DECISION OF A PANEL APPOINTED PURSUANT TO *THE FINANCIAL AND CONSUMER AFFAIRS AUTHORITY OF SASKATCHEWAN ACT*

In the Matter of
The Securities Act, 1988

and

In the Matter of
Gaetan Daniel Blouin
(the Respondent)

RE: SANCTIONS AND COSTS

Hearing on:	April 20, 2021
Before:	Howard Crofts, Panel Chairperson Honourable Eugene Scheibel Norman Halldorson (referred to as the "Panel")
Appearances:	Grace Hession David on behalf of Staff ("Staff") of the Financial and Consumer Affairs Authority of Saskatchewan (the "FCAA") Gaetan Daniel Blouin, representing himself as the Respondent
Date of Decision:	June 25, 2021

I. INTRODUCTION

a. Procedural Background

1. This is the Panel's decision in respect to sanctions and costs for Mr. Gaetan Blouin ("G Blouin"). A virtual hearing in respect to sanctions and costs was held on April 20, 2021 that was consistent with the *Guidelines for Managing Hearings during a Pandemic* [*Guidelines*]. These *Guidelines* supplement and amend, to the extent necessary, Part 11 and Rule 11.1 of *Saskatchewan Policy Statement 12-602*,

Procedure for Hearings and Reviews [*Local Policy*]. All parties agreed to proceed with the virtual hearing approach and all parties were in attendance.

2. Prior to the hearing on sanctions and costs, on January 13, 2021 this Panel released its decision on the merits in this matter [*Merits Decision*]. The short forms used in the *Merits Decision* are carried over and used in this decision.

3. In the *Merits Decision*, we set out the background to this matter including testimony and exhibit evidence that the Panel received during the hearing on the merits. While the full background will not be reproduced here, the Panel has taken this background into account in considering the issues of sanctions and costs in this decision. In addition, in this decision, the Panel will analyze and discuss facts that are of particular importance to crafting sanctions and costs orders that are fair, reasonable, and proportionate.

b. Background from ***Merits Decision***

4. During the Merits hearing, this Panel heard that investors were sold shares in Olive Equity, but that their investments funds were ultimately destined to be investments in various other businesses, one being a business named System Built. Neither G Blouin or the Raintree Clients he sold Olive Equity shares to fully understood the corporate structure or inter-corporate relationship between Olive Equity and System Built.

5. The Panel also learned that System Built became insolvent, was restructured under bankruptcy legislation, and G Blouin became more intimately involved with System Built's restructured successor company – Riel Trail Management Ltd. ("Riel Trail") – serving as its manager and member of its Board of Directors.

6. In addition, the Panel heard that G Blouin relied on one Ricki Arshi, an executive with Olive Equity, for all regulatory matters and the inter-corporate relationship between Olive Equity and its investment in System Built. G Blouin did no due diligence of his own in respect to these matters prior to selling the shares of Olive Equity to his clients.

7. During Staff's cross-examination of G Blouin and in his closing submissions, G Blouin admitted to the allegations set out in the Statement of Allegations dated June 13, 2019. In particular, G Blouin admitted and conceded Staff proved that:

a. He acted as a dealer and adviser for the purpose of assisting Saskatchewan residents to purchase shares of Olive Equity while not being registered as a dealer in Saskatchewan or registered as a representative of a registered dealer and acting on behalf of that dealer, thereby

being in breach of subsection 27(2) of the *Act* for the time period from May 2013 to July 2013 (the “Relevant Time”).

b. He sold shares to Raintree Clients during the Relevant Time and Raintree was not aware of such sales.

c. Raintree did not approve the shares of Olive Equity for sale by its representatives (G Blouin was a representative of Raintree).

d. He was required, pursuant to section 13.3 of *National Instrument 33-109 Registration Information* [*NI 31-103*], to take reasonable steps to ensure, before he accepted an instruction from a client to buy a security, that the purchase was suitable for the client and he failed to fulfil this requirement.

e. He failed to deal fairly, honestly, and in good faith with his clients contrary to subsection 33.1(1) of the *Act* when he got his clients to sign a document that included the phrase “The person selling me these securities is not registered with a securities regulatory authority or regulator and has no duty to tell me whether this investment is suitable for me”.

f. He failed to disclose to the FCAA through the National Registration Database (“NRD”) all of his current business and employment activities during the Relevant Time, in particular with regard to the sale of Olive Equity shares, when he filed his form 33-109F4 in accordance with *NI 33-109*. This was a contravention of section 4.1 of *NI 33-109*.

g. While under oath and during his May 7, 2019 interview, he provided false statements to FCAA Investigator Foster regarding raising any capital for any business outside of Raintree before August 2013. This was a contravention of subsection 55.13(1)(a) of the *Act*.

8. The evidence brought forward by Staff during the hearing on the merits, and G Blouin’s ultimate admissions and concessions, set the stage for this hearing on sanctions and costs.

c. Staff’s Requests in respect to Sanctions and Costs in the Statement of Allegations

9. In the Statement of Allegations, Staff sought various 7 year market access prohibitions against G Blouin. In particular, Staff requests that G Blouin be ordered to, for a period of 7 years:

a. cease trading in securities or derivatives (*Act*, s 134(1)(d));

b. cease acquiring securities or derivatives for and on behalf of residents of Saskatchewan (*Act*, s 134(1)(d.l));

c. cease giving advicerespecting securities, trades, or derivatives (*Act*, s 134(1)(e));

d. not be employed by any issuer, registrant, or investment fund manager in any capacity that would allow him to trade in securities or derivatives (*Act*, 134(1)(h)(iii)); and

e. be prohibited from becoming or acting as a registrant and investment fund manager or a promoter (*Act*, 134(1)(h.1)).

