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

In the Matter of

***The Securities Act, 1988*, ss 1988-89, c S-42.2**

and

In the Matter of

Jack Louis Comeau

and

Pinnacle Wealth Brokers Inc.

and

Grasswood Property Finance Ltd.

(the Respondents)

RE: MOTION FOR NON-SUIT

Motion Heard:	October 30, 2020
Panel:	Howard Crofts (Panel Chairperson) Norman Halldorson (Panel Member) Peter Carton (Panel Member) (collectively referred to as the "Panel")
Appearances:	Nathanial Day (Counsel for Staff of the Financial and Consumer Affairs Authority of Saskatchewan ("Staff")) Simon Bieber and Julia Wilkes (Counsel for Jack Louis Comeau ("Mr. Comeau") and Pinnacle Wealth Brokers Inc. ("Pinnacle")) No one appearing on behalf of the Respondent, Grasswood Property Finance Ltd. ("Grasswood")
Date of Decision:	February 4, 2021

I. INTRODUCTION

1. This decision concerns a motion for non-suit brought by one of the respondents in this matter, Mr. Comeau, and appears to be the first time a panel of the Financial and Consumer Affairs Authority ("FCAA") has had the opportunity to consider and render a written decision on a motion for non-suit in a securities related matter. As such, various issues new to this Panel were raised by the Parties, and the Panel also sought additional guidance from the Parties on various issues, in an effort to better explore those issues and the applicable law. The Panel is grateful to counsel for their helpful submissions.

2. Through his non-suit motion, Mr. Comeau seeks to have numerous allegations made by Staff through the Amended Statement of Allegations dismissed on the basis that Staff failed to bring forward any or sufficient evidence to support those allegations. In addition, in respect to one particular investor, Mr. Comeau seeks to have allegations relating to that investor dismissed based on an argument that the evidence brought forward by Staff during the hearing establishes that the limitation period found in section 136(2) of *The Securities Act* 1988, 1988-89, c S-42.2 [*Act*] has expired.

3. For the reasons in this decision, the relief requested by Mr. Comeau is granted in part.

II. BACKGROUND

a. Background to the Hearing on the Merits

4. Part of the background to this decision is set out in the Panel's March 2, 2020 Order approving a Settlement Agreement with Pinnacle Property Finance Ltd., as well as in previous decisions in this matter dated:

- March 12, 2020 (Staff's March 2, 2020 Motion to Adjourn);
- March 31, 2020 (Staff's March 3, 2020 Motion for Leave to Call Witnesses);
- April 16, 2020 (Staff's March 10, 2020 second Motion for Leave to Call Witnesses); and
- September 18, 2020 (regarding the August 18, 2020 Motion that considered the issue of whether Staff had closed their case).

In addition, further background may be found in the Panel's June 9, 2020 Order regarding Mr. Comeau's May 25, 2020 Motion to Adopt a Revised Transcript.

b. Background to this Non-Suit Motion

5. Mr. Comeau filed a Notice of Motion for Non-Suit on March 12, 2020 followed by an Amended Notice of Motion for Non-Suit on the same date seeking an Order dismissing certain allegations on the basis that Staff led no or insufficient evidence to establish the alleged contraventions.

6. The Statement of Allegations dated June 27, 2018 and the Amended Statement of Allegations dated August 30, 2019 make numerous allegations against Mr. Comeau (as well as other respondents) and involve various investors. Typically, Staff would attempt to prove such allegations during their case in chief by calling witnesses and entering documents or other evidence into the record. However, based on how Staff approached this matter and based on various decisions of this Panel resulting therefrom, Staff was limited in the witnesses it was permitted to call. In addition, Staff opted to close their case without first bringing forward and entering into evidence Mr. Comeau's compelled statement.

7. As a result, there are grounds in Mr. Comeau's motion stating that there are numerous allegations in the Amended Statement of Allegations that Staff failed to provide any evidence in support of. The relevant "Absence of Evidence" grounds as articulated in paragraphs 10 through 14 of the motion are as follows:

> 10. This Panel has heard no evidence about what Mr. Comeau allegedly said to Staff during the course of his compelled interviews. Accordingly, the allegation that Mr. Comeau contravened s. 55.13 [of the *Act*] ought to be dismissed (paras. 30-37 [of the Amended Statement of Allegations]).
>
> 11. Further, this Panel has heard no evidence that Mr. Comeau contravened s. 135.7(1) of the *Act* by destroying, concealing, or withholding a document required for the investigation (at paras. 23-24). Accordingly, this allegation ought to be dismissed.
>
> 12. There is no evidence that Mr. Comeau (i) had an unwritten agreement to receive future payment from Grasswood or (ii) had any client sign the document labelled "Disclaimer/Conflict of Interest" (at para. 4(g)). Accordingly, this Panel ought to dismiss the allegations that Mr. Comeau acted contrary to s. 33.1(1) in receiving a payment or requiring clients to sign a Disclaimer of the Amended Statement of Allegations (at paras. 11-13).
>
> 13. This Panel has heard evidence from three witnesses identified in the Amended Statement of Allegations as Pinnacle Client 1, Pinnacle Client 11 and Pinnacle Client 20. The evidence adduced from each of those witnesses related exclusively to their own investments made through Mr. Comeau.
>
> 14. There is no evidence before this Panel to support any allegations in relation to any of the other Pinnacle Clients or Other Investors listed in the Amended Statement of Allegations. Specifically, there is no evidence that Mr. Comeau contravened s. 27(2)(b), 33.1(1), 55.11(1) of the Act and s. 13.3 of National Instrument 31-103 in relation to any Pinnacle Clients and Other Investors who did not give evidence. Accordingly, all allegations in relation to Pinnacle Clients and Other Investors, except for Pinnacle Clients 1, 11 and 20 ought to be dismissed.

