**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)

**DECISION ON THE MERITS**

**Hearing dates:** March 2, 3, 5, 6, 9, 10, 11, 12, June 4, August 25, September 3, October 30, 2020, and March 22, 23, 24, 25 and April 8, 2021

**Panel:** Howard Crofts (Panel Chairperson)
Norman Halldorson (Panel Member)
Peter Carton (Panel Member)

(collectively referred to as the "Panel")

**Appearances:** Sonne Udemgba and 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:** December 7, 2021

## I. INTRODUCTION

1. This decision concerns the merits of the allegations against Jack Louis Comeau ("Comeau"). These allegations were initially brought by Staff through the Statement of Allegations dated June 24, 2018. These allegations were then amended and replaced with the Amended Statement of Allegations dated August 30, 2019 ("Amended Statement of Allegations").

2. An in-person hearing regarding the allegations commenced on March 2, 2020; however, on March 17, 2020, the in-person hearing needed to be adjourned *sine die* due to the onset of the COVID-19 pandemic. As various alternative hearing formats were implemented by the Financial and Consumer Affairs Authority of Saskatchewan ("FCAA") in the months that followed, including virtual hearings through WebEx, the hearing resumed.

3. What follows is a unanimous decision of the Panel.

## II. BACKGROUND

### a. Background from Previous Decisions in this Matter

4. A good portion of the background to this merits decision has been discussed at length and set out in previous decisions in this matter. These decisions resulted from numerous applications that were brought by both Staff and Comeau over the course of the proceedings. The entirety of this background will not be reproduced in this decision but has been taken into account. For this decision, the Panel will focus mostly on background that is necessary to dispose of the remaining issues in dispute.

5. As a brief summary, the following applications have been disposed of to date:

- At the commencement of the hearing on March 2, 2020, the Panel was presented with an application to approve a settlement agreement between Staff and Pinnacle Property Finance Ltd. The application was unopposed, and the Panel approved it.

- On March 2, 2020, the same day as the application to approve the settlement agreement, Staff brought a Motion to Adjourn the proceedings. After considering the arguments by the parties and the applicable provisions of *Saskatchewan Policy Statement 12-602: Procedure for Hearings and Reviews* [*Local Policy*], the application was denied, and the hearing was directed to proceed as scheduled. However, Staff failed to file a witness list as required by the *Local Policy*, and so on March 3, 2020, Staff brought an application for leave to file a witness list and call various witnesses. That application was granted in part, with Staff being permitted to call

three witnesses referred to herein as Pinnacle Client 1, Pinnacle Client 11, and Pinnacle Client 20.

- On March 10, 2020, Staff brought a second application for leave to call witnesses. That application was granted in part, with Staff being permitted to call a legal assistant in the Securities Division, but not Investigator Foster as the Panel already denied leave to call this witness in its decision on Staff's first application for leave to call witnesses.

- After an issue was identified with a transcript, on May 25, 2020, Comeau brought an application to adopt a revised transcript which remedied an error in the transcript. The Panel ordered that the revised transcript be adopted and utilized moving forward.

- On August 18, 2020, an application was brought that considered the issue of whether Staff had closed their case and, as a result, would not be permitted to call further evidence in chief. The Panel's written decision held that Staff had closed their case on March 12, 2020.

- With the issue of whether Staff closed their case being resolved, on March 12, 2020, Comeau filed a motion for non-suit that sought to dismiss certain allegations on the basis that Staff led no or insufficient evidence to establish the alleged contraventions, or on the basis that a limitation period had expired. The Panel's decision granted Comeau's motion in part by dismissing the allegations to which Staff failed to provide sufficient evidence, while rejecting Comeau's limitation period arguments on the basis that they were premature and should be dealt with at the end of the hearing.

**b. Background on Grasswood Property Finance Ltd. & Grasswood Property Estates Ltd.**

6. In May 2009, Marty Fletcher ("Fletcher"), CEO of Urban Elements Development Corp., a Calgary based property developer, embarked on the acquisition of a 269.64 acre parcel of agricultural land three kilometers south of the city of Saskatoon, SK, in the Rural Municipality of Corman Park. The property was acquired by Grasswood Property Estates Ltd. ("Grasswood Property"), an associated company under Fletcher's control. The end goal was a residential real estate development to be named Grasswood Estates. The development and marketing aspects of the project were expected to take around 24 months to complete.

7. An important part of the project's process included the raising of funds by selling bonds ("Grasswood Bonds") to investors. In May 2009, by way of an offering memorandum, Grasswood Property

Finance Ltd. ("Grasswood Finance") embarked on raising $8,000,000 for the acquisition and development of the Grasswood Estates project land through the issuance of the following Grasswood Bonds:

a. Class A, $1,000 bonds bearing interest at 15%, minimum investment of $10,000 with quarterly interest payments of $375.00 per $10,000 investment;

b. Class B bonds bearing interest at 17%, minimum investment of $75,000 with quarterly interest payments of $3,187.50 per $75,000 investment.

8. After deducting selling commissions of 10% as well as estimated offering and financing costs, the net proceeds of $7,082,500 were to be loaned to Grasswood Property and used for the purchase and development of the land. Paragraph 13 of the offering memorandum included the statement "[Grasswood Finance] intends to use the net proceeds as stated. The board of directors of [Grasswood Finance] will reallocate the proceeds only for sound business reasons".

9. The offering memorandum document dated May 26, 2009 for the sale and issuance of Grasswood Bonds included, amongst others, the following statements:

> [**Purchaser's Rights** page 1] You have 2 business days to cancel your agreement to purchase these Securities.
>
> [**Obligations Unsecured** page 19] [Grasswood Finance's] debt obligations represented by the Bonds are unsecured obligations and will rank *pari passu* amongst themselves and with all other unsecured and unsubordinated obligations of [Grasswood Finance] except for such preferences as provided for under applicable law.
>
> [**Limited Recourse** page 19] Recourse under the Bonds will be limited to the principal sum of the bonds plus any unpaid and outstanding accrued interest thereon. There is no additional recourse by the bondholder for any deficiency in value of the Bonds in the event of non-payment or default by [Grasswood Finance] of redemption of the bonds at maturity.
>
> [**Investment Risk** page 22] The [Grasswood Property] Loan will be secured by security instruments including a mortgage registered against the title to the Lands… In the event that [Grasswood Property] defaults in its obligations under the [Grasswood Property] Loan… The assets of [Grasswood Property] may not have a sufficient value to satisfy any outstanding debt obligations to [Grasswood Finance] and, consequently, in such event, [Grasswood Finance] will not have sufficient funds to satisfy its debt obligations under the terms of the Bonds.
>
> [**Default on Indebtedness** page 24] If [Grasswood Property] defaults in the repayment of any indebtedness, the creditors holding such indebtedness, including [Grasswood Finance], will be entitled to exercise available legal remedies against [Grasswood Property] including recourse against property of [Grasswood Property] pledged as collateral. There is no assurance that there will be assets available to recover any of the [Grasswood Property] Loan and, consequently there can be no assurance that funds will be available to repay the indebtedness under the Bonds.

10. As indicated in the May 26, 2009 offering memorandum, the funds that were loaned to Grasswood Property from Grasswood Finance were secured by an $8,000,000 mortgage. The mortgage was placed on the title of the 269.64 acre parcel of land owned by Grasswood Property.

11. The Grasswood Finance mortgage documents included, amongst other things, the following terms:

a. The mortgage agreement was effective May 15, 2009.

b. The principal amount advanced was $8,000,000.

c. The principal amount and any unpaid interest was due June 15, 2011.

12. As of February 25, 2021, the $8,000,000 Grasswood Finance mortgage was still showing as being registered to the title on the land.

13. The Grasswood Finance mortgage document did mention the Grasswood Bonds, but there was no mention of the land providing security directly to bondholders. There was also no mention of bondholders owning any land by virtue of them purchasing bonds.

14. As for interest payments, investors were paid quarterly interest payments on the Grasswood Bonds until the payments stopped in April 2014.

**c. Background in respect to Comeau**

15. Comeau graduated from the University of Saskatchewan in 1981 with a Bachelor of Science. He worked in the agricultural sector until around 1990 when he moved into the financial services industry as an advisor. He began his financial services career in the mutual fund business, mainly selling life insurance. In 1996, he moved his business to Sentinel Financial and Sentinel Life Management ("Sentinel). Then in 2012, he moved his business to Pinnacle Wealth Brokers ("Pinnacle"). As a result of some regulatory issues he experienced near the end of his time at Sentinel, when he applied to the FCAA to become registered with Pinnacle, the FCAA approved his registration, but required him to be under some supervision.

16. Comeau was a very experienced advisor holding many industry credentials including Chartered Financial Planner, Registered Financial Planner, and Chartered Financial Consultant. He completed various courses, including the Canadian Securities Course, and throughout his career engaged in continuing professional development. He was also a member of several industry associations, such as the

Financial Advisors Association of Canada, the Financial Planning Standards Council, the National Exempt Market Association, and Advocis.

17. Eventually, Comeau became a branch manager at Pinnacle's Saskatoon branch and was a contributor to Pinnacle's due diligence processes. Comeau had lots of experience conducting due diligence on financial products and on assessing suitability of investments for his clients.

18. Through a brother-in-law, and prior to joining Pinnacle, Comeau was introduced to Fletcher, the land developer that put together the Grasswood Estates project. Comeau familiarized himself with the Grasswood Estate investment opportunity, including by conducting his own due diligence on Grasswood Bonds. Comeau hired a lawyer to review and provide advice on the Grasswood Bonds offering, reviewed the mortgage documents to confirm whether there was a mortgage on the investment, and engaged in ongoing discussions with management of the Grasswood Estates project. Comeau also purchased Grasswood Bonds through his holding company and was thus an investor in the Grasswood Estates project. At the time of the hearing, Comeau still held his investments in the Grasswood Estates project.

19. The Grasswood Bonds investment was not a product that Pinnacle offered to its clients. When Comeau joined Pinnacle, he was given permission by Pinnacle to continue marketing and selling Grasswood Bonds. However, Pinnacle also required Comeau to inform clients that the Grasswood Bonds were not being made available through Pinnacle and would not appear in correspondence or statements from Pinnacle. In addition, Comeau informed clients that he was not being paid in respect to Grasswood Bonds. Comeau had clients acknowledge these conditions by getting them to sign a Disclaimer / Conflict of Interest form that set out these conditions. In addition, the form included the phrase that Comeau "was not benefitting in any way, including having any equity position or ownership in [the Grasswood Bonds] investment opportunity."

20. When clients of Comeau chose to invest in Grasswood Bonds, there was paperwork that needed to be filled out and completed. The subscription agreement for Grasswood Bonds included a Risk Acknowledgment form. In addition to setting out various risks regarding the investment itself, the form included the phrase "the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me…".

21. Comeau provided advice on, and sold investments to, various investors over the years. The investments included alternative investments. Three of his clients were Pinnacle Client 1, Pinnacle Client 11, and Pinnacle Client 20.

### d. Remaining Allegations against Comeau

22. As already noted, as a result of our decision on the non-suit motion, various allegations in this matter have already been dismissed. This decision focuses on the allegations in the Amended Statement of Allegations that remain live. These allegations relate to issues regarding Comeau's registration and his dealings with Pinnacle Clients 1, 11, and 20. These allegations state that Comeau:

i. failed to deal with clients fairly, honestly, and in good faith contrary to subsection 33.1(1) of *The Securities Act, 1988*, SS 1988-89, c S-42.1 [*Act*];

ii. made materially misleading or untrue statements that would reasonably be expected to have a significant effect on the market price or value of a security contrary to subsection 55.11(1) of the *Act*; and

iii. acted as a dealer and an advisor while not being registered to do so and while not acting on behalf of a registered dealer or adviser when he facilitated purchases of Grasswood Bonds contrary to subsection 27(2)(a) and (b) of the *Act*;

iv. failed to keep up to date information he previously submitted to the FCAA regarding his business activities contrary to section 4.1 of *National Instrument 33-109* [*NI 33-109*].

### e. Allegations against Grasswood Property Finance Ltd.

23. There are allegations in the Amended Statement of Allegations relating to another named respondent, Grasswood Finance, that will also be dealt with in this decision. No one appeared for Grasswood Finance during these proceedings. The allegations state that Grasswood Finance distributed securities without filing a preliminary prospectus with the FCAA in respect to those securities contrary to subsection 58(1) of the *Act*.

### f. Witnesses

24. Throughout the hearing, the Panel heard from numerous witnesses. Staff called three witnesses – Pinnacle Client 1, Pinnacle Client 11, and Pinnacle Client 20 – that provided testimony in respect to the allegations noted in subparagraph 22(i), (ii) and (iii) above.

25. In addition, Staff called one of their legal assistants who provided evidence in respect to the allegation noted in subparagraphs 22(iv) above.

26. Comeau provided testimony in defense against the above noted allegations. In addition, Comeau called his executive assistant and she also provided testimony in this matter.

27. The testimony provided by the above witnesses will be discussed below as the Panel analyses the various allegations.

## III. DOES THE SECTION 136(2) LIMITATION PERIOD APPLY TO THE ALLEGATIONS CONCERNING PINNACLE CLIENT 11?

28. The *Act* contains a six year limitation period on the ability of proceedings to be commenced before the FCAA. The six year time period starts to run from the date of the last material event that the proceedings are based upon. Section 136(2) of the *Act* reads:

> 136(2) Notwithstanding *The Limitations Act*, no proceedings pursuant to this Act are to be commenced before the Commission later than six years from the date of the occurrence of the last material event on which the proceedings are based.

29. Comeau raised limitation period arguments through his non-suit motion earlier in these proceedings. However, the Panel held that the arguments were premature and, in the context of this case, were best left for closing submissions. In line with that direction, Comeau raised his limitation period issues during his closing submissions as a defense to allegations pertaining to Pinnacle Client 11.

30. The Panel will now consider and dispose of this limitation period issue.

### a. Background to Pinnacle Client 11's Purchase of Grasswood Bonds

31. Pinnacle Client 11 testified that between January 15, 2010 and April 12, 2013, he and his wife made four separate investments totaling $435,000 in Grasswood Bonds. Pinnacle Client 11 made his last investment in Grasswood Bonds in the amount of $60,000 on April 12, 2013.

32. Comeau provided advice on the Grasswood Bonds investment and facilitated the various transactions through subscription agreements. The allegations pertaining to these transactions, including the last investment on April 12, 2013, were first raised by Staff in the Amended Statement of Allegations dated August 30, 2019.

33. Evidence submitted during the hearing, in particular the subscription agreements signed by Pinnacle Client 11, showed that the subscription agreements included wording that the Grasswood Bonds were unsecured obligations in respect to Grasswood Finance. In addition, there was wording indicating

that the securities were not reviewed by any securities commission or similar regulator, were not insured by any government or insurance company, involved risks, contained restrictions on the subscriber's ability to resell the securities, and that it was the subscriber's responsibility to inform him or herself about those restrictions before reselling the securities.

34. Like other investors, Pinnacle Client 11 received various "Investor Update" letters between March 2014 and June 27, 2018 that provided information on matters like delays in the Grasswood Estates project, refinancing initiatives including obtaining a construction mortgage and construction financing, how sales proceedings would service construction loans and other expenses, and how there would not likely be enough monies from the sales proceeds to pay bondholders. One of the letters dated March 21, 2017, warned that it was not known at that time when investor bond redemptions could begin. While Comeau forwarded these letters to Pinnacle Client 11 and other investors, the information contained in the letters came from Darren Hagan of Grasswood Property, not Comeau.

35. Pinnacle Client 11 testified that after he made his final investment in Grasswood Bonds on April 12, 2013, he continued to communicate with Comeau from time to time over the years in respect to the investment, including when interest payments stopped being paid. He testified he would ask Comeau about the investment and why he was not getting paid interest payments and Comeau would provide explanations and reassurances. However, Pinnacle Client 11 testified that after the interest payments stopped being paid, he never received any further interest payments, nor did he receive his money back in respect to the Grasswood Bonds.