10. Staff's Statement of Allegations also requests an administrative penalty (*Act*, s 135.1) in the amount of $65,000 and costs of or relating to the hearing (*Act*, s 161).

11. The Statement of Allegations also seeks financial compensation (*Act*, s 135.6), but this issue is not considered in this decision. Instead, it is to be considered after a hearing takes place in respect to the issue of financial compensation.

II. SUBMISSIONS BY THE PARTIES AS TO SANCTIONS AND COSTS

a. Staff's Submissions

12. In their written and verbal submissions regarding sanctions, Staff submitted that this matter involved several aggravating factors, including:

a. While this matter does not involve traditional fraud, the proven allegations are serious and involved an element of deception and dishonesty. G Blouin misled his clients by selling them off-book products without informing them of this fact, and also did not conduct proper due diligence. He also made false statements to an investigator.

b. The quantum of off-book sales ($690,000) and the 7% commissions G Blouin received ($48,300) from those sales were not insignificant.

c. G Blouin's actions were premeditated in that he intentionally sold off-book. G Blouin also new he had an obligation to update his business activities on the NRD to keep his regulator and employer aware, but failed to do so.

d. G Blouin abandoned his obligation as a fiduciary to his clients by not informing them that he received commissions on the sales he made to them.

13. As a mitigating factor in favour of G Blouin, Staff submitted that this is the first time G Blouin had regulatory proceedings brought against him. G Blouin had no prior warnings or rulings for any violations of securities regulations by any securities regulator.

14. During the merits hearing, the Panel heard that System Built was restructured to become Riel Trail as a result of System Built's insolvency and under the terms of a "Proposal to Creditors" from the restructured company. Investors who invested in System Built were to be eligible to be repaid their investment out of the profits of Riel Trail for a five-year period ending April 30, 2021. Staff speculated that G Blouin might offer this repayment plan as a mitigating factor, but took the position that this was either not a mitigating factor or at best a neutral factor because G Blouin conceded in cross-examination that:

a. the Proposal to Creditors was structured such that any repayment to System Built creditors was based on the profitability of, and payable solely at the discretion of, Riel Trail's management; and

b. the Proposal to Creditors was set to expire on April 30, 2021 and, as of the date of the Merits hearing and the hearing on sanctions and penalties, no payments had been made to the Olive Equity investors.

15. In their submissions regarding the administrative penalty, Staff identified that section 135.1(2) of the Act provides for a maximum penalty of $100,000 and requested $65,000 because:

a. G Blouin conceded all the allegations made in the Statement of Allegations dated June 13, 2019;

b. G Blouin received a 7% commission for each referral that purchased Olive Equity shares and he enjoyed a personal benefit from these commissions of $48,300;

c. In applying the concept of general deterrence, the Panel ought to ensure that the penalty is sufficient to serve as a preventative warning because it is within the public interest jurisdiction of securities commissions to maintain investor confidence in the capital markets; and

d. G Blouin's deception during the investigation and with his clients should result in the administrative penalty being "more than just a simple figure for disgorgement as a warning to others under the principle of general deterrence", and that the penalty amount should not be so low that it is viewed by industry participants as "the cost of doing business".

16. Staff also filed case law that they argued supported their position on sanctions. This case law will be discussed more below.

17. Regarding costs, the Registrar of the FCAA provided a bill of costs for Panel member per diems and court reporter and transcription services in the amount of $11,877. Staff requested that G Blouin be required to pay these costs, but did not provide any submissions on the law of costs, nor did Staff provide argument(s) as to why all of the costs should be ordered to be paid in the present circumstances.

b. G Blouin's Submissions

18. G Blouin did not provide any written submissions, but offered the following verbal submissions during the oral hearing in respect to sanctions and costs:

a. He had no response to Staff's submissions and that he just wanted this matter to be concluded; and

b. In the years that he continued operating Riel Trail with the view to returning funds to investors, he had personally not taken more than $20,000 per year in personal earnings, so he wasn't getting wealth from his continued efforts to keep Riel Trail operating in an effort to repay the investors in Olive Equity shares.

III. ANALYSIS

a. Legal Framework for Sanctions

19. With regard to the sanctions requested by Staff, this Panel is cognizant that the primary goal of securities legislation is the protection of the investing public and maintaining the integrity of capital markets and therefore, penalties imposed by regulators for contravention of securities legislation should be focused on preventing future harm to the capital markets and investors.

20. In addition, the Panel recognizes it must ensure that the sanctions that end up being imposed are proportionate in respect to the circumstances of the matter including the responsibility of the respondent.

21. These general principles, and other more specific factors, that securities decision makers should consider when crafting sanctions have been articulated in numerous cases. For example, in *Rezwealth Financial Services (Re)* (2014), 37 OSCB 6731, the Ontario Securities Commission ("ON Commission") spoke to the law on sanctions as follows:

[46] The Commission's mandate is to: (i) provide protection to investors from unfair, improper, or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the *Act*).

[47] The Commission has a public interest jurisdiction to order sanctions restricting respondents from participating in the Ontario capital markets in the future (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 43). The Commission's role when imposing sanctions is not to punish past conduct, but to restrain "future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient" (*Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at p. 1611).

[48] The Commission must ensure that the sanctions imposed are proportionate to the circumstances of the case and the conduct of each respondent. Factors that the Commission has considered in determining appropriate sanctions include:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been recognition of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;

(f) any mitigating factors;

(g) the size of any profit made, or loss avoided from the illegal conduct;

(h) the size of any financial sanctions or voluntary payment when considering other factors;

(i) the effect any sanction might have on the livelihood of a respondent;

(j) the restraint any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(k) the reputation and prestige of the respondent;

(l) the shame or financial pain that any sanction would reasonably cause to the respondent; and

(m) the remorse of the respondent.

