In the Alberta Court of Justice

Citation: R v Aitkens, 2024 ABCJ 169

Date: 20240815
Docket: 131151698P1
Registry: Calgary

Between:

His Majesty the King

- and -

Ronald James Aitkens

Sentencing Judgment of the Honourable Justice L.W. Robertson

Introduction

[1] Ronald James Aitkens (the accused) has been convicted of two offences under the *Alberta Securities Act*, RSA 2000, c S-4 (*ASA*). The issue to be decided is a fit and proper sentence for one count of making misleading statements in Offering Memoranda, contrary to section 92(4.1) of the *ASA* (count 3), and one count of perpetrating a fraud relating to a security, contrary to section 93(b) of the *ASA* (count 5). The basis for the convictions concerned the accused's involvement in the sale of securities in Legacy Communities Inc. (Legacy). Legacy was a real estate investment opportunity delivered under the Offering Memoranda (OM) exemption under the *ASA*. More than 1400 investors contributed $35.2 million to the project between 2005 - 2008. The accused secretly and deliberately diverted between $10.7 - $11.7 million of Legacy investor funds to projects not authorized under the OMs.

Issues

[2] The issues before the Court are:

i. the applicability of the sentencing procedures and principles of the *Criminal Code*, RSC 1985, c C-46 (the *Code*), to regulatory offences under the *ASA*;
ii. determination a proper sentence for the accused's conduct; and
iii. whether restitution claims advanced by three investors in the Legacy project are appropriate under either the provisions of the *ASA* or the *Code*.

History of the Accused's *ASA* Prosecution

[3] The accused was convicted on the previously mentioned offences after a lengthy trial. The reasons for conviction were reported at ***R v Aitkens***, 2020 ABPC 129 (***R v Aitkens*** 2020). The accused was also acquitted on a further count (count 4). Count 4 alleged that he failed to disclose two investment agreements, rendering the multiple Legacy OMs misleading or untrue. The allegation was that non-disclosure of those agreements negatively affected the market value of the Legacy investment, contrary to s 92(4.1)(a)(i) and (ii) of the *ASA*. The acquittal on count 4 was ironic. A conviction on that charge depended on the legitimacy of the disputed investment agreements. In my reasons for acquitting the accused of count 4, I found that the agreements were false documents, created by the accused or by someone else with the accused's knowledge and consent. I found the accused conspired to use these false documents to divert suspicion from himself and to justify his illegal activities during insolvency proceedings commenced under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36 (*CCAA*). My reasons for finding the investment agreements to be invalid are detailed at ***R v Aitkens*** 2020, *supra*, at paras 185 -212.

[4] Following the convictions on counts 3 and 5 the accused discharged his trial lawyer and retained new counsel. New counsel sought an adjournment of the sentencing hearing. The accused then petitioned the court to re-open the trial and applied to present new evidence. A hearing was conducted in accordance with the principles governing the admissibility of fresh evidence set out in ***Palmer v the Queen***, [1980] 1 SCR 759, 1979 CanLII 8, and ***R v Kowall*** (1996), 108 CCC (3d) 481, 1996 CanLII 411 (ONCA). Ultimately the accused's application to re-open the trial following conviction was dismissed, (***R v Aitkens***, 2022 ABPC 48).

History of Mr. Aitkens' Sentencing Proceedings

[5] Following the discharge of the application to re-open the trial both the Crown and counsel for Mr. Aitkens made numerous and fulsome submissions on the appropriate sentence. These included written and oral submissions. I have reviewed the positions of both counsel below.

[6] Mr. Aitkens' sentencing was adjourned numerous times, all at the request of Mr. Aitkens. Mr. Aitkens underwent knee replacement surgery for both knees, on separate instances. This delayed the proceeding by several months. At length, a final date for this Court's decision on sentence was set for October 23, 2023. That was again adjourned by Mr. Aitkens due to his illness.

[7] Finally, Mr. Aitkens did not attend on the next date set for decision, November 6, 2023. Accordingly, this matter went to warrant. Mr. Aitkens remained at large on a Canada-wide arrest warrant from November 6, 2023 until mid-August, 2024, a period of more than nine months.

[8] This sentencing decision is not meant to address that conduct. Mr. Aitkens' failure to attend court is a separate and distinct issue.

Facts

[9] The circumstances of the accused's unlawful behavior are described in detail in my reasons for conviction (***R v Aitkens*** 2020, *supra*). I will not fully repeat those findings here. A brief summary, however, is appropriate.

