ghani in addition to the orders against the other Respondents are appropriate because of his position as their directing mind and the directing mind of the Prism Group.

[83] All of the comparable decisions to which we were referred also involved permanent bans, so we are satisfied that such orders are proportionate and in the public interest in this case.

2. Monetary Sanctions

[84] Because of the nature and seriousness of the misconduct for which we have found the Respondents liable and our conclusions after analyzing the *Homerun* factors as set out above, we

have also determined that monetary sanctions are necessary in this case in addition to market-access bans.

[85] Bans alone are insufficient to achieve the required specific and general deterrence and to mitigate the risk posed to the public interest by deliberate fraudulent activity. The Respondents must not be permitted to retain amounts misappropriated, and they must face a direct financial cost. Others must also know that serious breaches of Alberta securities laws will result in more than denial of market access.

(a) Disgorgement

[86] Staff seek disgorgement orders against the Respondents in two different but overlapping amounts: $3,434,566 on a joint and several basis against Ghani and Summerside DevCo, and $873,071.76 on a joint and several basis against Ghani, Summerside DevCo, and PREIC. As the $873,071.76 amount sought against Ghani, Summerside DevCo, and PREIC is a subset of the total amount of $3,434,566 that we found was misappropriated, Staff submitted that any funds recovered from PREIC should be set off against the amount ordered against Ghani and Summerside DevCo.

[87] Staff argued that Summerside DevCo is responsible for the entire $3,434,566 misappropriated because all of the Sales Proceeds funds flowed through Summerside DevCo from Fateh. Relying on *Re Limelight Entertainment Inc.*, 2008 ONSEC 28, Staff further argued that Ghani is also responsible for the entire amount misappropriated because he was Summerside DevCo's directing mind. In *Limelight*, a panel of the Ontario Securities Commission stated (at para. 59):

> In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act.

[88] Although PREIC received $2,275,000 from the Sale Proceeds through Summerside DevCo, in the Merits Decision, we found that PREIC used $873,071.76 of that amount for purposes unrelated to the Summerside Project. Accordingly, Staff seek only $873,071.76 in disgorgement from PREIC.

[89] As we stated in the Merits Decision, all of the Respondents were liable for the fraud in this case because they were all integral parts of the Summerside Project. However, only Summerside DevCo directly received Sale Proceeds from Fateh. Thereafter, it was Summerside DevCo and PREIC – under Ghani's direction – that fraudulently diverted $3,434,566 from the Sale Proceeds to or for the benefit of other businesses and entities without authorization or disclosure to Summerside DT investors. It is therefore appropriate to restrict any disgorgement order to those three Respondents as Staff have suggested.

[90] The principles governing the determination of disgorgement orders were set out in *Fauth* (see paras. 76-87), and recently summarized in *Re Ward*, 2023 ABASC 62 (at para. 34):

> - First, the panel must determine whether the respondent obtained a monetary amount as a result of the misconduct. Second, the panel must be satisfied that a disgorgement order is in the public interest.

- Staff bear the burden of proving the approximate amount obtained by the respondent on a balance of probabilities. The burden then shifts to the respondent to demonstrate that that amount is inaccurate or unreasonable. Uncertainty is resolved against the respondent because it is the respondent's failure to comply with the law that gave rise to the uncertainty; this approach also ensures that a disgorgement order is not frustrated by the complexity of the misconduct or the respondent's attempts to conceal it.

- Since s. 198(1)(i) refers to "any amounts obtained" (and not to amounts retained), disgorgement may be appropriate even if the respondent has spent or otherwise dissipated some or all of the funds in question. This is to avoid rewarding a wrongdoer for spending ill-gotten gains quickly enough to avoid being held liable for those funds later.

- For the same reason, a disgorgement order may be appropriate even if the respondent is impecunious. As the panel explained in *Re Magee*, 2015 ABASC 846 (at para. 191), "it would seem perverse that disgorgement could be ordered against a respondent who has retained amounts illegally obtained, but not against a respondent who has squandered such amounts".

[91] In accordance with the foregoing, we are satisfied that collectively, Summerside DevCo and PREIC – and therefore Ghani – wrongfully obtained a total of $3,434,566 from the Sale Proceeds. Based on Staff's Expense Allocation Spreadsheet, Summerside DevCo – and therefore Ghani – misappropriated $2,561,493 of the total, while PREIC – and therefore Ghani – misappropriated the balance of $873,072 (figures rounded to the nearest dollar). Staff have met their burden of proof on a balance of probabilities, and there is no evidence to demonstrate that those amounts are inaccurate or unreasonable. Although it appears that Summerside DevCo, Ghani, and PREIC are or were recently impecunious, that does not make a disgorgement order against them inappropriate.