22. In this jurisdiction, in a case known as *In the Matter of Ronald James Aitkens – Sanctions Decision*, (June 19, 2019) FCAA [unreported] [*Re Aitkens*], a panel of the FCAA recently analyzed and set out similar principles as it articulated a legal framework for sanctions. The panel's review of the law is both thorough and instructive, and therefore it is helpful to quote that review in full:

> [17] Sections 134 and 135.1 of the *Act* list the sanctions that the Panel may impose where it finds that it is in the public interest to do so. The Panel must exercise this jurisdiction in a manner consistent with the purposes set out in section 3.1 of the Act.
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> [18] Section 3.1 of the Act provides that "the purposes of this Act are to provide protection to investors and to foster fair, efficient capital and derivatives markets and confidence in capital and derivatives markets".
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> [19] As noted in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (at paras 41-43, 45), all sanction orders are aimed toward the objectives of protecting investors, protecting the capital markets and preventing future harm; they are not meant to be punitive or remedial. Their primary goal is deterrence, both specific and general – specific deterrence from future misconduct by the respondents being sanctioned, and general deterrence from similar future misconduct which may be contemplated by others: *Re Cartaway Resources Corp.*, 2004 SCC 26 (at paras, 52-53, 55-56, 60-61).
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> [20] In *Euston Capital Corp. v. Saskatchewan Financial Services Commission*, (2008) SKCA 22, the Saskatchewan Court of Appeal referred to the *Asbestos* decision and stated at paras 48 and 49:
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>> 48 On the "public interest" issue, the appellants' submissions are grounded on the Supreme Court of Canada's decision in *Committee for Equal Treatment of Asbestos Minority Shareholders*, supra. In that case, the Court considered the nature and scope of the Ontario Securities Commission's jurisdiction to intervene in the public interest pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S. 5. Section 127 is the Ontario equivalent of s. 134 of the Saskatchewan *Act*, the provision under which the Commission purported to act here in imposing the cease trading orders on the appellants and making exemptions from securities laws unavailable to them.
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>> 49 The Supreme Court held that sanctions imposed under s. 127(1) must be preventive and prospective in character. It said s. 127 could not be used merely to remedy misconduct alleged to have caused harm or damages.
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> [21] *In the Matter of The Securities Act*, R.S.O. 1990, c. S.5 as amended and *In the Matter of Lehman Cohort Global Group Inc., et. al.*, the Ontario Securities Commission commented on the imposition of sanctions under securities laws as follows:

> [23] The Commission's dual mandate is (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).
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> [24] The Commission's objective when imposing sanctions is not to punish past conduct, but rather to restrain future conduct that may be harmful to investors or Ontario's capital markets. This objective was described in *Re Mithras Management Ltd.* as follows:
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> > … the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the *Act*. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
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> > (*Re Mithras Management Ltd.* (1990), 13 OSCB 1600 at pp. 1610-1611)

[22] In *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (at paras, 154, 156), the Alberta Court of Appeal cautioned that the sanctions must be "proportionate and reasonable" in the circumstances and that money sanctions in particular must be "proportionate to the offence, and fit and proper for the individual offender".

[23] We are also mindful that "If sanctions under this legislation are so low as to communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence, the opposite to deterrence may result": *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 (at para. 21).

[24] *In the Matter of Darcy Lee Bergen* (October 31, 2000), a hearing panel of the Financial and Consumer Affairs Authority of Saskatchewan (the "FCAA") adopted the following list of factors as some of the factors that should be considered when imposing sanctions:

> a) the seriousness of the respondents' conduct;
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> b) the harm suffered by investors as a result of the respondents' conduct;
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> c) the damage done to the integrity of the capital markets in the province by the respondents' conduct;

> d) the extent to which the respondent was enriched;
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> e) the factors that mitigate the respondents' conduct;
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> f) the respondents' past conduct;
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> g) the risk to investors and the capital markets posed by the respondents' continued participation in the capital markets of the province;
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> h) the respondents' fitness to be a registrant or to bear the responsibilities associated with being a director, officer, or advisor to the issuers;
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> i) the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to capital markets;
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> j) the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
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> k) orders made by the Commission in similar circumstances in the past.
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> [25] Although these factors are relevant in determining the appropriate sanctions, the applicability and importance of each factor will vary according to the facts and circumstances of the case. The Panel must ensure that the sanctions imposed in each case are proportionate to the circumstances and the conduct of each Respondent. Sanctions should also be proportionate to past decisions of the FCAA Hearing Panels.

23. In respect to the statement in *Re Aitkens* that sanctions should be proportionate to past decisions of FCAA Hearing Panels, we note that past decisions of other securities decision makers in jurisdictions outside Saskatchewan may also be of assistance in crafting proportionate sanctions. This is especially so in situations like the present case where there may not be many decisions in this jurisdiction that have imposed sanctions for the same or similar conduct. In reviewing such cases, care should be had to take into account any legislative or other relevant differences in the regulatory frameworks.

24. Staff in this case filed numerous cases from other jurisdictions because they were unable to locate any cases from this jurisdiction that involved a registered representative selling off-book. Staff's submission is that the decisions they filed support their sanctions requests.

25. On a general level, of the five cases cited to the Panel by Staff, all except one had market access prohibitions of two years or less (the case that was the exception imposed a permanent ban for conduct far

more egregious than, and not comparable to, the present case[1]). Staff relies most heavily on one case where a 2-year suspension was imposed, *Re Pariak-Lukic*, 2015 ONSEC 18 [*Re Pariak-Lukic*], arguing in part that because the present case involves an element of dishonesty and premeditation that *Re Pariak-Lukic* did not, this warrants 5 additional years of market access prohibitions for a total of 7 years. We do note however, and as will be shown below, that some of the decisions cited by Staff involved elements of dishonesty, yet the length of suspension was under 2 years.

