

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

In the Matter of
The Securities Act, 1988

and

In the Matter of
Jack Louis Comeau
Pinnacle Wealth Brokers Inc.
and
Grasswood Property Finance Ltd.
(the Respondents)

DECISION OF THE HEARING PANEL CONCERNING STAFF'S MOTION
FOR LEAVE TO CALL WITNESSES

Motion Heard on: March 11, 2020

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

Appearances: Sonne Udemgba and Nathaniel Day (Counsel for Staff of the Financial and
Consumer Affairs Authority of Saskatchewan ("FCAA"))

Simon Bieber and Julia Wilkes (Counsel for Respondents Jack Louis Comeau
("Mr. Comeau") and Pinnacle Wealth Brokers Inc. ("Pinnacle"))

No one appeared on behalf of the Respondent, Grasswood Property Finance
Ltd. ("Grasswood")

Date of Decision: April 16, 2020

BACKGROUND

1. Part of the background to this Decision is set out in the Decisions of the Hearing Panel dated March 12, 2020 and March 31, 2020. That background will not be reproduced in this Decision, but is incorporated into, and helps form the background to, this Decision.

Staff's Motion for Leave to Call Witnesses

2. Staff made a previous Motion for Leave to Call Witnesses ("Staff's 1st Witness Motion"), which was heard on March 5, 2020. In respect to that motion, the Panel rendered an oral decision on March 5, 2020 and then a written decision on March 31, 2020.
3. The Panel's Decision on Staff's 1st Witness Motion struck a balance between allowing Staff to call certain witnesses where doing so would be fair to the Respondents considering that Staff did not provide a witness list to the Respondents in accordance with the Local Policy. Along with failing to provide a witness list, Staff also did not provide witness summaries and documents that would be relied on by the witnesses. Staff's sole reason for not providing these necessary materials was that Staff believed its request for an adjournment would be granted, which would have resulted in there not being a need to provide these materials.
4. In deciding to grant leave to Staff to call three of the witnesses it proposed to call on certain conditions, the Panel stated the following in its Decision:
 13. Given the foregoing, and after considering all the circumstances, the decision of the Panel is to grant Staff leave to proceed with witnesses identified as Pinnacle Client numbers 1, 11 and 20 under the following conditions:
 - (a) witnesses be allowed to testify only to what is in the transcripts from matters raised during their interviews with Staff;
 - (b) witnesses be allowed to testify to documents discussed during their interviews with Staff and marked as exhibits to those interviews; and
 - (c) Staff are to provide the Respondents with the order that the three witnesses will be called at the Hearing.
 14. The reasons for the Panel's decision are:
 - (a) procedural fairness, including through consideration of the legitimate expectations of the parties, is important, as is compliance with the Local Policy. In this regard, the Panel is mindful of Staff's disclosure obligations as helpfully outlined by our Court of Appeal in *101115379 Saskatchewan Ltd.* with reliance on *Stinchcombe*, including the need to provide witness lists in accordance with the Local Policy. The Panel was also mindful of the Court of Appeal's decision in *C2 Ventures*, including its reaffirmation that a high order of procedural fairness is owed in securities proceedings brought pursuant to the *Securities Act, 1988* which includes considerations of legitimate expectations.
 - (b) the public expects that the Local Policy will be adhered to unless there is a good reason, in the interests of justice, to so depart. To ensure the public confidence in this regulatory body for the purpose of maintaining faith in and protection of the public markets in Saskatchewan, the Local Rules should be complied with by all parties, including by Staff.

- (c) Staff's reason for not complying with the Local Policy by preparing a witness list and sending it to the Respondents within the required timeframes was that Staff expected that its Motion to Adjourn would be granted by the Panel. The Panel does not consider this to be an appropriate reason, especially when all parties were directed by the Panel in writing on February 21, 2020 that they were to be prepared to proceed with the Hearing if Staff's motion was denied. As such, Staff was unable to provide an appropriate reason for not following the Local Policy and it is not in the interests of justice to countenance this behavior. Also in this regard, the Panel considered the recent decision of our Court of Appeal in *C2 Ventures*, a decision that is binding upon this Panel, and how the approach taken by Staff in this case in respect to the requirements of the Local Policy seemed to track the approach that the Court of Appeal criticized and rejected.
- (d) by granting Staff leave for the three witnesses to testify, the matter can proceed in a manner that is procedurally fair and in the public interest.
5. Relevant to this decision, FCAA Investigator Mr. [REDACTED] ("Investigator [REDACTED]") was one of the witnesses that the Panel denied leave to Staff to call.