8. In addition to the "Absence of Any Evidence" grounds, Mr. Comeau also lists in his motion grounds in support of a contention that evidence brought forth by Staff in respect to Pinnacle Client 11 demonstrates that the limitation period found in section 136(2) of the *Act* has expired. Mr. Comeau therefore requests that the allegations relating to Pinnacle Client 11 be dismissed by this Panel as being time-barred.

c. Submissions by the Parties

9. The Panel received various written submissions from the Parties and, on October 30, 2020, heard oral argument on the non-suit motion by way of a virtual hearing in line with the *Guidelines for Hearings during a Pandemic* [*Virtual Hearing Guidelines*]. The Virtual Hearing Guidelines amend, to the extent necessary, and supplement Part 11 and Rule 11.1 of the *Saskatchewan Policy Statement 12-602, Procedure for Hearings and Reviews* [*Local Policy*].

10. Beginning with Mr. Comeau, his position on this Motion advanced by his counsel was as follows:

(a) Staff led sufficient evidence to establish a *prima facie* case in respect to certain allegations contained in the Amended Statement of Allegations. In particular, Staff led sufficient evidence in respect to the following allegations concerning Pinnacle Client 1:

i. Paragraphs 4(a) through (f);
ii. Paragraph 10;
iii. Paragraphs 14 and 15;
iv. Paragraph 16; and
v. Paragraph~~s~~ 20-22.

In addition, Staff led sufficient evidence in respect to the following allegations concerning Pinnacle Client 20:

i. Paragraph~~s~~ 20-22.

(b) Staff failed to lead any evidence in respect to any of the other investors found in the Statement of Allegations with the exception of Pinnacle Client 11 (see below), and therefore all allegations pertaining to those other investors should be dismissed.

(c) Since the parties largely agree on non-suit motion principles as well as what evidence exists on the record and whether that evidence can or cannot sufficiently support various allegations in the Amended Statement of Allegations for non-suit purposes, the actual issue in dispute is rather narrow. For this motion, the real issue is how to interpret and apply the limitation period found in section 136(2) of the *Act* to allegations concerning Pinnacle Client 11.

(d) In respect to Pinnacle Client 11, Staff called evidence that establishes Mr. Comeau's alleged misconduct occurred before August 30, 2013. Since the Amended Statement of Allegations is dated August 30, 2019 and for the first time brought forward allegations against Mr. Comeau in respect to Pinnacle Client 11, these allegations are barred by the six-year limitation period found in section 136(2) of the *Act*.

(e) Staff's argument that the principle of discoverability can and should be read into section 136(2) of the *Act* is without merit. The wording of section 136 is not capable of being interpreted to include the principle of discoverability and existing case law does not support such an interpretation.

11. Staff also made various submissions in respect to the non-suit motion, both in writing and at the oral hearing. Focusing on the most recent oral submissions made by Mr. Day on behalf of Staff, Staff submitted as follows:

(a) Staff and counsel for Mr. Comeau agree on quite a few things, including that a key remaining issue in dispute between the parties is how the limitation period should apply.

(b) Pinnacle Client 11 testified that for 12 to 18 months after his investment in April of 2013, he had ongoing conversations with Mr. Comeau about the lack of interest payments being made to him on his investment and, in response, was told by Mr. Comeau that once 15 or 20 Grasswood lots were sold, more money would be paid. Staff submitted that these reassurances by Mr. Comeau formed a continuing course of conduct in respect to the Pinnacle Client 11 allegations such that the "last material event" (which section 136(2) of the *Act* deems the point in time when the clock begins to tick on the six-year limitation period) was when the reassurances ceased. Since the reassurances ceased around April 2014, the last material event would be within the six-year limitation period.

(c) The concept of discoverability is relevant when determining the "last material event". There would be unfairness and injustice to complainants and to the regulation of capital markets if the section 136(2) limitation period was construed in a limiting fashion such as to not include discoverability principles.

(d) The concept of discoverability is applicable in this case because Pinnacle Client 11 could not have known that his investments in Grasswood bonds had lost their value until after the investments were made. Pinnacle Client 11 discovered the impairment in value of his investment

in Grasswood bonds well after he made the investments and within the limitation period.

d. Additional Requests for Submissions by the Panel

i. Submissions Regarding an Applicant's Evidentiary Election

12. In light of the fact that in some of the administrative law cases filed by the Parties an issue arose as to whether the applicant in a non-suit motion should be put to an evidentiary election prior to the decision maker considering the motion for non-suit, on October 30, 2020 the Panel sought additional written submissions from the parties on the following issues:

> 1) Does this Panel have discretion to require a respondent to elect whether he will call evidence prior to deciding a non-suit motion?
>
> 2) Assuming this Panel does have such discretion, what factors should it consider in exercising its discretion?
>
> 3) Assuming this Panel does have such discretion, how should the Panel exercise its discretion in this case? Put another way, should Mr. Comeau be required to make his election as to whether he will call evidence prior to the Panel reaching a decision on the non-suit motion?

