CPA CHARTERED PROFESSIONAL ACCOUNTANTS ONTARIO

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO

THE CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

TO: David Prentice (suspended)

AND TO: The Discipline Committee of CPA Ontario

The Professional Conduct Committee hereby makes the following amended allegations against David Prentice, a suspended member of CPA Ontario:

1. THAT the said David Prentice, in or about the period March 1, 2007 to December 31, 2007, while holding himself out as Executive Vice President of Synergy Group (2000) Inc. and Vice President of Borealis International Inc., failed to act with competence through devotion to high ideals of personal honour and professional integrity and committed an act discreditable to the profession, contrary to CMA Ontario Bylaws sections 21(a)(iii) and 21(d)(ii), as amended from time to time, in that he conducted himself in a fashion which contravened the *Securities Act*, R.S.O. 1990, c. S.5, as described in the Reasons for Decision of the Ontario Securities Commission attached as Schedule "A".

Dated at Toronto, Ontario, this 17th day of September, 2018

A.J. SOKIC, CPA, CA., CHAIR
PROFESSIONAL CONDUCT COMMITTEE

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue Queen Ouest Toronto ON M5H 3S8

Citation: Borealis International Inc. et al., 2011 ONSEC 2
Date: 2011-01-13

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF
BOREALIS INTERNATIONAL INC., SYNERGY GROUP (2000) INC., INTEGRATED BUSINESS CONCEPTS INC., CANAVISTA CORPORATE SERVICES INC., CANAVISTA FINANCIAL CENTER INC., SHANE SMITH, ANDREW LLOYD, PAUL LLOYD, VINCE VILLANTI, LARRY HALIDAY, JEAN BREAU, JOY STATHAM, DAVID PRENTICE, LEN ZIELKE, JOHN STEPHAN, RAY MURPHY, ALEXANDER POOLE, DEREK GRIGOR, EARL SWITENKY, MICHELLE DICKERSON, DEREK DUPONT, BARTOSZ EKIERT, ROSS MACFARLANE, BRIAN NERDAHL, HUGO PITTOORS and LARRY TRAVIS**

REASONS FOR DECISION

Hearing:	January 19-22, 25-27, and 29, 2010 February 1, 3-5, 2010 March 1 and 5, 2010	
Decision:	January 13, 2011	
Panel:	Patrick J. LeSage	- Chair of the Panel
	Paulette L. Kennedy	- Commissioner
Appearances:	Yvonne B. Chisholm Usman Sheikh	- For Staff of the Commission
	Hugh DesBrisay	- Counsel for Borealis International Inc., Integrated Business Concepts Inc., Vince Villanti, Larry Haliday
	Alistair Crawley Bruce O'Toole	- Counsel for Synergy Group (2000) Inc., Canavista Corporate Services Inc., Shane Smith, Andrew Lloyd,

		David Prentice, Jean Breau
Self-Represented:	-	Paul Lloyd
Paul Lloyd appeared on behalf of:	-	Canavista Financial Centre Inc.
No one attended on behalf of these respondents:	-	Joy Statham
	-	Len Zielke
	-	John Stephen
	-	Ray Murphy
	-	Alexander Poole
	-	Derek Grigor
	-	Earl Switenky
	-	Michelle Dickerson
	-	Derek Dupont
	-	Bartosz Ekiert
	-	Ross Macfarlane
	-	Brian Nerdahl
	-	Hugo Pittoors
	-	Larry Travis

TABLE OF CONTENTS

REASONS FOR DECISION

I. INTRODUCTION

[1] This was a hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act,* R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether the 26 respondents referred to below in Part II (the "Respondents") of these reasons for decision (the "Reasons for Decision") were involved in a scheme to sell securities for which no prospectus had been issued and no exemptions were available. Staff also allege, among other allegations, that this scheme was fraudulent and therefore some of the respondents violated not only the trading sections of the Act, but also the fraud section of the Act. The product in question is a Borealis Guaranteed Return Investment Certificate ("Borealis GRIC"). It offered an annual return of between 10% to 18%. All of the more than $16 million of the Borealis GRIC was sold on the basis of an 18% annual return, payable at 4.5% quarterly.

[2] This proceeding was commenced by a Statement of Allegations and Notice of Hearing dated November 15, 2007. An Amended Statement of Allegations and Amended Notice of Hearing were subsequently issued on May 22, 2008.

[3] The investors were advised that the monies raised through the Borealis GRIC would be placed in a trust company, Atlantic Trust Company Inc. ("Atlantic"). The monies so placed would permit Atlantic to provide loans to small and medium-sized businesses, in particular businesses with a connection to Vince Villanti ("Villanti") and/or Integrated Business Concepts Inc. ("IBC").

