

# 2002 BCSECCOM 188

## Notice of Hearing

**Aspen Capital Management Inc. (Aspen Capital)**

**And**

**Cambria Bancorp Ltd., 3644871 Canada Inc. and  
601949 B.C. Ltd. (the Issuers)**

**And**

**Walter Leo Barnscher, Gordon Howard Callies,  
Michael Jerome Knight, Kenneth Kim Leiske,  
James Lee MacDonald and Richard Albert James Smith  
(Individual Respondents)**

**(collectively referred to as the Respondents)**

**Section 161 of the *Securities Act*, RSBC 1996, c. 418**

[para 1]

A hearing will be held (the Hearing) to give Aspen Capital, the Issuers, and the Individual Respondents an opportunity to be heard before the British Columbia Securities Commission (the Commission) considers whether it is in the public interest to make the following orders:

1. pursuant to section 161(1)(b) of the *Securities Act*, RSBC 1996, c. 418 (the Act) that all persons cease trading in the securities of the Issuers;
2. pursuant to section 161(1)(c) of the Act that any or all of the exemptions described in any of sections 44 to 47, 74, 75, 98 or 99 do not apply to any of the Respondents;
3. pursuant to section 161(1)(d)(i) of the Act that the Individual Respondents resign any position that they hold as a director or officer of any issuer;
4. pursuant to section 161(1)(d)(ii) of the Act that the Individual Respondents are prohibited from becoming or acting as a director or officer of any issuer;
5. pursuant to section 161(1)(d)(iii) of the Act that that the Respondents are prohibited from engaging in investor relations activities;

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6. pursuant to section 161(1)(f) of the Act that Aspen Capital's and the Individual Respondents' registrations be suspended, cancelled, restricted, or that conditions be imposed on them;
7. pursuant to section 162 of the Act that the Respondents pay an administrative penalty;
8. pursuant to section 174 of the Act that the Respondents pay prescribed fees or charges for the costs of, or related to, the Hearing; and
9. any other orders as may be appropriate in the circumstances.

[para 2]

The Commission will be asked to consider the following facts and allegations in making its determination:

### **The Dealer**

1. Aspen Capital was federally incorporated on August 13, 1987. Its registered address is 230 - 475 West Georgia Street, Vancouver, BC. It was registered as a securities dealer and portfolio manager until March 6, 2000, after which it was licensed as a mutual fund dealer and portfolio manager. Aspen Capital surrendered its registration on September 18, 2000. It commenced bankruptcy proceedings on September 19, 2000.

### **The Issuers**

2. Cambria Bancorp Ltd. (Cambria) was provincially incorporated on August 20, 1997. Its registered address is 2100 – 1075 West Georgia Street, Vancouver, BC. It is a non-reporting issuer. It has not filed any prospectus, preliminary prospectus, or offering memorandum with the Commission.
3. 3644871 Canada Inc. (Aspen Group) was federally incorporated on July 29, 1999, and has been registered as an extra-provincial company in British Columbia since May 5, 2000. Its registered address in British Columbia is 2100 – 1075 West Georgia Street, Vancouver, BC. It is a non-reporting issuer. It has not filed any prospectus, preliminary prospectus, or offering memorandum with the Commission.
4. 601949 B.C. Ltd. (ShelfCo) was provincially incorporated on February 24, 2000. Its registered address is 115B – 19705 Fraser Highway, Langley, BC. It is a non-reporting issuer. It has not filed any prospectus, preliminary prospectus, or offering memorandum with the Commission.

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### The Individual Respondents

5. Walter Leo Barnscher (Barnscher) resides in Langley, BC. He was Aspen Capital's president from June 14, 2000, until August 31, 2000. He was registered as a mutual fund salesperson from 1995 until 1999 with four different dealers. He was director, officer, and controlling shareholder of ShelfCo, and a director of Aspen Group during the material times. Barnscher was not registered to sell securities during the material times.
6. Gordon Howard Callies (Callies) resides in Langley, BC. From June 8, 1999, until September 18, 2000, he was registered as a mutual fund salesperson with Aspen Capital. He was also a director of Cambria during the material times.
7. Michael Jerome Knight (Knight) resides in Burnaby, BC. From 1994 until 1995, he was registered as a mutual fund salesperson with CT Fund Services Inc. He was also a senior officer of Aspen Group during the material times.
8. Kenneth Kim Leiske (Leiske) resides in White Rock, BC. From May 1998 to May 2000 and from September 1, 2000, until the present, he was the president, secretary, and controlling shareholder of Aspen Capital. He was registered as a mutual fund salesperson with Aspen Capital from July 20, 1998, until September 18, 2000. He was a director and controlling shareholder of Aspen Group and Cambria during the material times.
9. James Lee MacDonald (MacDonald) resides in Cloverdale, BC. From January 30, 1997 until June 7, 1999, he was registered as a mutual fund salesperson with Investors Group Financial Services Inc. From July 12, 1999 until June 15, 2000, he was registered as a mutual fund salesperson with Canadian Global Investment Corporation (CGIC), but, during the material time, his registration was restricted by certain temporary orders issued against CGIC and any person authorized to trade on its behalf.
10. Richard Albert James Smith (Smith) resides in Coquitlam, BC. From October 29, 1999 until September 18, 2000, he was registered as a mutual fund salesperson with Aspen Capital. He is currently registered as a mutual fund salesperson with a Vancouver mutual fund dealer.