**b. Positions of the Parties**

36. Comeau argues that the last material event upon which the proceedings regarding Pinnacle Client 11 could be based is the date of Pinnacle Client 11's last investment in Grasswood Bonds, being April 12, 2013. If that is accepted, then the six year limitation period would have expired six years later on April 13, 2019. Since the Amended Statement of Allegations was issued after this date (on August 30, 2019), Comeau submits that the allegations were brought outside the six year limitation period and are statute barred.

37. Staff counters Comeau's submissions with three main arguments:

- the concept of discoverability can and should be read into section 136(2) of the *Act* such that the limitation period should only begin to run after Pinnacle Client 11 became aware that there were issues with interest payments on the Grasswood Bonds – with that date being sometime in April 2014 – which is well within the limitation period;

- the last material event in respect to the allegations concerning Pinnacle Client 11 was when issues arose regarding interest payments in April 2014, which again is well within the limitation period; and

- there was a "continuing contravention" of the *Act* resulting from the various communications that took place between Comeau and Pinnacle Client 11 after April 12, 2013 regarding the Grasswood Bonds, which results in the allegations being brought within the limitation period.

38. In the Panel's respectful view, each of Staff's submissions are without merit. The submissions will be dealt with in turn.

**c. The Allegations concerning Pinnacle Client 11 are Statute Barred**

**i. Discoverability Cannot Be Read into Subsection 136(2)**

39. Very similar arguments regarding discoverability being read into a statutory limitation period were advanced in a case out of British Columbia called *British Columbia (Securities Commission) v Bapty*, 2006 BCSC 638, 52 BCLR (4th) 372 [*Bapty*]. One of the respondents in the securities-based matter brought an application directly to the British Columbia Superior Court arguing that the limitation period pursuant to British Columbia's securities legislation, which is worded identical to the limitation period in the *Act*, had expired. The British Columbia Securities Commission opposed the application, arguing that the discoverability principle applied, and the facts established a continuing contravention situation (the same arguments made by Staff in the present case).

40. In respect to the discoverability issue, the Commission argued that the limitation period could not begin to run until after the Commission gained knowledge of the matter. After reviewing the history of the limitation period provision, including the fact that in 1989 the British Columbia Legislature amended the provision to remove the knowledge component (i.e., the Legislature explicitly removed the discoverability aspect of the limitation period), the Court rejected the Commission's position (at paras 22-24). The Court cited numerous authorities from various jurisdictions in support of the proposition that in order for the discoverability principle to be read into a regulatory statute's limitation period regarding enforcement proceedings, there must exist "clear and express language" of the Legislature's intention to include discoverability (at para 25). The Court wrote:

> 22 In attempting to meet the burden of showing that the proceeding was commenced prior to the expiration of the limitation period, the Commission submits that the running of the limitation period was postponed until 2001 when the Commission became aware of the alleged fraudulent activities of Mr. Bapty and RBCM when complaints were made by Mr. Labrick and Ms. Labrick. The "discoverability principle" provides that the running of time

under a limitation period may be "postponed" until a potential claimant might reasonably discover the events which produce a loss. The postponement of a limitation period is based upon the common law notion of discoverability but the Supreme Court of Canada has held that the concept of discoverability is only an interpretative tool and each statute must be examined to determine whether this concept can be "read into" the particular statute: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) at para. 37. In this regard, see also *R. v. Pickles* (2004), 237 D.L.R. (4th) 568 (Ont. C.A.) at para. 13 and *410727 B.C. Ltd. v. Dayhu Investments Ltd.* (2004), 30 B.C.L.R. (4th) 157 (B.C. C.A.) at para. 34.

23 **The history and text of s. 159 of the *Act* make it clear that the Legislature intended to exclude the discoverability principle as the amendments in 1989 explicitly remove the element of the "knowledge" of the Commission as triggering the limitation period. At the same time, the Legislature did not amend s. 140 of the *Act* to remove this element.** Section of 140 of the *Act* states in part:

> Unless otherwise provided in this Act or in the regulations, an action to enforce a civil remedy created by this Part or by the regulations must not be commenced ...
>
> > (b) in the case of an action other than for a rescission, more than the earlier of
> >
> > > (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
> > >
> > > (ii) 3 years after the date of the transaction that gave rise to the cause of action.

24 **I am satisfied that the principle of *expressio unius est exclusio alterius* applies when interpreting this question of the intent of the Legislature when the amendments were made to what is now s. 159 of the *Act*. Accordingly, the exclusion of discoverability in s. 159 of the *Act* while, at the same time, retaining the concept of discoverability in s. 140 of the *Act* allows me to conclude that it was the intent of the Legislature to remove the concept of discoverability when what is now s. 159 of the *Act* was enacted.** In this regard, see the decisions in *R. v. Biedler* (1974), [1975] 3 W.W.R. 381 (B.C. S.C.); *Fernie (City) v. Bossio* (2004), 3 M.P.L.R. (4th) 200 (B.C. S.C.); and *Dennis, Re*, 2005 BCSECCOM 65 (B.C. Securities Comm.).

25 **There must be clear and express language for the discoverability principle to be read into a regulatory statute thereby postponing the limitation period for enforcement proceedings. As s. 159 of the *Act* does not contain such clear and express language to allow for the limitation period to be postponed, there can be no postponement**: *R. v. Pickles*, *supra*, at para. 13; *Ontario (Securities Commission) v. Reid* (1994), 5 C.C.L.S. 1 (Ont. Gen. Div.) at paras. 22-3; *R. v. Sentes* (2003), 175 Man. R. (2d) 84 (Man. Prov. Ct.) at para. 42; *R. v. Fingold* (1999), 45 B.L.R. (2d) 261 (Ont. Gen. Div.) at paras. 33, 36 and 60-2; and *Romashenko v. Real Estate Council of British Columbia* (2000), 77 B.C.L.R. (3d) 237 (B.C. C.A.) at para. 17.

[emphasis added]

(See also *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at para 28, [2013] 3 SCR 372 where the Supreme Court of Canada acknowledged the holding in *Bapty* regarding discoverability being excluded and did not disagree with it).

41. More recently in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, the Supreme Court of Canada discussed the discoverability principle in the context of a class action based on a statutory cause of action found in the *Competition Act*, RSC 1985, c C-34. As was also noted by the Court in *Bapty*, the Supreme Court of Canada reiterated that the discoverability principle is not universally applicable to all limitation periods but is instead a rule of construction to be used in interpreting limitation periods. In being a rule of construction, it can be ousted by clear legislative language. (at paras 31-41)

42. Turning to the subsection 136(2) of the *Act*, its history mirrors in substance that of the limitation period in British Columbia's securities legislation as discussed in *Bapty*. In 1995, the Saskatchewan Legislature chose to amend the *Act* to *remove* the knowledge element from subsection 136(2). In other words, the Legislature chose to oust discoverability. Prior to 1995, subsection 136(2) read:

> 136(2) No proceedings pursuant to this Act are to be commenced before the Commission more than five years after the facts on which the proceedings are based **first came to the <u>knowledge</u> of the Commission**.
>
> [emphasis added]

43. In addition, and again very similar to the situation in *Bapty*, the *Act* contains another limitation period that, unlike subsection 136(2), expressly incorporates discoverability through specific wording. Subsection 147(b)(i) contains a one year limitation period that is contingent upon the plaintiff first gaining *knowledge* of the facts that give rise to the cause of action at issue. The Legislature could have chosen to amend this limitation period as well to remove the knowledge component but has not. As was the case in *Bapty*, it is the Panel's view that the Saskatchewan Legislature's decision to amend subsection 136(2) to remove the knowledge component, while at the same time deciding to not amend subsection 147(b)(i) in order to retain the knowledge component, leads the conclusion that the Legislature intended for discoverability to be excluded from subsection 136(2).

44. For all the reasons above, Staff's position that discoverability can and should be read into subsection 136(2) is without merit.

#### ii. Last Material Event Occurred on April 12, 2013 – No Continuing Contravention

45. The concepts of "last material event" and "continuing contravention" are related. There are cases that have explored and interpreted both concepts in respect to limitation periods, including in the securities context and in respect to near identical limitation periods as subsection 136(2). We will review some of those cases and take helpful guidance from them.

46. We can begin with an Ontario securities case called *Re Boyle*, 2006 LNONOSC 359. There, the respondents brought an application to have the proceedings brought against them dismissed on the basis that a limitation period worded near identical to subsection 136(2) of the *Act* had expired. In the Statement of Allegations, staff alleged that the respondents engaged in an improper and abusive course of conduct involving unregistered trading of securities. The transactions at issue were completed more than six years prior to the Statement of Allegations being issued; however, the respondents received payment of some proceeds from the transactions from a trust account controlled by one of the respondents at times within the limitation period.

47. Staff in the case argued that the payments occurring within the limitation period were part of the course of conduct of the respondents such that the last material event fell within the limitation period. The respondents argued that the last material event occurred when the transactions were completed, which occurred outside the limitation period.

48. In analyzing the phrase "last event on which the proceeding is based"[1], the Commission noted that the event must be both material and significant to the underlying allegation. The event must go further than simply being part of the evidence that shows the purpose behind an action or the reason for the wrongdoing at issue; instead, it "must be integral to the wrongdoing" (at para 50).

49. The Commission ultimately held that the matter was statute barred as the payment of proceeds and other acts alleged by Staff to fall within the limitation period and be part of the course of conduct were not integral to the wrongdoing and did not establish any separate act of wrongdoing. The law followed by the Commission was set out in this way:

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[1] One may note that subsection 136(2) of the *Act* uses the language "last *material* event" [emphasis added], but it is clear from the reasons in *Re Boyle* that materiality played an important role in the analysis. In our view, in light of the case law, there is no substantive difference between "last event" and "last material event" as those phrases exist in Ontario and Saskatchewan's limitation periods.

46 The purposes of limitation periods are to provide certainty to ensure that the evidence available for a proceeding does not deteriorate or disappear with the passage of time, to ensure that public resources are spent on hearings that can be properly adjudicated, and to ensure that matters are adjudicated in accordance with standards applicable at the time that the events in issue actually occurred (see G. Mew, *The Law of Limitations*, 2nd ed. Markham, Ont.: LexisNexis, 2004 at 12-13).

47 In *Heidary, Re* cited above at paragraphs 20-22 of the decision, the Commission said:

> [I]n determining what constitutes "the occurrence of the last event on which the proceeding is based", it will normally be necessary to look at the course of conduct of the respondent, as alleged by Staff and proved in evidence, and to determine just what is the last event in the course of conduct alleged and proved.
>
> When the first breach occurred in a series of breaches of Ontario securities law is not, as argued by the Applicants, the touchstone. Nor, if some breaches in a series of breaches occurred before, and some during, the limitation period, is it appropriate to proceed only with respect to those breaches which occurred during the limitation period. Indeed, some or all of the "events" alleged and proved may not, as we have said, be breaches of Ontario securities law at all.
>
> Rather, "the last event on which the proceeding is based" referred to in section 129.1 of the Act is the last event in the series of events which form the course of conduct on the basis of which subsection 127(1) sanctions are requested by Staff. (Emphasis added)

48 The Commission in *Heidary, Re* did not define "course of conduct". However, "course of conduct" is used as a legal expression in other jurisdictions and has been defined to include three elements: (i) a pattern of conduct composed of a series of acts, (ii) over a period of time, (iii) evidencing a continuity of purpose. A continuity of purpose requires that the subsequent acts be similar to the original act and in line with a person's original intent (See *People v. Payton*, 612 N.Y.S.2d 815 (U.S. N.Y. City Ct. 1994)).

49 The Statement of Allegations in the "overview" section makes it clear that the primary purpose of the respondents' alleged abuse of registration and distribution requirements of the Act was to create tradeable securities for sale to the public. Events alleged to have occurred after August 5, 1999 must be analysed in light of this alleged purpose.

50 The words "last event on which the proceeding is based" in section 129.1 of the Act suggest that, to include in a proceeding events occurring before a limitation date, an event that occurred after the limitation date must be related in a significant way to those events. The event must be a material element of the allegation of wrongdoing in the Statement of Allegations and not a mere fact not constituting a material element of such wrongdoing. In other words, a subsequent event, such as the movement of moneys after the limitation

> date, needs to be more than part of the evidence, showing purpose, or reasons for the wrongdoing, or rewards, or identifying actors. It must be integral to the wrongdoing.
>
> 51 In a section 129.1 challenge, the Commission needs to distinguish between allegations in a Statement of Allegations which are of fact and those which are of wrongdoing, and then needs to determine if an alleged event that is a material element of an allegation of wrongdoing occurred after the limitation date.
>
> ...
>
> 54 If a subsequent isolated event is alleged in a Statement of Allegations to constitute a breach of the Act, but it is not an integral element of the wrongdoing relating to events prior to the limitation period, only the allegation based on the isolated event would survive a section 129.1 challenge.

50. In *Bapty*, the Court spent time discussing the concept of a "continuing contravention" and noted its equivalency to other phrases including a "continuing course of conduct". The Court stated that when a matter involves a continuing contravention, the limitation period does not begin to run until after conduct forming the breach has "run its course" (at para 36). In such situations, while some of the conduct that is part of a single transaction may fall outside the limitation period, other conduct necessary to complete the transaction can fall within the limitation period resulting in the transaction not being statute barred. The Court, in citing and quoting numerous authorities, set out the law as follows:

> 36 … **A "continuing contravention", a "continuing violation", a "continuing offence", or a "continuing course of conduct" results in the commission of such an offence not being complete until the conduct has run its course. These terms are most often used to describe a succession of separate illegal acts of the same character which, in their entirety, make up a single, continuing transaction**: *Manitoba v. Manitoba (Human Rights Commission)* (1983), 150 D.L.R. (3d) 524 (Man. Q.B.) at pp. 533-4; *Lynch v. British Columbia (Human Rights Commission)*, [2000] B.C.J. No. 1999 (B.C. S.C.) at para. 36; *O'Hara v. British Columbia (Human Rights Commission)*, [2002] B.C.J. No. 887 (B.C. S.C.) at para. 18; *Matheson v. Prince Edward Island (Human Rights Commission)* (2001), 15 C.C.E.L. (3d) 128 (P.E.I. T.D.) at para. 21; *Toussie v. U.S.*, 397 U.S. 112 (U.S. N.Y. 1970) at p. 115; and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (U.S. Va. 1982) at pp. 380-1. **Where there is a finding that there is a continuing contravention, the limitation period does not begin until the entire "transaction" is complete and discrete activities that occur outside of the limitation period are not statute-barred if they form part of the same transaction as events falling within the limitation period**: *Dennis, Re*, 2005 BCSECCOM 65 (B.C. Securities Comm.) at paras. 23 and 30.
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> 37 In *R. v. Rutherford* (1990), 75 C.R. (3d) 230 (Ont. C.A.), Grange J.A. on behalf of the majority dealt with a conviction under the *Power Corporation Act*, R.S.O. 1980, c. 384 and an electrical installation where the installer had neglected to comply with the regulations when he installed a 100 ampere service with less than a 24 circuit panelboard. The question was whether the limitation period started to run when the installation was made

or whether there was a continuing contravention. In dealing with what was a continuing offence, Grange J.A. stated:

> It is perhaps not always easy to determine what is and what is not a continuing offence. A helpful definition is that of the Supreme Court of Victoria in *R. v. Industrial Appeals* Court, [1965] V.R. 615. There, O'Bryan and Gillard JJ. observed at p. 620:
>
> > A continuous or continuing offence is a concept well known in the criminal law and is often used to describe two different kinds of crime. There is the crime which is constituted by conduct which goes on from day to day and which constitutes a separate and distinct offence each day the conduct continues. There is, on the other hand, the kind of conduct, generally of a passive character, which consists in the failure to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed.
>
> The offences here are clearly not of the first type. Nor do I think they are of the second. The duty imposed on this appellant is not a continuing one. There is nothing further he has to do. If he were obliged to remit money to a government authority (see *R. v. Sakellis*, [1970] 1 O.R. 720 (C.A.)), or failed to make payment of wages (as in *R. v. Industrial Appeals* Court, supra, and *Dressler v. Tallman Gravel and Sand Supply (No. 2)*, [1963] 2 C.C.C. 25 (Man. C.A.)), or to file income tax returns (see *R. v. Donen*, [1925] 1 D.L.R. 1141 (Man. C.A.)) the offence might well be considered continuing because he continued to fail to do what was required of him. As Smith J. put it in a concurring opinion in *R. v. Industrial Appeals* Court, supra, at p. 623:
>
> > The distinction is between, on the one hand, an offence which, once committed, is complete and concluded and exists only in the past, and, on the other hand, an offence constituted by a continuing breach of a duty to take action to put an end to a forbidden state of affairs, .... It is considerably easier to find a continuing offence where the statute provides for a penalty for every day that the corrective work is not done or the offending activity continues to be done. (at pp. 235-6)

[emphasis added]

51. After finding no continuing contravention in the case and noting that the Commission did not allege a continuing contravention in its petition against the respondent, the Court went on to draw a distinction between continuing contraventions and "'continuing ill-effects' of a past illegal act" (at para 40). The former can impact when a limitation period begins to run from, while the latter cannot. The Court stated:

> 40 The concept of a "continuing contravention" must be contrasted with the concept of "continuing ill-effects" of a past illegal act. The latter cannot extend a limitation period indefinitely as the limitation period is triggered by the completion of the offence even though the ongoing effects arising from the original breach may continue: *Rutherford*, *supra*; *Lynch v. British Columbia (Human Rights Commission)*, [2000] B.C.J. No. 1999 (B.C. S.C.) at para. 36; *O'Hara v. British Columbia (Human Rights Commission)*, [2002] B.C.J. No. 887 (B.C. S.C.) at para. 18 aff'd [2003] B.C.J. No. 709 (B.C. C.A.) at para. 25; *Matheson v. Prince Edward Island (Human Rights Commission)* (2001), 15 C.C.E.L. (3d) 128 (P.E.I. T.D.) at para. 22; and *Manitoba v. Manitoba (Human Rights Commission)* (1983), 150 D.L.R. (3d) 524 (Man. Q.B.) at pp. 533-4 aff'd (1983), 2 D.L.R. (4th) 759 (Man. C.A.). In *Lynch*, *supra*, Hutchinson J. cited with approval the following passage from *Manitoba (Human Rights Commission)*, *supra*, where Philip J.A. on behalf of the Court stated:
>
>> What emerges from all of the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions, discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the Act. To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences. (at p. 764)

(See also *Re Wireless Wizard*, 2015 BCSECCOM 100 at paras 56-74 [*Re Wireless Wizard*] and the authorities cited therein and *Re Williams*, 2016 BCSECCOM 18 at paras 234-48).

52. We should emphasize that in numerous cases in the securities context where a limitation period has been found to have expired and a continuing contravention argument was rejected, the decision makers specifically pointed out that the prosecuting party had failed to raise a continuing contravention or course of conduct in the commencement document (*Re Wireless Wizard* at para 74; *Bapty* at para 38). This is also the situation in the present case.

53. With an eye to the Amended Statement of Allegations, if there was a course of conduct in respect to Comeau's interactions with Pinnacle Client 11, looking at the evidence in the most favourable light to Staff it would have had to be between 2010 and April 12, 2013. From the evidence, it is during this timeline that the conduct alleged in the Amended Statement of Allegations took place. It was throughout this timeline that Comeau advised Pinnacle Client 11 in respect to Grasswood Bonds and Pinnacle Client 11 made four investments in Grasswood Bonds in light of that advice. However, this entire timeline, and consequently the entire course of conduct, falls outside the six year limitation period. No conduct alleged and supported by the evidence establishes a continuing course of conduct past April 12, 2013.

54. In line with the authorities cited above, we do not accept the communications that took place between Pinnacle Client 11 and Comeau after April 12, 2013 in respect to issues with payments on the Grasswood Bonds establishes a continuing contravention. These communications were not a significant part of, nor were they integral to, the wrongdoing alleged. That wrongdoing focuses on Comeau's conduct surrounding, leading up to, and ultimately concluding with Pinnacle Client 11's investments in Grasswood Bonds, while the communications pertain to issues with the performance of the investment over a year later. Moreover, there are no allegations in the Amended Statement of Allegations stating that Comeau made representations regarding the Grasswood Bonds to Pinnacle Client 11 after April 12, 2013 when the subscription agreements were signed that would have formed part of any course of conduct related to those underlying transactions.

55. In the Panel's respectful view, the last material event upon which the proceedings related to Pinnacle Client 11 are based is the date of Pinnacle Client 11's final investment in Grasswood Bonds. That date is April 12, 2013. Since the proceedings were commenced over six years from April 12, 2013 (the commencement date again being August 30, 2019), the proceedings were commenced over 4 months outside the six year limitation period and are consequently statute barred.

## IV. ANALYSIS OF THE ALLEGATIONS

56. The rest of this decision will focus on the remaining allegations. The Panel will begin with the allegations pertaining to Comeau's dealings with Pinnacle Client 1 and Pinnacle Client 20. After this, the allegations pertaining to subsection 27(2) of the *Act* and section 4.1 of *NI-31-109* will be disposed of. Finally, the Panel will consider the allegations against Grasswood Finance.

### a. Comeau's Dealings with Pinnacle Client 1 and Related Allegations

#### i. Testimony of Pinnacle Client 1 and Related Evidence

52. Pinnacle Client 1 testified in these proceedings. During examination in chief, his version of events alongside other documentary evidence went as follows:

a. After graduating in 1992 with an economics degree, Pinnacle Client 1 met Comeau in the mid-1990's when he and Comeau worked in the securities industry together at Sentinel.

b. While at Sentinel, Pinnacle Client 1 began taking the Canadian Securities and Investment course and the Chartered Financial Planner course; however, he did not complete either course because he decided that the securities industry was not his forte and he left after a few months.

c. After working at other types of employment, Pinnacle Client 1 and his wife owned and operated a business in Swift Current until they sold it in 2012 for $3,000,000.

d. Recognizing that they needed some investment advice after the sale of their business and since Comeau was the only financial planner that he knew, Pinnacle Client 1 contacted Comeau and told him that he and his wife were looking for secure investments that had low risk, cash flow, a fixed rate of return, and 30 day liquidity.

e. On June 19, 2012, Pinnacle Client 1 and his wife met for the first time with Comeau to discuss investment opportunities. The meeting took place in Swift Current at a restaurant and lasted approximately 2 – 3 hours. During the meeting, Pinnacle Client 1 and his wife discussed with Comeau their goals and objectives. Comeau also came prepared for the meeting with an "Investment Plan" that set out some personal background information and listed some potential investment objectives as:

- Long term growth - maximum growth
- Income generating - monthly or quarterly income
- Shorter term objectives - more liquidity

Comeau also provided brochures detailing some investments that he believed might meet the potential goals.

f. The Investment Plan also identified investment portfolio allocations, strategy suggestions, and recommendations for each of the three investment objective categories noted above. It also listed the following investment strategy benefits:

- Well- diversified portfolio
- Low volatility - low level of risk
- Low or no correlation to the stock market
- Growth Portfolio — high level of growth
- Income Portfolio - Monthly & Quarterly distributions
- Short term Portfolio - More liquidity & access
- Professional tax & investment advice
- Good on-going professional advice

g. After the initial meeting, Pinnacle Client 1 and his wife next met with Comeau on June 29, 2012 at his Saskatoon office where Comeau presented a revised Investment Plan to them that reiterated their investment objectives and set out three options for investments:

- Option 1 - Invest in Interest bearing Investments (e.g. GIC's & Bonds) (the document went on to list the types of securities this category would include and then discuss the pros and cons of investing using this option (i.e. low risk, but low returns)).

- Option 2 - Invest in the market (e.g. Mutual Funds, Stocks, ETF's, Managed Accounts) (the document also went on to list the types of securities this category would include and the pros and cons of this option (i.e. more liquidity and better returns than Option 1, but market volatility/corrections and less predictability)).

- Option 3 - Invest in Alternative Investments (e.g. real estate, mortgages, etc.) (like the first two options, the document went on to list types of securities this category would include and the pros and cons (in respect to pros, the document stated little to no volatility, no market corrections, potentially higher returns, more predictable & fixed returns, greater diversification, and attractive tax strategies and characteristics; in respect to cons, the document stated reduced liquidity, difficult to get out if problems occur, distributions not guaranteed, and business risk)).

h. The June 29, 2012 version of the Investment Plan also compared features of traditional and alternative investments in the following way:

**<u>Potential Challenges of Traditional Investments</u>**

- Lack of significant returns over the last 12 years (average mutual fund has earned an average of 2.71% per year from 2000 to 2012
- Lack of proper diversification with mutual funds, stock accounts, and managed pooled accounts
- High management fees (management fees are paid regardless of return) on mutual funds, segregated funds, and pooled accounts.
- Lots of volatility (detrimental during retirement when drawing an income) with the markets.
- Markets are poised to correct, as indices reach record levels and valuations are currently very high.
- Dividend rate of dividend-paying stocks and/or dividend funds has averaged around 3-4% per year, much lower than yields obtained from alternative investments.

- GIC's – current interest rate ranges from 0.75% to 1.50% depending on the term. Rate of return is below the inflation rate.
- Government bonds and corporate bonds – inverse relationship to interest rates (as interest rates rise, the value of bonds will decrease). Lots of risk with bonds in an increasing interest rate environment. They are currently not as safe as investors believe them to be.

## Why Consider Alternative Investments?

- Frustrations with traditional investments
- Desire to have investments which better meet retirement objectives
- Need for higher yielding investments
- Need for better & proper diversification
- Need for asset-backed investments – inflation hedge
- Need for better risk-adjusted returns
- Desire to reduce or eliminate volatility
- Desire to have a higher level of predictable & fixed rates of return
- Better tax-efficiency on non-registered investments & more preferential tax treatment
- Need to reduce exposure to stock markets

## Potential Challenges of Alternative Investments

- Reduced liquidity – some offerings have no liquidity, and many have limited liquidity. Please note that it may take 30 to 180 days to receive money after redemption request is made. Each offering is different. Please read the Offering Memorandum to understand the specific redemption policy.
- Offering Memorandum versus Prospectus – potential for less disclosure with Offering Memorandums (OM's)
- Redemptions can take 1-6 months, if permitted
- There may be redemption fees (generally declining with time) for the first 2 – 5 years (depending on specific offering)
- Many investments have a specified fixed or targeted rate of return.
- Please note that these rates are not guaranteed. They can be adjusted if economic conditions change. They may even be suspended if economic conditions have deteriorated significantly.
- Business Risk - as with every investment (public or private), results may differ from what is expected. Many factors can contribute to this including changes in economic conditions, poor management decisions, unanticipated time delays, cost over-runs, incorrect forecasts, uncollected receivables, and even malicious activities such as embezzlement, fraudulent activity, or misrepresentation.
- Past performance is not an indication of future performance Each investment has its own specific risks. These may include currency risk, default risk, leverage risk, economic risks, liquidity risks, etc.

i. The Investment Plan recommended specific securities to meet Pinnacle Client 1's above noted investment objectives. It also included descriptions of the various securities that were recommended. All of the recommended securities were alternative investments, but the Grasswood Bonds investment was not listed as one of the recommendations.

j. At the June 29, 2012 meeting, Pinnacle Client 1 reiterated to Comeau what was important to him and his wife in respect to investing, namely security of the investments, liquidity, and a fixed rate of return. Comeau later during the same meeting presented a stack of documents representing offering memorandums and subscription agreements for securities that were highlighted in the Investment Plan. Comeau did not go through the documents in detail, but Pinnacle Client 1 and his wife signed them and then left the meeting without taking copies.

k. Pinnacle Client 1 eventually obtained copies of the documents including offering memorandums some four years later after requesting them directly from the issuers. Prior to this, he contacted Comeau to try and obtain them, but Comeau advised he needed to contact the various companies directly to obtain copies.

l. At the June 29, 2012 meeting, Pinnacle Client 1 invested $1.8 million, purchasing the following securities in the name of his Alberta numbered company:

- Optimus U.S. Real Estate Fund $349,999.65
- Westpoint Capital Performance MIC $300,000.00
- OmniArch Capital Fixed Income Bond $300,000.00
- Centurion REIT $350,000.00
- Walton Alliston Development LP $200,000.00
- Grasswood Bonds $300,000.00

m. At the June 29, 2012 meeting, Comeau put before Pinnacle Client 1 and his wife various documents that were blank, including Know Your Client ("KYC") forms and subscription agreements. Pinnacle Client 1 and his wife signed and initialed those documents and all markings, check marks, dollar amounts for income, net worth, and other notations were put on the KYC forms and subscription agreements after the meeting.

n. With regard to the Grasswood Bonds, Pinnacle Client 1 was convinced that they were secured by a first mortgage on the Grasswood Estates property and that Pinnacle had done its due diligence on this security.

o. The Grasswood Bonds subscription agreement included a ‘Risk Acknowledgement’ form that stated “the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me”. Comeau got Pinnacle Client 1 to sign this form, but did not review it with him.

p. Pinnacle Client 1 indicated that Comeau did not spend any time understanding his financial situation. During a review of his KYC form, Pinnacle Client 1 stated that while his investment knowledge was rated as average on the KYC form, he had below average investment knowledge.

q. The subscription agreements that Pinnacle Client 1 signed included sections that identified him as an accredited or eligible investor. He testified that when signing the Westpoint Capital subscription agreement, Comeau had him initial the section identifying him as an eligible investor; however, Comeau did not spend any time reviewing the form or explaining these terms to him.

r. The Westpoint Capital subscription agreement also included a Risk Acknowledgement form that Comeau got Pinnacle Client 1 to sign, but Comeau spent no time reviewing this form with him either.

s. A year or two after he invested, Pinnacle Client 1 called Comeau to tell him that he wanted to exit the Grasswood Bonds investment and Comeau tried to convince him not to. A few months later, interest payments stopped being paid on the Grasswood Bonds.

