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IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, as amended

- and -

IN THE MATTER OF
MORGAN DRAGON DEVELOPMENT CORP.,
JOHN CHEONG (aka KIM MENG CHEONG),
HERMAN TSE, DEVON RICKETTS
and MARK GRIFFITHS

REASONS AND DECISION
(Section 127 of the *Securities Act*)

Hearing:	In Writing	
Decision:	April 15, 2014	
Panel:	Edward P. Kerwin	- Commissioner and Chair of the Panel
Submissions:	Jonathon T. Feasby	- For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

I. BACKGROUND 3
A. Overview 3
B. The Respondents 4
1. Devon Ricketts 4
2. Mark Griffiths 4
C. Settling Respondents 4
1. Morgan Dragon Development Corp. 4
2. John Cheong 4
3. Herman Tse 4
II. PRELIMINARY ISSUES 5
A. Notice and Failure to Participate 5
B. Jurisdiction 7
C. Standard of Proof 8
III. ISSUES 8
IV. EVIDENCE 8
A. Overview 8
B. Use of Hearsay Evidence 9
C. Use of Compelled Testimony 10
D. Evidence of MDDC's Business 10
E. Investor Evidence 12
1. Investor G.N. 12
2. Investor C.D. 12
3. Investor H.H. 12
4. Investor J.R. 13
F. Compelled Testimony of Ricketts 13
G. Testimony of Cheong 14
1. Voluntary Interview 14
2. Compelled Interviews 15
V. LAW AND ANALYSIS 16
A. Did the Respondents engage in unregistered trading, contrary to s. 25(1)(a) of the Act, as that section existed at the time the conduct commenced, and s. 25(1) of the Act, as subsequently amended on September 28, 2009? 16
1. The Law 16
2. Analysis 19
(a) LP Units are Securities 19
(b) Ricketts 20
(c) Griffiths 21
B. Did the Respondents distribute securities without a prospectus, contrary to subsection 53(1) of the Act? 22
1. The Law 22
2. Analysis 22
VI. CONCLUSION 23

REASONS AND DECISION

I. BACKGROUND

A. Overview

[1] This was a written hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Devon Ricketts ("**Ricketts**") and Mark Griffiths ("**Griffiths**") (collectively, the "**Respondents**") breached the Act.

[2] On March 22, 2012, Enforcement Staff of the Commission ("**Staff**") filed a Statement of Allegations against Morgan Dragon Development Corp. ("**MDDC**"), John Cheong ("**Cheong**"), Herman Tse ("**Tse**"), Ricketts and Griffiths, and the Commission issued a Notice of Hearing on the same day. On March 26, 2012, the Commission issued an Amended Notice of Hearing. Staff alleges that between September 2007 and July 2011 (the "**Material Time**") the Respondents engaged in or held themselves out as engaging in the business of trading in securities without being registered to do so, contrary to subsection 25(1) of the Act, formerly subsection 25(1)(a) of the Act, and distributed securities without filing a preliminary prospectus and prospectus, and without receipts having been issued for them by the Director, in circumstances in which no exemption was available, contrary to subsection 53(1) of the Act.

[3] On March 25, 2013, at Staff's request and on consent of counsel for MDDC, Cheong, Tse and Ricketts, the Commission ordered that the hearing on the merits proceed as a written hearing pursuant to Rule 11.5 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "***Rules of Procedure***") and set a schedule for written submissions by the parties (*Re Morgan Dragon Development Corp. et al.* (2013), 36 O.S.C.B. 3166 ("**Written Hearing Order**")).

[4] Before Staff filed its submissions on the merits, MDDC, Cheong and Tse (the "**Settling Respondents**") entered into a Settlement Agreement with Staff dated April 8, 2013 (the "**Settlement Agreement**") in relation to the matters set out in the Statement of Allegations. The Commission approved the Settlement Agreement by order of April 10, 2013 (*Re Morgan Dragon Development Corp. et al.* (2013), 36 O.S.C.B. 4212).

[5] Staff filed the Affidavit of Jeff Thomson, sworn April 19, 2013, which appended two volumes of evidence and is entered as Exhibit 1 ("**Ex. 1**") to this written hearing. Staff also filed the first Affidavit of Service of Peaches Barnaby, sworn April 25, 2013 and entered as Exhibit 2 ("**Ex. 2**"), the second Affidavit of Service of Peaches Barnaby, sworn on June 7, 2013 and entered as Exhibit 3 ("**Ex. 3**"), and the Affidavit of Service of Nancy Poyhonen, sworn on March 15, 2013 and entered as Exhibit 4 ("**Ex. 4**") to this written hearing. Finally, Staff also filed written submissions, dated May 23, 2013. Neither of the two Respondents has participated or provided written submissions on the merits.

B. The Respondents

1. Devon Ricketts

[6] Ricketts was a resident of Ontario during the Material Time and worked at MDDC's head office in Markham, Ontario. There is no record of Ricketts having been registered under the Act during the Material Time.

2. Mark Griffiths

[7] Griffiths was a resident of Ontario during the Material Time and worked at MDDC's head office in Markham, Ontario. There is no record of Griffiths having been registered under the Act during the Material Time.

C. Settling Respondents

1. Morgan Dragon Development Corp.

[8] MDDC was incorporated in Ontario on November 1, 2007 and has its head office in Markham, Ontario. MDDC was engaged in promoting and distributing units of limited partnerships that hold and develop interests in real estate in the Province of Saskatchewan.

[9] MDDC registered under the Act as a limited market dealer on May 15, 2009, and continued its registration under the Act as an exempt market dealer on September 28, 2009. MDDC was also registered as an exempt market dealer with the provinces of Alberta, British Columbia, and Manitoba. MDDC's registration under the Act was suspended effective January 27, 2012 (*Re Morgan Dragon Development Corp. et al.* (2012), 35 O.S.C.B. 1753 ("**Director's Decision**")).