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### **Aspen Capital Failed to Segregate Client Funds**

11. Aspen Capital received subscription money and prepayments for securities that its clients intended to purchase.
12. Aspen Capital, as a dealer, was required under section 58(a) of the *Securities Rules*, BC Reg. 194/97 as am. (the Rules) to hold subscription money and prepayments in a trust account for clients and, under section 58(b) of the Rules, to segregate those funds from its own assets.
13. On March 12, 1999, a former associate of Leiske filed a claim against Leiske and Aspen Capital for an alleged debt arising from a commercial dispute involving the purchase and sale of Aspen Capital. On March 15, 1999, \$84,975.33 was garnished from Aspen Capital's bank accounts.
14. On March 23, 1999, Aspen Capital transferred \$6,620.96 in client funds from its mutual fund trust accounts to an account belonging to Cambria (Cambria Account).
15. On March 24, 1999, Aspen Capital obtained the release of the garnished funds, but deposited such funds in the Cambria Account.
16. From March 26, 1999, until August 16, 1999, 251 transactions were settled through the Cambria Account. Many of these transactions included transfers of funds between the Cambria Account and Aspen Capital's trust and operating accounts. Aspen Capital paid some of its operating expenses using funds from the Cambria Account during that time.
17. By paying some of its operating expenses with funds from the Cambria Account, Aspen Capital failed to segregate client funds from Aspen Capital's own assets, contrary to section 58(b) of the Rules.

### **Aspen Capital Failed to Remit Trust Interest**

18. Aspen Capital received and held the funds that it received from clients for the purchase of mutual funds in an interest bearing account.
19. From September 1998 until May 2000, Aspen Capital failed to calculate and remit to mutual fund companies the interest earned monthly on client funds held in trust for investment in mutual funds, contrary to section 58(c) of the Rules.

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### **Aspen Capital Failed to File Accurate Financial Statements**

20. As a securities dealer, Aspen Capital was required to file periodically a Report of Risk Adjusted Capital in the form of Form 9A with the Commission, pursuant to section 70(2) of the Rules.
21. As a mutual fund dealer, Aspen Capital was required to file periodically a Report of Working Capital in the form of Form 62 with the Commission, pursuant to section 70(3) of the Rules.
22. While a securities dealer, Aspen Capital overstated its capital position in January 2000, by reporting in that single month all of the of the monthly portfolio management fees that it would earn for each month in year 2000, rather than accruing such revenue monthly and reporting that revenue in individual monthly reports. By doing so, Aspen Capital reported a \$47,108 risk adjusted capital deficiency rather than an actual risk adjusted capital deficiency of \$133,964.85.
23. While a mutual fund dealer, Aspen Capital overstated its working capital position in the following months:
  - (a) between March 2000 to July 2000, by reporting a \$10,000 auditing expense in March 2000 when the actual expense was \$24,610, which error was not corrected until July 2000; and
  - (b) in June and July 2000, by reporting a \$5,000 bond deductible figure when actual deductible was \$10,000 for the bond it was required to post, pursuant to section 21 of the Rules.
24. By filing the reports that contained these errors, Aspen Capital filed information in January, and March to July 2000, that was misleading in a material respect in the circumstances under which they were stated, contrary to section 168.1 of the Act.

### **Aspen Capital Failed to Maintain Adequate Capital**

25. As a securities dealer until March 6, 2000, Aspen Capital was required to maintain positive risk adjusted capital under section 19(2) of the Rules.
26. As a mutual fund dealer that held client funds after March 6, 2000, Aspen Capital was required to maintain working capital of greater than \$75,000 plus its bond deductible, under section 19(3) of the Rules.