[4] Villanti owned and operated IBC, through which he has provided coaching, mentoring and other services to small and medium-sized business since IBC was incorporated in 1994. Including his work with IBC, Villanti has been involved in providing these services to small and medium-sized businesses for some 30 years. In 2003, in his capacity of business coach and mentor, Villanti met Shane Smith ("Smith"), who was involved in mutual fund and life insurance sales and operated Synergy Group (2000) Inc. ("Synergy"). Villanti's advice to Smith and other small/medium-sized business owners included preparation of business plans, budgets, marketing plans, hiring practices, structuring accounting systems, business growth, etc.

[5] Villanti, through LBC, would on occasion provide bridge financing to clients. He believed that if more funds were available for these clients, his approximately 600 small/medium-sized business client revenue base could be significantly expanded.

[6] Over a period of time, Villanti discussed his concern about inadequate financing for his clients with Smith and with others. Villanti and Smith postulated that if they could create, or purchase a bank or trust company to raise money from investors, those monies could then be loaned out to the small businesses who were, or hopefully would become, clients of LBC. This would have the potential to create a significant expansion of Villanti/LBC's business and provide Smith, who had a network of clients interested in high-yield fixed-return investments in a bank or bank-like product, with substantial commissions from the sale of such product.

[7] In late 2006, Villanti through a Montréal lawyer, Robert Dostie ("Dostie"), became aware of the possibility of purchasing a dormant trust company, Atlantic. Atlantic was incorporated in Prince Edward Island under provincial legislation. The dormant company was owned by investors in Montréal whose spokesperson was Yan Mecca ("Mecca"). On learning of this, Villanti revived his earlier discussions with Smith and it was decided that Villanti would pursue the purchase of Atlantic.

[8] Borealis International Inc. ("Borealis") was incorporated on February 16, 2007, with Villanti as President and sole director. Borealis was to be the vehicle through which a purchase of Atlantic would be accomplished.

[9] Negotiations, through Dostie, for the purchase of Atlantic continued from late 2006 into early 2007. The purchase negotiations for Atlantic were protracted, in part, because Villanti was having trouble ascertaining exactly what Atlantic could and could not legally do. Suffice it to say that Atlantic could not satisfy the requirements that Villanti was seeking, which included: (a) a broad capacity to receive deposits and (b) the capacity to make loans to small and medium-sized businesses. On February 6, 2007, Ravi Chaudhary ("Chaudhary"), an employee of LBC, emailed Dostie to advise they would no longer deal with Dostie regarding the purchase of Atlantic, although they were prepared to deal directly with the owners of Atlantic. Further negotiations continued on this basis until May 2007, without any agreement and with little headway being made. This was partly because it was, or at very least ought to have been, clear to Villanti early on, that Atlantic was not, and could not be, in a position, without a major overhaul and probably a new Charter, to accept deposits and to make loans.

[10] Notwithstanding that even by early June, 2007, no constructive or concrete progress had been made to purchase or form a firm alliance with Atlantic, Smith and David Prentice ("Prentice") who together operated Synergy, began in March 2007 to market the Borealis GRIC product. The formal launch for the product occurred in Hull, Québec, in late March 2007. At that meeting, Smith and Prentice described via PowerPoint the features of the Borealis GRIC. The features described included:

1. Borealis had purchased a Bank ... Atlantic;
2. Investors' funds would sit in a trust account at Atlantic which could be leveraged to provide loans to struggling small to medium-sized businesses to keep them afloat;
3. The investment was subject to no risk;
4. Atlantic was the first level of guarantee;
5. As a federally-regulated trust company Atlantic would have $100,000 Canada Deposit Insurance Corporation ("CDIC") coverage for each investor;
6. Atlantic mitigated risk by placing a performance bond;
7. The balance of any investment would be insured through SwissRe, Credit Suisse and/or Lloyds of London;
8. Synergy had arranged a proprietary strategic alliance with Borealis/Atlantic/Laiki Group; and

9. Regulation of Borealis would come under The Financial Consumer Agency of Canada ("FCAC").

[11] None of those above statements, except that Synergy had arranged an alliance with Borealis, were true at the time presented (March 2007). Furthermore, none came to be true between then (March 2007) and December 2007 when the Commission froze the Borealis bank account at the Royal Bank of Canada ("RBC") in which most of the more than $16 million raised from investors had been deposited.