57. Cross examination of Pinnacle Client 1 covered the following:

a. Even though Pinnacle Client 1 spent a few months in the investment industry, he only had a casual understanding of investments and had never owned stocks or bonds. That said, he did understand what stocks and bonds were and that there were risks associated with them.

b. Pinnacle Client 1 was most familiar with investing in real estate and had invested in real estate with his father at age 19. He understood what a mortgage was and that sometimes loans end up going into default. He also understood that there were risks with investing in real estate.

c. His relationship with Comeau was only casual and that he had only been in contact with him a couple of times between the time they worked together at Sentinel and when he contacted Comeau in 2012 in respect to investing.

d. When questioned about the investments recommended by Comeau and the difference between short-term investments being more liquid versus long-term investments being more growth oriented, Pinnacle Client 1 testified that he believed the terms overlapped and were not much different regarding the investments recommended by Comeau because he told Comeau he wanted both income generating and liquid investments.

e. At the meeting on June 12, 2012, Comeau presented marketing material that Pinnacle Client 1 took with him in respect to eight alternative investments. Comeau and Pinnacle Client 1 discussed these eight investments at the meeting, including their risks and features. Pinnacle Client 1 ended up investing in six of these investments, including Grasswood Bonds, because they were real estate investments that he felt comfortable with and that were secured by land or mortgages on land.

f. After the June 12, 2012 meeting, Pinnacle Client 1 was provided a copy of the Investment Plan and took it home with him so he could give the investments additional thought and consideration. He was not prepared to invest on the day of the meeting because he wanted more time to think about the investments. He also discussed the investments with his wife after the meeting.

g. Between the dates of the two June 2012 meetings, Pinnacle Client 1 emailed Comeau with questions about recommended investments based on the information contained in the marketing brochures. Pinnacle Client 1 reached out to Comeau as a part of his decision making process regarding which securities to purchase. Comeau answered Pinnacle Client 1's questions and did not pressure him to invest.

h. Pinnacle Client 1 invested in six securities based on his original investment criteria – i.e. a secure investment with cash flow and liquidity. Comeau confirmed that all six of the investments met Pinnacle Client 1's criteria, except for one which did not meet the liquidity criteria because it was a long-term land development hold.

i. At the June 29, 2012 meeting, Pinnacle Client 1 signed offering memorandum acknowledgement forms acknowledging that he had received the offering memorandum documents for the various investments, but did not take any of them with him after the meeting.

j. At the June 29, 2012 meeting, Comeau presented Pinnacle Client 1 and his wife with a stack of documents – including KYC forms, offering memorandums, and subscription agreements and related schedules. The various documents had tabs placed on them indicating where Pinnacle Client 1 and his wife were required to sign. The process went quickly as they flipped through and signed/initialed the documents for the six investments he invested in. Pinnacle Client 1 stated in hindsight he regretted not taking more time to read and understand the documents.

k. Comeau did not review or explain the redemption clauses in some of the investments he purchased (e.g., the WestPoint Capital investment).

l. After making the investments in June 2012, he met with Comeau again in February 2014 to make RRSP investments and in April 2014 to discuss making additional investments in the range of $400,000 to $500,000.

m. After purchasing the investments in June 2012, Comeau never met with Pinnacle Client 1 to review his entire investment portfolio.

n. Despite receiving five interest payments on the Grasswood Bonds until the payments stopped 2014, Pinnacle Client 1 was not aware of the 17% interest rate on the Grasswood Bonds because he did not receive a copy of the subscription agreement or offering memorandum until some four years after he invested.

**ii. Comeau's testimony in relation to Pinnacle Client 1**

59. Comeau appeared before the Panel to testify on March 22, 23, and 24, 2021. The testimony covered the following:

a. Comeau graduated from the U of S in 1981 with a Bachelor of Science in Agriculture. He thereafter worked in the agricultural field until 1990 when he started working in the mutual fund business and selling life insurance. In about 1996, he moved his business to a local firm in Saskatoon named Sentinel. In January 2012, he became a registered dealing representative with Pinnacle.

b. Between 2009 and 2011, Comeau engaged in business that led to a regulatory issue with, and investigation by, the Mutual Fund Dealers Association ("MFDA"). His dealer at this time, Sentinel, ended up fining him $21,000 and the relationship began to sour. Prior to a hearing

with the MFDA in respect to the regulatory issue, Comeau decided to move his practice from Sentinel to Pinnacle. As he did so, he communicated with the FCAA and was permitted to be registered with Pinnacle under some supervision.

c. Throughout his career, Comeau earned a number of industry credentials/designations, including Chartered Financial Planner, Registered Financial Planner, Chartered Life Underwriter, Chartered Financial Consultant, Canadian Securities Course, Certified Employee Benefit Specialist, Certified Investment Management, Retirement Planning Advisor.

d. When at Pinnacle, he participated in ongoing professional development which included many company conferences and courses as well as attending sessions on compliance issues. He was also part of numerous Pinnacle committees, including Pinnacle's Product Advisory Committee which reviewed, provided input on, and conducted early due diligence on products Pinnacle marketed. He also joined a number of industry associations (e.g., Financial Advisors Association of Canada, Advocis, Institute of Advanced Financial Planners, Financial Planning Standards Council, National Exempt Market Association). In addition, while at Pinnacle he ultimately assumed a role as branch manager of Pinnacle's Saskatoon branch and took a branch manager course offered through the Canadian Security Institute.

e. In addition to participating in Pinnacle's early due diligence process before Pinnacle marketed various investment products, Comeau utilized his own two-phase due diligence process. The first stage was onset due diligent that involved an extensive review of a product to determine if he personally wanted to market the product. At this stage he would review various sources of information, including marketing material from issuers, offering memorandums, and subscription agreements. The second stage involved ongoing due diligence to help ensure the information he had on the product remained current. During this second stage, Comeau and his team would stay in contact with issuers by phone and would also meet with them in person a few times per year. He also attended Pinnacle conferences where time was dedicated to reviewing Pinnacle's products and receiving updates on those products.

f. Before Comeau was allowed to sell a particular Pinnacle product, Pinnacle required him to write an exam on that product. In order to be successful on that exam, Comeau studied the product's analyst reports and offering memorandums.

g. Comeau went through the two-stage due diligence process for every investment that he recommended to all clients, including Pinnacle Client 1.

h. When they worked together at Sentinel, Comeau and Pinnacle Client 1 had to and did attend numerous meetings and professional development sessions where presenters outside of Sentinel (e.g. from mutual fund and insurance companies) would present on various topics, most usually on products.

i. On June 7, 2012, Comeau received a call from Pinnacle Client 1. They talked about how Pinnacle Client 1 recently sold his business and he now desired to make some investments in three different bundles or tranches: 1) investments for longer term growth; 2) investments that would generate income he could live off; and 3) investments that had more liquidity that were secure. They also talked about setting up a meeting to go over investment options after Comeau had time to consider potential investments that might be suitable and meet Pinnacle Client 1's broader objectives. In addition, Comeau wanted to create an investment plan for the meeting to help stimulate deeper discussion as to Pinnacle Client 1's objectives and risk tolerances. At the end of the telephone conversation, Comeau and Pinnacle Client 1 agreed to have an in-person meeting in Swift Current on June 19, 2012.

j. Subsequent to the June 7, 2012 phone call, Comeau prepared an investment plan that listed Pinnacle Client 1's goals, objectives, and requirements. Comeau described the various objectives he ended up listing in Pinnacle Client 1's Investment Plan as a "wish list" that Pinnacle Client 1 told him over the phone. Comeau stated that everyone wants good returns with the least amount of risk possible, but that good returns and low risk are not always achievable so he would have these discussions with clients in an effort to make sure he understood what his clients' objectives were and what appropriate investments might be. The Investment Plan was presented to Pinnacle Client 1 at the June 19, 2012 meeting. The plan identified categories of investment that Comeau thought might be suitable to meet Pinnacle Client 1's goals, objectives, and requirements. At this point, the Investment Plan did not identify specific products or issuers.

k. The discussion at the June 19, 2012 meeting focused on the content of the Investment Plan. More specifically, Comeau and Pinnacle Client 1 discussed the various categories of investments and the pros and cons of each category. Comeau spent time talking to Pinnacle Client 1 about his desire for good returns with little or no risk and cautioned him that this was not possible. Comeau told Pinnacle Client 1 that you cannot have monstrous returns with no risk – you cannot have your cake and eat it too. Pinnacle Client 1 indicated that he was less interested in something that bounced around like the volatility and risk of corrections in the stock market.

l. As the discussions continued, a category of investments that drew particular attention from Pinnacle Client 1 was alternative investments and exempt securities. Pinnacle Client 1

appeared to be more interested in alternative investments because he was a businessperson, understood businesses, and understood real estate, which many of the alternative investments were about. As it became clear that Pinnacle Client 1 was leaning towards investing in alternative investments and exempt securities in respect to real estate, Comeau showed Pinnacle Client 1 various brochures on products in this category. They spent time discussing the higher risks with these types of investments, how they work, and their limitations. They also spent time talking about liquidity challenges and redemption fees associated with alternative investments. Moreover, they discussed redemption schedules associated with getting out of alternative investments before those investments are scheduled to mature.

m. Comeau also spent time discussing with Pinnacle Client 1 specific real estate investments and how land-based security for those investments worked (e.g., the Walton Alliston investment involved agricultural land north of Toronto and the OmniArch investment involved a first secured position of a general security agreement over bonds).

n. In respect to the Grasswood Estates project and the Grasswood Bonds investment, Comeau discussed with Pinnacle Client 1 how the bonds were backed by a first mortgage security, how statements in this regard were included in the marketing material and the offering memorandum, that he had discussions with Grasswood Finance management about this security, and that he had seen mortgage documents registered with Land Titles in Saskatchewan.

o. The June 19, 2012 meeting was a very long meeting, lasting approximately 5 ½ hours. At the conclusion of that meeting, Pinnacle Client 1 took the Investment Plan home with him.

p. Between the June 19, 2012 meeting in Swift Current and the second meeting on June 29, 2012 at Comeau's office in Saskatoon, Pinnacle Client 1 called Comeau two to three times to ask numerous questions about the investments contained in the brochures that were provided to him at the first meeting. The nature of the questions, described by Comeau as "relatively educated" made it obvious to him that Pinnacle Client 1 had done his own online research on the various investments.

q. For the June 29, 2012 meeting, Comeau prepared a revised Investment Plan that reiterated Pinnacle Client 1's three investment objectives as well as the three investment category options. It also listed suggested alternative investments for Pinnacle Client 1's objectives of growth, income, and short-term goals. In addition, it reiterated, and Comeau discussed at the meeting with Pinnacle Client 1, the potential challenges inherent with alternative investments, including redemption difficulties and liquidity issues. Comeau explained if there exist problems

with an alternative investment offering, it can be very difficult to get out of that investment. Comeau also explained to Pinnacle Client 1 that every investment has an element of business risk, meaning the risks associated with the business type itself (e.g., for a construction business, risks inherent in getting necessary approvals from municipalities). In addition, they discussed how each individual investment will have its own specific risks.

r. At the June 29, 2012 meeting, after discussions on the pros and cons of the various investment types, Pinnacle Client 1 told Comeau that, for the investments he was considering making through Comeau, he wanted to focus on his first two objectives only, being income and growth. As for the third objective of liquidity and security, Pinnacle Client 1 told Comeau he would accomplish it on his own through deposits with a bank.

s. Pinnacle Client 1 also indicated to Comeau that he was prepared to take more risk and was partial to investing in alternative investments, particularly those related to real estate because having owned real estate before, he understood it, and he viewed it as being less risky.

t. During the June 29, 2012 meeting, Comeau noticed that Pinnacle Client 1 had ideas to place large amounts of money in a small number of investments, which would result in not much diversification. Since Comeau believed in the merit of diversification, he tried to convince Pinnacle Client 1 to diversify his investment selection more. However, their discussions led Comeau to believe that Pinnacle Client 1, like many business owners he advised over the years, wanted less diversification as he believed investing in a larger number and wider array of products tended to dilute the success of his growth and income objectives. Ultimately, the two "compromised… halfway" with Pinnacle Client 1 deciding to diversify more, but not to the extent Comeau advised.

u. At the June 29, 2012 meeting, Pinnacle Client 1 decided to make investments in a number of exempt securities. One of the documents Pinnacle Client 1 signed in this regard was a KYC form. Comeau reviewed the KYC form with Pinnacle Client 1 and filled it in with information provided to him in real time from Pinnacle Client 1. Comeau then got Pinnacle Client 1 to sign and initial the KYC form after the information was inputted in real time to acknowledge the information contained in the KYC form was accurate, complete, and true.

v. The KYC form listed only five of the six investments that Pinnacle Client 1 made. The KYC form, which was a Pinnacle document, did not list the Grasswood Bonds investment because the Grasswood Bonds investment was not a Pinnacle product.

w. The KYC form included an extra page with the heading "Risk Associated with Exempt Securities and Alternative Investments". Comeau developed this document and included as

an additional part of the KYC form. The document listed nine items that focused on risks associated with alternative investments. Comeau reviewed each item with Pinnacle Client 1, checked each item off after each was reviewed with Pinnacle Client 1, and then had Pinnacle Client 1 sign the document to signify that the items were discussed.

x. Starting with the OmniArch bond issue, Comeau proceeded to go through each subscription agreement for investments that Pinnacle Client 1 invested in on June 29, 2012. Comeau had Pinnacle Client 1 sign and/or initial where required on each document. He spent time reviewing the initial Risk Acknowledgement form which in large, capital letters down the right-hand side of the document had "**WARNING**" written on it to draw attention to the list of risks associated with alternative investments. He also had Pinnacle Client 1 sign each Risk Acknowledgement form, spending less time on each subsequent one because the wording was the same in each agreement.

y. Each subscription agreement included an offering memorandum Receipt Acknowledgement Form that Pinnacle Client 1 signed, signifying that he acknowledged and confirmed receipt of each offering memorandum. Comeau could not recall whether or not Pinnacle Client 1 took the various offering memorandums with him at the end of the meeting, though his general experience was that, at the time since the offering memorandums were provided in paper copy and involved many pages, investors generally declined to take home the actual offering memorandums.

z. Comeau took time to explain the redemption and penalty provisions in respect to certain investments that Pinnacle Client 1 made (e.g., Westpoint Capital).

aa. In respect to the Grasswood Bond investment, Comeau understood that he had an agreement between himself and Pinnacle that he was required to disclose to his clients that the investment was not a Pinnacle product and that Comeau was not being paid for it. As such, while completing Grasswood Bond subscription agreements with clients, he explained to them that the investment was not one of Pinnacle's products, was not available through Pinnacle, and when they received statements or other correspondence from Pinnacle, it would not include the Grasswood Bonds. Comeau then got the investor to sign a document he created titled "Disclaimer / Conflict of Interest" that included statements indicating:

    i. Grasswood Bonds were not available through Pinnacle;

    ii. Grasswood Bonds were being made available through a referral arrangement between Comeau Financial and Urban Elements Development Corporation;

iii. Comeau was receiving no compensation, commissions, or any remuneration for the referral arrangement; and

iv. Comeau was not benefitting in any way, including by having any equity position or ownership in the investment opportunity.

After discussing the above with Pinnacle Client 1, Comeau had Pinnacle Client 1 sign this form to acknowledge that the foregoing had been fully discussed with him.

bb. The Risk Acknowledgement form in the Grasswood Bonds subscription agreement included, amongst others, a statement that "the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me" and "this is a risky investment and I could lose all my money". Comeau had his clients sign the form to acknowledge the statements on the form. Pinnacle Client 1 signed the form.

cc. It was Comeau's practice to recommend to his clients that they meet at least a couple times each year to review their investment portfolio and update their financial situation. Subsequent to Pinnacle Client 1 purchasing the investments, Comeau and Pinnacle Client 1 next met on December 19, 2012. After this meeting, because Pinnacle Client 1 lived in Medicine Hat which created challenges for in person meetings, they typically only got together about once each year to review his affairs.

dd. In 2013, OmniArch was subject to a cease trade order ("CTO") and audit by the Alberta Securities Commission in respect to its bond offering. When the audit was completed and the CTO lifted, one of the conditions imposed by the Alberta Securities Commission was that investor investments were to be automatically rescinded unless the investor contacted OmniArch directly to verify that the investor wanted to remain in the investment. Pinnacle Client 1 contacted Comeau to discuss the Omniarch situation and Pinnacle Client 1elected to stay in the investment. Pinnacle Client 1 contacted Omniarch directly and not through Comeau to remain in the investment.

ee. Comeau met with Pinnacle Client 1 on February 25, 2014 and Pinnacle Client 1 proceeded to make additional investments in RRSP accounts. The KYC form for this investment showed Estimated Net Assets of $4,800,000. Pinnacle Client 1 filled in this amount in addition to some other dollar amounts on the form showing an increase in his Estimated Net Assets from the $3,500,000 amount inputted on Pinnacle Client 1's June 29, 2012 KYC form.

ff. At the February 25, 2014 meeting, Pinnacle Client 1 told Comeau that with the exception of the WestPoint investment that decreased interest payments from 11% to 7.5%, he was very happy with the investments he had made.

gg. In June 2014, Pinnacle Client 1 called Comeau to discuss redeeming some of his investments because he wanted to move to British Columbia to start a business. Comeau cautioned Pinnacle Client 1 that some of the investments were not really liquid and would not be advisable to redeem considering their performance, and that others had redemption fees. He further told Pinnacle Client 1 he would get back to him on the redemption fees issue and at this time Pinnacle Client 1 did not seem alarmed at all. The next day, Comeau called Pinnacle Client 1 back to inform him of the details regarding which investments could be redeemed and the fees involved, and to provide advice on which investments he would or would not recommend redeeming. Pinnacle Client 1 again did not seem upset or frustrated with the conversation and advised Comeau that he would use other monies he had to fund his business venture. In addition, by this time the Grasswood Bonds investment had suspended interest payments, yet Comeau did not hear any dissatisfaction or complaints from Pinnacle Client 1 or his wife beyond the WestPoint investment.

hh. Comeau testified that in about 2015, Pinnacle imposed a requirement that brokers had to revisit the suitability of the investments that had been sold to clients by completing a new suitability assessment that was much more detailed than the KYC form. In April 2016, around the time Pinnacle Client 1 made a complaint to Pinnacle, Comeau prepared a suitability assessment in respect to Pinnacle Client 1 and his holding company for the alternative investments that he and his holding company had purchased over the previous few years. This assessment revisited the investments that had been made and the reasons why they were suitable at the time of purchase. It also determined that liquidity was not an issue and that the investments represented about 57% of Pinnacle Client 1's net worth. Moreover, it stated that Pinnacle Client 1 did not want to invest in the stock market and preferred alternative investments because they fit his long-term growth objective. Overall, the new suitability assessment confirmed that Pinnacle Client 1's assessments were suitable.