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27. As a portfolio manager, Aspen Capital was required to maintain working capital greater than \$25,000 plus its bond deductible under section 20(1) of the Rules.
28. Aspen Capital reported the following capital positions:

Month	Capital Deficiency
September 1998	(\$72,691)
December 1998	(\$67,720.81)
December 1999	(\$85,955.45)
January 2000	(\$47,108)
February 2000	(\$103,655.16)
April 2000	(\$20,626)
May 2000	(\$3,059)
September 7, 2000	(\$4,457)
September 14, 2000	(\$12,340)

29. Aspen Capital, as a securities dealer until March 6, 2000, failed to maintain positive risk adjusted capital in September and December 1998, December 1999, and January to February 2000, contrary to section 19(2) of the Rules.
30. Aspen Capital, as a mutual fund dealer from March 6, 2000, until September 18, 2000, failed to maintain the minimum prescribed working capital in April, May, and September 2000, contrary to section 19(5) of the Rules.
31. Aspen Capital, as a portfolio manager in February 2000, failed to maintain the minimum prescribed working capital in February 2000, contrary to section 20(1) of the Rules.

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### **The Trade and Distribution of Cambria Securities**

32. From February 3, 1999, to December 20, 1999, Leiske sold 2,850,600 Cambria shares to nine investors, for a total of \$72,015.
33. From August 27, 1999, to December 8, 1999, Callies sold 260,000 Cambria shares to twelve investors, for a total of \$130,000.
34. Most of the investors in British Columbia who purchased Cambria shares each:
  - (a) purchased less than \$25,000 worth of Cambria shares;
  - (b) did not sign any Acknowledgement of Individual Purchaser in the form of Form 20A under the Act (an Acknowledgement); or
  - (c) did not receive any Offering Memorandum in the form of Form 43 under the Act (an Offering Memorandum) from Cambria.
35. All of the shares that Leiske and Callies sold were from Cambria's treasury, had not been previously issued and were, therefore, distributions as defined in the Act.
36. Of the 2,850,600 Cambria shares sold by Leiske, who was registered to sell mutual funds only, 75,600 shares were sold without registration and without applicable exemptions from the Act or Rules, contrary to section 34 of the Act.
37. Most of the 260,000 shares of Cambria sold by Callies, who was registered to sell mutual funds only, were sold without registration and without applicable exemptions from the Act or Rules, contrary to section 34 of the Act.
38. Leiske and Callies distributed securities of Cambria without applicable exemptions from the Act or Rules, contrary to section 61 of the Act.
39. Cambria distributed its securities without an applicable exemption from the Act or Rules, contrary to section 61 of the Act.

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40. Some clients purchased Cambria securities for their registered retirement savings plans. For at least four purchasers, Aspen Capital received Cambria's subscription proceeds from its clients and then transferred those funds to Cambria from its mutual fund trust accounts. By doing so, Aspen Capital acted in furtherance of the distribution of Cambria's securities without applicable exemptions from the Act, contrary to section 61 of the Act.

### **The Trade and Distribution of Aspen Group Securities**

41. From December 10, 1999, to December 14, 1999, Smith sold 96,000 shares in Aspen Group to eleven investors, for a total of \$48,000.
42. On December 14, 1999, Knight sold 200,000 shares in Aspen Group to two investors, for a total of \$100,000.
43. All of the investors in British Columbia who purchased Aspen Group shares each:
  - (a) purchased less than \$25,000 worth of Aspen Group shares, except for two investors in British Columbia;
  - (b) did not sign any Acknowledgements; and
  - (c) did not receive any Offering Memorandum from Aspen Group.
44. All of the securities sold by Smith and Knight were from Aspen Group's treasury and had not been previously issued and so were distributions as defined by the Act.
45. All of the Aspen Group shares sold by Knight and Smith, both of whom were registered to sell mutual funds only, were sold without registration and without applicable exemptions from the Act or Rules, contrary to section 34 of the Act.
46. Smith and Knight distributed securities of Aspen Group without applicable exemptions from the Act or Rules, contrary to section 61 of the Act.
47. Aspen Group distributed its securities without an applicable exemption from the Act or Rules, contrary to section 61 of the Act.



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48. Some clients purchased Aspen Group securities for their registered retirement savings plans. For at least some purchasers, Aspen Capital received Aspen Group's subscription proceeds from their clients and then transferred those funds to Aspen Group from its mutual fund trust accounts. By doing so, Aspen Capital acted in furtherance of the distribution of Aspen Group's securities without applicable exemptions from the Act, contrary to section 61 of the Act.