[12] It is very important to note that the presenters at the Hull, March 2007 meeting, Smith and Prentice, told the audience that the arrangements had not yet been completed, however, in the words of one investor, attendees were informed that "the lawyers were in the final process of dotting all the Is and crossing all the Ts, but by the time [the investors] got home, it should be all *fait accompli*". (Hearing Transcript, January 21, 2010 at page 149)

[13] The Borealis GRIC was principally promoted and sold by Smith and Prentice through Synergy and its network of agents across Canada. The Borealis/Synergy promotional documents for this GRIC were very descriptive and stressed throughout the 'guaranteed' component of the product. In particular, they stressed the levels of insurance which included reinsurance. For example, the Borealis website described in part the investment as follows:

What protection is in place for clients?

There are four layers of protection in place:

1) Bank guarantee of repayment (Principal and Interest)

2) CDIC (Canadian Deposit Insurance Corporation – up to $100,000 principal and interest per account. Only applies to Canadian dollar deposits)

3) Performance Bond ("Sinking Fund") – collateral is put up from the parties to the contract, to pay interest as it becomes due

4) Re-Insurance Company (insures 100% of both principal and interest in the event of a failure to pay)

(Borealis website, www.borealisglobal.com, April 17, 2007)

[14] Investors consistently testified that they were each promised their investment was guaranteed, with multiple levels of protection that included CDIC protection and reinsurance coverage.

[15] The sales documents included a Participation Agreement, a Transfer Agent Agreement, and a Business Referral Agreement. These documents were the creation of Synergy, Smith and Prentice. These documents, were, even if intended to be accurate when they were drafted, misleading and false in important characteristics. For example, Item 8 in the Participation Agreement states:

> **Insurance,** A copy of the insuring policy which guarantees ROI and principal, issued to client. (Policy is not individual).

[16] The only insurance coverage for the more than $16 million deposited in the Borealis account with RBC was $100,000 CDIC coverage. The beneficiary for that insurance was not the investors, but rather Borealis, the account holder.

[17] In addition, the Transfer Agent Agreement at Item 1 makes reference to Atlantic as the final recipient of the investors' funds.

[18] As earlier indicated, Atlantic never received any of the investments, nor was it ever in a position to receive any of the investments. Further, there was never any real connection between Borealis, IBC, Synergy and any of Atlantic, SwissRe, Credit Suisse or Lloyds of London, as had been purported.

[19] Notwithstanding the misrepresentations in the sales pitch, in the material provided both orally and by way of a Borealis and/or Synergy website, and the PowerPoint presentations at meetings held in the provinces of Ontario, Québec and Alberta, none of the investors lost any money. The investors were repaid their capital and in addition were paid the promised and generous (18%) interest rate for their investments. This satisfactory result occurred not because any of the money was utilized as advertised (i.e., to leverage or create loans for small and medium-sized businesses) but solely because Villanti, the President of Borealis, and his company, IBC, paid, out of their own pockets, an amount probably in excess of $2 million to honour the payment terms of the Borealis GRIC.

[20] Mr. O'Toole, counsel for Synergy, Canavista Corporate Services Inc., Smith, Prentice, Andrew Lloyd and Jean Breau ("Breau"), set out the issues as follows:

1. Were any of the Borealis GRIC or the arrangements with investors 'securities'?

2. If, and only if, any of them was a 'security,' could the Respondents even have possibly violated the trading provisions or fraud provisions of the Act?

3. Is this an appropriate case for the panel to consider making an order pursuant to its "public interest" jurisdiction?

[21] Mr. DesBrisay, counsel for Villanti, Larry Haliday ("Haliday"), IBC and Borealis, adopts the position of Mr. O'Toole and, in addition, submits that it must be remembered:

(a) That Villanti treated the investors' money as trust funds and kept them in a segregated account;

(b) That IBC never received any funds;

(c) That none of IBC, Villanti or Haliday were involved in sales or sales presentations; and

(d) That Villanti had been mislead by Dostie and Mecca as to the ease and the effect of purchasing Atlantic.

[22] That now brings us to review the participation of each of the Respondents to determine whether or not they breached any of the sections of the Act as alleged by staff of the OSC.

II. THE RESPONDENTS

A. The Corporate Respondents

[23] Borealis is an Ontario company which was incorporated on February 16, 2007. Borealis is not a reporting issuer and has never been registered with the Commission.

[24] Synergy is an Ontario company which was incorporated on June 15, 2004. Synergy is not a reporting issuer and has never been registered with the Commission.

[25] IBC is an Ontario company which was incorporated on June 14, 1994. IBC is not a reporting issuer and has never been registered with the Commission.