26. With these general comments said, to better contextualize the present situation with the cases cited by Staff, we will review in a summary fashion the cases cited by Staff. We will then highlight two other decisions that are of assistance. This will help us compare various precedents to the present case, which will in turn assist us in crafting fair and proportionate sanctions.

- ***Re Pariak-Lukic*** – this was an appeal of an Investment Industry Regulatory Organization of Canada ("IIROC") decision where the IIROC Panel originally imposed a $50,000 fine, but no suspension. The maximum fine amount under IIROC's governing rules is $5,000,000 (by comparison, while not termed a fine, the maximum administrative penalty under section 135.1 of the *Act* is $100,000). The respondent sold approximately $3,000,000 worth of investments off-book, which is over 4 times more than G Blouin did in the present case. There was also personal benefit as the respondent's husband received an annual fee equal to 1% of the investments. The IIROC Panel found that there was no outright dishonesty. On appeal, the ON Commission held that the IIROC Panel erred in not imposing a suspension in the circumstances. The ON Commission noted that the losses were substantial in the case and that the respondent's clients trusted and relied on her. The respondent also did not understand the nature of the investments she was selling to her clients. The wrongful conduct also took place over a 2 year period and was not an isolated incident. The ON Commission stated that the respondent "demonstrated reckless disregard for the interests of her clients" and that in such "egregious cases involving large value high-risk off-book distributions", a suspension should be imposed. IIROC Staff requested a 2-year

[1] See generally *Re Noronha*, 2017 IIROC 16 (Over 2.5 years, the respondent sold off book and intentionally did not disclose his activities to his employer. His off-book transactions totaled approximately $5.4 million and he personally received compensation of $669,500. He purposely concealed conflicts of interests and actually planned to profit from those conflicts of interest. When approached by his employer about his conduct, he denied that he was trading off book, misrepresented the compensation he was receiving, and then actively tried to subvert his employer's investigation for e.g., by deleting emails and disconnecting a backup server). He also had a history of prior misconduct and on a prior occasion had sanctions ordered against him. He then did not appear at the liability or sanctions hearing before IIROC. There was no remorse whatsoever. In addition to a permanent market access ban, the IIROC Panel ordered $669,500 in disgorgement of the compensation he received (we note that the *Act* does not contain a similar disgorgement provision) and an additional fine of $200,000).

suspension and the ON Commission agreed a 2-year suspension was appropriate in the circumstances.

- ***Re Marek*, 2017 ONSEC 41 aff'ing *Marek (Re)*, 2017 IIROC 13** – this was also an appeal of an IIROC decision. The respondent made off book transactions in respect to 2 clients without the knowledge or approval of his employer. The conduct was found to be both intentional and deceptive in nature. In addition, it was found that the respondent knew his responsibilities and that his conduct was wrongful because he was previously registered as a Branch Manager. His sales to the clients were $28,900 each, for a total of $57,800 (far less than in the present matter). Aggravating factors included the intentional and deceptive nature of the conduct as well as the breaches of trust between him, his clients, and his employer. The only mitigating factor was no prior regulatory history. The IIROC Panel imposed a fine of $50,000, a 1-year suspension, retraining, and 12 months of close supervision upon any re-registration. The ON Commission upheld these sanctions.

- ***Re Debus*, 2019 IIROC 18** – the respondent conducted off book trades in respect to 2 clients. His employer became concerned and therefore placed him under close supervision requirements. He was also disciplined by his employer and his employer prohibited him from selling a certain product. Regardless, he encouraged a client to purchase the product and then also helped facilitate the purchase. He then chose not to disclose these actions to his employer. His conduct was found to be intentional, deliberate, deceptive, and involving concealment. A factor weighing in his favour was that he relied on his job to support his family, including his wife and two teenage children. Another factor weighing in his favour was that after the investigation and prior to the hearing, he worked under strict supervision without further incident, demonstrating he was respecting the rules and had potential for rehabilitation. The Panel ordered a fine of $40,000 and a 9 month suspension followed by 12 months of strict supervision.

- ***Re Knight* (2018), 41 OSCB 6051** – the respondent sold off-book in a situation where the products were not suitable for her clients and where she should have known the products were not in compliance with Ontario laws. The security in the case was a $100,000 promissory note. While some of the mitigating factors were similar those involving G Blouin, there were not as many aggravating factors. Pursuant to a settlement agreement, the respondent agreed to withdraw from her practice and not reapply until a full audit had been done. She eventually applied to reactivate her registration. Upon reviewing the application, Staff learned that the respondent had some of her clients pre-sign forms to help make transactions more efficient. After discussions with Staff, the parties brought forward a joint recommendation as to registration for the Director's consideration,

which included at least 12 months of strict supervision and 12 months of not being able to process transactions without a client's prior written authorization. Key facts brought forward by the parties included no intentional deception; the misconduct relating to getting clients to pre-sign forms was not an attempt to defraud the clients, but an attempt to make things more convenient; the clients had provided instructions for all the transaction where pre-signed forms were used; the respondent admitted her wrongdoing and was remorseful; the respondent suffered financial and reputational harm as a result of her misconduct; and the respondent was cooperative during the review.