### **The Trade and Distribution of ShelfCo Securities**

49. From March 13, 2000 to June 6, 2000, Barnscher and MacDonald jointly sold 1,613,405 shares of ShelfCo to twelve investors, for a total of \$242,055.70.
50. Most of the investors in British Columbia who purchased ShelfCo shares each purchased less than \$25,000 worth of shares.
51. None of the investors in British Columbia who purchased ShelfCo shares signed any Acknowledgements.
52. None of the investors in British Columbia who purchased ShelfCo shares received any Offering Memorandum from ShelfCo.
53. All of the shares sold by Barnscher and MacDonald were from ShelfCo's treasury and had not been previously issued and so were distributions as defined by the Act.
54. All of the ShelfCo shares sold jointly by Barnscher, who was not registered, and MacDonald, whose registration was suspended by the Commission at the time, were traded without registration and without applicable exemptions from the registration requirements of the Act, contrary to section 34.
55. Barnscher and MacDonald distributed securities of ShelfCo without an applicable exemption from the prospectus requirements of the Act, contrary to section 61.
56. ShelfCo distributed its securities without an applicable exemption from the prospectus requirements of the Act, contrary to section 61.

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### The Aspen Group Scheme

57. Knight, with the intention of promoting the Aspen Group shares, advised two investors (the Aspen Group Investors) that they could use money in their registered retirement savings plans (RRSPs) to purchase Aspen Group securities, which they would then hold in their RRSPs, without incurring any tax on the redemption.
58. On the basis of Knight's advice, the Aspen Group Investors each purchased \$50,000 of Aspen Group securities on or around December 14, 1999.
59. Sometime shortly before December 23, 1999, Leiske, with the intention of selling or assisting in the sale of Aspen Group securities, caused a chartered accountant to prepare a tax opinion on the ability of the Aspen Group Investors to include the Aspen Group securities in their RRSPs. The tax opinion stated that they could place the Aspen Group shares into their RRSPs
60. Leiske caused the chartered accountant to send the tax opinion to the RRSP trustee on December 23, 1999.
61. The tax opinion was premised on an assumption that Aspen Group's issued share capital was 2,206,633 common shares and that the two investors held less than 10% of Aspen Group's issued shares. Both assumptions were incorrect.
62. Leiske provided the accountant with the assumptions on which it prepared its opinion. Leiske therefore knowingly provided false information regarding the share structure of Aspen Group.
63. Leiske and Knight knew or ought to have known that the tax opinion was incorrect.
64. The money invested by the Aspen Group Investors in Aspen Group was transferred to Aspen Capital and funded Aspen Capital's operations. The money was not used to fund the operations of Aspen Group.
65. The Aspen Group Investors would not have invested in Aspen Group had they known that the purchase of shares in Aspen Group would not have been eligible for their RRSPs or that the money would be used to fund Aspen Capital's operating expenses. Leiske and Knight deprived them of

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\$100,000 by falsely representing the RRSP eligibility of their investment in Aspen Group and the use of those funds.

66. Leiske and Knight, directly and indirectly, engaged in a series of transactions relating to the trade in and acquisition of Aspen Group shares by the Aspen Group Investors, both of whom lived in British Columbia, when they knew, or ought to have known, that those transactions perpetrated a fraud on those two investors, contrary to section 57(b) of the Act.
67. The ability of the Aspen Group Investors to include shares in Aspen Group and RRSP was a fact that could be expected to significantly affect the value of the Aspen Group securities.
68. Knight, by advising The Aspen Group Investors that they could place the Aspen Group shares into their RRSPs, with the intention of effecting the trade of Aspen Group shares to those investors made a statement that he knew, or ought reasonably to have known, was a misrepresentation, contrary to section 50(1)(d) of the Act.
69. Leiske, by providing false information to a chartered accountant for the purposes of preparing a tax opinion to effect the sale of Aspen Group shares to the Aspen Group Investors, made a statement that he knew, or ought reasonably to have known, was a misrepresentation, contrary to section 50(1)(d) of the Act.

### **Callies' Scheme**

70. An elderly investor with no investment experience gave Callies \$80,000 to invest in Cambria. Cambria gave this investor an investment certificate having a principal of \$50,000, bearing 10% interest per annum.
71. Cambria returned \$30,000 to this investor. The investor then wrote a cheque in the amount of \$30,000 to Callies on the premise that it would be invested in investments related to Aspen Capital.
72. Callies appropriated the \$30,000 for his own use. He did not invest the money into any investments for this investor.
73. Callies directly engaged in a series of transactions relating to the trade and acquisition of Cambria securities with an investor in British Columbia when he knew, or ought to have known, that those transactions perpetrated a fraud on that person, contrary to section 57(b) of the Act.