2. John Cheong

[10] Cheong was the Secretary, the Treasurer, and a Director of MDDC throughout the Material Time. Cheong owns 50% of the shares in MDDC and is a directing mind of the company.

[11] From May 15, 2009 to September 28, 2009, Cheong was registered under the Act as a trading officer and an approved designated compliance officer, director and shareholder of MDDC. On September 28, 2009, Cheong became registered as the chief compliance officer and dealing representative and continued as an approved officer, director and shareholder of MDDC. Cheong's registration under the Act was suspended effective January 27, 2012 (Director's Decision, *supra*).

3. Herman Tse

[12] Tse was the President and a Director of MDDC throughout the Material Time. Tse owns 50% of the shares in MDDC and is a directing mind of the company.

[13] As of May 15, 2009, Tse was approved under the Act as a non-trading, non-resident officer, director and shareholder of MDDC. Tse became registered as the ultimate designated person on October 16, 2009. Tse's registration under the Act was suspended effective January 27, 2012 (Director's Decision, *supra*).

II. PRELIMINARY ISSUES

A. Notice and Failure to Participate

[14] Subsection 6(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended (the "**SPPA**") requires that "reasonable notice" be given to parties to a proceeding, and subsection 6(4) of the SPPA sets out the requirements for notice of a written hearing:

> **Notice of hearing**
> 6.(1) The parties to a proceeding shall be given reasonable notice of the hearing by the Tribunal.
>
> […]
>
> **Written hearing**
> [6.](4) A notice of a written hearing shall include,
> (a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;
> (b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;
> (c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding.

[15] Subsection 7(1) of the SPPA authorizes a tribunal to proceed in the absence of a party when that party has been given notice of an oral hearing and subsection 7(2) of the SPPA provides similar authority for the purpose of written hearings:

> **Effect of non-attendance at hearing after due notice**
> 7.(1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.
>
> (2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (4) (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

[16] Further, Rule 7.1 of the Commission's *Rules of Procedure* provides:

> 7.1 **Failure to Participate** – If a Notice of Hearing has been served on any party and the party does not attend the hearing, the Panel may proceed in the party's absence and that party is not entitled to any further notice in the proceeding.

[17] Rule 11 of the *Rules of Procedure* permits the Commission to conduct a proceeding by means of a written hearing. On March 25, 2013, the Commission ordered that the hearing on the merits proceed by way of written hearing and established a schedule for filing materials. The Commission ordered that Staff file evidence in affidavit form with the Secretary's office no later than April 26, 2013 and any written submissions no later than May 24, 2013 and that the respondents file evidence in affidavit form no later than May 17, 2013 and any written submissions no later than May 31, 2013 (Written Hearing Order, *supra*).

[18] The two Affidavits of Service of Peaches Barnaby support that the Respondents have been served with the Written Hearing Order and with disclosure of materials that Staff is relying on in the written hearing on the merits, including Staff's written submissions, briefs of authorities and the Affidavit of Jeff Thomson with appended exhibits (Ex. 2 and Ex. 3).

[19] Staff submits that Ricketts was provided with a notice of the proceeding. At the time when the hearing on the merits was converted to a written hearing, Ricketts was represented by counsel who consented to the written hearing. On April 8, 2013, counsel for Ricketts filed a notice of motion, pursuant to Rule 1.7.4 of the Rules of Procedure, for leave to withdraw as representative for Ricketts. At that time, Ricketts' counsel also filed an affidavit stating that Ricketts has been advised that disclosure is available in connection with this matter and was made aware of the dates scheduled for the merits hearing to proceed in writing. On April 9, 2013, the Commission granted counsel leave to withdraw as representative for Ricketts (*Re Morgan Dragon Development Corp. et al.* (2013), 36 O.S.C.B. 4211).

[20] Subsection 4(1) of the SPPA permits any procedural requirement of the Act to be waived with consent of the parties. At the time of the Written Hearing Order, Ricketts was represented by counsel who consented to the hearing proceeding in writing. Based on the affidavits of service filed in this matter and the fact that Ricketts was represented, I am satisfied that Ricketts was given reasonable notice in accordance with subsection 6(1) of the SPPA. Given the consent of then-counsel for Ricketts, I also find that the requirements of subsection 6(4) of the SPPA with respect to statements in a notice of a written hearing were waived, pursuant to subsection 4(1) of the SPPA.

[21] Staff submits that it has provided notice of the proceeding to Griffiths. In support of its submission, the Affidavit of Nancy Poyhonen details the steps taken by Staff to serve Griffiths with Staff's request to the Office of the Secretary to convert this matter to a written hearing and a draft order detailing the same (Ex. 4). The Written Hearing Order, *supra*, states that Griffiths "has never attended any hearing in this matter or participated in the proceeding in any way, although properly served with the Notice of Hearing and Amended Notice of Hearing and Staff's Statement of Allegations" and that "Griffiths has not objected to this matter proceeding as a written hearing, though properly notified by Staff". The two Affidavits of Service of Peaches Barnaby demonstrate Staff's continued service on Griffiths (Ex. 2 and Ex. 3). Furthermore, the

Notice of Hearing, Statement of Allegations and Amended Notice of Hearing were posted on the Commission's website, as was the Written Hearing Order which sets out the deadlines for filing of materials for the written hearing on the merits.

[22] Based on the affidavits of service filed in this matter and the fact that the Written Hearing Order and related materials were posted on the Commission's website, I am satisfied that Griffiths was given reasonable notice. Accordingly, I am entitled to proceed in the absence of the Respondents in accordance with section 7 of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure*.