### iii. Credibility of Pinnacle Client 1's Testimony

58. Counsel for Comeau emphasized various credibility issues in respect to Pinnacle Client 1. In Comeau's written closing submissions, some of those credibility issues were set out as follows (footnotes omitted):

> 131. [Pinnacle Client 1] claimed to be an inexperienced investor and unsophisticated businessperson – and yet, he testified that he had taken his Canadian Securities Course

and worked for Sentinel. He had invested in a variety of investment properties from the time he was a teenager and had built a highly lucrative business that netted between $600,000-800,000 profit in a single year and then ultimately sold his portion to his business partner for $3 million.

132. But [Pinnacle Client 1] also testified that he was aware that all investments involved risk. Indeed, in cross-examination, [Pinnacle Client 1] admitted repeatedly that Mr. Comeau explained the risks of specific investments to him. He then tried to suggest that the investments which he made were presented as "safe". This is inconsistent and simply not credible.

133. [Pinnacle Client 1] was adamant that Mr. Comeau lied to him about the Walton investment. [Pinnacle Client 1] focused on the fact that the land was zoned heavy industrial, and he would never invest in heavy industrial because of the environmental issues in his scrap metal business. However, confronted with the documents, he was forced to agree that the land was zoned agricultural, exactly as Mr. Comeau had described to him.

134. [Pinnacle Client 1's] cross-examination revealed in a number of inconsistencies between the complaints he made to Pinnacle, OBSI, and his evidence in chief. For example, during cross-examination, [Pinnacle Client 1] gave the following answers:

> Q. Okay. So then the second sentence says: (as read)
>
> > You also stated that this investment, Westpoint, could be redeemed at any time within 90 days' notice.
> >
> > And what I'm saying to you, sir, is that the sentence that you've written there, the second sentence --
>
> A. Correct.
>
> Q. -- is, in fact, accurate?
>
> A. I think I have made a mistake with that sentence.
>
> Q. Okay. So the second sentence of this is also inaccurate?
>
> A. I believe so.

135. [Pinnacle Client 1] admitted on cross-examination that he made an untrue statement in his complaint to Pinnacle. [Pinnacle Client 1] wrote a complaint to Pinnacle about his investments in April 2017. At that time, he wrote that Mr. Comeau told him that Westpoint was involved in leasing office equipment. He went on to say that it was only after Westpoint ceased paying interest that he learned that Westpoint was involved in high-risk mortgages. On cross-examination, [Pinnacle Client 1] admitted that his statement made in April 2017 was simply not true and that Mr. Comeau always stated that Westpoint was related to mortgages. His explanation for this misstatement was "That's not accurate. That's a -- I don't know why that's in there, but it doesn't seem like I was right with that one" and later said that he was confused and "going on information from five years earlier."

136. When [Pinnacle Client 1] was confronted with his prior complaint to OBSI in respect of the details of the June 29, 2012 meeting, [Pinnacle Client 1] suggested that it was the complaint that was inaccurate, not his testimony about the meeting in the hearing. He suggested that the sentence was "not properly placed".

> 137. [Pinnacle Client 1] stated that Mr. Comeau told him that the Grasswood investment had "zero risk" and that he would be a land owner. Yet [Pinnacle Client 1] conceded on cross-examination that he did not sign title documents and that he was not personally named as a land owner. There is no suggestion anywhere in the documents that the bond holders would own the Grasswood land. These statements are not credible.
>
> 138. [Pinnacle Client 1's] dissatisfaction with the performance of his investments has coloured his views of his interactions with Mr. Comeau; his evidence was not internally consistent and is not credible.

59. In respect to credibility issues, including inconsistencies, the Panel is bound and guided by the Supreme Court of Canada's decision in *F.H. McDougall*, 2008 SCC 53, [2008] 3 SCR 41. In addition, we agree with counsel for Comeau that there are some issues with Pinnacle Client 1's testimony, including some conflicts and inconsistencies. The Panel is alive to these issues and has taken them into consideration in reaching our findings.

### iv. Provisions Alleged to be Contravened

60. Staff's allegations pertaining to Comeau's dealings with Pinnacle Client 1 are made pursuant to numerous provisions of the *Act* and *NI 31-103*. In respect to the *Act*, Staff alleges breaches of subsections 33.1(1) and 55.11(1) which read:

> **Duty of registrant and investment manager to deal honestly, fairly and in good faith**
>
> **33.1**(1) A registrant shall deal fairly, honestly and in good faith with his, her or its clients.
>
> …
>
> **Misleading and untrue statements - prohibition**
>
> **55.11**(1) No person or company shall make a statement if that person or company knows or reasonably ought to know that:
>
> (a) the statement either:
>
> (i) is misleading or untrue in a material respect and at the time and in the light of the circumstances under which it is made; or
>
> (ii) does not state a fact required to be stated or that is necessary to make the statement not misleading in a material respect and at the time and in the light of the circumstances under which it is made; and
>
> (b) the statement would reasonably be expected to have a significant effect on the market price or value of a security or derivative.

61. In respect to *NI 31-103*, Staff alleges a breach of section 13.3, which reads in part:

*Division 1 – Know your Client and Suitability*

**Suitability**

(1) A registrant must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a client to buy or sell a security, or makes a purchase or sale of a security for a client's managed account, the purchase or sale is suitable for the client.

(2) If a client instructs a registrant to buy, sell or hold a security and in the registrant's reasonable opinion following the instruction would not be suitable for the client, the registrant must inform the client of the registrant's opinion and must not buy or sell the security unless the client instructs the registrant to proceed nonetheless.

62. Each of the above-noted sections of the *Act* and *NI 31-103* are important elements of the overall legislative framework which is designed to provide protection to the investing public and foster public confidence in the public markets. We now analyze how each applies to Comeau's dealings with Pinnacle Client 1.

**v. Registrant Obligations**

63. A key component of securities regulation is the requirement that persons or companies register with the applicable regulatory authority if they wish to engage in certain activities such as being a dealer or adviser. In Saskatchewan, section 27 of the *Act* sets out various registration requirements as follows:

27…(2) No person or company shall:

(a) act as a dealer or underwriter unless the person or company:

(i) is registered as a dealer; or

(ii) is registered as a representative of a registered dealer and is acting on behalf of the dealer.

(b) act as an adviser unless the person or company:

(i) is registered as an adviser; or

(ii) is registered as a representative of a registered adviser and is acting on behalf of the adviser;

64. In *In the Matter of Ronald James Aitkens – Merits Decision*, (December 5, 2018) FCAA (unreported) [*Aitkens*], a panel of the FCAA described the registration requirement in this way:

[119] The registration requirement found in section 27 of the Act is one of the cornerstones of the regulatory framework of the Act. Registration serves an important gate-keeping function by ensuring that only properly qualified and suitable individuals are permitted to be registrants and to trade with or on behalf of the public. Registration requirements impose proficiency, good character and ethical standards on individuals and companies trading in and advising on securities.

…

[120] Participants who engage in the securities industry do so voluntarily and for their own profit. In exchange for the privilege of participating in the Saskatchewan capital markets, individuals and companies must comply with Saskatchewan's securities laws. Compliance is paramount, ensuring the protection of the public and the integrity of the capital markets.

65. In *Rustulka (Re)*, 2020 ABASC 93 (QL), the Alberta Securities Commission discussed the importance that the role of registration plays as well as the obligations of registrants, including the general duties placed on registrants to deal with clients fairly, honestly, and in good faith. The Commission also discussed how more specific duties, such as those relating to suitability assessments, flow from the general duties. The Commission noted that the general duties are the most fundamental of obligations owed to clients and that a registrant's breach of them is "extremely serious". The Commission wrote:

161 As explained in *Canadian Securities Regulation*, 5th ed. (D. Johnston, K. Rockwell and C. Ford, Markham: LexisNexis Canada Inc., 2014), Canadian securities regulation has two primary goals: investor protection and the promotion of efficient capital markets (at p. 18). One of the means for achieving these goals is the requirement that certain parties involved in the securities industry register in accordance with securities laws (*ibid*. at pp. 25, 473). To qualify for and maintain registration, these parties must meet certain standards of integrity and proficiency, and adhere to certain standards of conduct (*ibid*. at pp. 472-473).

162 A "registrant" is defined in s. 1(aaa) of the *Act* as "a person or company registered or required to be registered under this Act or the regulations". Pursuant to s. 75.2(1) of the Act, registrants have an obligation to "deal fairly, honestly and in good faith with [their] clients".

163 Along with the requirements set out in the *Act*, *NI 31-103* has governed the registration regime and the obligations of registrants in Alberta since September 28, 2009. The Companion Policy to *NI 31-103* (31-103CP) and periodic staff notices provide guidance as to how CSA members - including the ASC - will apply *NI 31-103*.

164 CSA Notice 31-336, referenced earlier in these reasons, describes registrant obligations as follows (at pp. 3-4):

> Securities laws impose a general duty on registrants to deal fairly, honestly and in good faith with clients. Part 13 of [*NI 31-103*] sets out the principal

> KYC, KYP, and suitability obligations for registrants. These obligations work together. The KYC, KYP and suitability obligations are an extension of the duty to deal fairly. In turn, the suitability obligation requires a registrant to *know* the client, *know* the product that is the subject of the proposed recommendation or client order, and to form an opinion as to whether the product is suitable in light of the client's investment needs and objectives. [original emphasis]

165 The notice indicates that these obligations "are among the most fundamental obligations owed by registrants to their clients and are cornerstones of our investor protection regime" (at p. 1). Accordingly, a registrant's failure to comply with them "is an extremely serious matter" (at p. 2).

66. The Commission went on to cite and summarize the often-cited decision of *Lamoureux (Re)*, 2001 LNABASC 433 (QL) [*Lamoureux*] to further explain registrant obligations. The Commission stated there is a “three stage process" involved in registrants assessing the suitability of investments for clients:

168 In *Lamoureux*, the respondent was a mutual fund salesperson who was found to have breached his obligations as a registrant, including by failing to "know his clients", recommending securities to his clients that were not suitable for them, and failing to make his clients aware of material negative factors with respect to the recommended securities (at pp. 2, 4, 18). In summarizing its conclusions, the panel stated as follows with respect to registrant obligations (at p. 2; see also pp. 5, 14-15, 18):

> A registrant, in recommending investments to clients[,] must adhere to a three stage process:
>
> *use due diligence to "know the product" and "know their clients"[,]
>
> *assess suitability by determining whether a particular securities product is an appropriate match for a particular client, and
>
> *if a securities product is suitable for a particular client the registrant can recommend the investment product but, in so doing, must make the client aware of material factors associated with the investment product.

169 This "three stage process" has been adopted in other jurisdictions as well; see, for example, *Re Daubney*, 2008 LNONOSC 338 (at para. 17), *Re Sterling Grace & Co.*, 2014 LNONOSC 558 (at para. 220) and *Re Foresight Capital Corp.*, 2007 BCSECCOM 101 (at paras. 51-52). The panel in *Foresight* described the third stage as an obligation to "disclose the negative as well as the positive aspects of the proposed investment" (at para. 52).

67. The Commission also stated that findings in respect to registrant obligations are situation and fact specific. Citing *Lamoureaux* again, the Commission stated:

The determination "requires close analysis of the client's situation and the relationship between the registrant and the client", as "[b]oth the fiduciary and the regulatory obligations

of a registrant may be more or less onerous depending upon the extent of the client's reliance upon the registrant" (Lamoureux at p. 7).

68. As required by subsection 27(2)(b)(ii) of the *Act*, Comeau was registered with the FCAA as a representative of a registered advisor, being Pinnacle. In respect to all the investments sold to Pinnacle Client 1, except for Grasswood Bonds, Comeau was acting on behalf of that registered advisor. As such, Comeau was subject to the obligations of a registrant as outlined above during his dealings with Pinnacle Client 1.

### vi. Comeau Breached subsection 33.1(1) of the *Act* in respect to Pinnacle Client 1

69. As cited and discussed above, subsection 33.1(1) of the *Act* sets out the general obligation that registrants deal with their clients fairly, honestly, and in good faith. In the Panel's respectful view, we have concerns about Pinnacle Client 1's credibility in respect to some of the circumstances surrounding his investment transactions with Comeau. Consequently, we do not accept many of Staff's submissions in respect to subsection 33.1(1). That said, the evidence does establish at least three instances where Comeau failed to deal with Pinnacle Client 1 fairly, honestly, and in good faith.

70. First, Comeau had Pinnacle Client 1 sign a Risk Acknowledgement form in respect to Grasswood Bonds that included the statement "the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me…". Since Comeau was registered with the FCAA, this statement was untrue and misleading. The Panel is not persuaded by Comeau's testimony that this statement being included in the Risk Acknowledgment form was some sort of minor oversight or carry over from outdated forms that slipped Comeau's mind or that he was not responsible for. Comeau was a very experienced financial advisor and understood well how to conduct proper due diligence on products. He testified that he was detailed and thorough in his dealings with Pinnacle Client 1. Comeau should have corrected the statement to mitigate its misleading nature. Failing to do so was to not deal with Pinnacle Client 1 fairly or honestly. Having Pinnacle Client 1 sign a form that contained the misleading statement without appropriate correction was a breach of subsection 33.1(1) of the *Act*.

71. As will be discussed below in respect to the allegations regarding subsection 27(2) of the *Act*, this does not mean that Comeau was properly registered to deal in or advise in respect to Grasswood Bonds. What it does mean is that Comeau was registered with a securities regulatory authority and for him to get Pinnacle Client 1 to sign a form indicating he was not so registered and without proper clarification was a breach of subsection 33.1(1) of the *Act*.

72. Second, Comeau had Pinnacle Client 1 sign a Disclaimer/Conflict of Interest form that he created which included the statement *"Jack Comeau is not benefitting in any way, including having any equity position or ownership in this investment opportunity."* The evidence demonstrates that this statement is misleading on the basis that Comeau admitted in his testimony on March 23, 2021 that he invested $150,000 in Grasswood Bonds, and did so through his holding company Comeau Holdings:

> Q. Okay. And -- and, Mr. Comeau, do you invest in -- in Grasswoods?
>
> A. The answer's yes, and to elaborate on that, I -- I try to invest in almost all the investments that I recommend to my clients. I -- I believe in that, and I don't practice that 100 percent because I just don't have that much money, but I try to practice that as much as I can. So, yes, I do own Grasswood Estates, but I own a lot of other things too.
>
> Q. Okay. And how much did you invest in Grasswoods?
>
> A. My corporation, Comeau Holdings, invested 150,000.
>
> Q. Okay. And is -- is that money still invested with Grasswoods?
>
> A. Yes, it is.