[10] The accused was the operating mind behind Legacy and exercised full control of Legacy's assets. Legacy was sold to investors exclusively as an opportunity to purchase and develop a 503-acre parcel of land immediately west of Calgary. The parcel was very precisely and carefully described as were the risks associated to that project. Some of the $35.2 million raised for the project was indeed dedicated to the project. However, very early in the process the accused diverted significant Legacy sums to other projects which he owned or controlled personally. These other projects had nothing to do with Legacy. They were not authorized under any of the three OMs used to raise Legacy 's capital.

[11] The transfers of Legacy's assets were done secretly and deliberately using numbered corporations which the accused wholly owned. The accused was the only one who stood to benefit from these transactions. One of the projects was a $4.6 million investment in a proposed holiday resort off the western coast of Panama. Another was a $5.3 million diversion of Legacy funds to a commercial property south of Edmonton, Alberta known as "Railside." Another project was the purchase of two quarter sections of land near Granum, Alberta. In total the Legacy investment was deprived at least $10.7 million in capital by these transactions. The figure rises to $11.7 million if the unauthorized and unnecessary transfer of water rights, sold back to Legacy in the Granum transaction, is also included. None of these disputed transactions were authorized under the OMs, which very specifically detailed that investor funds would be used only for the Legacy lands.

[12] The secret and unauthorized use of Legacy funds was at the core of the accused's breaches of the *ASA* which led to his convictions. Specifically, count 3 involved making misleading representations in the legacy OMs about how the money raised by the investment would be spent. The only authorized use of those funds was the purchase and development of the specifically described lands west of Calgary. As the accused used Legacy funds for his own personal projects, he offended s 92(4.1) of the *ASA*.

[13] The accused also offended the general fraud provisions of the *ASA*, contained within s 93(b). He engaged in dishonest acts which met the criminal definition of fraud, as adopted under s 93 of the *ASA*. By making false statements about how the Legacy funds would be used, the accused engaged in practices which he knew, or reasonably ought to have known, would objectively lessen the value of the Legacy investment. The accused's actions were a betrayal of the terms and assurances given to the investors in the Legacy OMs, who used these documents to carefully consider the proposed investment.

[14] The Legacy project ultimately failed. There were numerous reasons for the failure including that planning permission to develop the lands was not granted by municipal authorities. By December 2011 Legacy had a cash balance of less than $10,000. To protect Legacy from insolvency the accused placed the company into the *CCAA*, process. A court-appointed Monitor did not receive accurate or detailed assistance from the accused during this process. The Monitor could not confirm the legitimacy of promissory notes or the previously mentioned investment agreements produced by the accused to justify his use of Legacy funds. As previously discussed, those agreements were found to be illegitimate and were submitted by the accused when the Monitor asked increasingly uncomfortable questions about the use of Legacy proceeds (***R v Aitkens*** 2020, *supra*, at paras 185 – 211). The accused's behaviour within the *CCAA* process was highly dubious.

Penalty Provisions of the *ASA*

Applicable Penalty Provisions of the *ASA*

[15] Part 16 of the *ASA* a contains the general offences and penalties for breaching the *Act*. The accused's offences are governed by the maximum penalties set out in s 194(1) of the *ASA*. That section reads as follows:

> ***194. General offences and penalties***
> ***194(1)*** *A person or company that contravenes Alberta securities laws is guilty of an offence and is liable to a fine of not more than $5 000 000 or to imprisonment for a term of not more than 5 years less a day, or to both.*

[16] The *ASA* also permits the Court to make ancillary orders of restitution and orders that a person cease trading in securities. There are also provisions dedicated to forcing offenders to resign current corporate director or officer positions, preventing persons from subsequently acting as directors or officers of any securities issuers, or acting in a management or consultative capacity in connection with the securities market.

[17] The ancillary orders are authorized under the general enforcement provisions contained within s 194(6)(b) of the *ASA* which reads as follows:

> ***194(6)*** *If a person or company is guilty of an offence under this section, the court*
>
> *(a) may make an order requiring the person or company to compensate or make restitution to an aggrieved person or company; and*
>
> *(b) may make any other order that the court considers appropriate in the circumstances.*

[18] The specific provisions authorizing the "cease trading" and other securities prohibitions are contained within s 197(3), (4) and s 198(1) of the *ASA*.

The Offender and the Position of the Parties

i. The Offender

[19] Counsel for Mr. Aitkens provided detailed information concerning the accused's personal circumstances, especially regarding his age and health. The sentencing position of the accused is best understood in light of these considerations.

[20] The accused is now 70 years old. When the prosecution of these matters began, he was 59. Mr. Aitkens' prosecution has been frequently delayed, almost always by the accused. The delays have always been accompanied by waivers of his right to trial within a reasonable time, protected under s 11(b) of the *Canadian Charter of Rights and Freedoms*. Significant delays also occurred because of the accused bringing a post-conviction application to re-open the trial, referred to above, and knee-replacement surgeries for both knees.