[26] Borealis, Synergy and IBC share the same registered address: 235 Yorkland Boulevard, Suite 202, North York, Ontario.

[27] Canavista Corporate Services Inc. ("Canavista Corporate") is an Ontario company which was incorporated on September 1, 2005. Canavista Corporate is not a reporting issuer and has never been registered with the Commission.

[28] Canavista Financial Center Inc. ("Canavista Financial") is an Ontario company which was incorporated on July 31, 1996. Canavista Financial is not a reporting issuer and has never been registered with the Commission.

[29] Canavista Corporate and Canavista Financial share the same registered address: 311 George Street North, Peterborough, Ontario. Borealis and Synergy also have offices at this address.

B. The Individual Respondents

[30] Smith is a resident of Peterborough, Ontario. Smith is not currently registered with the Commission.

[31] Smith was also a respondent in a Commission proceeding (the "Sabourin Proceeding"). At the time of the hearing, Smith was subject to a cease trade order which was issued by the Commission on December 7, 2006 and extended by further orders of the Commission on December 20, 2006, June 14, 2007 and April 7, 2008 (the "Sabourin Cease Trade Order."). The Commission has since released its Reasons and Decision on Sanctions and Costs in the Sabourin Proceeding, in which Smith was ordered to cease trading in securities permanently.

[32] Smith held himself out to be President of Synergy and on occasion held himself out as President of Borealis.

[33] Andrew Lloyd is a resident of Peterborough, Ontario. He is not currently registered with the Commission.

[34] Andrew Lloyd is a respondent in the Sabourin Proceeding and was subject to the Sabourin Cease Trade Order. In the Commission's Reasons and Decision on Sanctions and Costs in the Sabourin Proceeding, Smith was ordered to cease trading in securities permanently.

[35] Andrew Lloyd acts as Synergy's Regional Manager (GTA and Central Ontario) and as the Regional Manager and Regional Contact for Borealis in Central and North Ontario. Andrew Lloyd is also a director of Canavista Corporate and the Vice-President and a director of Canavista Financial.

[36] Paul Lloyd is Andrew Lloyd's father and is a resident of Peterborough, Ontario. Paul Lloyd is a director of Canavista Corporate and the President and a director of Canavista Financial. Paul Lloyd is not currently registered with the Commission.

[37] Villanti is a resident of Whitby, Ontario. Villanti is the President and director of Borealis, and the Executive Director and a director of IBC. Villanti has never been registered with the Commission.

[38] Haliday is a resident of Richmond Hill, Ontario. Haliday is a director of IBC. Haliday has never been registered with the Commission.

[39] Breau is a resident of Whitby, Ontario. During part of the period relevant to these allegations, Breau was the 'nominal' President and a director of Synergy. Breau has never been registered with the Commission.

[40] Joy Statham ("Statham") is a resident of Ottawa, Ontario. Statham is not currently registered with the Commission.

[41] Prentice is a resident of Mississauga, Ontario. Prentice holds himself out as the Executive Vice-President of Synergy. Prentice has never been registered with the Commission.

[42] Len Zielke ("Zielke") is a resident of Richmond, British Columbia. Zielke holds himself out as Synergy's Regional Manager and Regional Contact for British Columbia, Alberta and Saskatchewan. Zielke has never been registered with the Commission.

[43] John Stephan ("Stephan") is a resident of London, Ontario. Stephan holds himself out as Synergy's Regional Manager for Western and South-Western Ontario and the Borealis Regional Contact for Western Ontario. Stephan is not currently registered with the Commission.

[44] Ray Murphy ("Murphy") is a resident of Kingston, Ontario. Murphy holds himself out as Synergy's Regional Manager for Eastern Ontario, Quebec and the Maritimes and as Borealis' Regional Contact for Quebec, Maritimes, Manitoba and Eastern Ontario. Murphy is not currently registered with the Commission.

[45] Alexander Poole ("Poole") is a resident of Waterloo, Ontario and is currently registered with the Commission as a salesperson in the categories of mutual fund dealer and limited market dealer.

[46] Derek Grigor ("Grigor") is a resident of Okotoks, Alberta. Grigor has never been registered with the Commission.

[47] Earl Switenky ("Switenky") is a resident of Kelowna, British Columbia. Switenky has never been registered with the Commission.

[48] Michelle Dickerson ("Dickerson") is a resident of Napanee, Ontario. Dickerson has never been registered with the Commission.

[49] Derek Dupont ("Dupont") is a resident of Nepean, Ontario. Dupont is not currently registered with the Commission.