73. In owning Grasswood Bonds, Comeau would stand to benefit from the success of the Grasswood Estates project. That success was dependent in part on others also investing in the project through Grasswood Bonds. Accordingly, Comeau did benefit from others, including Pinnacle Client 1, investing in Grasswood Bonds. Getting Pinnacle Client 1 to sign a form containing the statement that he was "not benefitting in any way… in this investment" was therefore not fair or honest. To the contrary, it was unfair, dishonest, and not done in good faith. As a very experienced and knowledgeable financial adviser, the conflict of interest here should have been identified by Comeau and he should not have included any disclaimer in respect to the conflict that was meant to convince investors such as Pinnacle Client 1 that no conflict of interest existed. Having included the misleading statement in the disclaimer and in having Pinnacle Client 1 sign the form to acknowledge the statement, Comeau breached subsection 33.1(1) of the *Act*.

74. Third, during the proceedings, the parties spent time addressing, both in evidence and argument, the issue of whether there was a mortgage in place that secured the Grasswood Bonds investment, and whether Comeau's assurances to Pinnacle Client 1 that his Grasswood Bonds investment was secured by a mortgage breached subsection 33.1(1) of the *Act*. In the Amended Statement of Allegations, Staff alleged that Comeau said to Pinnacle Client 1 that the "Grasswood investors' investments were secured by title to a piece of land". The testimony of both Pinnacle Client 1 and Comeau confirmed that such a statement was made. The issue is whether having made this statement, Comeau failed to deal with Pinnacle Client 1 fairly, honestly, and in good faith.

75. In response to the allegations, Comeau submitted into evidence a mortgage document showing that Grasswood Finance held a mortgage in respect to land owned by Grasswood Property that was for the Grasswood Estates project. Staff cross-examined Comeau on the document in an attempt to advance a position that because the mortgage document indicated that the mortgage needed to be paid by June 2011 and had not been, the default resulted in there no longer being a mortgage in place. Since Pinnacle Client 1 made his investments in Grasswood Bonds in June 2012, Staff argued it was untrue and misleading for Comeau to say to Pinnacle Client 1 that the Grasswood Bonds investment was secured by a mortgage.

76. The fact that a default on a mortgage might exist does not mean the mortgage is no longer in place. Indeed, Comeau submitted into evidence a current land titles document demonstrating that the mortgage remains in place. The parties agreed in their closing submissions that there is no document that states that the Grasswood Bondholders themselves hold title to the land. This is true. But this does not mean that there was not a mortgage in place regarding the Grasswood Estates project that was an asset of the company that issued the Grasswood Bonds (i.e. Grasswood Finance).

77. Of deeper concern though is the fact that in the Grasswood Bonds subscription agreements, it states that the Grasswood Bonds "are unsecured obligations" of Grasswood Finance "and will rank *pari passu* with each other Bond and all other obligations of" Grasswood Finance. In closing submissions, Staff argued that this clear wording means the Grasswood Bonds investment is not backed by a mortgage and contradicts Comeau's assurances to Pinnacle Client 1 that the investment was backed by a mortgage. The mortgage's payment terms expressly refer to the Grasswood Bonds and the Grasswood Bonds offering memorandum issued by Grasswood Finance does set out important components of the mortgage and its relationship to the Grasswood Estates project, but this does not change the fact that the Grasswood Bonds themselves, according to the subscription agreements and offering memorandum, remain unsecured from the viewpoint of investors. While it would not have been untrue or misleading for Comeau to state that Grasswood Finance's investment in the Grasswood Estates project was backed by a mortgage, in our view it was misleading for Comeau to say to Pinnacle Client 1 that the Grasswood Bonds investment was secured by title to a piece of land or secured by a first mortgage. This could leave an impression with investors that their investments in Grasswood Bonds were secured directly by a mortgage when quite clearly, on the terms of the subscription agreements, they were unsecured.

78. While we have concerns with Pinnacle Client 1's credibility, we find on the evidence as a whole that Comeau did not adequately explain the nature of the Grasswood Bonds investment to Pinnacle Client 1, including that Grasswood Bonds were unsecured from the viewpoint of investors. In this regard, we reject Comeau's testimony to the contrary. Comeau's statements regarding the mortgage resulted in a breach of subsection 33.1(1) of the *Act.*

### vii. Comeau Breached subsection 55.11(1) of the *Act*

79. In respect to subsection 55.11(1) of the *Act*, a panel of the FCAA in *Aitkens* discussed and adopted the three stage test established in Alberta's securities jurisprudence regarding a substantively equivalent provision in Alberta's securities legislation:

> [268] The [Alberta Securities] Commission also cited its previous decision in *Arbour Energy Inc., Re*, 2012 ABASC 131 at para 753 for the relevant test for misrepresentation and noted that to establish a misrepresentation under subsection 92(4.1), Staff must prove:
>
> > (a) a statement was made by a respondent;
> >
> > (b) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; and
> >
> > (c) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security (*Aitkens* at para 134).
>
> [269] The Commission further explained that with respect to the last factor, the context or the circumstances must be considered since a significant fact for one issuer at a given point in time may not be significant for another (*Aitkens* at para 135, citing *Re Stan*, 2013 ABASC 148 at para 225).
>
> [270] The Commission also commented on the element of materiality. While investors' evidence with respect to the impact the information may have had on their investment decisions may be considered, neither that evidence nor expert evidence on market price or value is required to meet the legal test (citing *Arbour* at paras 763-766; and *R v Zelitt*, 2003 ABPC 2 at paras 32- 34, 56 WCB (2d) 486). This is because the Panel is an expert tribunal with the specialized knowledge and experience necessary to draw inferences as to the objective view of a reasonable investor (*Aitkens* at para 137, citing *Arbour* at para 765). As stated in *Arbour*, "[c]ommon-sense inferences […] may suffice in certain cases" (at para 764).
>
> [271] The Commission went on to state that a hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. In other words, the determination is "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (*Aitkens* at para 138, citing *Arbour* at para. 765).
>
> [272] The Commission noted that a panel can find a breach of the provision even in the absence of proof that any particular investor relied on any particular misrepresentation or omission (*Aitkens*, at para 139).

80. Regarding the first two elements that Staff must prove, as already noted above, Comeau made at least three statements that were untrue or misleading in a material respect. The first was in a Risk Acknowledgement form for the Grasswood Bonds investment where the statement read “the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me…”. This statement was untrue and misleading because Comeau was registered as an advisor with the FCAA. He was also not prohibited from conducting a suitability analysis. In fact, as part of his registrant obligations, he was required to consider suitability. This statement was also material in that it went to the risks of the investment and the role of Comeau as an advisor to Pinnacle Client 1. In respect to knowledge, we find that Comeau knew or reasonably ought to have known that the statement was untrue or misleading. Comeau knew he was registered as an advisor and actually provided suitability advice to Pinnacle Client 1 in respect to the various investments Pinnacle Client 1 purchased through Comeau, including in respect to Grasswood Bonds.

81. The second untrue and misleading statement was set out in the Disclaimer / Conflict of Interest form that Comeau had Pinnacle Client 1 sign. The statement was that “Jack Comeau is not benefitting in any way, including having any equity position or ownership in this investment opportunity.” As discussed above, this statement was untrue or misleading because Comeau had invested in Grasswood Bonds and stood to benefit from the project succeeding, which was in part dependent on investors such as Pinnacle Client 1 also investing. The statement was material in that it was information that could impact on an investor’s decision to invest. We also believe that Comeau knew the statement was untrue or misleading or reasonably ought to have known. Comeau was an experienced investment advisor who understood the nature of investments. We are unable to accept that Comeau would not have known that his investments in Grasswood Bonds would benefit from Pinnacle Client 1 purchasing Grasswood Bonds. Comeau was benefitting from Pinnacle Client 1’s investment and it was misleading for him include in the Disclaimer / Conflict of Interest a statement to the contrary.

82. The third statement that Comeau made to Pinnacle Client 1 that was misleading was in respect to the mortgage on the Grasswood Estates project. As noted above, the mortgage was held by Grasswood Finance in respect to the Grasswood Estates project and some of its terms were related to the Grasswood Bonds. However, the subscription agreements and offering memorandum for the Grasswood Bonds investment expressly stated that the Grasswood Bonds were *unsecured* obligations of Grasswood Finance. As such, when Comeau stated to Pinnacle Client 1 that the Grasswood Bonds investment was secured by title to land or by a first mortgage, this was misleading. While Grasswood Finance held security in the form of a mortgage, and while this may have had indirect security for investor bondholders, these investors were nevertheless in an unsecured position. The terms of the subscription agreements make this clear.

83. The Panel also finds that Comeau had knowledge that his explanation was misleading. With Comeau's extensive experience and in-depth due diligence process, which in respect to the Grasswood Bonds investment even included an opinion from a lawyer (we note for clarity that Comeau never produced or submitted the opinion as evidence before the Panel), we find that Comeau would have or should reasonably have known that the Grasswood Bonds investment was unsecured from the viewpoint of the investors. The Panel does not think it is credible that Comeau, with his extensive knowledge of the products he was selling, would not have known this important aspect of the Grasswood Bonds investment.

84. But this does not end the matter. The third element of the test requires Staff to prove that Comeau knew his untrue or misleading statements would reasonably be expected to have a significant effect on the market price or value of a security. Taking instruction from *Aitkens* and the authorities cited therein, the Panel may draw common-sense inferences about the objective view of a reasonable investor, which includes a determination about whether the untrue or misleading statements made by Comeau would reasonably be expected to have a significant effect on the market price or value of a security (see e.g. *Arbour Energy Inc. (Re)*, 2012 ABASC 131 at paras 764-65). The test is not a subjective one. It does not require that any specific investor be misled or rely on a misleading statement in making an investment.

85. As an expert tribunal, the Panel finds based on the objective test that each of the three untrue or misleading statements made by Comeau would reasonably be expected to have a significant effect on the market price or value of the securities at issue.

86. The first untrue statement would lead investors to believe that the individual they are receiving advice from was not registered with a securities regulator such as the FCAA and was unable to conduct suitability analyses. This would tend to introduce uncertainty and increased risk for reasonable investors, which in turn would reasonably be expected to have a significant effect on the market price or value of a security.

87. Similarly, in respect to the second untrue statement, if the person selling and giving advice to an investor in respect to an investment is also an investor in that investment, reasonable investors would understand that this type of conflict of interest could impact on that person's objectivity in respect to the investment. Reasonable investors would factor this into their assessment of the investment. If misled in thinking the person did not have investments in the investment, this would have a significant effect on the market price or value of a security for the investors.

88. Finally, in respect to the misleading statement regarding the mortgage as security for the Grasswood Bonds investors, this would also be expected to have a significant effect on the market price or

value of the Grasswood Bonds for reasonable investors. Whether or not an investment is secured or unsecured is a key feature of an investment, with unsecure investments posing more risk. Reasonable investors would factor this risk into their assessment of the investment and willingness to purchase the investment, which in turn would have a significant effect on the market price or value of the security.

89. The Panel also finds that Comeau knew or reasonably ought to have known that his inaccurate or misleading statements would have a significant effect on the market price or value of the securities. Again, Comeau was an experienced advisor who had considerable knowledge of investments and investing. He also understood the products he sold as he conducted extensive due diligence and continuing education on them.

90. Ultimately then, for the reasons above, the Panel finds Comeau breached section 55.11(1) of the *Act*.

**viii. Comeau Breached his Suitability Obligations**

91. Section 13.3 of *NI 31-103*, which was quoted above, sets out the suitability requirements that registrants must abide by. Case law has further discussed suitability requirements and the nature of the obligations on a registrant.

92. In *Rustulka (Re)*, for example, the Alberta Securities Commission discussed the law pertaining to suitability obligations at paragraphs 188-99. The Commission, citing to a quotation made in *Lamoureux*, stated as a general proposition that “An investment is suitable if ‘it will achieve the investment objectives of the client while keeping [within] the level of risk determined by the client’s comfort level and overall circumstances’” (at para 188). The Commission stated that, from the perspective of a registrant, a suitability determination is fact-specific and can only be made after the registrant understands the investment at issue, the risks, and how those risks may impact a client (at para 193). The fact-specific nature of suitability assessments means that there is not and cannot be a one size fits all approach. What may be suitable for one client may not be suitable for another client.

93. Suitability obligations flow from other obligations, including know your product or due diligence obligations and know your client (“KYC”) obligations (at para 193).

94. Expanding on how KYC obligations impact suitability assessments, the Commission wrote:

> 194 The extent of the KYC information a registrant will need to make a suitability determination may vary depending on the client's particular circumstances, the type of security involved, and the client's relationship to the registrant (see 31-103CP at s. 13.3).

Relevant circumstances will generally include the client's income, net worth, risk tolerance, liquid assets, and investment objectives (*Lamoureux* at pp. 14-15). Comparing the risk of the investment with the risk tolerance of the investor is of particular importance - according to *Lamoureux*, this comparison is "probably the most critical element in the registrant's suitability obligation" (at p. 17; cited with approval by the OSC in *Daubney* at para. 202).

195 Moreover, risk tolerance is not simply a matter of asking the client's preference. In *Re Jaynes* (2000 LNONOSC 126), the OSC held that (at p. 7 (QL)):

> ...notwithstanding what a client may indicate as their risk tolerance level, speculative trades may be wholly unsuitable based on their personal circumstances; a registrant's responsibility is to properly identify when this is the case and even refuse to execute unsuitable trades on behalf of a client when necessary.

196 In particular, a registrant should consider his or her client's age, investment time horizon, and financial situation, as a high-risk investment may be unsuitable for an older client of modest means who is near to retirement and therefore has a limited ability to withstand and recover from financial losses - even if that client says he or she is prepared to accept a high level of risk (see *Sawh* at para. 213; *Daubney* at para. 199). The client's Investment knowledge and sophistication should also factor into the analysis for the reason pointed out in *Lamoureux*: some clients' "investment experience and sophistication may be insufficient to enable them to fully recognize or assess the risks inherent in an investment" (at p. 16). For such clients, the registrant's assessment of suitability is all the more important.

197 Much of this guidance is also set out in CSA Notice 31-336. Several of the additional points made in CSA Notice 31-336 are of particular relevance to this matter, including the following:

> - "[a]ssessing suitability is more than a mechanical fact-finding or 'tick the box' exercise. It requires meaningful dialogue with the client to obtain a solid understanding of the client's investment needs and objectives, and to explain how a proposed investment strategy is suitable for the client in light of the client's investment needs and objectives" (at p. 2; see also p. 19);
>
> …
>
> - a suitability assessment should take into account the size of the investment the client is proposing to make and what proportion of his or her total holdings it represents (at p. 15);
>
> …
>
> - diversification should be considered when assessing suitability, since lack of diversification could expose the client to additional risk; registrants are reminded to be cognizant of over-concentration in a single issuer, a

> group of related issuers, a single industry, or the exempt market itself, and are told that "[m]ost CSA staff will consider investments (either individually or taken together with prior investments) in securities of a single issuer or group of related issuers that represent more than 10% of the investor's net financial assets as potentially raising suitability concerns due to concentration" (at p. 22).