[21] The accused has no criminal record. He does have a history of receiving sanctions from the Alberta Securities Commission and the Financial and Consumer Affairs Authority of Saskatchewan. In 2009 two companies the accused was president and director of received

sanctions for making, authorizing or permitting misleading statements to investors concerning a real estate development project known as Spruce Ridge Estates, ***Foundation Capital Corporation, Re***, ABASC 425. In 2018 the Alberta Securities Commission found that Mr. Aitkens perpetrated a fraud on investors, contrary to s 93(b) of the *ASA*, the very charge on which is before this Court, ***Aitkens, Re***, 2018 ABASC 27 (Decision February 15, 2018). In ***Aitkens, Re***, 2019 Carswell Sask 301, the Financial and Consumer Affairs Authority of Saskatchewan found the accused to have breached several provisions of the *Saskatchewan Securities Act*, SS 1988-89, c S-42.2, by trading in securities without registration, prospectuses or exceptions, engaging in conduct which perpetrated fraud on Saskatchewan investors, making misrepresentations, and other similar offences (Decision June 19, 2019). It should be noted that Legacy was one of the investment vehicles involved in that scheme and many of the facts are very similar to the case at bar.

[22] The accused suffers from coronary artery disease and atrial fibrillation. He is taking prescription medication for both conditions. He also experiences shortness of breath and fatigue on exertion. He suffers from sleep apnea and requires a CPAP (Continuous Positive Airway Pressure) device to sleep.

[23] The accused underwent two total knee replacement surgeries, first for his left knee on June 17, 2022, and then for his right knee, on May 26, 2023. Letters from the accused's surgeons indicated that full recovery could take 6-12 months, post-operation. I glean from this timeline that Mr. Aitkens has now fully recovered from both surgeries.

[24] Finally, the accused tended several letters of support.

ii. Position of the Crown

[25] The Crown seeks a global sentence of five years custody for both offences. The Crown seeks four years for the accused's breach of count 5 (s 93(b), *ASA* general fraud provision), and one year for count 3 (s 92(4.1) *ASA*, making misleading statements in the Legacy OM's) to be served consecutively.

[26] The Crown points to the large sums diverted from the Legacy project (between $10.7 and $11.7 million) as well as the secrecy and deliberateness of the accused's actions in effecting the unlawful transfers. The Crown argues that the accused's lack of remorse is an aggravating factor. Additionally, the Crown maintains that the accused's lack of genuine cooperation with the court-appointed Monitor and the deliberate attempts to deceive the Monitor with false documents are aggravating factors.

[27] The Crown also seeks orders permanently prohibiting the accused from trading in or purchasing securities, accessing exempt trading, directing the accused to resign any current director or officer positions, and prohibiting him from acting as a director or officer for any securities issuer. The Crown also seeks an order preventing the accused from acting as a manager of, or in a consultative capacity in connection with any activities in the securities market.

[28] Finally, the Crown seeks restitution on behalf of three Legacy investors. These investors submitted restitution requests calculated as the difference in value from their original investments to the current value of the equity received in Legacy bonds resulting from the *CCAA* process.

i.	Investor	N. Yee	$48,161.09
ii.	Investor	D. Nelson	$28,962.60

iii. Investor T. Tompkins $57,830.01

[29] The Crown argues that significant custodial sentences are necessary for specific and general deterrence and to denounce the accused's conduct. The Crown argues that meaningful sentences are required to maintain public confidence in the capital markets and to protect the public and the Alberta economy from those who offend the cornerstones of securities regulations.

iii. Position of the Accused

[30] Counsel for Mr. Aitkens submits that a global sentence of two years, less one day, is appropriate. Counsel maintains that Aitkens poses no ongoing risk to the community and applies to have the sentence served by way of a Conditional Sentence Order (CSO). Counsel for the accused argued that recent amendments to the *Criminal Code* regarding CSOs are directed at a renewed emphasis on alternatives to physical jail sentences. It is suggested that the accused is exactly the type of candidate envisioned as appropriate for a CSO under the legislative changes to the scheme. Counsel submits that the penitentiary sentence proposed by the Crown is excessive and places inappropriate emphasis on general deterrence. It was argued that a CSO would meet all the relevant sentencing objectives in the present case.

[31] Counsel for the accused asks the Court to reject the four-year custodial submission requested by the Crown on count 5. Counsel argued that this near-maximum term is inappropriate on the facts of this case. In particular, counsel for the accused suggests that the five-year maximum custodial term must be reserved for the worst offenders, offending on the worst possible factual pattern. The accused maintains that the sentence proposed by the Crown is problematic on this basis and disregards appropriate sanctions that may be required in subsequent cases which may present more egregious fact patterns. The accused also disputes the relationship between lengthy custodial dispositions and deterrence based on the recent Supreme Court decision in ***R v Bissonnette***, 2022 SCC 23.