13. Mr. Comeau and Staff responded with written submissions on November 17 and 23 respectively. The issues will be analyzed below.

ii. Clarifications Regarding Concessions During Oral Argument

14. In light of the fact that both parties submitted during oral argument that they largely agreed on which allegations should be dismissed for lack of evidence, yet did not specifically state which allegations they agreed should be dismissed, the Panel sought clarification from the Parties as to which allegations they agreed should be dismissed on the basis of there being no evidence to support those allegations.

15. On December 11, 2020, Mr. Udemgba on behalf of Staff responded by conceding that there is presently no evidence regarding any contravention of sections 135.7(1) and 55.13(1)(a) of the *Act*. However, Mr. Udemgba took the position that Staff had made no further concessions.

16. Counsel for Mr. Comeau responded to Staff's position by stating that, in his view, Staff's most recent position was not consistent with the position put forward by Mr. Day on behalf of Staff during oral argument on the motion.

17. For greater clarity, the Panel notes that in oral argument, Mr. Day stated the following:

> Mr. Bieber and I agree on quite a few things, actually…
>
> …
>
> FCAA Staff agree there is no evidence before the Panel in relation to investors other than [Pinnacle Client 1], [Pinnacle Client 20], and [Pinnacle Client 11]. And we also agree there's no evidence before the Panel in relation to Mr. Comeau's alleged contravention of Section 135.7(1) of the Act. We agree there. So, I think we agree that those allegations shouldn't be going forward.
>
> With respect to [Pinnacle Client 11 and the limitation period issue], there is disagreement. …

18. After making these remarks, Mr. Day spent the bulk of his time arguing Staff's position on the limitation period issue.

III. ISSUES

19. Mr. Comeau's motion gives rise to, and this decision will address, the following issues:

(a) What is the law pertaining to non-suit motions?

(b) Does the Panel have discretion to put Mr. Comeau to an election as to whether he will call evidence prior to the Panel entertaining his non-suit motion?

i. If so, should Mr. Comeau be put to that election?

(c) What allegations in the Amended Statement of Allegations should be dismissed based on non-suit motion principles?

i. What allegations, not relating to limitation periods, should be dismissed?

ii. What is the appropriate approach to a non-suit motion based in part on assertions that a limitation period has expired?

IV. ANALYSIS

a. Law pertaining to Non-Suit Motions

20. While there has yet to be a written decision of a panel of the FCAA regarding a motion for non-suit, the issue has been addressed in securities matters in other jurisdictions as well as in other contexts in this jurisdiction. There is thus ample law to guide this Panel on the issues raised.

21. In respect to other jurisdictions, and for example, there are numerous decisions from Ontario that have articulated and applied non-suit motion principles in the securities context. One such case is *ATI Technologies Inc., Re* (2005), 28 OSCB 9667, 2006 CarswellOnt 6814 (WL) [*ATI Technologies*] where the panel there considered a number of issues including: 1) whether the Ontario Securities Commission ("ONSECC") had the power and authority to hear and decide a non-suit motion, and 2) the test for a non-suit motion. The ONSECC held that pursuant to its power to control its own procedures (which is statutory based in Ontario pursuant to, at that time, the *Statutory Powers and Procedure Act*, RSO 1990, c S.5) the ONSECC had the power and authority to hear and decide a non-suit motion. In respect to the test, the ONSECC cited to a labour arbitration case as follows:

> 23 We refer to the decision in *Toronto (City) v. Toronto Civic Employees' Union, Local 416*, in which the test is stated as follows:
>
> > In determining a non-suit motion, the standard of proof applied in the courts is that of a prima facie case, and not the higher standard of the balance of probabilities. That is, the question on a non-suit motion is whether there is any evidence which, taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. *Any doubts in that respect are to be resolved in favour of the responding party*. [Emphasis added]

22. In British Columbia, *ATI Technologies* and the above passage was recently cited with approval by the British Columbia Securities Commission ("BCSECC") in *Aly Babu Husein Mawji, Re*, 2019 BCSECCCOM 228. Similar to in *ATI Technologies*, the BCSECC held that it had the power and authority to hear and decide a non-suit motion based on its ability to control its own procedures.

23. In Alberta, a similar articulation of the law in a securities case took place in *Workum, Re*, 2006 ABASC 1737 (WL). The Alberta Securities Commissions stated as follows:

> **A. The Test**
>
> **1. Applies to Administrative Hearing**
>
> [8] The authorities are clear that a non-suit application can be made in an administrative proceeding, including an enforcement proceeding before this Commission, and that the test applied in a court proceeding applies in the administrative context also - see, for example,

International Brotherhood of Electrical Workers Local 348 v. AGT Ltd., [1997] A.J. No. 1004 (Q.B.).

2. Fundamental Test

[9] The fundamental test for a non-suit motion was not in dispute: has a prima facie evidentiary case been established? The test is not whether the ultimate case had been made on a balance of probabilities standard but, rather, whether there is any evidence from which, if accepted by a decision-maker, that decision-maker could infer on the lesser prima facie standard that an allegation could be sustainable.