B. Jurisdiction

[23] The Commission's mandate, as outlined in section 1.1 of the Act, is to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.

[24] In *Gregory & Co. v Quebec (Securities Commission)*, [1961] S.C.R. 584 ("***Gregory***"), the Supreme Court of Canada ("**SCC**") held that, despite the fact that the appellant company dealt with clients residing outside of Quebec, it did carry on the business of trading in securities for the purposes of Quebec securities law. The SCC determined that Quebec securities law was enacted to protect the public from being defrauded as a result of activities initiated in the province by persons therein carrying on the business of trading in securities. According to the SCC, several factors indicated a nexus between the appellant and Quebec, including that the appellant's head office address and telephone number, which clients were invited to contact, were in Montreal, orders for securities were solicited by telephone from Montreal, a bulletin promoting sales of securities was prepared and printed in Montreal, payments made by cheque were sent to Montreal and a substantial bank account was kept by the appellant in Montreal (*Gregory*, *supra* at 589-590).

[25] In *Re Allen* (2005), 28 O.S.C.B. 8541 ("***Allen***") the Commission held that it "has jurisdiction over a trade in securities, notwithstanding that the purchaser is in a different province, provided that some substantial aspect of the transaction occurred within Ontario" (para. 21). In *Allen,* the respondent's offices and operations were based in Ontario, the promotional materials were mailed from Ontario, the phone calls were made from Ontario and cheques in payment for the securities were sent to Ontario (*Allen, supra* at para. 20).

[26] The investors in this case resided in several Canadian provinces. However, the units sold were units of limited partnerships formed under Ontario's *Limited Partnerships Act*, R.S.O. 1990, c. L. 16, as amended (the "***LP Act***"), naming Ontario corporations as the general partners, which had registered offices in Markham, Ontario. Investors were solicited by telephone calls originating in Markham, Ontario, and promotional materials and other documents were sent to investors from Ontario. Investors made the payments to the Ontario corporations via courier or to a bank account in Ontario. Therefore, there is sufficient nexus to Ontario for the Commission to have jurisdiction over the Respondents.

C. Standard of Proof

[27] The standard of proof in administrative proceedings is the civil standard of proof on a balance of probabilities, which requires that the trier of fact decide whether it is more likely than not that an alleged event occurred (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 ("***F.H.***") at paras. 40 and 44). To meet this standard of proof, the evidence must be sufficiently clear, convincing and cogent (*F.H.*, supra at 46).

III. ISSUES

[28] Staff's evidence raises the following issues:

(a) Did the Respondents trade in securities, or engage in or hold themselves out as engaging in the business of trading in securities, without being registered to do so, in circumstances in which no exemption was available, contrary to subsection 25(1)(a) of the Act, as that section existed at the time the conduct commenced, and contrary to subsection 25(1) of the Act, as subsequently amended on September 28, 2009? and

(b) Did the Respondents distribute securities without having filed a preliminary prospectus or a prospectus and without an exemption from the prospectus requirement, contrary to subsection 53(1) of the Act?

IV. EVIDENCE

A. Overview

[29] Staff tendered the affidavit of a senior investigator, Jeff Thomson ("**Thomson**"), sworn April 19, 2013 and entered as Exhibit 1 to this written hearing, together with two volumes of exhibits to his affidavit, Volume 1 ("**Ex. 1, Vol. 1**") and Volume 2 ("**Ex. 1, Vol. 2**"). Through Thomson's affidavit, Staff tendered excerpts from transcripts of interviews with one of the Settling Respondents, Cheong and three investors, J.R., C.D. and H.H., and a full transcript of Ricketts's compelled examination of August 22, 2011.

[30] Staff also introduced a number of documents through Thomson's affidavit, including:

a. documents received from investor G.N., such as a subscription agreement and related fax correspondence;

b. investor presentation materials;

c. payment receipts;

d. corporate profile reports for MDDC and the general partners of each limited partnership;

e. limited partnership reports;

f. a national registration database report;

g. a MDDC training manual;

h. offering memoranda;

i. a limited partnership agreement;

j. an investor list;

k. reports of payments to Ricketts and Griffiths;

l. section 139 of the Act certificates;

m. bank account opening documents;

n. other subscription agreements;

o. certificates for units of limited partnerships; and

p. letters, fax and email communications.

[31] As noted above, the Respondents did not file any materials, nor did they make any submissions, on the merits of this matter.

[32] To protect the privacy of investors and witnesses, I have referred to them anonymously by initials rather than using their respective names. In addition, I direct that Staff provide a redacted version of the record to serve the same purpose. Specifically, I request that Staff provide a redacted copy of the evidence tendered for the public record, in accordance with the Commission's Practice Guideline of April 24, 2012, "Use and Disclosure of Personal Information in Ontario Securities Commission's Adjudicative Proceedings". In addition, I also direct that investor names be redacted from the record.

B. Use of Hearsay Evidence

[33] Subsection 15(1) of the SPPA allows the panel to admit relevant hearsay evidence, subject to the weight given to such evidence. Subsection 15(1) of the SPPA provides:

> **What is admissible in evidence at a hearing**
>
> 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[34] The panel determines how much weight should be accorded to hearsay evidence (*Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671 ("***Sunwide***") at para. 22).

C. Use of Compelled Testimony

[35] As stated above, Staff has tendered, through the affidavit of Thomson, the compelled testimony of Ricketts and certain excerpts from voluntary and compelled interviews with Cheong. This evidence is admissible hearsay. Subsection 17(6) of the Act permits disclosure of compelled testimony, given under investigative powers of section 13 of the Act, in connection with a proceeding commenced by the Commission under the Act.