[32] The accused maintains that a CSO, as observed in ***R v Proulx***, 2000 SCC 5 at para 22, is "*a serious punitive sanction capable of achieving the objectives of denunciation and deterrence.*" Moreover, the accused argues a sentence of two years less one day is more appropriate in terms of its length and effectiveness for a person in the accused's situation.

[33] Counsel for the accused submits that Mr. Aitken's age and significant health considerations mean that a penitentiary sentence, served within a correctional facility, would be inappropriate. Further, he submits that physical separation of the accused from society is not required as Mr. Aitkens poses no continuing risk to the community. Counsel observes that the risk of the accused re-offending, in the manner which occurred here, would be non-existent as the likely sentence would extinguish his access to the capital market with specific orders. Counsel submits that ss 718.2(c) and (d) must be applied to ensure that the accused's sentence is not unduly harsh or that the accused is not sentenced to actual incarceration where less restrictive sanctions would be more than sufficient to meet the required sentencing objectives.

[34] Finally, counsel for the accused submits that there is no proof Mr. Aitkens personally profited from the disputed transactions. It was argued that there was no suggestion that he engaged in a lavish lifestyle on misappropriated funds, as is sometimes seen in such cases. The accused argues that his moral culpability is reduced by these factors.

Analysis

1. Application of the *Criminal Code*

[35] The *ASA* and its regulations are provincial legislation. Offences under the *ASA* incorporate the provisions of the *Criminal Code* by virtue of ss 2 and 3 of the *Provincial Offences Procedure Act,* RSA 2000 c P-34 (*POPA*). Those sections read as follows:

> ***Application of Act***
> ***2(1)*** *Subject to any express provision in another Act, this Act applies to every case in which a person commits or is suspected of having committed an offence under an enactment for which that person may be liable to imprisonment, fine, penalty or other punishment.*

> ***Application of Criminal Code***
> *Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the Criminal Code (Canada), including the provisions in Part XV respecting search warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.*

[36] Accordingly, sentencing prohibitions contained within Part XXIII of the *Code* apply to the accused's conduct. These include the purpose and principles contained within ss 718, 718.1, 718.2, and the restitution provisions within ss 737.1-738. This was the finding in ***R v Chan***, 2012 ABPC 272, as well as ***R v Nason***, 2015 ABPC 220.

[37] A conditional sentence of imprisonment is theoretically possible for an *ASA* offence, provided the accused meets the criteria enunciated in s 742.1 of the *Code*.

[38] I find the relevant portions of the *Code* to be as follows:

> ***718. Purpose***
> *The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:*
>
> *(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;*
>
> *(b) to deter the offender and other persons from committing offences;*
>
> *(c) to separate offenders from society, where necessary;*
>
> *(d) to assist in rehabilitating offenders;*
>
> *(e) to provide reparations for harm done to victims or to the community; and*
>
> *(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.*

> ***718.1 Fundamental principle***
> *A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*

[39] Section 718.2 dictates other considerations which must be taken into account. These include:

> ***718.2 Other sentencing principles***
> *A court that imposes a sentence shall also take into consideration the following principles:*
>
> *(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,*
>
> *(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;*
>
> *(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;*
>
> *(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
>
> *(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.*

[40] Abusing a position of trust while committing an offence is statutorily deemed to be an aggravating circumstance (s 718.2(a)(iii)). I accept the Supreme Court of Canada's definition of trust as enunciated in ***R v Audet***, [1996] 2 SCR 171.

> *"Trust" must instead be interpreted in accordance with its primary meaning: "[c]onfidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement". The word "confidence" is defined as follows: "[t]he mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith".* ***R v Audet***, para 35

[41] The statutory prerequisites for qualifying for a CSO have been modified under the recent amendments to the *Code* Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2021, (assented to November 17, 2022), SC 2022, c 15). The current rendition of s 742.1 reads as follows:

> ***742.1 Imposing of conditional sentence***
> *If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if*
>
> *(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;*

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence under any of the following provisions:

(i) section 239, for which a sentence is imposed under paragraph 239(1)(b) (attempt to commit murder),

(ii) section 269.1 (torture), or

(iii) section 318 (advocating genocide); and

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.

2. General Sentencing Considerations for *ASA* offences

[42] There are few previously reported decisions to assist in determination of a fit sentence for Mr. Aitkens' conduct. I begin by acknowledging the fundamental principle of sentencing enunciated in s 718.1 of the *Code*. The sentence for Mr. Aitkens must be proportionate to the gravity of his offences and his degree of culpability. I also acknowledge the fundamental purpose of regulatory offences, to protect the public. Sentencing for serious breaches of the *ASA* emphasize denunciation and deterrence as a method of protecting the economy and the capital markets.