95. In *Lamoureux*, a three-stage framework for determining suitability allegations was set out (at 14-15). It requires that a registrant use due diligence in knowing the client and the product, use sound professional judgment in recommending products, and disclose material negative and positive features of the product to the client. In this regard, the Alberta Securities Commission in *Lamoureux* wrote:

> Suitability is to be assessed prior to any investment recommendation by the registrant to a client. The process that culminates in a registrant's investment recommendation to a client has three component phases or stages that must occur in sequence.
>
> The first stage involves the "due diligence" steps undertaken by the registrant to "know the client" and to "know the product". Knowing the product involves carefully reviewing and understanding the attributes, including associated risks, of the securities that they are considering recommending to their clients. Knowing the client was discussed above.
>
> Only after the "due diligence" of the first stage is completed, can the registrant move to the second stage in which they fulfil their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for that client.
>
> Suitability determinations, discussed in section IV (B) (d), will always be fact specific. A proper assessment of suitability will generally require consideration of such factors as a client's income, net worth, risk tolerance, liquid assets and investment objectives, as well as an understanding of particular investment products. The registrant must apply sound professional judgement to the information elicited from "know your client" inquiries. If, based on the due diligence and professional assessment the registrant reasonably concludes that an investment in a particular security in a particular amount would be suitable for a particular client, it is then appropriate for the registrant to recommend the investment to that client.
>
> By recommending a securities transaction to a client, a registrant enters the third stage of the process. Whether a particular transaction has in fact been "recommended" is to be determined objectively, taking into consideration the content, context and manner of communication from a registrant to the client, to assess whether it could reasonably be understood as a suggestion that the customer engage in a securities transaction. At this stage, when making the client aware of a potential investment, the registrant is obligated to make the client aware of the negative material factors involved in the transaction, as well as positive factors.
>
> The disclosure of material negative factors in the third stage of the process is intended to assist the client in making an informed investment decision. It should be emphasized that

> such disclosure cannot ameliorate deficiencies in either of the first two stages of the process. If a registrant recommends securities that are not suitable for a particular client, then disclosure by the registrant during the third stage is irrelevant to their suitability obligation in stage two. The registrant's failure may have been the result of not knowing the client, or not knowing the securities, or an error in the suitability determination but, once the improper recommendation has been made, it does not matter whether or how the registrant discloses the material negative factors, or whether the client claims to understand and accept the risks involved in the investment. The registrant has failed to fulfil their obligations.

96. In *Sterling Grace & Co. (Re)*, 2014 LNONOSC 558 (QL) at para 216, the Ontario Securities Commission cited *Lamoureux*, amongst other authorities, as they addressed how KYC obligations and suitability obligations are distinct, but closely related concepts. Both are considered basic obligations of a registrant. The Ontario Commission stated:

> 216 In [*Re Daubney* (2008), 31 OSCB 4817] the Commission recognized that "KYC" and "suitability" obligations are conceptually distinct, but so closely connected and interwoven that the terms are at times used interchangeably (*Daubney*, *supra* at para. 16 citing *Re Lamoureux* (2001), ABSECCOM 813127 at p. 10). In that matter, the Commission accepted the Alberta Securities Commission finding in *Lamoureux* that:
>
>> The "know your client" obligation is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance.
>>
>> The "suitability" obligation is the obligation of a registrant to determine whether an investment is appropriate for a particular client. Assessment of suitability requires both that the registrant understands the investment product and knows enough about the client to assess whether the product and client are a match.
>>
>> (*Ibid*.)

97. The Ontario Commission went on to succinctly reiterate the “three-stage analysis” that had been adopted and applied in Ontario in respect to suitability allegations:

> 220 It is well established that the Commission has adopted a three-stage analysis of suitability, according to which a registrant is obliged to:
>
>> a) use due diligence to know the product and know the client;
>>
>> b) apply sound professional judgement in establishing the suitability of the product for the client; and
>>
>> c) disclose the negative as well as the positive aspects of the proposed investment.

> (*Re Foresight Capital Corp*, 2007 BCSECCOM 101 at para. 52; cited in *Daubney, supra* at para. 17, *Sawh*, *supra* at para. 165 and *North American*, *supra* at para. 274)

98. Finally, in *Foresight Capital Corp. (Re)*, 2007 LNBCSC 69 (QL), the British Columbia Securities Commission also cited to *Lamoureux* in describing the law of suitability assessment, adopting the same principles above including the three-step test (at paras 46-56). As a part of its review of the law, the British Columbia Securities Commission indicated that regardless of whether KYC forms are available as tools to get to know a client, registrants are still obligated to use proper due diligence to satisfy their obligations, including understanding their clients and their needs.

99. All of the cases cited are relevant in analyzing the suitability allegations brought against Comeau in respect to Pinnacle Client 1. The Panel has reviewed this law and considers it instructive.

100. Beginning with the first stage of the test, which in part considers whether Comeau used due diligence to know the products he was selling, we find that Comeau was credible in his explanation of the due diligence process he utilized for the products he determined were suitable for Pinnacle Client 1. Comeau was an experienced and seasoned registrant. He employed a rigorous due diligence process in his practice regarding products he advised on and played a key role on Pinnacle's due diligence team. He also attended regularly at continuing education events, including product seminars and internal meetings.

101. We also find that Comeau satisfied his obligations regarding getting to know Pinnacle Client 1. Comeau and Pinnacle Client 1 used to work with one another in the securities industry at Sentinel, so they were familiar with one another. Upon being contacted about potentially investing, Comeau met in person with Pinnacle Client 1 twice and had numerous telephone conversations with him. During these meetings and conversations, Comeau gathered information about Pinnacle Client 1 that was relevant to investing, such as his age, net worth, and investment objectives. Comeau completed a KYC form regarding Pinnacle Client 1, an investment plan, and a revised investment plan as he continued to learn more about Pinnacle Client 1 over the course of their meetings. In all the circumstances, the Panel finds that Comeau appropriately got to know Pinnacle Client 1.

102. As for the second stage of the test, the Panel believes that Comeau did apply sound professional judgment in establishing the suitability of the various products Pinnacle Client 1 invested in. Comeau spent time reviewing various types of investments available to Pinnacle Client 1, including GIC's, stocks, bonds, mutual funds, and exempt market products. He explained how each would apply to Pinnacle Client 1's investment objectives of long-term growth, income, liquidity, and safety. He understood Pinnacle Client 1's financial circumstances and that the source of Pinnacle Client 1's investment money was the recent sale

of his business. He appropriately credited Pinnacle Client 1 for having some investing knowledge since Pinnacle Client 1 had worked in the industry prior and was a businessperson with experience in real estate investing. He then took this information and selected various products that would potentially meet Pinnacle Client 1's objectives. He also explained the importance of diversification in investments and selected a range of products for Pinnacle Client 1 to consider that could spread the exposure risk of the $1.8 million investment. In considering all the evidence, we are satisfied that the second stage of the test is also met.

103. As for the third stage, while the Panel is satisfied that Comeau adequately disclosed to Pinnacle Client 1 the positive and the negative aspects of most of the investment products Pinnacle Client 1 chose to purchase, we are not satisfied that Comeau did so in respect to the Grasswood Bonds investment. As analyzed above, on the whole of the evidence, it is our respectful view that Comeau did not adequately explain to Pinnacle Client 1 the nature of the mortgage that was in place between Grasswood Finance and Grasswood Property, and that the Grasswood Bonds were unsecured investments as detailed in the offering memorandum and subscription agreement. The difference between an investment being secured or unsecured is significant. Having conducted proper due diligence on the Grasswood Bonds investment and in properly understanding that a real estate investment with security was important to Pinnacle Client 1, Comeau should have clearly explained to Pinnacle Client 1 the nature of the mortgage held by Grasswood Finance in respect to the Grasswood Estates project. In our view, he did not.

104. Ultimately then, the Panel finds that Comeau breached section 13.3 of *NI 31-103*.

**b. Comeau's Dealings with Pinnacle Client 20**

105. In respect to Comeau's dealings with Pinnacle Client 20, Staff alleges a breach of subsection 33.1(1) (the obligation to deal fairly, honestly, and in good faith as discussed above) and section 13.3 of *NI 33-103* (suitability).

106. Pinnacle Client 20's financial circumstances were very different from Pinnacle Clients 1's, as was her investment knowledge. The Panel found Pinnacle Client 20 to be a forthright and credible witness. Her testimony was consistent with the documentary evidence, and she presented as sincere and genuine in telling her story. In general, where Pinnacle Client 20's evidence materially departs from or is in conflict with Comeau's testimony, we prefer Pinnacle Client 20's evidence.

**i. Testimony of Pinnacle Client 20**

107. Pinnacle Client 20 appeared before the Panel and her testimony covered the following:

a. Pinnacle Client 20 first met Comeau at a business networking “breakfast club” in Saskatoon. She heard Comeau’s presentations on alternative investments and found them attractive because these types of investments implied that one could earn better returns.

b. Pinnacle Client 20 met with Comeau in his office in September 2014 to discuss investing her pension funds that were in a Locked-In Retirement Account.

c. When she met with Comeau in 2014, Pinnacle Client 20 told him that her income was around $41,000 and that she had about $60,000 in investments which included her Manulife pension funds. She also told him she rented and had no other assets besides a 1988 car and some home belongings like a laptop. She did *not* tell Comeau that she had assets exceeding $400,000.

d. In 2014, Pinnacle Client 20’s net income did not exceed $75,000. She did not have a spouse, nor did she live with anybody.

e. When Pinnacle Client 20 agreed to purchase some investments, Comeau presented her with a number of documents to initial and sign, including offering memorandums, subscription agreements, and a KYC form.

f. When Pinnacle Client 20 was presented with the KYC form, it was blank. Upon being asked to by Comeau, she signed and initialed the KYC form. Comeau asked Pinnacle Client 20 about her name, address, and phone numbers. She was also asked about her income, which was $41,000. No other parts of the form were filled in prior to her signing and initialing the form. Pinnacle Client 20 later found out that the form had been filled in without her knowledge and with numbers that were not true. The form estimated her net financial assets at $315,000 and net fixed assets at $120,000 for a total net worth of $435,000. The net worth numbers on the form appeared to have been written over, and boxes showing her personal information, investment objectives, and risk tolerance had been ticked and filled in after she signed the form.

g. Pinnacle Client 20 signed only one KYC form during the meeting with Comeau in September 2014, but when she later received copies of the documents, there was a second KYC form that she had never seen before. She believed that the one she signed must have been copied and completed after she left the meeting.

h. Pinnacle Client 20 did not understand the type of investments that she was investing in and had no idea what offering memorandums were. She testified that her investment knowledge

was ordinary to below average. She ultimately trusted Comeau as to which products to invest in.

i. Pinnacle Client 20 ended up investing $43,550 in five different products in the following amounts:

| | | |
|---|---|---|
| i. | KV Mortgage Fund | $10,000.00 |
| ii. | OmniArch | $10,000.00 |
| iii. | SecureCare | $10,000.00 |
| iv. | Weslease Income Growth Fund | $ 6,770.00 and |
| v. | Canadian Coyote Energy Trust | $ 6,780.00 |

j. When Pinnacle Client 20 left the meeting with Comeau in September 2014, she did not take copies of any of the documents that she signed.

k. Pinnacle Client 20 found out after she signed documents regarding the OmniArch investment that OmniArch had an equity deficit of $8 million. Comeau did not review this information with her, and she would never have invested in OmniArch had she known that the investment was in financial difficulty.

l. Pinnacle Client 20 told Comeau that she needed liquidity in the investments. Despite this, Comeau did not explain that some investments had a 5 year term before they could be redeemed without penalties. Since liquidity was important to Pinnacle Client 20, had she known about the 5 year term she would not have invested.

m. Pinnacle Client 20 did not fully understand the risks or redemption timeframes associated with the investments she purchased through Comeau.

n. Pinnacle Client 20 was instructed by Comeau to initial and sign Schedule C to the SecureCare subscription agreement to signify that she was an eligible investor with net assets exceeding $400,000. She did not, however, have net assets exceeding $400,000, which she had previously told Comeau.

**ii. Comeau's testimony in relation to Pinnacle Client 20**

108. Comeau's testimony regarding his dealings with Pinnacle Client 20 covered the following:

a. In general, Comeau's process for reviewing the risks associated with alternative investments was the same for all his clients, including Pinnacle Client 1 and 20.

b. Comeau provided an investment plan during his September 2014 meeting with Pinnacle Client 20. The investment plan outlined investment objectives and options for Pinnacle Client 20. It also set out challenges with alternative investments. Moreover, Comeau included brochures for various investments with the investment plan.

c. Pinnacle Client 20 was interested in higher returns and was willing to accept more risk. Comeau spent time explaining to her issues associated with these types of investments.

d. All of the information on Pinnacle Client 20's KYC form was in Comeau's handwriting, but the information was provided by Pinnacle Client 20, including the net financial and fixed asset amounts. Comeau modified the net worth amount to $435,000 after Pinnacle Client 20 changed her mind as to the amount. Pinnacle Client 20 then initialled the document signifying she agreed with the revised amounts.

e. Comeau spent time with Pinnacle Client 20 reviewing the pros and cons of the various investment options, including risks, rate of return, and liquidity. Pinnacle Client 20 did not like the returns for the first two options, so they began discussing the third option which was alternative investments. They discussed the risks of alternative investments and their redemption clauses. He also put emphasis on certain aspects of the investments as he reviewed with Pinnacle Client 20 the warnings in the subscription agreements.

f. Pinnacle Client 20 qualified to purchase alternative investments in a couple of ways. First, as an eligible investor because her net worth was greater than $400,000. Second, as an ineligible investor if she purchased $10,000 or less of any individual exempt security, which she did.

g. Comeau testified as to the issues around the OmniArch investment that resulted in a cease trade order being issued by the Alberta Securities Commission. He explained that OmniArch had undergone a special audit and was subsequently allowed to continue raising funds. Comeau explained the various areas of concern with the investment to Pinnacle Client 20 and further explained why he continued to recommend it for her. Comeau told her about how Pinnacle management reviewed the situation and believed it was still an appropriate product to sell to investors. After hearing Comeau's explanations, Pinnacle Client 20 chose to proceed with the OmniArch investment.

h. Comeau explained that the various investment documents that were signed were dated November 6, 2014 rather than September 2014 because Pinnacle Client 20's funds were being transferred from another financial institution. It was only at the time the funds were received and exact amount was known (which was on November 6, 2014) that the documents were then dated.

i. Comeau reviewed with Pinnacle Client 20 the special Risk Assessment form that he created to highlight things like the risks, challenges, and liquidity issues for exempt securities. Comeau then had Pinnacle Client 20 sign the form during the September 2014 meeting to acknowledge her understanding of it.

### iii. Testimony of Comeau's Administrative Assistant

109. Comeau's administrative assistant of 19 years testified to the following:

a. The assistant's role in Comeau's office was to assist with operation of the office by answering the phone, processing paperwork, assisting with emails, setting appointments, filing documents, inputting information into Pinnacle's electronic file management system, preparing documents for client signatures, and organizing blank documents (such as offering memorandums and subscription agreements).

b. The assistant's understanding was that Comeau was required to familiarize himself with products that Pinnacle approved for marketing.

c. The assistant did not have any role in the investment plans beyond binding them for Comeau and Comeau was the one that drafted the investment plans. She also did not fill in any financial information of clients on any forms, such as KYC forms, as Comeau would do that.

d. The assistant saw Comeau as a very knowledgeable person that was caring and genuine. She believed Comeau was able to build good rapport with his clients and peers because he never spoke above their heads and was well liked.

e. When the assistant was helping complete documents for Pinnacle Client 20's signature, the KYC form only had room to enter four investments. However, since Pinnacle Client 20 was purchasing five investments, in order to complete the package of documents the assistant photocopied the signed page 2 of the KYC to accommodate adding the fifth investment. The assistant admitted that photocopying documents with a client's signature was not an approved practice, that she should not have done this, and that she did not inform Comeau that she had copied the document.