[36] In *Alberta (Securities Commission) v. Brost*, 2008 A.B.C.A. 326 ("***Brost***"), the respondents argued that the Alberta Securities Commission ("**ASC**") erred by admitting into evidence transcript excerpts from investigative interviews of the respondents. The Alberta Court of Appeal determined that the ASC did not err in admitting the hearsay evidence and noted that the respondents could have applied to the ASC for a subpoena to have other respondents testify, but did not, and elected not to testify themselves, which amounted to a decision by the respondents not to challenge the reliability and content of the hearsay evidence (*Brost, supra* at paras. 36 and 40). The Alberta Court of Appeal also decided that the parties to a securities proceeding "do not have a reasonable expectation that the content of their investigative interviews will not be used" for the purposes of the act under which the proceedings are initiated (*Brost, supra* at para. 38).

[37] Rule 4.7 of the Commission's *Rules of Procedure* and section 12 of the SPPA permit a party to request that the Commission issue a summons to a witness, including a party, to give and produce evidence at a hearing. The Respondents had an opportunity to have the witnesses summoned so they could cross-examine them, including the co-respondents. I agree with the conclusion in *Sunwide* that since neither of the Respondents participated, objected to the use of the hearsay evidence, requested to cross-examine on it or introduced contradictory evidence of their own, they have waived their rights to do so (*Sunwide, supra* at para. 24). As a result, the compelled evidence has been entered into evidence and is still subject to my determination of weight to be accorded to it in the circumstances and to evidence law considerations relating to hearsay, particularly relating to co-respondents.

D. Evidence of MDDC's Business

[38] Thomson was assigned to this matter throughout the investigation and has reviewed all documents and records appended in two volumes comprising a single exhibit to his affidavit. Much of the evidence referred to in his affidavit was derived from examinations of respondents and other witnesses by Staff.

[39] Thomson testified that, during the Material Time, MDDC was in the business of promoting and distributing units of three limited partnerships registered under the *LP Act*:

(a) MD Land Pool Limited Partnership, whose general partner is Morgan Dragon Capital Fund Inc., an Ontario corporation incorporated on July 6, 2007 with a registered office in Markham, Ontario ("**Phase 1**").

(b) MD Land Pool Phase 2 Limited Partnership, whose general partner is Morgan Dragon Land Holding Inc., an Ontario corporation incorporated on March 31, 2008 with a registered office in Markham, Ontario ("**Phase 2**").

(c) MD Land Pool Dundurn Limited Partnership, whose general partner is Morgan Dragon Management Inc., an Ontario corporation incorporated on June 23, 2009 with a registered office in Markham, Ontario ("**Dundurn**").

[40] The limited partnership units of Phase 1, Phase 2 and Dundurn shall be referred to in these reasons as the "**LP Units**".

[41] There is no record of registration under the Act for any of the limited partnerships or any of the general partners. Furthermore, none of MDDC or any of the limited partnerships or general partners has ever been a reporting issuer in Ontario, or filed a preliminary prospectus or a prospectus, or delivered "offering memorandums [sic]" to the Commission, or filed reports of exempt distribution during the Material Time.

[42] The Respondents, through MDDC, solicited residents of British Columbia, Alberta, Manitoba and Saskatchewan to purchase the LP Units.

[43] The business was organized in the following way:

(a) MDDC purchased lists of names from a company called Sales Genie;

(b) members of MDDC's staff called potential investors whose names appeared on the lists;

(c) if potential investors were interested, MDDC's administrative staff would send them a package with information about MDDC's business and offering documents;

(d) then, MDDC staff would follow up with interested investors, including giving investors online presentations about the current project and about Saskatchewan's economy and real estate market;

(e) MDDC staff did not qualify investors as accredited investors, though investor CD stated that she was asked questions about the general nature of her wealth to see if she would qualify for the investment;

(f) if the investors were interested in purchasing the LP Units, MDDC would send out documents for them to fill out, including subscription agreements that appended accredited investor forms;

(g) if the investors had difficulties with filling out the paperwork, MDDC sales staff would explain the forms to them and provide assistance with filling them out, as well as instructions on how to make the payment; and

(h) then, the partnerships would use part of the money received from investors to acquire land, upgrade and develop the land into lots and sell the lots. The investors were paid out from the proceeds of the sale of the lots.

[44] From September 2007 through December 2010, MDDC raised approximately $5,247,000 from the distribution of the LP Units.

E. Investor Evidence

1. Investor G.N.

[45] Investor G.N. is a resident of Alberta. In October 2008, G.N. purchased six Phase 2 LP Units from MDDC for $126,000.

[46] G.N. received a fax from Ricketts dated October 2, 2008, enclosing the subscription agreement for Phase 2 LP Units for signature and advising that Ricketts will contact G.N. to walk him through the process. G.N.'s signed subscription agreement is dated October 2, 2008.

2. Investor C.D.

[47] In March 2009, investor C.D. purchased three Phase 2 LP Units and, in August 2009, ten Dundurn LP Units from MDDC for a total of $108,000.

[48] In his interview of August 30, 2011, C.D. told Staff that he first became aware of MDDC when Ricketts called him by telephone several times. C.D. stated that he dealt exclusively with Ricketts.

[49] C.D. told Staff that Ricketts sent him an email containing an information package about Phase 2 that outlined the property and its history.

[50] C.D. recalled that Ricketts told him that he will receive a subscription agreement from MDDC. C.D.'s signed subscription agreement for Phase 2 LP Units is dated March 30, 2009. C.D. also received a payment receipt and letter of confirmation for his purchase of Dundurn LP Units.

3. Investor H.H.

[51] In July 2010, investor H.H. purchased ten Dundurn LP Units from MDDC for $45,000.