[43] I reject the concept that maximum sentences must be reserved only for the worst offenders committing offences under the worst possible conditions. Our Supreme Court has repeatedly established that language such as "worst offender" is unhelpful and inappropriate, ***R v Friesen***, 2020 SCC 9, at para 175, ***R v LM***, 2008 SCC 31at para 20, referring to ***R v Cheddesingh***, [2004] 1 SCR 433. Sentencing is an individualized process. Sanctions must be crafted to acknowledge the circumstances of the offences and the offender. This direction has been acknowledged and applied by our Court of Appeal, (***R v EAM***, 2019 ABCA 413 at para 11, ***R v Hanna***, 2013 ABCA 134 at para 14).

[44] I acknowledge the recent comments made by our Supreme Court in ***R v Bissonnette***, *supra*. The Supreme Court in ***Bissonnette*** rightly rejected consecutive life sentences as cruel and unusual punishment (at para 73). It also found that excessively long sentences have a greatly diminished effect in terms of deterrence (at para 94). However, ***Bissonnette*** did not fundamentally alter the foundation principles of sentencing or reject the use of penitentiary terms to achieve denunciation and deterrence. With great respect, ***Bissonnette*** does not stand for the principle that prison terms have no value in achieving a proportionate sentence, are not relevant to denounce an offender's conduct, or play no role in recognizing an offender's moral blameworthiness.

[45] The amount of money the accused has been found to have defrauded investors is highly relevant. It informs the gravity of his offences and his moral responsibility for his wrongful conduct. Comparator *ASA* cases referred to the court establish that the losses attributed to Aitkens' conduct are clearly at the high end of the range. The Alberta Court of Appeal (albeit in a criminal setting) has frequently observed that denunciation and deterrence are the primary sentencing objectives where large sums of money are harvested by a person in a position of trust. This is especially so when the activities are planned, deliberate and persistent (***R v Evanson***, 2019 ABCA 122 at paras 18-19).

3. Specific Comparator Cases

[46] A review of relevant comparator *ASA* cases is useful. While fact patterns may very considerably, many times the conduct being addressed takes a familiar pattern. In ***R v Chan**, supra*, the accused entered a guilty plea to several counts of trading in securities while not registered and when no prospectus had been filed, making false statements, and committing fraud under the *ASA* general fraud provision. The total losses to investors were $1.1 million. About ten percent of that amount had been repaid when sentencing occurred. Chan had gone to great lengths to avoid detection for the offences, even creating a false email record. The offences had also occurred over a lengthy period. The court found that Chan had not pocketed the missing investment money but deliberately overrode investor instructions to avoid risky investments (at para 50). The court found that the regulatory offences under the *ASA* were created to protect broad segments of the public who are exposed to the capital market (at para 58). The court concluded that denunciation and deterrence are the overarching principles to be considered (at para 32). These sentiments were echoed in ***R v Boyle***, 2002 ABPC 136. Chan was sentenced to a global term of 3 years.

[47] In ***R v Peers***, 2017 ABQB 770, two individuals (a father and son) pleaded guilty to fraud and related *ASA* offences. These included trading in securities while unregistered and without a prospectus, making misleading statements, and general fraud under the *ASA*. There were clear breaches of trust. Some investors were particularly vulnerable to the offences due to their long-standing relationships with the accused. Losses were approximately $2.21 million over a 16-month period. Peers Sr. received a 3.5-year global sentence.

[48] In ***R v Sellars,*** 2011 ABPC 110, a 73-year-old accused pleaded guilty to seven *ASA* offences. These included four counts of trading securities while prohibited, one count of trading while unregistered, one count of trading without a prospectus, and one count of making misleading statements. Investor loses were approximately $3.7 million. A joint submission of a 2-year penitentiary term was honoured by the court.

[49] In ***R v DeBoer,*** 2021 ONCJ 690, a 3-year penitentiary term was given for two counts of fraud and one count of trading while being subject to a temporary cease-trading order. The accused exercised control over two separate investment schemes which received a combined total of $7.5 million from investors in Ontario and internationally. The accused diverted significant funds to purposes other than what investors had authorized. The accused never disclosed to local or international investors that the cease trading order was in place. Some investors were financially ruined by the accused's activities. A significant mitigating factor was the guilty plea entered. The accused had no criminal record.