### iv. Comeau Contravened Section 33.1(1) of the *Act* and section 13.3 of *NI 31-103* in his dealings with Pinnacle Client 20

110. The law regarding subsection 33.1(1) of the *Act* (dealing with clients fairly, honestly, and in good faith) and section 13.3 of NI 31-103 (suitability) was discussed at length above. We will now apply that law to the facts regarding Pinnacle Client 20.

111. As noted above, the Panel found Pinnacle Client 20's testimony credible. Pinnacle Client 20 was and is a person of modest means. She was never married and never lived with anyone. At the relevant time she was renting, and her only assets were a pension fund, a 1988 car, and some home belongings like a laptop. Her employment income has never exceeded $41,000 per year. Based on this level of income, it would have taken her a considerable number of years to accumulate $60,000 in her pension fund. The Panel believes Pinnacle Client 20's testimony that she did not tell Comeau that she had assets worth $400,000 and rejects Comeau's testimony in this regard. The Panel also believes that Comeau inputted the $400,000 amount on the form after Pinnacle Client 20 signed the form so that it appeared that she qualified for some of the alternative investments as an eligible investor despite the information not being true.

112. Pinnacle Client 20 had only average to below average investment knowledge. While she understood certain basics like that all investments have a level of risk and can generate a return or a loss, she did not understand important documents like offering memorandums. As such, Pinnacle Client 20 testified that she trusted and relied on Comeau's advice in respect to what investments she should invest in. The Panel believes Pinnacle Client 20 both trusted and relied on Comeau, and that she had an element of vulnerability as an investor considering her investment knowledge.

113. After meeting at an investment "breakfast club", Pinnacle Client 1 became interested in alternative investments and wanted to meet with Comeau to discuss. Comeau told Pinnacle Client 20 that she needed a minimum of $10,000 to invest in most alternative investments. In light of this, once Pinnacle Client 20 was able to gain access to her pension funds worth about $60,000, she decided to invest this money in alternative investments through Comeau. Pinnacle Client 20 was forthright in her testimony in this regard.

114. Pinnacle Client 20 was also forthright when she admitted that she did not mind taking a little more risk to try to get a better return on her investments. This makes sense considering her interest in moving her investments to a different product. The Panel also believes Pinnacle 20 when she testified that she did not, however, fully understand the level of risk associated with alternative investments and that Comeau did not adequately explain those risks to her.

115. The Panel also believes that Pinnacle Client 20 was credible when she testified that during her meeting with Comeau in September 2014, she was not provided with copies of the documents that she signed and initialed. Not providing a copy of these documents was contrary to the receipt acknowledgment forms in the offering memorandums, which Comeau also got Pinnacle Client 20 to sign. The Panel does not place any blame on Pinnacle Client 20 in this regard as, again, she had average to below average investment knowledge and was following the directions of Comeau in reliance on him. In being an experienced financial advisor, Comeau knew the products he was selling and knew what was required of him and Pinnacle Client 20 in completing the transactions.

116. On the KYC form, Comeau testified that the amounts on the form came directly from Pinnacle Client 20 and that he only modified the numbers when new information was provided to him by Pinnacle Client 20 when she changed her mind. He claimed that the final numbers were on the form when Pinnacle Client 20 signed the form. The Panel does not believe this testimony. Pinnacle Client 20 told Comeau her income was $41,000 and saw him put that number on the form. At that time, she did not see the other numbers on the form. We believe her testimony.

117. We also believe that Pinnacle Client 20 told Comeau liquidity was important to her in investments she made and that Comeau did not adequately explain to her the liquidity features of the investments including redemption clauses. Some of the investments had five-year redemption clauses and we believe Pinnacle Client 20's testimony that she was not aware of this and had she been aware, she would not have invested. She did not want to risk being in an investment that was locked in for more than a year.

118. The above analysis shows multiple examples of actions and omissions by Comeau that constitute contraventions of subsection 33.1(1) of the *Act.* Comeau failed to deal with Pinnacle Client 20 fairly, honestly, and in good faith by inadequately explaining the risks and features of the various alternative investments that Pinnacle Client 20 invested in considering her level of investment knowledge. In addition, he failed to properly assess Pinnacle Client 20's financial situation and then inputted amounts on the KYC form that did not accord with reality or with information gathered from Pinnacle Client 20. Moreover, he told Pinnacle Client 20 to sign the KYC form and then filled in critical fields after the fact with information that was not true so that she would meet a criterion of an eligible investor. He also failed to provide Pinnacle Client 20 with copies of the various investment documents when they were signed. In the Panel's respectful view, Staff has met its burden of proving a breach of subsection 33.1(1).

119. In respect to section 13.3 of *NI 31-103* and allegations pertaining to suitability, the Panel also believes Staff has met its burden of proving Comeau breached this subsection. With reference to the three-stage analysis of suitability applied above, while we believe that Comeau was an experienced advisor with

a thorough due diligence process and therefore knew the products he was selling to Pinnacle Client 20, the facts also demonstrate that Comeau:

a. failed in his obligation to properly know Pinnacle Client 20 who was of modest financial means and possessed only average to below average investment knowledge;

b. failed in his obligation to apply sound professional judgment in establishing whether the alternative investments recommended to Pinnacle Client 20 were suitable for her all things considered; and

c. failed in his obligation to adequately disclose the positive and negative aspects of the alternative investments, including in respect to liquidity of some of the investments and in respect to the financial situation regarding OmniArch.

**c. Did Comeau Contravene Subsection 27(2) of the *Act*?**

120. Subsection 27(2) of the *Act* prohibits persons and companies from acting as dealers and advisors unless they are properly registered. In respect to being a dealer, one can either register as a dealer or be registered as a representative of a registered dealer and then act on behalf of that dealer (*Act*, s 27(2)(a)(i)-(ii)). In respect to advisers, one can either be registered as an advisor or registered as a representative of an adviser and then act on behalf of that adviser (*Act*, s 27(2)(b)(i)-(ii)).

121. Comeau's actions meet the definition of both dealer and advisor under the *Act*. Subsection 2(1)(n) defines "dealer" as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities or derivatives as principal or agent". Subsection 2(1)(a.1) defines "adviser" as "a person or company engaged in or holding himself, herself or itself out as engaging in the business of advising another as to the investing in or the buying or selling of securities or derivatives". As Comeau engaged in both selling Grasswood Bonds (a security) and advising investors such as Pinnacle Client 1 in respect to Grasswood Bonds, he was acting as a dealer and adviser. Accordingly, Comeau needed to be properly registered.

122. Comeau was registered as a representative of Pinnacle and acted on behalf of Pinnacle in respect to various investments. However, the Grasswood Bonds investment was not one of Pinnacle's products. Comeau testified that when Comeau joined Pinnacle, he negotiated an agreement with Pinnacle whereby Pinnacle permitted him to continue marketing and selling Grasswood Bonds, but he was required to advise clients that the Grasswood Bonds investment was not a product of Pinnacle and would not appear in any

investor statements provided by Pinnacle. In the Panel's respectful view, when Comeau was marketing, selling, and advising investors (such as Pinnacle Client 1) in respect to on Grasswood Bonds, he was doing so independent of Pinnacle and therefore needed to be registered as a dealer and advisor. In not being registered, Comeau contravened section 27(2)(a) and (b) of the *Act*.

**d. Did Comeau Contravene Section 4.1 of *NI 33-109*?**

123. This allegation emanates from Comeau allegedly failing to file appropriate forms with the FCAA to disclose his outside business activities after he moved from Sentinel to Pinnacle in January 2012. It was at this time that Comeau says he was granted permission by Pinnacle to continue marketing Grasswood Bonds under certain conditions.

124. Section 4.1 of *NI 33-109* requires registrants to keep their securities regulator apprised of their employment and business activities whenever there is a change. Section 4.1 reads:

> **4.1 Notice of Change to an Individual's Information**
>
> (1) Subject to subsection (2), a registered individual or permitted individual must notify the regulator of a change to any information previously submitted in respect of the individual's Form 33-109F4 as follows:
>
> > (a) for a change of information previously submitted in items 4 [*Citizenship*] and 11 [*Previous employment*] of Form 33-109F4, within 30 days of the change;
> >
> > (b) for a change of information previously submitted in any other items of Form 33-109F4, within 7 days of the change.
>
> (2) A notice of change is not required under subsection (1) if the change relates to information previously submitted in item 3 [*Personal information*] of Form 33-109F4.

125. During the hearing, a legal assistant in the FCAA Securities Division was called to testify to all Form 33-109F4s that were filed by Comeau with the FCAA through the National Registry Database ("NRD") for the period between January 23, 2012 to April 30, 2019. The legal assistant testified that she compared hard copies of Comeau's 33-109F4 filings on the NRD for the above-noted dates to the screen copies on the NRD database online and found no differences between the two versions of the filings.

126. The Panel reviewed the 33-109F4 filings from when Comeau commenced employment in January 2012 with Pinnacle, which included a section asking conflict of interest questions with regard to outside business activities. Comeau responded to these questions, but there is no reference to his continuing business activity regarding Grasswood Bonds. Since Grasswood Bonds was an outside business activity of Comeau, his failure to disclose it is a breach of section 4.1 of *NI 33-109*.

127. In Comeau's written closing submissions, he argues that the allegations relating to s. 4.1 of *NI 33-109* are statute barred based on the section 136(2) limitation period in the *Act*. Comeau argues that since the Amended Statement of Allegations is dated August 30, 2019, Staff needed to lead evidence of a breach of section 4.1 on or after August 30, 2013 (within six years). Comeau argues that Staff has failed to do so since Comeau did not act in any capacity in relation to Grasswood Bonds after April 2013.

128. The Panel does not accept Comeau's argument. The law regarding section 136(2) was set out above, including the concept of a continuing contravention. In the present situation, Comeau made filings at the time he was selling Grasswood Bonds to investors, yet he failed to disclose the activity. He also failed to correct the non-disclosure to bring himself in compliance well past August 30, 2013. The evidence before us shows he never corrected the non-disclosure up to at least 2018, meaning he permitted non-disclosures to remain on his filings. In the Panel's respectful view, these failures constitute a continuing contravention such that the limitation period did not expire.

129. In closing oral arguments, Comeau did not argue that the limitation period expired. Instead, he argued that if the evidence established a breach of section 4.1, it was more of a minor technical breach and that Comeau did not realize he needed to disclose his continuing involvement in Grasswood Bonds. However, we find this hard to accept. A review of Comeau's 33-109F4 filings between January 23, 2012 and April 30, 2019 demonstrate that Comeau knew he had to disclose, and did disclose, various involvements in volunteer positions and community organizations and included explanations as to why these activities would have no effect on his being a dealing representative of Pinnacle. In being such an experienced advisor, we do not accept that Comeau did not know he needed to disclose his involvement in Grasswood Bonds.

130. Technical breach or otherwise, Comeau was an experienced and credentialed representative that had filed several 33-109F4 forms between January 2012 and April 2019. He understood what was required of him in disclosing outside business activities and had several opportunities to both disclose his off-book involvement with Grasswood Bonds and to correct his non-disclosures. The Panel finds Comeau in contravention of s 4.1 of *NI 33-109*.

#### e. Did Grasswood Finance contravene section 58(1) of the *Act*?

131. The allegations in this part of the decision pertain only to Grasswood Finance. Throughout these proceedings, Grasswood Finance was provided notice of all conference calls organizing the hearing, motions that were filed with the Registrar, and decisions of the Panel. Despite receiving notice, no one appeared for or on behalf of Grasswood Finance at any point throughout the hearing. As such, the Panel

is left to assess the merits of the allegations against Grasswood Finance based on the evidence presented by Staff, which stands uncontradicted.

132. The Grasswood Finance allegations pertain to Grasswood Finance trading in Grasswood Bonds constituting a distribution of securities without first filing various prospectuses as required by subsection 58(1) of the *Act*. If Grasswood Finance was to have relied on an exemption from filing a prospectus, Staff alleges that such a defence must fail because Grasswood Finance did not adhere to the exemption reporting requirements found in section 6.1 of *NI 45-106*.

133. In *Re Aurora*, 2011 ABASC 501 (QL) (Alta. Sec. Comm.) at para 133, it was held that the burden of proof in respect to whether an exemption was available at a time a distribution was made lies with the person seeking to rely on an exemption. Grasswood Finance did not rely on any exemption in respect to the allegations, nor was any evidence presented to the Panel that would establish that Grasswood Bonds qualified for an exemption or adhered to the reporting requirements in section 6.1 of *NI 45-106*. As such, the exemption issue can be set aside with our focus instead placed on subsection 58(1) of the *Act* and whether Grasswood Finance complied with prospectus requirements.

134. Subsection 58(1) of the *Act* reads in full:

> **Prospectus required**
>
> 58(1) No person or company shall trade in a security on the person's or the company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:
>
> > (a) a preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it; and
> >
> > (b) a prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it.

135. To begin, the evidence establishes that Grasswood Finance issued and traded in Grasswood Bonds. That said, subsection 58(1) only concerns the trade of a security if that trade constitutes the distribution of a security. Therefore, the Panel must determine whether Grasswood Finance's trading in Grasswood Bonds constitutes the distribution of a security.

136. Subsection 2(1)(r)(i) of the *Act* defines "distribution" in the following way:

> **"distribution"**, where used in relation to a trade in a security, means a trade:
>
> > (i) in a security of an issuer that has not been previously issued;

137. Reference to the Grasswood Bonds subscription agreement confirms that the bonds that any investor subscribes for, in this case Pinnacle Client 1, form part of a larger issuance and sale of series A and series B bonds of Grasswood Finance. The evidence demonstrates that the Grasswood Bonds were securities that were not issued prior to Grasswood Finance issuing them. Grasswood Finance traded these previously unissued securities with investors, resulting in a distribution as defined by the *Act*. Since Grasswood Finance distributed securities, section 58(1) was triggered, and Grasswood Finance was required to file the necessary prospectuses.

138. There was no evidence that Grasswood Finance filed any prospectuses with the Director. Instead, the evidence from Investigator Foster was that Grasswood Finance did not file any prospectuses and there were no receipts issued by the Director showing that Grasswood Finance filed prospectuses.

139. In the end then, having failed to file the required prospectuses, and having not relied on any exemptions from filing prospectuses, Grasswood Finance contravened subsection 58(1) of the *Act*.

## V. CONCLUSION AND NEXT STEPS IN THE PROCEEDINGS

140. In summary, the Panel finds based on the evidence as a whole that Comeau contravened subsections 33.1(1) and 55.11(1) of the *Act* and section 13.3 of *NI 31-103* in respect to Pinnacle Client 1, and subsection 33.1(1) of the *Act* and section 13.3 of *NI 31-103* in respect to Pinnacle Client 20. Comeau also contravened subsection 27(2) of the *Act* and section 4.1 of *NI 33-109*.

141. In respect to Grasswood Finance, the Panel finds that Grasswood Finance contravened subsection 58(1) of the *Act*.

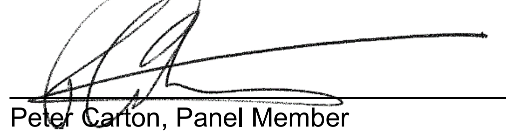
142. Having found that Comeau contravened various securities laws and that Grasswood Finance also contravened a securities law, the next step in these proceedings is for the Panel to receive submissions from the parties in respect to sanctions and costs in accordance with section 19.3 of the *Local Policy*. After consulting with the parties, the Registrar will set a date for a hearing. Once a date is set, if the parties believe they need more time to draft and file written submissions considering the timelines in the *Local Policy*, they may apply to the Panel for appropriate relief and should do so as soon as possible.

143. In respect to the issue of orders for financial compensation pursuant to section 135.6 of the *Act*, if Staff files a Request by the Director for financial compensation, a hearing will be scheduled and held in accordance with Part 13 of the *Local Policy*.

Dated at Regina, Saskatchewan this 7th day of December, 2021.

Howard Crofts, Chairperson

Norman Halldorson, Panel Member



Peter Carton, Panel Member