…

[16] In our view the authorities are consistent with the statement made in *Clark v. Rockyview (Municipal District No. 44)*, [1996] A.J. No. 183 (Q.B.) in discussing the adjudicator's considerations on a non-suit motion, at para. 49: "There can be no findings of credibility or weighing of evidence applying this test".

[17] As noted, our task as adjudicator in the Non-Suit Application is not to determine whether Staff has proved, on a balance of probabilities, the allegations in the Second Notice of Hearing. We must determine only whether there is evidence that, if believed, could prima facie support those allegations. For this limited purpose, ambiguities are to be resolved against the applicant moving for a non-suit. We are not to determine whether we believe the evidence, what weight should be attached to it, how our assessment is affected by other evidence, or what inferences can or should be drawn from all or any of the evidence. If we conclude that there is evidence to support an allegation in the Second Notice of Hearing, it would be inappropriate for us to dismiss the allegation at this stage.

24. In Saskatchewan, law in respect to non-suit motions exists from administrative tribunals and the courts. Beginning with administrative tribunals, and again by way of example only, in *S.G.E.U. v Mitchell's Gourmet Foods Inc.*, [1999] Sask LRBR 577 [*Mitchell's*] a panel of the Saskatchewan Labour Relations Board articulated a view of the law similar to the cases discussed above while citing to many other administrative law cases:

> 18 In considering a non-suit motion, the standard of proof is whether, on a *prima facie* basis, there is a case for the opposite party to meet. In several recent decisions, including *Service Employees Union Local 268 v. Fort William Clinic* [1997] O.L.R.D. No. 277 (January 29, 1997) and *Dias, et al. v. Hospitality and Service Trades Union, Local 261 v. Lorne Murphy Foods Limited*, [1997] O.L.R.D. No. 681 (February 25, 1997), the Ontario Board has affirmed the following description of the standard of proof earlier adopted by it in *White v. Canadian Union of Shinglers & Allied Workers* [1996 CarswellOnt 4175 (Ont. L.R.B.)], (unreported, Board File No. 0014-95-R, April 30, 1996):
>
> > 14. In determining a non-suit motion, the standard of proof applied in the courts is that of a prima facie case, and not the higher standard of the balance of probabilities. That is, the question on the non-suit motion is whether there is any evidence which, if taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. Any doubts in that respect are to be resolved in favour of the responding party (*Hall v. Pemberton* (1974), 5 O.R. (2d) 438 (C.A.)). This is consistent with what appeared to be the Court's view

> of how administrative tribunals should handle such motions (*Ontario v. Ontario Public Service Employees Union* (1990), 37 O.A.C. 218 (Div. Ct.)).

25. Saskatchewan's courts have also articulated principles pertaining to non-suit motions. In the Court of Queen's Bench, the law is informed by the rules of civil procedure set out in *The Queen's Bench Rules*. A number of cases have settled the law and repeated the settled principles, including *Ceapro Inc. V Saskatchewan*, 2008 SKQB 76 at paras 69-73, 313 Sask R 52 [*Ceapro*] *per* Popescul CJQB citing *Kvello v Miazga*, 2003 SKQB 451, 242 Sask R 19 [*Kvello*] per Baynton J. One may well note the parallels between the principles articulated in these cases and the principles articulated in the cases above:

> 69 The law pertaining to non-suit applications was succinctly and eloquently stated by Baynton J. in the case of *Kvello v. Miazga* (2003), [2004] 7 W.W.R. 547 (Sask. Q.B.), and has been applied and approved in subsequent cases such as *Igor v. Saskatoon Police Service*, 2005 SKQB 463, 271 Sask. R. 248 (Sask. Q.B.) and *M. (K.) v. Canada (Attorney General)*, 2004 SKQB 287, 251 Sask. R. 12 (Sask. Q.B.). Also instructive and of relevance on this issue is a decision from our Court of Appeal in *Reid v. Kraus*, 2000 SKCA 32, 189 Sask. R. 122 (Sask. C.A.).
>
> …
>
> 72 The general legal test applied to non-suit applications, as well as the "collateral legal principles", were summarized by Baynton J. in *Kvello* as follows:
>
> > 16 The general legal test to be applied in determining non-suit applications is well established. It is whether a *prima facie* case has been made out at the conclusion of the plaintiffs' case in the sense that a reasonable trier of fact (a judge or properly instructed jury) could find in the plaintiffs' favour on the basis of the uncontradicted evidence adduced. Where the nature of the case requires the drawing of inferences of fact from other facts established by direct evidence, the test includes the question of whether the inferences that the plaintiffs seek could reasonably be drawn from the direct evidence adduced if the trier of fact chooses to accept the direct evidence as fact.
> >
> > 17 I use the term *prima facie* case to indicate that the applicants have a lesser onus than having to demonstrate the absence of "any" evidence on a material issue. The case law clearly establishes that the applicants need only demonstrate the absence of "sufficient" evidence, which if left uncontradicted, could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. The ruling on a nonsuit motion is a question of law. The determination of the credibility or believability of the evidence is a question of fact to be subsequently determined in the action if the non-suit application fails.
> >
> > 18 As authority for the comments I have just outlined, I rely primarily on *Reid v. Kraus*, 2000 SKCA 32, 189 Sask. R. 122 (C.A.) and Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at s. 5.4 and on the quotations from these authorities referred to in *Palmer-Johnson v. Tochor*, 2003 SKQB 197, 33 C.P.C. (5th) 116 (Sask. Q.B.), a decision of my colleague Zarzeczny J.
> >
> > 19 I have also considered and adopted the following collateral legal principles that apply to non-suit applications:

1. The court must consider the evidence which has been presented in a fashion most favourable to the plaintiffs and must draw reasonable inferences from the evidence to determine whether, if a jury were present, that jury would be in a position to make a decision based upon the evidence adduced. This involves a weighing of the evidence to determine on the whole what tendency the evidence has to establish the issue in dispute including all such inferences of fact the jury would be warranted in drawing from the direct facts they found to be proved. But the determination of credibility issues must be left for the subsequent determination by the trier of fact. *Moody's Equipment Ltd. v. Royal & Sun Alliance Insurance Co. of Canada*, 2002 SKQB 507,226Sask. R. 237 (Sask. Q.B.), a decision of my colleague Allbright J., and the citations of authorities referred to therein.

2. The fact that there are multiple defendants in the lawsuit usually precludes an application by any of them for a non-suit even where there is no asserted claim of contribution. *Moody's Equipment Ltd.*, *supra*. But this restriction does not apply where it is clear that no evidence led by the remaining defendants could result in liability attaching to the defendants who seek the non-suit. *Stillwater Forest Inc. v. Clearwater Forest Products Ltd. Partnership*, 2000 SKQB 110, [2000] S.J. No. 211 (Sask. Q.B.), a decision of my colleague Pritchard J. Her decision also demonstrates that the court must consider the non-suit application from the perspective of each cause of action pled in the lawsuit except in cases where the law respecting those causes of action is not well settled.

3. At the non-suit stage, it is not the function of the court to decide the substantive issues to be tried or to make substantive rulings respecting the application or non-application of common law principles or statutory provisions to the facts of the case as they may ultimately be found. These substantive determinations are properly left as matters to be decided and determined after all the evidence is in and complete legal briefs are filed. *Travel West (1987) Inc. v. Langdon Towers Apartments Ltd.*, 2000 SKQB 294, [2000] S.J. No. 418 (Sask. Q.B.), a decision of my colleague Zarzeczny J. and a case that relied on *Reid v. Kraus*, *supra*, and which dismissed the nonsuit application and dealt with the substantive issues in the final judgment. The appeal from the final trial judgment was allowed on other grounds, 2002 SKCA 51, 217 Sask. R. 233 (Sask. C.A.).

The extensive appeal judgment indicated that it was not the facts but the application of legal principles to those facts which was primarily in dispute between the parties. The decision also indicates the wisdom of the trial court dismissing the non-suit application on the basis that it required the court to rule primarily on substantive legal issues. The determination of those substantive issues was deferred until the trial judgment and was made with the benefit of all the evidence and full legal submissions. Had the trial court done otherwise, the Court of Appeal would likely have had no other alternative but to order a new trial at the considerable expense of all the parties.

Obviously, a ruling on legal issues pursuant to a non-suit application brought midway through the trial might well shorten the trial by narrowing the focus of the litigation. But where the parties desire a legal interpretation or a ruling on legal issues that is likely to determine the outcome of the litigation or that is likely to significantly affect the course of the trial, there

> are more efficient and timely ways of doing so, such as a Rule 188 application by the consent of the parties.
>
> Views expressed by some of the Justices of the Supreme Court of Canada in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.) as to the advisability of the court determining unsettled legal issues on the basis of a preliminary motion, do not strictly apply to a non-suit motion. But the views indicate the potential problems that preliminary rulings can pose for the parties and the appeal courts.
>
> 4. The failure to adduce the evidence of an expert witness usually entitles a defendant to successfully bring a non-suit application in cases alleging professional negligence except where the alleged negligence is so evident that the trier of fact can determine the issue on the basis of "common sense". *Palmer-Johnson v. Tochor*, *supra*. I have discussed this aspect of this decision more fully later.
>
> 5. The examination for discovery read-in admissions of one party are not receivable as evidence against another party in the action unless it is a conspiracy case and there is independent proof of common design of the nature set out by Grotsky J. in *Culzean Inventions Ltd. v. Midwestern Broom Co.*, [1984] 3 W.W.R. 11 (Sask. Q.B.) at paras. 64 and 65.

…

> 73 Therefore, in summary, my task at this stage is not to determine whether the elements of the various causes of action have been established by the evidence nor is it my role to determine the credibility of the evidence. Rather it is simply to determine if there is a *prima facie* case. In other words, it is to determine if there is sufficient evidence on which a reasonable person could conclude that the case has been met on a balance of probabilities. Accordingly, it is important to bear in mind that any of the evidence that I may relate ought to be considered to be "evidence" adduced in this case and not a "fact" that I have found from the evidence.

26. More recently, non-suit motion principles were rearticulated by Brown J. in *Barbagianis v Nychuk*, 2018 SKQB 266 and *Cherkas v Richardson Pioneer Ltd.*, 2020 SKQB 7, 2 BLR (6th) 42. After citing to the quote above from *Ceopro*, Brown J. stated the following in respect to approaching evidence and inferences on a non-suit motion:

> 159 As noted earlier, the evidence "as a whole" which came out during the presentation of [the Plaintiff's] case is to be considered. The entirety of the evidence, both in direct examination and cross-examination, *viva voce* and documentary, forms the basis for the assessment of [the Plaintiff] having met the requisite burden of making out a *prima facie* case and contribute to any inferences which are to be reasonably drawn at this point in time. The following points summarize the law in this area as it relates to the evidentiary basis as a whole:
>
> > • Uncontradicted evidence is to be considered and measured against the standard of whether a reasonable trier of fact could find in [the Plaintiff's] favour based on the uncontradicted evidence.