STAFF'S NOTICE OF MOTION FOR LEAVE FOR INVESTIGATOR KEN FOSTER AND/OR ANOTHER STAFF MEMBER TO TESTIFY

6. The motion that this Panel is presently considering constitutes a second and separate motion by Staff in these proceedings for leave to call witnesses ("Staff's 2nd Witness Motion"). The facts directly underlying this motion follow.
7. On March 10, 2020, Staff filed a Notice of Motion seeking leave to call Investigator [REDACTED], and/or another staff member of FCAA, to testify to the following:
- (a) all Form 33-109F4s, including appendices, filed by Jack Comeau with the Financial and Consumer Affairs Authority of Saskatchewan through the National Registration Database ("NRD") for the period of January 23, 2012 to April 30, 2019; and
- (b) all filings made by Grasswood Property Finance Ltd. with the Authority for the period January 23, 2012 to April 30, 2019.
8. Staff cited the following grounds in support of the 2nd Motion for Witnesses:
- (a) the Amended Statement of Allegations dated August 30, 2019 alleged (at paragraphs 25 – 29) that Mr. Comeau's filings of Form 33-109F4 with the Authority through the National Registration Database did not include any information with respect to his activities related to Grasswood Property Finance Ltd., and is further alleged that he did not notify the Authority of any change to the said Form 33-109F4.

(b) Staff would introduce Form 33-109F4 into evidence as Mr. Comeau's own filing and as such he cannot argue that he was previously unaware of this document or presently unable to be cross-examined on it. As a result, there is no prejudice to Mr. Comeau in submitting this evidence.

(c) failure to file Form 33-109F4 had been alleged against Comeau in paragraphs 25 – 29 of the Amended Statement of Allegations.

(d) Grasswood received notice of Staff's intention to call evidence against it at this hearing and since have failed to participate in this hearing and as such will not suffer prejudice by allowing Mr. [REDACTED] and/or any staff member of the Authority to give evidence against it.

(e) the Panel's previous direction to Staff that it may only call witnesses Pinnacle Client numbers 1, 11 and 20 to testify was on the basis of prejudice suffered by Mr. Comeau. There was no finding of prejudice to Grasswood, nor was there any argument received with respect to Grasswood.

9. On March 11, 2020, Staff filed an Affidavit of Investigator [REDACTED] in support of the Notice of Motion deposing that he had searched the NRD for, and located, Mr. Comeau's 33-109F4 filings for the period January 2012 to April 2019. Investigator [REDACTED] also deposed in the affidavit that during his investigation he searched the NRD and located Mr. Comeau's NRD report for the period January 2012 to December 14, 2017 and the result of this search was disclosed to Mr. Comeau through his legal counsel.

SUBMISSIONS BY STAFF

10. Staff's submissions included the following:

(a) the Amended Statement of Allegations dated August 30, 2019 alleged (at paragraphs 25 – 29) that Mr. Comeau's filings of Form 33-109F4 with the Authority through the National Registration Database did not include any information with respect to his activities related to Grasswood Property Finance Ltd., and Mr. Comeau did not notify the FCAA of any change to the said Form 33-109F4.

(b) as The Form 33 109F4 at issue was Mr. Comeau's own filing and as such he cannot reasonably argue that prior to this time he was previously unaware of this document or presently unable to engage in cross-examination in respect to it. As a result, there is no prejudice to Mr. Comeau if the Panel allowed the evidence to be submitted.

(c) Paragraphs 25-29 of the Amended Statement of Allegations against Mr. Comeau specifically allege that he failed to file Form 33-109F4, so the allegation has been properly particularized . This further demonstrates that Mr. Comeau will not suffer prejudice.

(d) In respect to Grasswood, it received notice of Staff's intention to call evidence against it at this hearing and yet failed to participate in this hearing. As such, Grasswood will not suffer prejudice by allowing Mr. [REDACTED] and/or any staff member of the FCAA to give evidence against it.

(e) the Panel's previous direction to Staff that it may only call witnesses Pinnacle Client numbers 1, 11, and 20 to testify was on the basis of prejudice suffered by Mr. Comeau. There was no finding of prejudice to Grasswood, nor was there any argument of prejudice advanced by Grasswood.

(f) Contrary to the affidavit from [REDACTED], a law clerk in the office of counsel for the Respondent, who was not able to locate Mr. Comeau's Form 33-109F4 filings in the NRD, Mr. [REDACTED]'s affidavit indicates that he was able to locate the NRD through publicly available sources.

(g) The Panel needs to be cognizant of fairness principles and it is, in all the circumstances, fair and in the interests of justice for the proposed witnesses and evidence to be submitted.

SUBMISSIONS BY THE RESPONDENT

11. Counsel for the Respondent argued that:

(a) his law clerk (per the affidavit of [REDACTED] filed with the Registrar on March 10, 2020) could not find the Form 33-109F4 filings in the NRD so they are not publicly available. Accordingly, Staff should not be able to create one set of rules for Staff where they can access documents and different rules for Respondents who cannot access the same documents.

(b) the Panel already ruled in the previous decision that it would only allow three witnesses of ten listed by Staff. Of the witnesses the Panel refused to grant leave to testify, Mr. [REDACTED] was one of them. Therefore, since the Panel already rejected Mr. [REDACTED] as a witness, Staff once again seeking leave for him to testify would amount to an abuse of process.