[52] In his interview of August 30, 2011, H.H. told Staff he was first contacted by MDDC by telephone. After receiving an initial package by email solicitation, Griffiths contacted H.H. by telephone. H.H. recalled that Griffiths told H.H. about the success of MDDC's previous developments and H.H. deduced from Griffiths statements that investors made money on previous projects. H.H. told Staff that the communications concerning the subscription agreement were between H.H. and Griffiths.

[53] On June 28, 2010, H.H. received a fax from Griffiths enclosing the subscription agreement and advising that Griffiths will contact H.H. to walk him through the process and providing MDDC's bank account information. Griffiths did not mention anything about the commission he would receive from selling the LP Units.

[54] H.H.'s signed subscription agreement is dated June 28, 2010 and was sent to MDDC via fax and courier on July 5, 2010, together with a cheque signed by H.H. on behalf of his company, for $45,000.

[55] On July 19, 2010, H.H. received an email from Griffiths confirming the receipt of the documents and advising that Griffiths will contact H.H. to follow up regarding H.H.'s business friends, who may also be interested in investing in the project. Griffiths sent another letter dated August 10, 2010, as a follow-up regarding H.H.'s associates and enclosed an information package about the investment opportunity, including Griffiths' business card that identifies him as a "Sales Associate".

4. Investor J.R.

[56] In late 2010, investor J.R. purchased one Dundurn LP Unit from MDDC for $5,000.

[57] J.R. was first contacted by MDDC by telephone by an individual who identified himself as Devon. After the initial contact, J.R. was dealing mostly with Griffiths and MDDC's administrative staff. J.R. recalled receiving instructions from both Ricketts and Griffiths on how to pay.

[58] J.R.'s signed subscription agreement is dated November 16, 2010. J.R. sent it back to MDDC by courier, together with a personal cheque for $5,000.

[59] J.R. received a letter from MDDC confirming the receipt of payment and enclosing the offering memorandum for the Dundurn project.

F. Compelled Testimony of Ricketts

[60] On August 22, 2011, Staff conducted a compelled examination of Ricketts (Ex. 1, Vol. 1, Tab F). The admissions referred to in these reasons as attributable to Ricketts are based on Staff's compelled examination of him.

[61] Ricketts told Staff that he began working at MDDC in 2007. Ricketts considered himself to be the office manager at MDDC and stated that he had approximately eight people reporting to him.

[62] Ricketts told Staff that MDDC's marketing department made initial contact with potential investors based on leads generated by a database called "Sales Genie". He also stated that MDDC subsequently sent brochures to those who were interested.

[63] Ricketts admitted that his duties at MDDC included the following:

(a) after MDDC's marketing department made the initial contact with potential investors, Ricketts followed up with them by telephone and made online presentations about the merits of the MDDC investment opportunity for the purpose of making a sale. He did not cold call people;

(b) Ricketts made 12-14 calls on average per day, ranging between 5 and 25 minutes in length;

(c) Ricketts assisted investors with filling out subscription agreements, but not the accredited investor section;

(d) Ricketts would explain the prices of the LP Units to potential investors;

(e) Ricketts notified investors that materials, including subscription agreements, will be sent to them;

(f) Ricketts trained sales staff on how to do the presentations, educated the employees in the marketing department about the investment projects and managed them while they were working; and

(g) Ricketts also sold real estate lots after the property was developed.

[64] Ricketts stated that he never fully read MDDC's offering memoranda. He told Staff that he did not send out any materials to the investors, never sent out email instructions to them, nor did any clients ever communicate with him by email. When Ricketts was questioned about the business card that referred to him as the "Area Sales Manager", he stated that it was related to the real estate part of MDDC's business.

[65] With respect to the financial circumstances of the individuals being solicited, Ricketts stated that he did not ask the potential investors about their incomes or their financial position in order to qualify them as accredited investors. Ricketts stated that, to his knowledge, Cheong and administrative staff would provide the marketing department with leads of potential investors who were supposed to be accredited. Ricketts' understanding was that all the people that invested with MDDC were accredited investors because they filled out the accredited investor form.

[66] Ricketts was paid exclusively on commission. The commission was calculated as 10% of the investment amount that he solicited from investors. Ricketts employment agreement with MDDC was not in writing.

[67] Ricketts admitted that he was studying the limited market dealer course manual because he was told that the law changed in late 2010 and that he could not sell the LP Units until he is licensed. Ricketts admitted that prior to being told of the change in the law he was selling LP Units without being registered. Ricketts also told Staff that he took the Canadian Securities Course, but did not pass the exam. He also admitted that he is not, and has never been, registered in any jurisdiction in Canada during the Material Time.

G. Testimony of Cheong

1. Voluntary Interview

[68] On May 6, 2011, Cheong gave a voluntary interview to Staff ("**Cheong's Voluntary Testimony**") (Ex. 1, Vol. 2, Tab G). The evidence referred to in this section is attributable to Cheong's Voluntary Testimony.

[69] MDDC operates out of Ontario. MDDC employs "finders" - employees who contact potential investors in Saskatchewan, Manitoba, Alberta and British Columbia by telephone to provide MDDC's offering and project information to them. MDDC provides finders with lists of

names and phone numbers from Sales Genie. This evidence was corroborated by Cheong's compelled interview that took place on February 2, 2012, which is discussed below.

[70] Cheong provided Staff with a list of finders that work for MDDC, which included the names of Griffiths and Ricketts.

[71] Cheong confirmed that only administrative staff from MDDC sent out the paperwork to the investors, including brochures, subscription agreements, accredited investor forms and offering memoranda.

[72] According to Cheong, Ricketts had been working for MDDC since 2007 as a finder. Ricketts also assisted with the management of MDDC, including recruiting and training new finders. To Cheong's knowledge, Ricketts is not registered with the Commission.