• Where the nature of the case requires the drawing of inferences of fact from other facts established by direct evidence, the evidence to be relied upon in resolving the non-suit application includes those inferences that could reasonably be drawn from the direct evidence adduced if a trier of fact chooses to accept the direct evidence as fact for the purposes of the non-suit application.

• The applicants in a non-suit application have a lesser onus than having to demonstrate the absence of "any" evidence on a material issue. The applicants need to demonstrate the absence of "sufficient" evidence, which, if left uncontradicted, could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities.

• The ruling on a non-suit application is a question of law; The determination of the credibility or believability of the evidence is a question of fact which is to be subsequently determined in the action if the non-suit application fails.

• The court is to consider the evidence which has been presented in a fashion most favourable to the plaintiffs.

• The court is to draw reasonable inferences from the evidence to determine whether, if a jury were present, that jury would be in a position to make a decision based upon the evidence adduced.

• The task involves a weighing of the evidence to determine on the whole what tendency the evidence has to establish the issue in dispute including all such inferences of fact the jury would be warranted in drawing from the direct facts they found to be proved.

• Substantive determinations are properly left as matters to be decided and determined after all the evidence is in and complete legal briefs are filed.

• Considerations of efficiency and proportionality are now also factors at play in the determination of a non-suit application as set out in the new Rules 1-3.

27. From the cases cited above, while there may be various nuances in the way the decision makers articulate the law, the overarching test on a motion for non-suit appears to be consistent and imposes a high bar for applicants. The question is whether there is evidence on record which when taken at its highest may establish, or may allow for a reasonable inference to be drawn that could establish, a *prima facie* case in respect to the allegations brought forward. Should there be any doubt as to that question, the doubt at the non-suit motion stage should be resolved in favour of the respondent to the motion, in this case Staff. In assessing the evidence, the Panel is not making any determination as to whether the allegations have been established in fact. Instead, the Panel is assessing the available evidence to determine whether it may establish a *prima face* case.

28. The burden of proof on a non-suit motion lies with the applicant, in this case Mr. Comeau. Therefore, it is Mr. Comeau that must establish that Staff failed to bring forward sufficient evidence which, if left uncontradicted, could satisfy this Panel that the allegations at issue are made out.

29. The present non-suit motion raises an additional issue as to whether it is proper for an applicant to raise a limitation period issue on a non-suit motion. The Panel will unpack and apply the applicable law as to this issue later on in this decision.

b. The Panel has Discretion to Put Applicants on a Non-Suit Motion to their Election

30. There is an issue that sometimes arises in administrative law cases, including in some of the cases cited above, as to whether the decision maker should put an applicant on a non-suit motion to her or his evidentiary election prior to deciding a non-suit motion.

31. The law suggests that while putting an applicant to her or his election has declined in usage over the years in the administrative context (and is no longer a consideration in the civil litigation context in this jurisdiction pursuant to *The Queen's Bench Rules*), the procedure is still available to this Panel pursuant to its common law power to control its own processes and procedures. Utilization of the procedure may prove beneficial when, for example, a non-suit motion is frivolous or vexatious, would not promote fairness or efficiencies, would not accord with principles of natural justice, would add undue costs to the proceedings, or would result in inordinate delay. In *Mitchell's*, the Board explained the evolution of this area of the law in its own administrative context as follows:

> 3 The former rule requiring that a party that moves for non-suit be put to an election as to whether it will call evidence has not been applicable to proceedings in the civil courts in Saskatchewan since the revision to *The Rules of Court of the Court of Queen's Bench* in 1991. The present rule states:
>
> > Rule 278A. At the close of the plaintiff's case the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the action.
>
> 14 Not long after this rule change, the Board considered its policy on motions for non-suit in the context of the special considerations necessitated by the *Act*, in *Brock v. R.W.D.S.U., Local 539* [(1992), 17 C.L.R.B.R. (2d) 152(Sask. L.R.B.)] (unreported, November 27, 1992, B. Bilson), LRB File No. 211-92. At p. 4, the Board stated:
>
> > ... We must balance the procedural flexibility required in the interest of the parties and of the promotion of the goals of The Trade Union Act, with an ability to facilitate the production of relevant information, and an attention to fairness to the parties.
>
> In that case, it was unnecessary for the Board to decide whether it would, in appropriate circumstances, rule on a non-suit motion without putting the moving party to its election. Since the decision in *Brock* , *supra*, the Board has not had the opportunity to consider the issue in detail, but collective agreement arbitrators have generally not required that the moving party be put to an election.
>
> 15 The issue has received considerable attention from the Ontario Labour Relations Board. In *L.I.U.N.A. v. Hurley Corp.*, [1992] O.L.R.B. Rep. 940 (Ont. L.R.B.), the Ontario

Board determined that it had a discretion to permit a party to bring a motion for non-suit without requiring an election. At 941, the Ontario Board stated:

> The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put the party to its election. In this regard, the Board will no doubt consider all of the circumstances, including the need for fair, efficient and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case, the moving party must make its election. To so conclude would be to fetter our discretion...