[50] Bartosz Ekiert ("Ekiert") is a resident of Kitchener, Ontario. Ekiert has never been registered with the Commission.

[51] Ross Macfarlane ("Macfarlane") is a resident of Powell River, British Columbia. Macfarlane has never been registered with the Commission.

[52] Brian Nerdahl ("Nerdahl") is a resident of Elmira, Ontario. Nerdahl is not currently registered with the Commission.

[53] Hugo Pittoors ("Pittoors") is a resident of Calgary, Alberta. Pittoors has never been registered with the Commission.

[54] Larry Travis ("Travis") is a resident of Chatham, Ontario. Travis has never been registered with the Commission.

III. STAFF'S ALLEGATIONS

[55] Staff make the following allegations against the Respondents:

(i) The activities of the Respondents constitute trading in securities without registration in respect of which no exemption was available, contrary to section 25 of the Act.

(ii) The activities of the Respondents constitute distributions of securities for which no preliminary prospectus and prospectus were issued nor receipted by the Director, contrary to section 53 of the Act.

(iii) Each of the individuals who are directors and officers of the corporate respondents, including *de facto* directors and officers of the corporate respondents, have authorized, permitted or acquiesced in the corporate respondents' non-compliance with Ontario securities law, and accordingly, failed to comply with Ontario securities law contrary to section 129.2 of the Act.

(iv) Each of the Respondents has directly or indirectly engaged or participated in an act, practice or course of conduct relating to securities which he, she or it knows, or reasonably ought to know, has perpetrated a fraud on investors in the Borealis GRIC, contrary to section 126.1 of the Act.

(v) Smith and Andrew Lloyd breached the Sabourin Cease Trade Order.

(vi) Smith, Andrew Lloyd and Poole traded in securities in breach of the temporary cease trade order issued in these proceedings on November 15, 2007 and continued by orders of the Commission on November 28, 2007 and January 11, 2008 (the "Borealis Cease Trade Order").

(vii) The Respondents' conduct is contrary to the public interest and harmful to the integrity of the Ontario capital markets.

IV. ANALYSIS

A. The Applicable Sections of the Act

[56] The relevant sections of the Act are set out below.

[57] Subsection 25(1)(a) of the Act prohibits trading in securities without being registered:

> **25. (1) Registration for trading** – No person or company shall,
>
> > (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer ...

[58] Subsection 53(1) of the Act sets out the prospectus requirement for trades that comprise a distribution:

> **53. (1) Prospectus required** – No person or company shall trade in a security on his, her or its own account or on

> behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.

[59] A significant issue raised by counsel was whether the Borealis GRIC constitutes a security within its definition under subsection 1(1) of the Act.

[60] Staff submit that the product was an "investment contract" and as such a security as defined in subsection 1(1)(n) of the Act. They set out what they say is the test the Supreme Court of Canada created in *Pacific Coast Coin Exchange of Canada Ltd.* v. *Ontario (Securities Commission)* [1977] S.C.J. No. 117 (S.C.C.), at pages 9-10 (Q.L.) where an investment contract is described as one involving:

> (a) the advancement of money by an investor;
>
> (b) with an intention or expectation of profit;
>
> (c) in a common enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those who solicit the capital or third parties; and
>
> (d) where the efforts made by those other than the investors are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

[61] All counsel agree that this hearing is premised on the law that the onus is on Staff to prove their allegations on the balance of probabilities with clear and convincing evidence. Mr. O'Toole and Mr. DesBrisay submit that the Borealis investments all went to, and were advertised as going to, a Bank or Trust Company. They were deposited at RBC, a Bank under the *Bank Act (Canada).* Later investments were deposited at the Croatian Credit Union ("CCU") governed by the Provincial *Loan and Trusts Corporations Act* and/or the *Credit Unions and Caisses Populaires Act, 1994* which would put the investments beyond the enforcement purview of the Ontario Securities Commission; see subsection (e)(ii) of the definition of "security" within subsection 1(1) of the Act.

[62] The transactions with the CCU which for the most part occurred after the Commission froze the RBC Borealis account, are significantly different in both substance and structure. In those transactions the investors had a direct connection with CCU as a financial institution. Because of our decision regarding the transactions already relating to all of the other transactions, we have determined it unnecessary to examine those Borealis/CCU transactions. Our decision therefore will not deal with investments made via the CCU. Similarly, we do not consider whether transactions with the CCU constituted breaches of the Borealis Cease Trade Order by Smith, Andrew Lloyd or Poole.

[63] We find that none of the more than $16 million that went to RBC were contracts with Atlantic nor was the $16 million investment contracts between the investors and RBC, or any other entity, that could exclude them from the definition of "security"; see subsection (e)(ii) of the definition of "security" within subsection 1(1) of the Act.