27. In addition to the cases cited by Staff, we note *Re Pandelidis*, [2005] IDACD No 16 (QL) [*Re Pandelidis*]. In this case, an IIROC Panel found that the respondent engaged in conduct that involved repeated intentional deception and concealment of his conduct from his employer. The respondent intentionally and knowingly provided false information to his clients. He also placed himself in a conflict of interest and then preferred his own interests over those of his client. The matter also involved a very large volume of transactions regarding products that were not permitted for sale in Alberta. The respondent submitted that he should not be subject to a suspension. The IIROC panel disagreed and imposed a fine of $75,000 and a 5 year suspension with no ability to be reinstated until all monetary penalties and costs had been paid. In addition, future reinstatement was conditional upon re-writing and passing the Canadian Securities Course, 12 months of strict supervision, and 12 months of close supervision. As will be shown below when analyzing the aggravating and mitigating factors of the present case, the conduct in this case is more egregious when compared to G Blouin's situation and involved less mitigating factors.

28. Finally, the Panel was able to find at least one case from Saskatchewan where off book trading took place: *In the Matter of Darcy Lee Bergen – Merits Decision*, (September 14, 2000) FCAA [unreported] and *In the Matter of Darcy Lee Bergen – Sanctions Decision*, (October 13, 2000) FCAA [unreported] (collectively [*Re Bergen*]). In *Re Bergen*, the respondent was a registrant and advised clients in respect to sales of various securities. One of these securities, known as Platinum, was sold to numerous investors off-book in large amounts (there were other products at issue in the matter as well). The respondent referred 85 individuals to Platinum and received approximately $340,000 in commissions. Investors lost millions and many of them were vulnerable and could not afford to lose such high amounts – one elderly couple alone lost $194,000 through investments in Platinum. The respondent did not properly review or understand the securities he was providing advice on and did not display the knowledge required of a registrant. He had a reckless attitude towards his clients and refused to take responsibility for his actions. During the investigation and at the merits hearing, he repeatedly tried to deflect blame from himself to others. He also failed to appreciate his fiduciary duties owed to his clients. The decision maker in the case stated that the significant number of people involved and the media attention that resulted caused "a significant setback to confidence in the Saskatchewan capital markets." As mitigating factors, the

respondent cooperated with the investigation and made efforts to assist his clients in mitigating their losses. The were also others involved that were more culpable than the respondent and had a supervisory role over the respondent. Staff requested a permanent ban and the maximum administrative penalty amount of $100,000 – this is still the maximum amount today. The respondent submitted that a 5 year ban and $10,000 administrative penalty would be appropriate. The decision maker weighed the relevant factors and held that a 10 year ban and $50,000 administrative penalty were appropriate. The situation in *Re Bergen* is also more egregious than the present case with fewer mitigating factors.

i. Decision in respect to Market Access Prohibition Sanctions

29. With the above cases providing helpful context, especially in respect to proportionality, we turn now to the specific facts of the present case. First, G Blouin's conduct in this case is properly described as serious and concerning and an appropriate sanction ordered must adequately consider this factor. Like many of the cases cited above, G Blouin sold off-book and did not inform his employer or the FCAA of this conduct. He did not file the required updates to his business activities through the NRD.

30. The volume of the sales conducted by G Blouin also contributes to the seriousness of his conduct. G Blouin sold $690,000 worth of Olive Equity shares off book. While this is not as high a volume as the cases cited above where lengthier market access bans were ordered, the Panel still considers this to be a high volume amount and aggravating in nature. In addition, G Blouin received a 7% commission from the sales totalling $48,300. Again, while this amount is not as high as some of the cases cited above, the fact that G Blouin was dishonest towards his clients by not informing them of the commissions is also aggravating.

31. Another factor that is aggravating and that contributes to the seriousness of this matter is the fact that G Blouin provided false information under oath during his interview with Investigator Foster.

32. G Blouin also failed to ensure that he conducted proper due diligence in respect to the Olive Equity shares and related investments in System Built, and also failed to ensure that all other regulatory requirements regarding these investments had been complied with. In this regard, he abandoned the fiduciary duties he owed to his clients and chose to inappropriately defer to Ricki Arshi of Olive Equity in respect to this matter. Moreover, G Blouin did not understand the inter-corporate relationship between Olive Equity and System Built. This lack of understanding is apparent in the fact that when clients wanted to invest in System Built, G Blouin could not explain why they received shares in Olive Equity and that the investment in System Built was substantially an unsecured loan. A similar deferential approach and lack of understanding of products being sold off book occurred in *Re Bergen* and the decision maker there made clear that such conduct by a registrant is improper and reckless.

33. In respect to the attempt to restructure System Built into Riel Trail with an agreement to repay from Riel Trail's profits the System Build investors for their losses, while we find that G Blouin's intentions in this regard might have been genuine, no monies have so far been paid to any investors. So, while G Blouin's intentions here demonstrate an effort to right some of the wrongs, which is mitigating, we do not provide as much weight to this fact as we do to other mitigating factors.

34. In respect to the mitigating factors, we agree with Staff that the fact that G Blouin has had no prior regulatory issues with the FCAA is a mitigating factor. But in addition, we also find that there are other important mitigating factors that should be taken into account, including:

a. While he did provide false information in respect to an aspect of his interview, G Blouin willingly cooperated throughout other aspects of the investigation process;

b. G Blouin fully cooperated throughout the hearing process;

c. During cross-examination and at the end of the proceedings, G Blouin admitted to and conceded the allegations brought by Staff;

d. G Blouin ultimately took responsibility for his conduct; and

e. G Blouin has shown some remorse for his actions.

35. In addition to the mitigating factors, there are other factors noted in the above decisions that are relevant on the facts of this case. The Panel notes that G Blouin's reputation has suffered due to his actions and the fallout from his actions. In addition, while G Blouin received $48,300 in commissions from his sales, and while this is not an insignificant amount, it is also not a financial windfall. The financial gain in some of the cases cited above was far greater leading to market access prohibitions well under 7 years. G Blouin also retired from the financial services industry a number of years ago and is unlikely to re-enter it to earn a living in the future.