(c) it would also be unfair for a substitute staff member to be allowed to testify regarding the Form 33-109F4 filings because the Panel already made its decision regarding witnesses that Staff could call.

(d) Staff is also engaging in an abuse of process by attempting to litigate by instalment. Staff already brought an application for leave to call witnesses and should have brought forward all their proposed witnesses at that time.

(e) the Respondents were not sure if they received the Form 33-109F4 in disclosure as the disclosure was massive and Staff did not put forth this document as a document it intended to put into evidence prior to the Hearing date. Since Staff has a duty to separate the wheat from the chaff in respect to disclosure, the Respondents were taken off guard and so staff should not be allowed to testify to information contained in the Form 33-109F4 filings as it would be contrary to procedural fairness.

Counsel for the Respondents cited three cases in support of their opposition to the Motion: *Canadian Imperial Bank of Commerce v Sylvester*, 2002 SKCA 52, 219 Sask R 138; *Gilewich v Gilewich*, 2007 SKCA 44; and *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR. Each of these

cases were submitted in support of the Respondents abuse of process argument where it is suggested that Staff was trying to re-litigate an issue already decided by the Panel and/or attempting to litigate by instalments (in this case, having Mr. [REDACTED] testify after the Panel specifically ordered in respect to Staff's 1st Motion for Witnesses that he be excluded from testifying, and overall, Staff attempting to call additional witnesses after already bringing a motion for witnesses in these proceedings).

ANALYSIS AND DECISION

12. Prior to rendering its decision on this present motion, the Panel considered all the materials filed by the parties, their oral submissions, the relevant provisions of the Local Policy (including section 4.5), and case law filed by the parties, and also remained mindful of the principles of procedural fairness and natural justice. In addition, prior to rendering its oral decision, the Panel asked Staff that if Mr. [REDACTED] were not permitted to testify, would the 'other staff member of the FCAA' so listed in Staff's motion to be available to be called be Staff's legal assistant that had previously sworn affidavits in this matter, that being Ms. [REDACTED]. Staff responded that it could be [REDACTED], or it could be the Director of the FCAA's Security Division.
13. Given the foregoing, and to begin, the Panel has decided to deny Staff leave to call Mr. [REDACTED] as a witness as this would be problematic considering the Panel's previous decision that rejected Mr. [REDACTED] as an appropriate witness in these proceedings. That said, the Panel has decided to grant leave to Staff to call Ms. [REDACTED] as a witness for the first purpose outlined in this Notice of Motion to call a Witness, that being to testify to all Form 33-109F4 filings, including appendices, filed by Mr. Comeau with the FCAA through the NRD for the period of January 23, 2012 to April 30, 2019. As to the second purpose in the motion, there were no issues between the parties regarding this purpose so the Panel did not feel it was necessary to provide a decision thereon.
14. The reasons for the Panel's decision are:
 - (a) Allowing Mr. [REDACTED] to be called as a witness would run contrary to the Panel's decision on Staff's first motion to call ten witnesses, of which Mr. [REDACTED] was one of the witnesses the Panel rejected as being an appropriate witness in these proceedings.
 - (b) The Panel is the master of its own house and enjoys discretion in these circumstances, so long as that discretion is exercised judicially, fairly, and in the interests of justice.
 - (c) The decision is consistent, and not in conflict, with its decision regarding Staff's 1st Motion for Witnesses. As with the three witnesses the Panel allowed in its other decision, the materials filed in respect to this motion demonstrate that Mr. Comeau will not be ambushed or prejudiced by allowing [REDACTED] to be called as a witness or by her evidence because the evidence to be testified to is referenced, and allegations in respect to it are particularized, through paragraphs 25 to 29 of the Amended Statement of Allegations. Moreover, The documents at issue were in the disclosure materials provided to Mr. Comeau and his counsel prior to the proceedings, were not voluminous in nature, and were specifically referenced in the Amended Statement of Allegations,

further demonstrating Mr. Comeau would not be ambushed or prejudiced.

(d) The Panel also does not view Staff's 1st Notice of Motion, or the Panel's decision in that regard, as closing the door to Staff or the Respondents from ever again being able to request leave of this Panel to call a witness. Hearings are fluid and the Panel retains discretion in how a hearing proceeds in part to ensure that the interests of justice are served.

15. Ultimately, while we agree with counsel for Mr. Comeau that Staff's attempt to call Mr. [REDACTED] in its second motion is problematic because he has already been denied by this Panel as a witness, we believe our decision fairly disposes of this Motion as it is in the interests of justice to grant Staff leave to have Ms. [REDACTED] testify on the terms previously mentioned.

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

Dated at Regina this 16th day of April, 2020.

[REDACTED]

Howard Crofts (Chairperson)

[REDACTED]

Norman Halldorson (Panel Member)

[REDACTED]

Peter Carton (Panel Member)