[64] These were not investment contracts with Atlantic, nor were they investment contracts with RBC. They were, each and every one, a contract between Borealis and the investor. The investors were placing their money with Borealis on the understanding that Borealis would place the investments with Atlantic or failing that, another Trust company or Bank, to generate loans to small and medium-sized businesses and for which the investor would receive a very high interest rate return for his/her participation in this "Alternative Income Strategies Program." This was not a contract between RBC and the investor, nor between Atlantic and the investor, nor between any entity governed by the *Bank Act (Canada),* the *Loan and Trust Corporations Act,* or the *Credit Unions and Caisses Populaires Act, 1994.* We have no hesitation in concluding that the Borealis GRIC was an investment contract and a "security" as defined in subsection 1(1)(n) of the Act.

[65] Fraud involving securities is found at section 126.1(b) of the Act, which states:

> **126.1 Fraud and market manipulation** – A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
>
> ...
>
> (b) perpetrates a fraud on any person or company.

[66] In recent decisions, the Commission has adopted the British Columbia Court of Appeal's interpretation of the substantially identical fraud provision in the British Columbia *Securities* Act, R.S.B.C. 1996, c. 418, as amended in *Anderson v. British Columbia (Securities Commission),* 2004 BCCA 7, leave to appeal denied by the Supreme Court ([2004] S.C.C.A. No. 81) (see *Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 and *Re Global Partners Capital* (2010), 33 O.S.C.B. 7783).

[67] The legal test for criminal fraud is set out in *R. v. Théroux,* [1993] 2 S.C.R. 5 (***"Théroux"***). In *Théroux,* the elements of fraud are summarized at paragraph 27 as:

> ... the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in

> knowledge that the victim's pecuniary interests are put at risk).

[68] Section 129.2 provides that a director or officer is deemed to be liable for a breach of securities law by the issuer where the director or officer authorized, permitted or acquiesced in the issuer's non-compliance with the Act. Section 129.2 of the Act states:

> **129.2 Directors and officers** – For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[69] Directors and officers are defined in the Act under subsection 1(1) as follows:

> **"director"** means a director of a company or an individual performing a similar function or occupying a similar position for any person;
>
> ...
>
> **"officer",** with respect to an issuer or a registrant, means
>
> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b); ...

[70] Individuals who are not directors or officers of a corporation, but are *de facto* directors or officers, performing functions similar to the functions of officers or directors as contemplated in the definitions found in subsection 1(1), can nonetheless violate section 129.2 of the Act if they permit, authorize or acquiesce in the corporation's breaches of Ontario securities law.

B. The Individual Respondents

[71] Not all the respondents were represented or appeared at the hearing. However, we relied on subsection 7(1) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, as amended which provides that a tribunal may proceed in the absence of a party when that party has been given adequate notice:

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[72] We are satisfied based on the evidence provided that the Respondents received adequate notice of these proceedings.

1. Shane Smith

[73] Smith has had probably greater involvement in the Borealis GRIC program than any of the other individual respondents. Smith was a catalyst, along with Villanti, in the creation of the Borealis GRIC program. He, as President and *de facto* operating mind of Synergy, and Prentice, were the marketing and sales organizers for this product. Smith and Villanti had known one another since 2003, when Smith, who was involved in mutual funds and life insurance sales, became a client of Villanti's company, IBC, which mentors, coaches and advises small and medium-sized businesses.

[74] Smith and Prentice, both directly and through Synergy and its representatives across the country, became the principal, if not sole, marketers of the Borealis product. Smith received over $1 million for his participation in the sale of the Borealis GRIC. As indicated earlier, Smith and Prentice began the sales pitch by way of websites and meetings in late March 2007. They continued their marketing and sales of the Borealis product until the Commission froze the Borealis RBC account in December 2007. (They continued even after the Commission froze the RBC account by engaging in sales through CCU, which as earlier indicated we will not consider in these reasons.)

[75] In December 2006, Smith became subject to the "Sabourin Cease Trade Order", referred to above at paragraph 36, relating to another product and remained subject to that order throughout the period when he was organizing, marketing and overseeing the sale of Borealis.