[92] From our conclusions following our consideration of the *Homerun* factors, we are satisfied that disgorgement orders in this matter are in the public interest. Those who perpetrate fraud must not be permitted to profit from their breaches of the Act, and both specific and general deterrence are effected by removing the incentive to profit from ill-gotten gains in the future. It must be made clear to all capital market participants that such misconduct will result in the most serious consequences.

[93] Disgorgement orders here are also consistent with the types of orders issued in the comparable decisions cited by Staff, and in other securities enforcement cases involving fraud.

[94] However, we do not agree with Staff that Summerside DevCo should be liable for the full $3,434,566. It passed some of the Sale Proceeds on to PREIC, but PREIC spent only part of that sum for unauthorized purposes. We conclude that Summerside DevCo is liable for the $2,561,493 it misappropriated, while PREIC is liable for the $873,072 it misappropriated. As the directing mind of both companies, Ghani is responsible for the total: $3,434,566.

[95] We are therefore satisfied that it is necessary and appropriate in the public interest to order Summerside DevCo and Ghani to disgorge $2,561,493 on a joint and several basis, and to order PREIC and Ghani to disgorge $873,072 on a joint and several basis.

(b) Administrative Penalty

[96] As mentioned, Staff seek an additional monetary sanction against all of the Respondents on a joint and several basis: an administrative penalty of $325,000. They relied on the sanctions ordered in *Magneson* as the closest analogue to this matter because in both cases:

- the respondents perpetrated a fraud contrary to s. 93 of the Act;
- the misconduct was deliberate;
- the respondents misappropriated approximately 80 percent of the funds in question; and
- the size of the disgorgement orders sought are similar: approximately $3,600,000 in *Magneson*, and approximately $3,400,000 here.

[97] However, Staff argued, there are aggravating and mitigating factors in this matter that were not present in *Magneson*, and *vice versa*:

- While the individual respondent in *Magneson* was 83 years old at the time of sanctioning and his advanced age was considered mitigating, Ghani is only in his late forties. Staff argued that this means that Ghani poses more of a risk of future capital-market misconduct than the individual respondent in *Magneson*.
- The individual respondent in *Magneson* did not have specific experience in the capital markets or the investment industry, but Ghani has extensive and highly relevant experience that is an aggravating factor.
- Much of the sum misappropriated by the respondents in *Magneson* was directed to purely personal use, which Staff argued was more egregious than the benefit that accrued to the Respondents in this case: funds directed primarily toward other Prism projects and other entities, for business purposes.

[98] It was therefore Staff's submission that overall, the misconduct here calls for a somewhat higher administrative penalty ($325,000) than was imposed in *Magneson* ($300,000). If it were not for the evidence of the Respondents' constrained finances, Staff added, they would have sought an administrative penalty of $400,000.

[99] Generally, we agree with Staff's analysis of the considerations relevant to determining that an administrative penalty is warranted in this matter, and the appropriate amount. Serious, deliberate misconduct calls for a significant package of sanctions including an administrative penalty in addition to a disgorgement order – as we noted previously, if disgorgement alone is ordered without the addition of an administrative penalty, the perpetrator would, at worst, "break even". That would not provide the necessary specific and general deterrence.

[100] Ghani's extensive experience in the capital markets is an aggravating factor here. We take into account the evidence of the Respondents' impecuniosity, but in our view, the impact of some of that evidence is attenuated by its age and Ghani's relative youth.

[101] Because all of the Respondents were involved in perpetrating the fraud whether or not they received a direct financial benefit, it is also appropriate that any administrative sanction be ordered against them on a joint and several basis. A similar order was made in *Magneson* concerning the individual respondent and the corporation that was found to have been a vehicle for the fraud.

[102] We have concluded that the administrative penalty of $325,000 sought by Staff is appropriate and necessary here. It is lower than might have been ordered if impecuniosity were not a factor or a disgorgement order were not made, as the deterrent effect of the latter in addition to market-access bans diminishes the need for a higher administrative penalty in order to achieve specific and general deterrence. At the same, it is sufficient to send a message to the Respondents and others that non-compliance with securities laws –in particular, fraud – will result in a direct financial cost on top of market-access bans and an order to disgorge misappropriated amounts.