[50] ***R v Nason***, 2015 ABPC 220, is the only similar recent decision which utilizes a CSO under the provisions of the *Code*. However, the oddities in the facts of ***Nason*** are highly relevant. Nason was convicted after trial of numerous *ASA* offences. These included five counts of trading in securities while prohibited by a previous *ASA* order, five counts of distributing securities without a prospectus, and ten counts of making misleading statements. Investor losses were a modest $290,000. It was relevant that Nason had previously been sanctioned by securities regulators in New Brunswick for similar offences about a year before. Significantly, the court found that Nason was not the operating mind of the scheme. He did not benefit personally from his conduct. Instead,

Nason acted in the position of a sales advisor under the direction of his colleague Drever. Drever was found to be the operating mind and to have harvested the funds from Nason's wrongful conduct (at para 11). The court in ***Nason*** was confronted with the difficult problem of addressing parity since Drever's conduct was not addressed through court prosecution under the *ASA* offences, but by the administrative forum of the Alberta Securities Commission (ASC). While the ASC has wide-ranging powers, it was not able to incarcerate Drever. In reluctantly sentencing Nason to an 18-month CSO term, followed by a 12-month probation period, the court made these comments at para 25: *"...[w]ere it not for the parity principle and the lack of incarceration for Drever, who is probably the more culpable, I would not be inclined to impose a Conditional Sentence Order. However, it is the only way any kind of parity can be achieved and be understandable to the public."* Had a CSO not been utilized a global sentence of a 9 months of actual custody would have been imposed by the Court (at para 22).

4. Aggravating and Mitigating Factors

a. Aggravating factors

[51] The aggravating factors in the present case are as follows:

1. The high value of investor money diverted during the commission of the offences. At a minimum the accused diverted $10.7 million from the Legacy project, approximately 30% of the total funds invested by 1,475 investors. This amount eclipses the value of misconduct represented in comparator cases, in most instances by a wide margin.
2. The lengthy period during which funds were misused. Aitkens unlawfully searched for opportunities to use Legacy funds at an early stage in the subscription of the project (2006). Funds were *actually* diverted in an unauthorized manner from September 2007-October 2008. Aitkens' abuse of Legacy funds was prolonged and persistent.
3. Deception regarding the misuse of funds was also persistent. Investors were not informed about the diversion of the funds for at least four years, until December 2011 when the accused was forced to apply for creditor protection through the *CCAA* process. The funds were secretly and deliberately transferred.
4. Deception was employed to obfuscate the investigation regarding the true use the misused funds were put to and the authority for doing so. Aitkens presented, as genuine, documents that were patently false. This was done in an attempt to hastily add legitimacy to fraudulent transactions which were not authorized under any of the OMs.
5. The accused abused a position of trust to commit the offences. As a director and officer of Legacy, Aitkens owed a trust-like fiduciary duty to Legacy's investors. That trust was breached by the secret diversion of funds that investors had contributed to a highly specific real estate development opportunity. The OMs describing the Legacy opportunity were highly detailed. The risks and benefits of purchasing and developing a legally described parcel of land, in a desirable location west of Calgary, were exhaustively set out. Almost a third of Legacy funds went to different projects that bore no resemblance to the Legacy project and did not present

the same risks or rewards. A large sum of money, $4.6 million, was even diverted to a project set in a foreign developing country. No investor expected the funds would be used in this fashion.

6. In addition to the unauthorized use of Legacy funds for significantly different investments, no Legacy investor could have profited from the diverted funds. Even if those unauthorized investments had lavishly succeeded only the accused stood to gain from the illegitimate transactions. Aitkens made a show of trying to justify his actions as being in the best interests of investors. When the court-appointed monitor asked increasingly specific questions about the use Legacy funds were put to Aitkens relied on the "Reallocation" clauses to excuse the behavior. The truth is that all funds transferred went through two numbered companies controlled exclusively by the accused. Legacy investors had no knowledge of the investments and no claim to the profits the accused targeted with their money. Not even other Legacy staff knew about the opportunities.

b. Mitigating Factors

[52] There are no mitigating factors. I acknowledge that Aitkens does not have a criminal record.

[53] The accused has taken the matter to trial. I acknowledge that this is his constitutional right. His sentence cannot be increased for this reason, nor is it an aggravating factor to consider. Having said that, almost all of comparator cases reviewed above were instances where guilty pleas were entered. Those offenders received an appropriate reduction in their penalty in recognition of this. They also expressed remorse for their actions. The range of penalties imposed in the comparator cases must be understood in this context. A plea of guilty can have significant benefit in such cases, especially in matters that are difficult to investigate and litigate as was observed in ***R v Drabinski,*** 2011 ONCA 582 at para 166:

> *First, the investigation and prosecution of crimes like these is difficult and expensive. It places significant stress on the limited resources available to the police and the prosecution. An early guilty plea coupled with full cooperation with the police and regulators and* bona fide *efforts to compensate those harmed by the frauds has considerable value to the administration of justice. The presence of those factors, depending of course on the other circumstances, may merit sentences outside of the range.*

[54] There has been no expression of remorse from Mr. Aitkens. In addition, the state has borne the full burden of proving these matters in lengthy trial and post-trial proceedings.