[76] Further, we accept that Smith was provided, either directly or indirectly, the information contained in a May 4, 2007 letter from CDIC sent by courier and regular mail to Atlantic, as well as to Borealis, "Borealis Global", Synergy, and "the Synergy Group", at their addresses in Toronto, Peterborough and Richmond, British Columbia. That letter had as its re line: **"RE: UNAUTHORIZED REFERENCES TO CDIC."** The letter stated in part:

> During the past few weeks the Corporation has received a number of inquiries from the public concerning whether or not [Atlantic], The Synergy Group or similarly named entities are member institutions of CDIC. We are writing to all of you because the inquiries and our review of the websites of Borealis International and Borealis Global ... point to a possible alliance among [Atlantic] and one or all of the Borealis and Synergy Group companies.

The letter went on to explain what CIDC understood to be representations made by Borealis and Synergy regarding the Borealis GRIC and its connection to CDIC. The letter continued:

> **The representations ... are inaccurate, since none of the Atlantic Trust, Borealis, The Synergy Group or Synergy Group (2000) Inc. are member institutions of CDIC and money held by Atlantic Trust, Borealis, The Synergy Group or Synergy Group (2000) Inc. is not insured by CDIC.**
>
> [emphasis in original]

That letter required the recipients to cease and desist making any use of the CDIC name or trade name.

[77] It is to be noted that on May 4, 2007 a Consumer Alert was issued by the Financial Consumer Agency of Canada ("FCAC") which said in part:

> **COMMISSIONER'S ADVISORY**
>
> **FCAC: Beware of "investment opportunities" that sound too good to be true**
>
> ... (FCAC) is advising all Canadians to use extreme caution with regard to Internet and phone investment schemes that claim to offer very high "guaranteed" returns on investment ...

[78] Smith and Synergy were also sent an early May 2007 Warning Notice from the Office of the Superintendent of Financial Institutions of Canada ("OSFI") which stated in part as follows:

> Borealis International is soliciting deposits which it claims are "guaranteed by a Canadian Trust, to grow 10% – 18% Per Year". Material previously posted to the above web site claimed that such deposits were "insured by one of the world's 3 largest re-insurance companies. [CDIC] only protects the first $100,000 Cda$ in banking products. We protect you beyond that."

The Warning Notice continued on in part as follows:

> Members of the public should note the following facts:
>
> ...
>
> 2. Atlantic Trust is not authorized to accept deposits and is not a member of the Canada Deposit Insurance Corporation.
>
> 3. OSFI has been advised by Atlantic Trust that there is no arrangement between Borealis International (or any related entity) and Atlantic Trust as described in the Borealis International material on the above web sites.

[79] On May 16, 2007, the Federal Deposit Insurance Corporation ("FDIC") issued a special alert. In essence, this alert replicated the CDIC warning notice earlier referred to and again stated in part as follows:

> The Borealis Web site also indicated that deposit taking was offered through "Atlantic Trust Company." Other names

> associated with Borealis International are "The Laiki Group" and "The Synergy Group."
>
> Borealis International is not insured by the Canada Deposit Insurance Corporation. Any proposed transactions involving this entity or persons purported to represent that entity should be viewed with extreme caution.

[80] In June 2007, SwissRe advised Borealis, Synergy and others, including Smith that they were not providing insurance to support the Borealis GRIC and they had no connection or no involvement with Borealis.

[81] Also in June 2007, the Alberta Securities Commission issued a cease trade order against Borealis, Synergy, Smith, Prentice, and others.

[82] We are satisfied that most if not all of those notices and orders would have come to the attention of Synergy, Smith and Prentice. Notwithstanding all of those warnings, orders, cease and desist directions, Smith continued to market the Borealis GRIC to investors on a very large scale and without changing the contractual documents that investors utilized to purchase that product. In other words, the documents continued to misrepresent the form of insurance, reinsurance and general 'security.'

[83] It is no defence for Smith or others to say or to infer that the invested monies were safe, because they were at least substantially invested with RBC, and that at the end of the day no investor lost money and they were paid the promised interest rate. The marketing of the Borealis GRIC was fraudulent, it was deceitful. The investors were both advised and led to believe by the written and spoken comments of Smith/Synergy that the money would be deposited with Atlantic, that the money would be used for the purpose of leveraging loans to small and medium-sized businesses, that the principal and interest (18% annually) was secure because each of the investors' monies was both insured by a Bank or Trust Company, CDIC or equivilant, and additional insurance would cover any excess not covered by CDIC or similar institutional insurance. All of that was false.