[103] In arriving at this conclusion, we are mindful of the ABCA's cautions in *Walton*, and have carefully considered proportionality in light of the facts of the case and the Respondents' circumstances. We are satisfied that in this context, $325,000 is neither "crushing or unfit", nor so low as to amount to "a 'licensing fee'" for such a serious offence (*Walton* at paras. 154 and 165). As set out above in these reasons, in other decisions, the ABCA has similarly warned against financial penalties that are not significant enough to achieve the necessary deterrence. We agree with the panel in *Rustulka*, which stated (at para.114):

> Rustulka and his brother each provided evidence with respect to Rustulka's current financial situation. This evidence would have carried greater weight if it had been supported by independent confirmation, but we are nevertheless prepared to accept it as some evidence of his impecuniosity. We have also noted his age and his future employment prospects. This is a "moderating consideration" with respect to the quantum of the administrative penalty to be imposed (see [*Re*] *Holtby*[, 2015 ABASC 891] at para. 55). However, it does not mean that there should be no penalty or that the penalty should be a nominal amount. As observed in *Homerun* (at para. 18), ". . . a monetary sanction almost inevitably involves . . . a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all."

[104] In other words, impecuniosity alone does not justify a nominal administrative penalty.

[105] We are therefore satisfied that $325,000 is proportionate to the circumstances of the misconduct and the Respondents, and that the order is in the public interest because of its deterrent, preventive, and protective effect. It addresses the risk and protects against similar misconduct in the future, thereby helping to preserve public confidence in the Alberta capital market.

IV. COSTS

A. General Principles

[106] Section 202 of the Act provides that if after conducting a hearing, an ASC hearing panel is satisfied that a person or company has contravened Alberta securities laws, it may order that person or company to pay the reasonable costs of or related to either the hearing or the investigation, or both.

[107] Section 20 of the *Alberta Securities Commission Rules (General)* (the **Rules**) sets out the categories of costs that may be ordered, including Staff's time, witness expenses, and "any other costs paid or payable for purposes of or related to the investigation or the hearing, or both".

[108] ASC sanction and costs decisions frequently cite *Re Marcotte*, 2011 ABASC 287, in which the hearing panel explained the difference between sanction orders and costs orders (at para. 20):

> A costs order is not a sanction, but rather a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC]'s operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

[109] While the primary goal of sanction orders is protection and prevention, costs orders – or the prospect thereof – are aimed at encouraging procedurally efficient proceedings. They are not dependent on the seriousness of the underlying misconduct or the amount of any monetary sanction imposed. As stated in *Ward* (at para. 113):

> In a very serious case involving egregious misconduct resulting in a large disgorgement order and administrative penalty, a respondent may still have made significant contributions to the case's efficient resolution. In such an instance, a lower costs order may be appropriate, while the reverse may be true in a less egregious case where a respondent did not contribute to an efficient resolution, or behaved in a way that extended the proceedings unnecessarily . . .

[110] Several factors relevant to a panel's determination of an appropriate costs order were set out in *Homerun* (at paras. 49-50 and 52-53). We are to consider:

- any contribution the respondent made toward an efficient resolution of the proceedings – e.g., formal admissions or an agreed statement of facts;
- Staff's level of success in proving their allegations (because respondents should not generally be responsible for costs attributable to allegations that were withdrawn or unproved);
- any duplication of efforts by Staff;
- the nature and amount of any claimed disbursements; and
- the effect a costs order might have on investor victims' ability to recover their investment funds.

[111] The assessment of each factor may lead us to conclude that a reduction of the costs claimed by Staff is warranted. By contrast, even if proved, impecuniosity is not generally relevant to an assessment of costs. As noted in *Fauth* (at para. 117):

> Although they are monetary in nature, costs orders, like disgorgement orders, have not been in issue in recent ABCA decisions that have considered impecuniosity in the ASC context: *Walton*; *Spaetgens* . . . (see also *Re Spaetgens*, 2017 ABASC 38 at para. 116).

[112] Where there are multiple respondents, a panel may allocate the recoverable costs among them. In some cases, it may be possible to estimate what proportion of resources was applied to proving each respondent's misconduct, and to adjust the resultant orders accordingly (*Homerun* at para. 51).

B. Application to this Case

[113] Staff's Bill of Costs indicates that the investigation and litigation costs from inception to the conclusion of the merits phase totalled $174,758.01, inclusive of disbursements. We have reviewed the Bill of Costs in detail, and following the correction of some minor arithmetical errors, we arrived at a total amount of $173,983.01, a difference of only $775.

[114] Staff seek an order for payment of costs against the Respondents on a joint and several basis, in the full amount of $174,758.01. They noted that while Ghani attended for investigative interviews with Staff, he did not participate in the Merits Hearing, made no admissions, and made no effort to reach an advance agreement with Staff as to the evidence that could be admitted – all of which would have contributed to the efficiency of the proceedings.

