

## ASC Panel Finds that Due Diligence Defence Does Not Apply to Fraud Allegations

February 23, 2018

On February 20, 2018, the Alberta Securities Commission (ASC) released its decision in *Re Aitkens*, 2018 ABASC 27. The ASC Panel found that the respondents, Aitkens, Stoney View Crossing and Harbour View Landing, had breached section 93(b) of the Alberta Securities Act (the "Act") by engaging "in a course of conduct that they knew or ought to have known perpetrated a fraud on Stoney View and Harbour View investors". The Panel also found that Aitkens, and certain other respondents, had made materially misleading omissions in offering memoranda. The Panel's decision did touch on some interesting legal issues, including the availability of a due diligence defence in the **securities law context**.

The ASC Staff had alleged that Aitkens, who was the directing mind of Stoney View Crossing and Harbour View Landing as well as other companies, had made misleading omissions in Stoney View Crossing and Harbour View Landing offering memoranda and had diverted most of the balance of the funds to other private companies he owned. The Panel alleged that Stoney View Crossing and Harbour View Landing had breached s. 93(b) of the Act by engaging "in a course of conduct that they knew or ought to have known perpetrated a fraud on Stoney View and Harbour View investors".

Aitkens had argued in part that he had not intended to commit fraud and he argued that he believed that he was entitled to use the money from projects which was not currently needed to assist other projects.

In reviewing the legal test for fraud, the Panel noted that it was not necessary for the Staff to show that a respondent specifically intended to be dishonest or cause financial loss to others. Rather, the Staff only had to establish a "prohibited" or dishonest act occurred that resulted in the deprivation of another and the person committing the act had subjective awareness of the prohibited act and such act placed another's economic interests at risk. In issuing its decision, the Panel noted that: "Aitkens knew or ought to have known that the transfers from [Stoney View] Crossing and the [Harbour View] Entities resulted in deprivation to others by placing their pecuniary interests at risk because he knew that such funds were ultimately being used for other projects and

purposes" and not for the purposes set out in the offering memoranda. Further, the Panel noted that "Aitkens' contention that he did not intend to commit fraud or to have investors lose their money was also irrelevant."

One of the interesting arguments raised by Aitkens (as well as one of the other respondents) was the defence of due diligence. Aitkens had argued that he relied on legal and accounting advice.

The ASC Panel acknowledged that there was an unfortunate lack of clarity in the law around the concept of due diligence (of which reliance on professional advice may be considered a subset) as a defence to allegations of securities regulatory misconduct. The ASC Panel did recognize that the concept of a due diligence defence could apply to securities administrative enforcement proceedings, such as strict liability offences (those offences that do not require proof of any particular "state of mind"). However, the ASC Panel found that allegations of misrepresentation and fraud did not give rise to a due diligence defence as those offences were not strict liability offences and required that **Staff prove the respondents requisite state of mind. Accordingly, to the extent that the concepts of strict liability and the related due diligence defence apply in the securities law context, they were not relevant in this case.** Further, the Staff had acknowledged the qualification of lawyers and accountants involved, but these professionals had insufficient knowledge of the facts and there was scant evidence regarding what advice was given to the respondents.

The Staff concluded that Aitkens Stoney View Crossing and Harbour View Landing perpetrated a fraud on investors when they caused these companies to misuse money raised from investors by diverting it to other entities with common ownership or management and he, along with a number of other respondents, had made materially misleading omissions in certain offering memoranda.

By

[Andrew Pozzobon](#)

Expertise

[Securities Disputes](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### Montréal

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.