[55] Finally, while I accept that Mr. Aitkens has submitted many letters of support, I cannot agree they should influence the resulting sentence significantly. I do acknowledge Mr. Aitkens' involvement in charity efforts in several countries, mostly associated with religious organizations. He has donated both time and money to worthy causes in this regard. However, as was also observed in ***Drabinski*** at para 167, previous good character and a reputation for community minded activities have their limits:

> *Second, individuals who perpetrate frauds like these are usually seen in the community as solid, responsible and law-abiding citizens. Often, they suffer*

personal and financial ruin as a result of the exposure of their frauds. Those factors cannot, however, alone justify any departure from the range. The offender's prior good character and standing in the community are to some extent the tools by which they commit and sustain frauds over lengthy time periods.

5. Appropriate Sentence

[56] After considering the preceding factors I conclude that a global penitentiary sentence of four years is appropriate. A penitentiary term of this length is reasonable in light of the accused's deliberate and prolonged breach of trust. It fairly acknowledges the gravity of the accused's conduct and his degree of responsibility for committing the offences. The amount of investor funds targeted by the accused is significantly higher than in comparator cases. This fact, combined with the duration over which the accused's conduct occurred, amply justify a modest increase over the custodial terms imposed in previous cases. The accused cannot claim the mitigating effect of a remorseful guilty plea recognized in many comparator cases. Moreover, the accused's deliberate deception employed to justify his actions to a court-appointed Monitor and the secrecy with which he misused investor funds are also factors justifying a custodial sentence of this length.

[57] I acknowledge the health considerations facing the accused. However, the accused has not established that his medical concerns would prevent him from serving an actual prison term. Apart from the knee surgeries, from which he has recovered, the accused's condition is not unusual for someone of his age. There is no information to suggest that his medical issues cannot be accommodated while in custody.

[58] A CSO is not appropriate. The length of a CSO term is limited to sentences of under two years. While the recent amendments to the CSO regime in the *Criminal Code* have broadened the list of eligible offences, they have not changed the fundamental requirement that the court must impose a sentence of less than two years for a CSO to be an available disposition. A sentence of under two years would not recognize the fundamental purposes of sentencing enunciated in ss 718 and 718.1 of the *Code* given the aggravating conduct of the accused.

[59] I would apportion the sentence as follows:

- 39 months on count 5 (breach of s 93(b), *ASA* general fraud provision); and
- 9 months consecutive for count 3 (making misleading statements in the legacy OMs, contrary to s 92(4.1) of the *ASA*.

[60] On November 15, 2023 I granted the following ancillary orders sought by the Crown, authorized under s 194(6)(b) of the *ASA*:

i. an order that Ronald James Aitkens is permanently prohibited from trading in or purchasing securities or derivatives;
ii. an order that Ronald James Aitkens is permanently prohibited from using any exemptions contained in Alberta securities laws;
iii. an order that Ronald James Aitkens is to immediately resign all positions that he holds as a director or officer of any issuer;

iv. an order that Ronald James Aitkens is permanently prohibited from becoming or acting as a director or officer or as both a director and officer of any issuer; and

v. an order that Ronald James Aitkens is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market.

6. Restitution

[61] As previously mentioned, three investors have filed claims for restitution. The amounts sought represent the entirety of their investment in Legacy minus the current value of equity received in Legacy bonds resulting from the *CCAA* process. The value of the equity is nominal compared to the original investments.

[62] Each of the *ASA*, *POPA* and the *Criminal Code* contain provisions authorizing compensation to individuals that have been financially harmed as the result of the commission of an offence. The *Code* provisions, contained in ss 737.1, 738 and 739 are the most comprehensive. In this case restitution has been sought under the s 194(6) of the *ASA*. I accept the conclusion arrived at in ***R v Sellars***, 2011 ABPC 110 that the *Criminal Code* provisions are complimentary to the restitution provisions contained within the *ASA* and *POPA* and may be used where restitution is appropriate. The restitution provisions of all three Acts make it clear that restitution is discretionary, not mandatory.