36. After considering all the circumstances and weighing the above-noted factors to gauge the seriousness and gravity of this case, and after considering the numerous precedents cited to better assess proportionality, the Panel is of the view that it is appropriate to impose the market access prohibitions listed at paragraph 9 above, but for a period of **36 months** as opposed to the 7 years requested by Staff. The Panel believes such sanctions are consistent with the objects of the *Act* and adequately take into account the purposes of sanctions, including protection of investors, protection of capital markets, and preventing future harm. We also believe that these sanctions are reasonable and proportionate and will provide the appropriate level of general and specific deterrence.

ii. Decision in respect to Administrative Penalty

37. Section 135.1 of the *Act* provides authority to impose an administrative penalty up to a maximum amount of $100,000 when it is in the public interest to do so. The relevant provisions read:

> 135.1(1) The Commission may make an order pursuant to subsection (2) where the Commission, after a hearing:
>
> > (a) is satisfied that a person or company has contravened or failed to comply with:
> >
> > > (i) Saskatchewan securities laws; … and
> >
> > (b) considers it to be in the public interest to make the order.
>
> (2) In the circumstances described in subsection (1), the Commission may order all or any of the following:
>
> > (a) that the person or company pay an administrative penalty of up to $100,000;
> >
> > …

38. The Supreme Court of Canada discussed this "public interest" jurisdiction as well as how the concept of general deterrence may be taken into account in relation to administrative penalties in securities matters in *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 SCR 672. The Court held that because sanctions, such as administrative penalties, are regulatory in nature, they need to be aimed at preventing future harm rather than punishing prior conduct. General deterrence is an important consideration in crafting orders in this regard. The Court reasoned:

> 58 "Public interest" is not defined in the Act. This Court considered the scope of a securities commission's public interest jurisdiction in *Asbestos*, *supra*. At issue in *Asbestos* was the Ontario Securities Commission's jurisdiction to intervene in Ontario's capital markets, for purposes of protection and prevention, if it is in the public interest to do so pursuant to s. 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5. This Court held that the discretion to act in the public interest is not unlimited. In exercising its discretion, the Commission should consider "the protection of investors and the efficiency of, and public confidence in, capital markets generally" (Asbestos, supra, at para. 45). Because s. 127 is regulatory, its sanctions are not remedial or punitive, but rather are preventative in nature and prospective in application. As a result, this Court held that s. 127 could not be used to redress misconduct alleged to have caused harm to private parties or individuals: *Asbestos*, *supra*, at paras. 41-45. It should be observed that our Court was not considering the function of general deterrence in the exercise of the jurisdiction of a securities commission to impose fines and administrative penalties nor denying that general deterrence might play a role in this respect.

…

> 60 In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, *supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para. 125).

39. As such, administrative penalties may be imposed to encourage future compliance with the *Act* and *Regulations* and to deter others from future misconduct. While administrative penalties cannot be punitive, retributive, or denunciatory in nature, and cannot be focused on punishing past conduct, they can be imposed to help protect the public through general and specific deterrence (*Thow v British Columbia (Securities Commission)*, 2009 BCCA 46 at para 38, 90 BCLR (4th) 36).

40. It has also been held that when considering the amount of an administrative penalty, the amount should not be so low that it would "amount to nothing more than another cost of doing business." (*Alberta (Securities Commission) v Brost*, 2008 ABCA 326 at para 54, 440 AR 7 [*Brost*]).

41. Staff submits that an administrative penalty of $65,000 is appropriate in this case and relies on the cases discussed above, which are largely IIROC cases. It is important to reiterate here that there are relevant differences between IIROC's regulatory framework and the *Act*, in particular in relation to fine and administrative penalty maximums. For IIROC, the maximum fine amount pursuant to their governing rules is $5,000,000 per contravention (Rule 8210(1)(iii) of IIROC's *Rule 8200 – Enforcement Proceedings*). As outlined above, the maximum amount of an administrative penalty pursuant to the *Act* is $100,000. Legislatures in other jurisdictions have increased their administrative penalties beyond $100,000 (for e.g. British Columbia, Alberta, and Ontario) which can signal an intent that higher penalty amounts may be necessary in certain circumstances to fit the sanctions with the gravity of the situation and the need to deter similar conduct and encourage future compliance (*Brost* at para 54). The maximum administrative penalty in Saskatchewan remains at $100,000 and the Panel has remained mindful of this when comparing the precedents filed by Staff.

42. Since administrative penalties are also a type of sanction, the sanction factors set out above can be weighed and considered. In addition, we must ensure that the administrative penalty that is ordered is reasonable and proportional.

43. As the discussion of Staff's cases above demonstrates, fines ordered by IIROC Panels in those cases ranged from $40,000 to $50,000 when the maximum amount was $5,000,000 per contravention. In

an additional case we noted, *Re Pandelidis*, which involved facts more egregious overall than the present case, a $75,000 fine was ordered when the maximum amount was $5,000,000 per contravention.

44. There was also an administrative penalty ordered in *Re Bergen* which was the case from this jurisdiction where substantial off-book trading occurred. In that case, Staff requested the maximum penalty of $100,000. After weighing the various factors, the decision maker in that case ordered an administrative penalty of $50,000. Again, the circumstances in *Re Bergen* were more serious overall than the circumstances here.