[73] MDDC paid its finders on commission only. Commission ranged from 8 to 10% of the investment solicited by the finder, depending on the project. Finders do not get paid for referring clients that do not invest with MDDC.

[74] Cheong provided Staff with the Phase 1 limited partnership agreement, the Phase 2 offering memoranda and the Dundurn offering memoranda.

2. Compelled Interviews

[75] On September 21, 2011, February 2, 2012, and March 27, 2012, Cheong gave compelled interviews to Staff ("**Cheong's Compelled Testimony**"). The evidence referred to in this section is attributable to Cheong's Compelled Testimony.

[76] According to Cheong, sales presentations were done by both Ricketts and Griffiths. Cheong told Staff that the only reason the finders were contacting potential investors was to sell them LP Units.

[77] Cheong stated that Ricketts worked on all three projects - Phase 1, Phase 2 and Dundurn - and that Griffiths worked on the latter two projects.

[78] Cheong provided Staff with a QuickBooks accounting record of cheque disbursements to Ricketts from September 2007 to August 2011 and to Halfatree Enterprises ("**Halfatree**") from July 2009 to May 2011. Cheong gave evidence that Halfatree was Griffiths' company and corporate records obtained by Staff confirm that Halfatree was a sole proprietorship registered by Griffiths. The accounting records indicate that, during the Material, Time Ricketts received $177,094.50 and Griffiths, via Halfatree, received $51,192.50. I note that the affidavit of Thomson indicates that Ricketts was paid sales fees of $177,254 (Ex. 1 at para. 76). However, the supporting documentation records a payment of $160 outside of the Material Time (Ex. 1, Vol. 2, Tab H4). Therefore, I accept that Ricketts received $177,094.50 in sales fees during the Material Time. A portion of the payments made to Ricketts were funds for his managerial and training duties at MDDC.

[79] Cheong also provided Staff with a list of investors for Phase 1, Phase 2 and Dundurn. All investors that gave evidence to Staff in this matter were found on that list.

[80] Cheong provided Staff with signed subscription agreements for Phase 1, Phase 2 and Dundurn. It appears that the earliest subscription agreement was dated October 2007, and the latest dated December 2010. At least three payments for LP Units subscriptions were received in 2011.

V. LAW AND ANALYSIS

A. Did the Respondents engage in unregistered trading, contrary to s. 25(1)(a) of the Act, as that section existed at the time the conduct commenced, and s. 25(1) of the Act, as subsequently amended on September 28, 2009?

1. The Law

[81] During the Material Time, prior to September 28, 2009, subsection 25(1)(a) of the Act set out the registration requirement as follows:

> **25. (1) Registration for trading**
>
> No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer;
>
> …
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[82] During the Material Time, on and after September 28, 2009, subsection 25(1) of the Act set out the registration requirement as follows:

> **Registration**
>
> **Dealers**
>
> **25. (1)** Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as a dealer; or
>
> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

[83] Section 1.3 of *Companion Policy 31-103: Registration Requirements and Exemptions* (2009) 32 O.S.C.B. (Supp-2), sets out a number of relevant factors that may be indicative of whether trading or advising in securities is done for a business purpose. The relevant factors are:

a. engaging in activities similar to a registrant, including promoting securities or stating in any way that the individual or firm will buy or sell securities;
b. intermediating trades or acting as a market maker;
c. directly or indirectly carrying on the activity with repetition, regularity or continuity, including regularly trading or advising in any way that produces, or is intended to produce, profits to be for a business purpose;
d. being, or expecting to be, remunerated or compensated for carrying on the activity;
e. directly or indirectly soliciting, including contacting someone by any means, including advertising that proposes buying or selling securities or participating in a securities transaction, or offering services or advice for that purpose.

[84] A "security" is defined in subsection 1(1) the Act to include:

> (a) any document, instrument or writing commonly known as a security,[…]
>
> (e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription […]
>
> (n) any investment contract

[85] The definition of "security" includes an "investment contract", which term has been defined by the Supreme Court of Canada in *Pacific Coast Coin Exchange v. Ontario Securities Commission* [1978] 2 S.C.R. 112 ("***Pacific Coast Coin***"), as "an investment of money in a common enterprise with profits to come from the efforts of others".

[86] The Commission has found that a limited partnership unit of the Axcess Fund was a "security" within the meaning of subsections 1(e) and 1(n) of the Act (*Re Axcess Automation LLC* (2012), 35 O.S.C.B. 9019 at paras. 152-153).

[87] The terms "trade" or "trading" are defined in subsection 1(1) of the Act as:

> (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise[…]
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

[88] The inclusion of the word "indirectly" in the definition of "trade" indicates the Legislature's intention to make the definition broad in order to capture conduct which seeks to avoid the registration and prospectus requirements by indirectly engaging in prohibited behaviour (*R. v. Sussman* (1993), 1 C.C.L.S. 273 (Ont. Ct. J. (Prov. Div.) at paras. 47-48).

[89] Cases considering the issue of acts in furtherance of trade, which are referenced in subsection 1(1)(e) of the definition of "trade", indicate that the primary emphasis is on a contextual approach that examines the totality of the conduct, the setting in which it occurs, and

the effects of the acts on those to whom they were directed (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 ("***Momentas***") at para. 77). Case law has interpreted the following activities as among those constituting acts in furtherance of trading:

a. providing potential investors with subscription agreements to execute;
b. distributing promotional materials concerning potential investments;
c. issuing and signing certificates;
d. preparing and disseminating materials describing investment programs;
e. preparing and disseminating forms of agreements for signature by investors;
f. conducting information sessions with groups of investors; and
g. meeting with individual investors.

(*Momentas* at para. 80).

[90] Furthermore, acts in furtherance of trade do not require that a final sale, or an actual trade, occur (*Momentas* at para. 78).