[115] Staff further argued that the amount of the costs sought is modest compared to the amounts of the disgorgement and administrative penalty orders sought, meaning that it would "only marginally diminish investors' prospects of recovery". They also noted that they already reduced the amount of the actual costs incurred, as they deducted 30 hours from counsel's time to prepare Staff's written submissions on the merits.

[116] Concerning the nature of the costs claimed by Staff, we are satisfied that they are all recoverable under s. 20 of the Rules. They all relate to the investigation and hearing, and in fact do not include all of the hearing costs. Not only did Staff deduct 30 hours from their time already, they also did not include any claim for costs relating to the sanction phase of the proceeding.

[117] Concerning the other factors we are to consider before making a costs order, the Respondents' non-participation in either phase added no efficiencies to their conclusion. Staff was still required to prepare for and conduct a complex, six-day Merits Hearing with six witnesses and extensive documentary evidence. Staff proved all of the allegations in the ANOH against all of the Respondents. Our review of the Bill of Costs did not disclose any duplication of effort among Staff, nor any questions as to the appropriateness of any of the claimed disbursements.

[118] As we observed in the Merits Decision, each of the Respondents was an integral part of the fraud perpetrated on Summerside DT investors. We therefore discern no reason to except any of them from a costs order, and find that an order on a joint and several basis is appropriate.

[119] Based on the evidence before us, the Respondents are likely all impecunious and none of the corporate entities is currently conducting business. In some matters, corporate respondents remain active or receivership proceedings present some hope that wronged investors will recover at least some of their lost investment funds. As that does not appear to be the case here, we are not concerned that a costs order against all of the Respondents will prejudice investors' prospects of future financial recovery.

C. Conclusion on Appropriate Order

[120] In view of the foregoing, we do not find it necessary to apply any further reductions to Staff's claim. We are ordering that the Respondents pay costs of $173,983 (rounded to the nearest dollar) on a joint and several basis.

V. CONCLUSION AND ORDERS

[121] Given our conclusions herein, we make the following orders against Ghani:

- under s. 198(1)(d) of the Act, he must immediately resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization, designated information processor, recognized quotation and trade reporting system, or designated benchmark administrator;

- with permanent effect:

    - under s. 198(1)(b), he must cease trading in or purchasing any securities or derivatives;

    - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;

    - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;

    - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization, designated information processor, recognized quotation and trade reporting system, or designated benchmark administrator;

    - under s. 198(1)(e.1), he is prohibited from advising in securities or derivatives;

    - under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager, or promoter; and

    - under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 198(1)(i), on a joint and several basis with Summerside DevCo, he must pay to the ASC $2,561,493 obtained as a result of his non-compliance with Alberta securities laws;

- under s. 198(1)(i), on a joint and several basis with PREIC, he must pay to the ASC $873,072 obtained as a result of his non-compliance with Alberta securities laws;

- under s. 199, he must pay to the ASC an administrative penalty of $325,000, on a joint and several basis with the other Respondents; and

- under s. 202(1), he must pay to the ASC $173,983 of the costs of the investigation and hearing, on a joint and several basis with the other Respondents.

[122] We make the following orders against Summerside DevCo, Summerside DT, Summerside CT, Summerside LP, and PREIC:

- with permanent effect:

    - under s. 198(1)(b), they must cease trading in or purchasing any securities or derivatives;

    - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to them;

    - under s. 198(1)(c.1), they are prohibited from engaging in investor relations activities;

    - under s. 198(1)(e.1), they are prohibited from advising in securities or derivatives;

    - under s. 198(1)(e.2), they are prohibited from becoming or acting as registrants, investment fund managers, or promoters; and

    - under s. 198(1)(e.3), they are prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 199, they must pay to the ASC an administrative penalty of $325,000, on a joint and several basis with the other Respondents; and

- under s. 202(1), they must pay to the ASC $173,983 of the costs of the investigation and hearing, on a joint and several basis with the other Respondents.

[123] We make the following additional order against Summerside DevCo:

- under s. 198(1)(i), on a joint and several basis with Ghani, it must pay to the ASC $2,561,493 obtained as a result of its non-compliance with Alberta securities laws.

[124] We make the following additional order against PREIC:

- under s. 198(1)(i), on a joint and several basis with Ghani, it must pay to the ASC $873,072 obtained as a result of its non-compliance with Alberta securities laws.

[125] These proceedings are now concluded.

March 21, 2024

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn

""original signed by"
Karen Kim