16 In *Paul G. Martel v. L.I.U.N.A., Local 493*, [1996] O.L.R.D. No. 1119 (Ont. L.R.B.) (April 4, 1996), the Ontario Board identified several factors that tribunals have considered in determining whether it is fair and reasonable to put a party to its election, including: whether permitting the non-suit without an election will either delay or expedite the proceedings; the impact of any decision in terms of the costs of the proceedings; the policy against requiring a party to respond to allegations of wrongdoing where there is no case for it to meet; whether hearing the non-suit without requiring an election would give either party an unfair or undue advantage; and, the interest in making a decision based on hearing all of the evidence. …

[emphasis added]

(See also *ATI Technologies* at para 19)

32. The Panel also notes in respect to this issue that pursuant to subsection 1.3(2) of the *Local Policy*, the Panel "may issue procedural directions or orders with respect to the application of this Policy in respect of any proceeding before it, and may impose any conditions in the direction or order as it considers appropriate." This provision provides additional support for the notion that this Panel has the power to put an applicant on a non-suit motion to her or his election.

33. With all of this in mind, the Panel is of the view that it does have the power to put an applicant to her or his election prior to deciding the motion for non-suit.

i. Mr. Comeau Will Not be Put to His Election

34. After careful consideration of the factors articulated in the cases, including *Mitchell's*, and after careful consideration of the submissions of the Parties on this issue, the Panel has decided to exercise its discretion to **not** put Mr. Comeau to an evidentiary election prior to deciding his non-suit motion. The Panel does not believe Mr. Comeau's motion is frivolous or vexatious. To the contrary, as this decision will show below, there is merit to at least part of Mr. Comeau's motion. By dismissing allegations that were not supported by evidence, the proceedings are narrowed and more focused. This will lead to efficiencies as these proceedings move forward. The Panel also does not believe that either party will gain an unfair

advantage if the motion is decided without first requiring an election. Overall, the Panel sees no compelling reason to require an election in this case.

c. What allegations in the Amended Statement of Allegations should or should not be dismissed based on non-suit principles?

i. Non-Limitation Period based Allegations

35. Beginning first with the allegations that the Parties most recently agreed should stand dismissed as there is no evidence on record to support those allegations, the Panel agrees with the Parties that there is no evidence on record to support the allegations that Mr. Comeau contravened sections 135.7(1) and 55.13 of the *Act*. These allegations are dismissed.

36. In respect to the remaining allegations, the Panel accepts the position of Mr. Comeau (except in relation to the limitation period issues as set out below), the concessions of Mr. Day on behalf of Staff in oral argument on the motion, and the concessions of Staff made through their Brief dated July 17, 2020, that there is only evidence before the Panel to establish a *prima facie* case in respect to the allegations pertaining to Pinnacle Clients 1, 11, and 20. There is simply not sufficient evidence to support allegations pertaining to any other investor as contained in the Amended Statement of Allegations. As such, moving forward, only allegations pertaining to Pinnacle Clients 1, 11, and 20 in the Amended Statement of Allegations will be in issue. As established through Mr. Comeau's non-suit motion and materials filed in support, all allegations pertaining to Pinnacle Clients 2 through 10 and 12 through 19, and Other Investors 1 through 8, as listed in the Amended Statement of Allegations, should be dismissed.

37. In respect to the allegations contained at paragraphs 11-13 of the Amended Statement of Allegations and that pertain to one instance of an alleged breach of section 33.1(1) of the *Act* (there are other instances of alleged breaches of section 33.1(1) in the Amended Statement of Allegations based on different particulars), the Panel agrees with Mr. Comeau that there is not evidence to establish a *prima facie* case in respect to these specific allegations. However, it should be made clear that Mr. Comeau did not argue that Staff failed to bring forth sufficient evidence for all allegations pertaining to section 33.1(1) as contained in the Amended Statement of Allegations, nor did he request that all such allegations be dismissed. As such, section 33.1 and the other allegations pertaining to that section as they relate to Pinnacle Clients 1, 11, and 20 remain live issues in this hearing moving forward.

38. Finally, in respect to the allegations concerning a breach of section 4.1 of *National Instrument 33-109*, after a review of the record, including the Form 33-109F4 regarding Mr. Comeau entered into evidence by Staff, the Panel is of the view that on non-suit motion principles there is sufficient evidence such that these allegations should **not** be dismissed at this stage of the proceedings. The Panel is mindful of the high bar an applicant must reach in having allegations dismissed at the non-suit motion stage and that

every reasonable inference from the available evidence is to be drawn in favour of Staff. Moreover, Mr. Comeau's position in this regard seems to hinge, at least to some extent, on his limitation period arguments, which are rejected below in part because there are ambiguities in the evidence – non-suit motion case law makes clear that when ambiguities exist in the evidence, those ambiguities should at this stage be resolved in favour of Staff. Therefore, applying these principles, the Panel rejects Mr. Comeau's position in respect to section 4.1 of *National Instrument 33-109* such that the allegations pertaining thereto will remain live issues moving forward.

ii. Mr. Comeau's Argument Regarding Limitation Periods is Dismissed Without Prejudice to His Right to Raise the Issue in Closing Submissions

39. By the time of oral argument on this motion, the parties spent the bulk of their submissions on the limitation period issue. Both parties advanced their own interpretations of section 136(2) of the *Act* and how their interpretations should be applied. However, the Panel is of the view that to dispose of the limitation period issues through this non-suit motion in the context of this case would not be wise or proper.