[91] Once Staff establishes that there was a contravention of the registration or prospectus requirements under the Act, the onus is on the Respondents to prove that an exemption was available to them under the Act (*Re Lydia Diamond Exploration of Canada Ltd.* (2003), 26 O.S.C.B. 2511 at paras. 83-84).

[92] In this case, there is some indication that the Respondents may have sought to rely upon the "accredited investor" exemption found in subsection 2.3 of National Instrument 45-106 ("**NI 45-106**") before September 28, 2009, and subsection 3.3(1) of NI 45-106 from September 28, 2009 to March 27, 2010. The definition of "accredited investor" is found in section 1.1 of NI 45-106 and includes:

(j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
(k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year, […]

[93] Section 2.43 of NI 45-106, subsequently subsection 3.0(1)(b) of NI 45-106 from September 28, 2009 to March 27, 2010, provides that the accredited investor exemption from the dealer registration requirement is not available to a "market intermediary". During the Material Time, section 3.2 of Companion Policy 45-106CP - *Prospectus and Registration Exemptions* ("**45-106CP**") indicated that in Ontario a person is a market intermediary if the person is in the business of trading in securities as principal or agent. The definition of "market intermediary" is found in subsection 1.1(2) of Ontario Securities Commission Rule 14-501, which prior to September 28, 2009 directed the reader to subsection 204(1) of Ont. Reg. 1015 - R.R.O. 1990, Regulation 1015, and provides:

> **"market intermediary"** means a person or company that engages or holds himself, herself or itself out as engaging in Ontario in the business of trading in securities as principal or agent, other than trading in securities purchased by the person or company for his, her or its own account for investment only and not with a view to resale or distribution, and, without limiting the generality of the foregoing, includes a person or company that engages or holds himself, herself or itself out as engaging in the business of,
>
> (a) entering into agreements or arrangements with underwriters or issuers, in connection with distributions of securities, to purchase or sell such securities,
> (b) participating in distributions of securities as a selling group member,
> (c) making a market in securities, or
> (d) trading in securities with accounts fully managed by the person or company as agent or trustee,
>
> whether or not the person or company engages in trading in securities purchased for investment only;

[94] Section 3.2 of 45-106CP indicates that during the Material Time the Commission took the position that:

> if an issuer retains an employee whose primary job function is to actively solicit members of the public for the purposes of selling the issuer's securities, the issuer and its employee are in the business of selling securities, both the issuer and its employees [are considered by the Commission] to be market intermediaries […and] in order to be in compliance with securities legislation, these issuers and their employees should be registered under the appropriate category of registration in Ontario.

[95] Further, section 3.0 of Companion Policy 45-501CP – *Ontario Prospectus and Registration Exemptions* provides guidance that, after the introduction of the "business trigger" for dealer registration on September 28, 2009 and a transition period, any person or company "in the business of trading securities" is required to register and may not take advantage of the accredited investor exemption.

2. Analysis

(a) LP Units are Securities

[96] LP Units purchased by investors in this case are securities within the meaning of the Act.

[97] The offering documents explicitly state: "[t]his Offering Memorandum constitutes an offering of these securities…" and refers to "securities" a number of times throughout.

[98] For the following reasons, LP Units satisfy the requirements for an investment contract set out in *Pacific Coast Coin* and are therefore "securities" within the meaning of subsection 1(1)(n) of the definition of "security":

a) Investors advanced money as evidenced by the spreadsheets of investments received by MDDC and amounts corroborated by the subscription agreements (Ex. 1, Vol. 2, Tabs J6-J9 and H6).
b) Investors expected to make a profit:
    i) The purpose expressed in both the Phase 2 and the Dundurn offering memoranda is that the partnership was established to issue units to raise funds to purchase interest in real property, develop it, sell it, and distribute net proceeds to the limited partners.
    ii) The Phase 1 Limited Partnership agreement provides that there is no cash distribution until the real estate lots are sold and that the cash generated from those sales is intended to be used to pay partnership expenses and subsequently distributed to the partners on an agreed basis.
    iii) Investor C.D. said that Ricketts discussed the success of previous projects with him and the great possibilities to make money with these projects.
    iv) Investor H.H. said that Griffiths discussed the success of previous projects with him.
c) This was a common enterprise in which fortunes of the investors were interwoven with, and dependent upon, the efforts and success of those who solicited the capital or third parties:
    i) Investor C.D., when asked about various details about the project, spoke about the representations of how successful past and future projects were or will be, and vaguely described the details making it apparent that his investment depended on successful execution of the project by the general partner.
    ii) Investor H.H. described what he was told by the company prior to investing, and part of his understanding of what the investment entailed was that he was going to be an investor enabling financially the project to be brought to fruition, but the rest of the work associated with making the project successful was to be done by the general partner.
    iii) The offering documents make it clear that the investors must rely on management of the general partner to make appropriate decisions on behalf of limited partners for the purpose of the common enterprise.

[99] Investors themselves had no role in the project beyond investing money. The LP Units in this case fit under the definition of "security" pursuant to subsection (1)(1)(e) of the Act as they constitute "units" or "unit certificates" and investors received certificates and/or payment receipts for their investments. The LP Units also constitute "investment contracts" and come within the definition of "security" pursuant to subsection 1(1)(n) of the Act, as determined above.