[63] Section 194(6)(a) of the *ASA* reads as follows:

> **194(6)** *If a person or company is guilty of an offence under this section, the court*
>
> *(a) may make an order requiring the person or company to compensate or make restitution to an aggrieved person or company, and*
>
> *(b) may make any other order that the court considers appropriate in the circumstances.*

[64] Section 738(1)(a) of the *Code* reads as follows:

> **738(1) Restitution to victims of offences**
> *Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:*
>
> *(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;*

[65] The Alberta Court of Appeal discussed the concept of restitution in ***R v Bean***, 2020 ABCA 409. Important factors when considering restitution can be derived from that case. The factors relevant to this matter can be distilled as follows:

i. Restitution orders are discretionary.

ii. Restitution should be ordered with restraint and caution. A restitution order should not be made as a mechanical afterthought to an otherwise appropriate sentence.
iii. Restitution can contribute to a just sentence. Restitution orders can hold offenders to account for their actions and prevent them from profiting by committing offences. Restitution also provides recovery for victims.
iv. Restitution should not be used as a substitute for civil proceedings, nor should it be a method of unraveling complex commercial transactions.
v. Restitution should not be awarded where losses are not capable of ready calculation or where a court would be forced to draw interpretations from factual elements in a case to arrive at a suitable compensation amount.
vi. Restitution must be grounded in the responsibility of an offender for the calculated losses suffered by the aggrieved party. Causation for the losses claimed is a key element to justifying a compensation order. ***R v Bean***, *supra* at paras 16-17, 24.

[66] The causation requirement referred to in ***Bean*** was echoed in ***R v Lugela***, 2023 ABKB 404 at para 64, and ***R v Kelly,*** 2018 NSCA 24, at paras 42-44.

[67] The Crown submits that Aitkens is responsible for investor losses because he diverted at least 30% of Legacy's value to his own unrelated projects, making the Legacy project far less viable. The Crown argues the losses suffered are readily calculable by subtracting the current value of investor shares from their original investments. The Crown urges the Court to apply the reasoning employed in an apparently similar case, ***R v Iyer***, 2016 ABQB 680.

[68] Iyer was convicted, after trial, of 33 counts of fraud over $5000, contrary to s 380(1)(a) of the *Criminal Code*. The sentence imposed was seven years imprisonment combined with restitution orders for the aggrieved investors in a real estate investment. The court found Iyer to be the principal and sole director of a company that sold investments in three land parcels. The entire point of the investment was to hold or develop the lands and reap the reward of their increased value. Iyer used the money harvested from the investors as his own personal funds. Iyer did not develop the land or purchased lands other than those contemplated in the agreements. In some instances, the land contemplated was not even owned by the company at the time of the investment or was entirely incapable of being developed in the manner contemplated. Iyer knew this in advance of the investments, or ought to have known.

[69] Admittedly there are some similarities between ***Iyer*** and ***Aitkens.*** Both cases involve fraud relating to commercial real estate investment. Multiple investors contributed to both projects. The projects were overseen by an individual who did not do what was promised with all or a portion of the invested funds leaving investors with interests in relatively worthless properties. Funds harvested through the investments were reallocated to other purposes not disclosed to the investors.

[70] The key difference in ***Iyer*** is that Iyer's conduct was provably linked to the entirety of investor losses. In ***Iyer*** there was never a possibility that the investment could succeed. Investors essentially threw their money away at multiple lies. The lies were that the company properly owned or controlled land that was capable of being developed and that could yield the promised returns. Iyer knew the land was unsuitable but engaged in elaborate inducement to convince investors to contribute their funds regardless. Everything was a fraud, yet Iyer behaved as if the investment and the opportunities it presented were achievable.

[71] The Legacy investment is a much different situation. The Legacy project failed for multiple reasons, most significantly, that planning approval to develop the project was not granted. Legacy was always a risky investment, dependant on many factors to align perfectly for its success. This point was driven home by all three Legacy OMs in plain language. The OMs described in detail the difficulties that could ensue if planning approval was not granted, if there was a drop in the real estate market and many other reasons associated with the realities of property development. It is true that the accused's illegal reallocation of Legacy funds did not help the situation. However, it does not entirely link the failure of Legacy exclusively to the accused's conduct. Unlike the facts in ***Iyer,*** there was a genuine attempt to develop the Legacy lands. The contemplated property was purchased, and significant attempts were made to advance the project through to the next stages, when it was interrupted by the failure to secure planning approval.

[72] The actions of the accused were reprehensible. Aitkens is responsible for illegally removing millions of dollars from a highly specific investment opportunity for his own purposes. He did this secretly and deliberately. His actions were motivated by greed. For this he has been punished with a significant prison term. However, I cannot conclude that restitution is appropriate on these facts. Even if all the money was applied to the desired project, even if everything was done above board and in the full view of investors, even if everything had gone according to plan, there was always a real risk the project would fail. I exercise my discretion and decline to issue a restitution order for these reasons.

Dated at the City of Calgary, Alberta this 15th day of August 2024.

L.W. Robertson
A Justice of the Alberta Court of Justice

Appearances:

D. Young KC
C. Schulhauser
A. Karbani
Y. Somji
for the Alberta Securities Commission

B. Beresh KC
[redacted]
for the Accused