40. There is case law from this jurisdiction in the civil context stating that a motion for non-suit can be granted based on evidence establishing that a limitation period has expired. Brown J. in both *Barbagianis* and *Cherkas* expressly stated this and then disposed of civil allegations through a non-suit motion based on expired limitation periods (see also *Bruen v University of Calgary*, 2019 ABCA 211 [*Bruen*], a case out of Alberta). However, there is also case law from the Saskatchewan Court of Appeal in the civil context that has "routinely called into question" the wisdom of bifurcating proceedings on the basis of preliminary limitation period motions when doing so will not dispose of the entire matter (see e.g. *Saskatchewan Government Insurance v Williams*, 2011 SKCA 66 at paras 10-11 and the authorities cited therein, 371 Sask R 305).

41. In addition, the Saskatchewan Court of Appeal has stated that it can be an error to treat a limitation period as a basis for a non-suit motion as opposed to a defence on the merits (*Shultz v Simpson*, 2000 SKCA 9 at para 1). In case law from the civil litigation context, it is settled that limitation periods are substantive, as opposed to procedural, defences (see e.g. *Tolofson v Jensen*, [1994] 3 SCR 1022; see also *Chalupiak & Associates Accounting Services Inc. v Piapot First Nation*, 2018 SKQB 131 at paras 94-97 and the authorities cited therein). As such, while in both *Barbagianis* and *Cherkas* Brown J. held that limitation period issues could be considered on an application for non-suit, the law regarding limitation periods being substantive defences also seems to coincide with another principle that Brown J. and other cases have expressly acknowledged, being that "(s)ubstantive determinations are properly left as matters to be decided and determined after all the evidence is in and complete legal briefs are filed." (*Barbagianis* at para 159; *Cherkas* at para 25(h); see also *Kvello* at para 19(3) and the authorities cited therein including *Reid v. Kraus*, 2000 SKCA 32, 189 Sask. R. 122).

42. This is not to suggest that on the current state of the law, limitation period arguments can *never* be advanced or considered on a non-suit motion. *Barbagianis*, *Cherkas*, and *Bruen* have each held otherwise in contexts different than the present case. In addition, limitation period issues have been advanced and considered in the criminal context in respect to requests for a directed verdict on a motion for non-suit after the close of the Crown's case (see e.g. *R v Duzan* (1993), 105 Sask R 295 (CA) (WL) at para 9) as well as through applications to quash an information (see e.g. *R v Newton-Thomson*, 2009 ONCA 449 at para 3, 249 OAC 320). But in the Panel's view, based on the various principles in the authorities cited, when certain circumstances exist such as the evidence is not clear as to whether a limitation period has expired, there are interpretation issues that would benefit from a complete record, or the limitation period argument would bifurcate or only dispose of part of a proceeding thereby creating efficiency or fairness concerns, then the limitation period issue may well be best determined at the end of the proceedings in a decision on the merits.

43. In respect to the limitation period provision at issue on this non-suit motion, it has yet to be interpreted by a court or by a panel of the FCAA. As such, if the Panel were to resolve the limitation period issues now, it would be doing so without the benefit of a complete record and on the basis of competing and new interpretation arguments advanced by the parties. With a focus on the various authorities cited above, the Panel does not believe this would be an appropriate approach in this case all things considered.

44. The Panel also notes that the parties argued at length about the application of their interpretation of the limitation period to facts that appear to still be in dispute or, at best, to evidence that does not lead to a clear finding in favour of Mr. Comeau. As the authorities above indicate, any doubt in this regard is to be resolved *at this point* in favour of Staff.

45. With all this in mind, the Panel is of the view that Mr. Comeau's request to dispose of the allegations pertaining to Pinnacle Client 11 on the basis of an alleged expired limitation period should be dismissed without prejudice to his ability to raise the issue as a defence during closing arguments. In so holding, the work done by Mr. Comeau and his counsel in respect to the limitation period defence will not be lost. In addition, the Panel will have the benefit of a complete record and additional context to aid it in interpreting and applying for the first time the limitation period in section 136(2) of the *Act*. In short, by deciding the limitation period issue in this case at the end of the proceedings as opposed to on the present non-suit motion, principles of efficiency will not be offended, while principles of fairness and better decision making will be enhanced.

V. CONCLUSION

46. Based on the reasons above, and in accordance with those reasons, the Panel grants Mr. Comeau's motion in part. The allegations in the Amended Statement of Allegations pertaining to Pinnacle Clients 1, 11, and 20 will form the basis of the proceedings moving forward. Allegations pertaining to section 135.7(1) and 55.13 of the *Act* are dismissed as there is no evidence on record to support them. The allegations concerning section 4.1 of *National Instrument 33-109* are not dismissed and will remain in issue moving forward.

47. Mr. Comeau's argument regarding the section 136(2) limitation period is dismissed without prejudice to his ability to raise the limitation period issue as a defence.

48. This is unanimous decision of the Panel.

Dated at Regina, Saskatchewan this 4th day of February, 2021.

Howard Crofts, Chairperson

Norman Halldorson, Panel Member

Peter Carton, Panel Member