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### Breaches of the Act and Rules

74. Leiske acted contrary to the following sections of the Act and Rules:
- (a) section 34 of the Act, by trading in the Cambria and Aspen Group shares without registration;
  - (b) section 61 of the Act, by participating in the distribution of the Cambria and Aspen Group shares;
  - (c) section 57 of the Act, by participating in the fraudulent scheme involving the Aspen Group securities; and
  - (d) sections 19(2) and 20(1) of the Rules and section 61 of the Act, by authorizing or permitting Aspen Capital's contravention of those provisions while he was a director and senior officer of Aspen Capital, under section 168.2 of the Act.
75. Barnscher acted contrary to the following sections of the Act:
- (a) section 34, by trading in the ShelfCo shares without registration;
  - (b) section 61, by participating in the distribution of the ShelfCo shares; and
  - (c) section 61, by authorizing or permitting ShelfCo and Aspen Group not to comply with that provision while he was a director of ShelfCo and Aspen Group, under section 168.2 of the Act.
76. Callies acted contrary to the following sections of the Act:
- (a) section 34, by trading in the Cambria shares without registration;
  - (b) section 61, by participating in the distribution of the Cambria shares; and
  - (c) section 57, by participating in the fraudulent scheme involving the Cambria securities.

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77. Knight acted contrary to the following sections of the Act:
- (a) section 34, by trading in the Aspen Group shares without registration;
  - (b) section 61, by participating in the distribution of the Aspen Group shares;
  - (c) section 57, by participating in the fraudulent scheme involving the Aspen Group securities; and
  - (d) section 61, by authorizing or permitting Aspen Group not to comply with that provision while he was a director of Aspen Group, under section 168.2 of the Act.
78. MacDonald acted contrary to sections 34 and 61 of the Act by trading in and participating in the distribution of the ShelfCo shares.
79. Smith acted contrary to sections 34 and 61 of the Act by trading in and participating in the distribution of the Aspen Group shares.
80. Cambria, ShelfCo, and Aspen Group acted contrary to section 61 of the Act by distributing their securities without a prospectus and without any applicable exemptions.
81. Aspen Capital acted contrary to the following sections of the Act and Rules:
- (a) section 58(b) of the Rules, by failing to keep separate its clients' investment funds from its operating funds;
  - (b) section 58(c) of the Rules, by failing to remit interest earned on client funds;
  - (c) section 168.1 of the Act, by filing information that was misleading in the circumstances;
  - (d) section 19(2), 19(3) and 20(1) by failing to maintain the prescribed minimum capital; and
  - (e) section 61 of the Act, by participating in the distribution of the Cambria and Aspen Group shares.

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### Acts Contrary to the Public Interest

82. As a director of Cambria, Callies failed to take reasonable care to ensure that Cambria complied with section 61 of the Act. By failing to take reasonable care as a director of an issuer who sold shares to the public, Callies failed to exercise the care, diligence, and skill of a reasonably prudent person under section 118 of the *Company Act*, RSBC 1996, c.62 (the Company Act) and in doing so acted contrary to the public interest.
83. As a director and senior officer of Cambria and Aspen Group, Leiske failed to take reasonable care, diligence, and skill of a reasonably prudent person to ensure that Aspen Group and Cambria complied with section 61 of the Act. By failing to take reasonable care as a director of issuers who sold shares to the public, through a dealer of which Leiske was also a director, and by acting contrary to the Company Act, Leiske acted contrary to the public interest.

[para 3]

The Respondents may each be represented by counsel at the Hearing and make representations and lead evidence. The Respondents are requested to advise the Commission of their intention to attend the Hearing by informing the Commission Secretary at PO Box 10142, Pacific Centre, 701 West Georgia Street, Vancouver, BC V7Y 1L2 phone: (604) 899-6500; email: commsec@bcsc.bc.ca.

[para 4]

The Respondents or their counsel are each required to attend at the 12th Floor Hearing Room, 701 West Georgia Street, Vancouver, British Columbia, on Tuesday, April 2, 2002, at 10:00 a.m. if they wish to be heard before the Commission sets a date for the Hearing.

[para 5]

Determinations may be made in this matter if the Respondents, or their counsel, do not appear at the Hearing.

[para 6]

February 21, 2002.

Steve Wilson  
Executive Director