(b) Ricketts

[100] Ricketts engaged in trading LP Units and acts in furtherance of trading LP Units, in the following ways:

a. Ricketts was an employee of MDDC, and in this capacity he solicited investors by calling them and making online presentations to them about the merits of the MDDC investment opportunity for the purpose of making a sale;
b. Ricketts advised investors on the prices of the LP Units;

c. Ricketts provided investors with instructions on how to make payments and assisted investors with filling out the paperwork (e.g. subscription agreements);
d. Ricketts notified investors that materials, including subscription agreements, will be sent to them;
e. Though Ricketts claimed that he did not send out the subscription agreements, investor G.N. provided Staff with a copy of a fax he received from Ricketts enclosing the subscription agreement.
f. Though Ricketts claimed that he did not communicate with his clients by email, investor C.D. provided Staff with a copy of an email he received from Ricketts containing promotional materials about Phase 2;
g. I find that Ricketts was paid $177,094.50 during the Material Time as an amount for commission based on the value of the securities he sold, was not paid for making calls unless they resulted in sales and a portion of the payments to Ricketts was compensation for his training of sales staff and managerial duties at MDDC; and
h. Ricketts admitted to selling the LP Units.

[101] As stated above, during the Material Time, Ricketts was not registered under the Act in any capacity.

[102] Based on the evidence, Ricketts' primary job function as an employee of MDDC was to actively solicit investors to purchase LP Units. Therefore, both MDDC and Ricketts were in the business of selling securities and are both market intermediaries. For this reason the "accredited investor" exemption does not apply to Ricketts. Furthermore, after the introduction of the "business trigger" for dealer registration on September 28, 2009 and a transition period, Ricketts is required to register and may not take advantage of the accredited investor exemption.

[103] Based on the evidence, I find that Ricketts traded in securities without registration and without a registration exemption being available, contrary to s. 25(1)(a) of the Act, as that section existed at the time the conduct commenced, and s. 25(1) of the Act, as subsequently amended on September 28, 2009.

(c) Griffiths

[104] Griffiths engaged in trading LP Units and acts in furtherance of trading LP Units, in the following ways:

a. Griffiths was an employee of MDDC and in this capacity he solicited investors by calling them and making online presentations to them about the merits of the MDDC investment opportunity for the purpose of making a sale;
b. Griffiths made representations about the success of MDDC's previous investment projects in order to induce investor H.H. to purchase LP Units;
c. Griffiths faxed a subscription agreement to investor H.H.;
d. Griffiths provided investors J.R. and H.H. with instructions on how to make payments and assisted investors with filling out the paperwork (e.g. subscription agreements);
e. Griffiths' business card, as enclosed with the Dundurn materials sent to investor H.H., identified Griffiths as a "Sales Associate";

f. Griffiths confirmed receipt of payment from investors; and
g. Griffiths was paid $51,192.50, via Halfatree, during the Material Time as commission based on the value of the securities he sold and was not paid for making calls unless they resulted in sales.

[105] As stated above, during the Material Time, Griffiths was not registered under the Act in any capacity.

[106] Based on the evidence, Griffiths' primary job function as an employee of MDDC was to actively solicit investors to purchase LP Units. Therefore, both MDDC and Griffiths were in the business of selling securities and are both market intermediaries. For this reason the "accredited investor" exemption does not apply to Griffiths. Furthermore, after the introduction of the "business trigger" for dealer registration on September 28, 2009 and a transition period, Griffiths is required to register and may not take advantage of the accredited investor exemption.

[107] I find that Griffiths traded in securities without registration and without a registration exemption being available, contrary to s. 25(1)(a) of the Act, as that section existed at the time the conduct commenced, and s. 25(1) of the Act, as subsequently amended on September 28, 2009.

B. Did the Respondents distribute securities without a prospectus, contrary to subsection 53(1) of the Act?

1. The Law

[108] During the Material Time, subsection 53(1) of the Act sets out the prospectus requirement as follows:

> **53. (1) Prospectus Required** - No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.

[109] A "distribution" is defined in subsection 1(1)(a) of the Act as "a trade in securities of an issuer that have not been previously issued".

[110] The definitions of "securities", "trade" and "accredited investor" are the same as described in Section V.A.1. above at paragraphs [84]-[90]and [92]. As stated above, the onus is on the Respondents to prove facts establishing the availability of an exemption from the prospectus requirements of subsection 53(1) of the Act.

2. Analysis

[111] As stated above, in this case the LP Units constitute "securities" within the meaning of the Act. The sales of LP Units by the Respondents were trades in securities not previously issued and therefore were distributions.

[112] MDDC has never filed a preliminary prospectus or a prospectus with the Commission, and no prospectus receipt has ever been issued to qualify the sale of LP Units or any other Morgan Dragon securities.

[113] Not all of the subscription agreements were tendered to the Panel for review. The subscription agreements that were included in the evidence were accompanied by signed accredited investor forms. However, there was no evidence presented by the Respondents indicating that the accredited investor exemption was available in every instance of a distribution that occurred in this matter. Furthermore, the Respondents took no reasonable steps to determine or confirm that the investors qualified as accredited investors. For these reasons, the Respondents did not discharge their onus of proving the facts establishing the availability of an exemption from the prospectus requirements of subsection 53(1) of the Act in respect of some of the subscription agreements.

[114] I find that the Respondents engaged in distributing LP Units without a preliminary prospectus or a prospectus being filed, and without receipts being issued, without an exemption available, contrary to s. 53(1) of the Act.

VI. CONCLUSION

[115] For the reasons given above, I conclude that:

(a) The Respondents traded in securities and/or engaged in acts in furtherance of trades in securities without having been registered under the Act to do so, contrary to subsection 25(1)(a), for conduct predating September 28, 2009 and subsection 25(1), for conduct on and after September 28, 2009, of the Act; and

(b) The Respondents engaged in an illegal distribution of securities contrary to subsection 53(1) of the Act.

[116] For the reasons outlined above, I will also issue an order dated April 15, 2014 which sets down the date for the hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 15th day of April, 2014.

"Edward P. Kerwin"

Edward P. Kerwin