45. Having considered: the seriousness of G Blouin's actions and his contraventions of the *Act*; the need to deter similar conduct in the future; the need to protect investors and the efficiency of, and public confidence in, capital markets; and various precedents where off-book trading occurred and fines or administrative penalties were ordered, this Panel's decision is to order an administrative penalty of **$32,500.** The Panel believes this penalty is fair, reasonable, and proportional for reasons that include the following:

a. While his contraventions of the *Act* and *NI 33-109* are serious, this was G Blouin's first regulatory misconduct;

b. G Blouin cooperated during the hearing process;

c. G Blouin ultimately took responsibility for his actions and displayed remorse;

d. The amount is sufficient to address the seriousness of the contraventions and to prevent similar conduct in the future;

e. The penalty is sufficient to protect investors and capital markets;

f. The penalty is in the range of penalties imposed by other jurisdictions in comparable cases brought forward by IIROC referenced herein and reviewed by the Ontario Securities Commission; and

g. When compared to the $50,000 penalty imposed in *Re Bergen* where, amongst other more aggravating and less mitigating factors, the number of investors was more than eighty and the quantum of investment funds lost was many millions of dollars, $32,500 in the present case where the number of investors was five and the quantum lost was substantially less represents a penalty amount that is fair, reasonable, and proportional.

V. ANALYSIS AND DECISIONS REGARDING COSTS

46. Section 161 of the *Act* outlines the scope of the Panel's authority in respect to ordering costs. The ordering of costs is discretionary as is the amount ordered. In *Re Aitkens*, a panel of the FCAA set out various factors that may be considered by a panel in exercising its discretion in respect to costs. Citing to the *Act*, *The Securities Regulations*, c S-42.2 Reg 1 [*Regulations*], and the *Local Policy*, the panel stated:

> [54] Clause 161(1)(a) of the *Act* allows the Panel, after conducting a hearing, to order a person or company to pay costs of or related to the hearing if it is satisfied that the person or company whose affairs were the subject of the hearing has not complied with any provision of the *Act*.
>
> [55] Subsection 161(2) of the *Act* outlines what costs the Panel may impose. These include:
>
> > (a) costs incurred with respect to services provided by a person appointed or engaged pursuant to section 8, 12 or 14;
> >
> > (b) costs of matters preliminary to the hearing;
> >
> > (c) costs for time spent by the Commission;
> >
> > (d) fees paid to a witness.
>
> [56] Subsection 176(1) of *The Securities Regulations* (c. S-42.2 Reg I) requires a person or company to pay to the Authority any amount set out in Table 1 of Appendix A thereto. Part 6 of Table 1 to Appendix A states:
>
> > The costs of or related to a hearing or an investigation that the Commission may order pursuant to section 161 of the Act include the following:
> >
> > (a) costs for time spent by the Commission [...] to a maximum of $1,500.00 for each day or partial day;
> >
> > (b) disbursements properly incurred by the Commission or the staff of the Commission, including travel costs;
> >
> > (c) fees to an expert or witness, in the amount of the actual fees paid, to a maximum of $200.00 per hour for each person involved; and
> >
> > (d) travel costs paid to a witness.
>
> …
>
> [58] Section 20.2 of [the *Local Policy*] sets out factors that a panel may consider in exercising its discretion under section 161 of the *Act*. Subsection 20.2 provides:
>
> > **20.2 Factors Considered When Awarding Costs**
> >
> > **20.2** In exercising its discretion under section 161 of the Act to award costs against a person, a Panel may consider the following factors:
> >
> > > (a) whether the respondent failed to comply with a procedural order or direction of the Panel;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to the costs of the investigation and the proceeding;

(e) whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;

(f) whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;

(g) whether the respondent participated in the proceeding in a way that helped the Authority understand the issues before it;

(h) whether the respondent participated in a responsible, informed and well-prepared manner;

(i) whether the respondent co-operated with Staff and disclosed all relevant information;

(j) whether the respondent denied or refused to admit anything that will have been admitted; or

(k) any other factors the Panel considers relevant.

47. Before addressing the appropriate costs order in the present case, we should comment further on one aspect of the above citation from *Re Aitkens*. At paragraph 56, it is stated that a person is *required* to pay any amounts set out in Part 6 of Table 1 to Appendix A. In considering the various provisions at issue, we do not take this to mean that the Panel has no discretion in respect to these amounts or that these amounts must always be ordered by panels in every case. Close inspection of the provisions reveals why. It is true that the Legislature has used the mandatory language "shall" in subsection 176(1) of the *Regulations* when referencing payment of prescribed "fees" – "A person or company *shall* pay to the Commission the *fees* set out in Table 1 of Appendix A" [emphasis added]. Table 1 of Appendix A then largely contains specific fees associated with various licensing and registration requirements. However, Part 6 of Table 1 of Appendix A does not relate to fees *per se*, but instead to various types of *costs* related to hearings. Part 6 is the only part in Table 1 of Appendix A that does not relate to specific fees outside the context of hearings. And, like subsection 161(1) of the *Act*, Part 6 specifically utilizes the permissive language "may" instead of mandatory language such as "shall" in respect to costs – "The costs of or related to a hearing or an investigation that the Commission *may* order pursuant to section 161 of the Act include the following…" [emphasis added]. This all suggests that an order of costs, including any amounts ordered

to be paid pursuant to Part 6 of Table 1 of Appendix A (subject to the legislated maximum amounts in Part 6), remains a discretionary matter for panels.

48. We also note that Part 6 of Table 1 of Appendix A is open ended in nature, stating that the type of costs that can be ordered in respect to a hearing "include the following". This suggests that the Panel can order that amounts be paid in respect to other types of costs related to a hearing, which brings us back to subsection 161(2) of that *Act* cited in *Re Aitkens*. Subsection 161(2) delineates in more general language the ultimate boundaries of a panel's authority in respect to costs.

49. All of the factors cited in *Re Aitkens*, including those expressly set out in the *Local Policy*, are important in considering 1) whether a costs order should be made; and 2) the amount of costs that should be ordered. In *Re Aitkens*, the panel decided to make a costs order considering that it found that the various respondents had not complied with the *Act*. The background facts involved fraud and various other serious breaches of the *Act*. In respect to the amount of costs, the panel ordered that the full amount in the bill of costs submitted by Staff ($30,319.51) be paid in the case because the matter was complex requiring significant time to consider, the respondents did not attend any of the hearings, and the respondents did not participate in the proceedings in a way that assisted the panel in understanding the issues. After weighing all the factors, few (if any) of which weighed in favour of reducing costs, the panel held that the bill of costs submitted by Staff was both reasonable an appropriate. *Re Aitkens* then is demonstrative of a situation where an award of full costs might be appropriate.

50. There are other cases by panels where full costs have not been ordered and where costs requested by Staff have been reduced in light of various considerations. For example, in *Re Bergen*, a case cited above that involved serious misconduct on behalf of the respondent with many investors losing significant sums of money, Staff requested costs of $25,501.05 be paid by the respondent. The costs included time spent by investigators and Staff counsel in the matter, as well as various disbursements. The respondent argued that he should only pay 25% of the costs due to the fact that he cooperated during the proceedings and that some of the costs of the investigation related to other respondents. After weighing the various factors and taking into account the respondent's submissions, and after noting that one of the respondents had already been ordered to pay $10,000 in costs, the Commission chose not to order the full amount of costs requested by Staff. Instead, the Commission ordered costs in the amount of $5,049.75 (which was approximately 20% of the total amount requested by Staff).

51. Another, and more recent, example of a situation where a Panel found reason not to impose a full costs order was in *Re Pastuch et al – Decision on Sanctions*, (December 18, 2014) FCAA [unreported] [*Re Pastuch*]. This matter also involved very serious conduct by the respondent, including fraud, with millions lost to investors. The matter was complex and the respondent's conduct throughout the proceedings was

particularly difficult and obstructive. The panel stated that the respondent "consistently and persistently initiated steps and proceedings that can only be described as a deliberate abuse of process." Staff submitted two bills of costs totaling over $71,000, however the panel decided to impose a lesser amount of just over $46,000 because the panel did not want the costs order to "negatively impact" the potential for eligible investors to collect financial compensation.

52. Having cited the applicable law, we turn to consider whether a costs order should be made and, if so, in what amount. Staff has requested costs in the amount of $11,877 supported by a document titled Registrar's Statement of Hearing and Panel Costs ("Statement of Costs"). The $11,877 is made up of Panel Member *per diems* ($10,050) and Court Reporter/transcription costs ($1,827). These amounts do not include any costs for time spent by FCAA Staff or investigation time in bringing this matter forward.

53. That said, G Blouin conducted himself throughout these proceedings in a professional manner. He did not cause delay in the proceedings. He did not operate in any improper, vexatious, unreasonable, or negligent manner. He did not try to obstruct the proceedings and was cooperative. He made appropriate concessions and, as already noted, admitted responsibility for his actions. He also attended the proceedings virtually and in a prompt fashion. In general, G Blouin's approach to and conduct during the proceedings was reasonable.

54. Staff did not provide any submissions in respect to their request for costs beyond a bare request for the full amount set out in the Statement of Costs. In other words, Staff did not provide us with compelling argument as to why ordering G Blouin to pay the full amount of costs set out in the Statement of Costs would be appropriate in light of the various factors that this Panel may consider in exercising its discretion as to costs.

55. Having said that, the Panel is of the view that imposing a costs order of some amount is appropriate in this case. G Blouin has been found to have not complied with the *Act*. His conduct resulted in the need for an investigation and a hearing. In addition, while he admitted responsibility at the end of the hearing, he did not do so prior to the proceedings to forego the need for a hearing altogether.

56. Weighing all the relevant factors, and considering various reasons why costs amounts were reduced in cases such as *Bergen* and *Pastuch* (some of which the Panel believes apply to this case as well), the Panel is of the view that a reasonable and appropriate costs amount in this case is **$6,000**, approximately 50% of the full amount of costs requested by Staff.

VI. SUMMARY OF SANCTIONS, ADMINISTRATIVE PENALTIES AND COSTS

57. For all of the foregoing analysis and reasons, the Panel orders that G Blouin:

a. be prohibited from undertaking all activities noted in paragraphs 9 (a) through 9 (e) above for a period of **36 months**, commencing with the date of this decision;

b. is ordered to pay an administrative penalty in the amount of **$32,500**; and

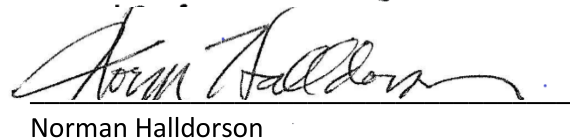
c. pay hearing costs in the amount of **$6,000**.

58. What remains in this matter is Staff's request that G Blouin pay financial compensation to each person or company found to have sustained financial loss as a result, in whole or in part, of the Respondent's contraventions of Saskatchewan securities laws. The Panel directs that this issue be the subject of a future hearing in accordance with the procedures set out in Part 13 of the Local Policy.

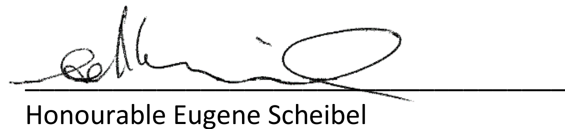
59. This is a unanimous decision of the Hearing Panel.

Dated at Regina this 25 day of June, 2021.

Howard Crofts, Hearing Panel Chairperson



Norman Halldorson



Honourable Eugene Scheibel