[84] An example of the approach Smith and Synergy had taken throughout is found in a letter sent to the Borealis GRIC investors on December 20, 2007. This letter was sent after all the aforementioned warnings, cease and desist directions, and after the Commission had frozen Borealis's RBC bank account. The letter written on Synergy letterhead and signed by Smith stated in part as follows:

> December 20, 2007.
>
> Dear Borealis Client,
>
> As you are aware, The Securities Commission (OSC, ASC) has been issuing warnings to the public regarding our program which was still in development throughout 2007. While we were working to launch a fully compliant product this year, we were unable to reach our goals as expected due to the intervention of the regulatory bodies within Canada.
>
> ... As you know, your capital has been safely on deposit with the Royal Bank of Canada in Toronto, so that we could

> maintain our fiduciary responsibility and safeguard your capital until our structure was complete and compliant. ... In fact, we have taken extreme steps to not only protect your capital within a chartered Bank, but to also insure your money above the CDIC threshold of $100,000.
>
> ...
>
> Respectfully,
>
> Shane D. Smith B.Sc.
>
> President
>
> The Synergy Group

[85] The reality is that the investors' money in the RBC account (approximately $16 million) was covered by insurance to a total of $100,000 only, not $100,000 per investor as inferred in Smith's December 20, 2007 letter and as clearly inferred in all of the earlier documentation, including the investment agreements. Smith repeats the fallacy that the investors were also protected beyond the $100,000 when he states in this letter: "but to also insure your money above the CDIC threshold of $100,000". Smith qualified that statement somewhat by prefacing his comments about the reinsurance or additional insurance when he wrote: "Ln fact we have taken extreme steps to not only protect your capital within a chartered bank, but to also insure your money about the CDIC threshold of $100,000." If any extreme steps were taken to protect the investments as described by Smith, we have seen or heard no evidence of same. Further, the sentence is structured to, at very least, infer that excess insurance was in place. There was none. The clear inference of the letter that there was such excess insurance in place is clearly and knowingly false.

[86] Mr. O'Toole on behalf of Smith submits that Smith was honestly following through on a process, doing his best to ensure that the monies were kept secure and safe, that the information he had was consistent with the information he had disseminated and that when he knew a circumstance to be untrue, such as the money going to Atlantic, he was aware of the fact that Haliday (after the investors placed their money with Borealis) had advised all of the investors of that fact. He submits, therefore, that Smith neither knew, nor ought he to have known, that any information provided to the investors was deceitful or misleading.

[87] On the totality of the evidence we are satisfied that clear and convincing evidence has been adduced that establishes on the balance of probabilities that Smith actually knew or, at the very least, reasonably ought to have known, that notwithstanding the monies were kept secure by Villanti and the interest paid by Villanti and IBC, that the investors were unequivocally misled as to what their money was in fact being used for, and more importantly, what security for that investment was in place, or more specifically, that no excess insurance was in place.

[88] Only the depositor, Borealis, was insured. Investors were never insured. There was only $100,000 CDIC coverage for the $16 million investment; there was no reinsurance or any insurance in addition to the CDIC $100,000. The investors were neither told nor kept advised as to what exactly was happening. Smith continued to make sales throughout that whole period where the contractual

documents represented a false state of affairs, both as to where the money was being placed; what, if anything, it was being used for; and most importantly, what security was in place, to protect the investors. His participation and involvement in the sales and marketing of this product clearly represents a deceit on the investors by direct and indirect fraudulent misrepresentations. Smith is therefore found to have transgressed subsection 126.1(b) of the Act.

[89] The evidence is overwhelming, and in some regards, uncontradicted that Smith was trading in a security without being registered as well as being the subject of the Sabourin Cease Trade Order issued by the Commission in 2006, and that no prospectus had been issued for the security. For all these reasons, we find that he is in violation of both sections 25(1) and 53(1) of the Act.

[90] It is clear that Smith represented himself to be President of both Synergy and Borealis to investors in the Borealis GRIC. Smith, through his actions as *de facto* President of Synergy and a *de facto* officer of Borealis, authorized, permitted and acquiesced in those corporations' failures to comply with sections 25, 53 and 126.1(b), thereby breaching section 129.2 of the Act.

2. Andrew Lloyd

[91] Andrew Lloyd was a director of Canavista Corporate and Vice-President and Director of Canavista Financial, both of which are located in Peterborough, Ontario (in the same office building as Synergy.) He was as well Regional Manager, GTA & Central Ontario for Synergy, which made Borealis GRIC Product Sales. In December 2006, the Commission issued the Sabourin Cease Trade Order against Andrew Lloyd, Smith and others in an unrelated matter. Andrew Lloyd was involved in sales of Borealis GRIC to four investors totalling in excess of $610,000. Although Andrew Lloyd in his affidavit stated he only referred these investors to Borealis, he signed two of the three documents effecting the purchase of the Borealis GRIC for one of these investors as 'agent' and he signed all three documents as 'witness'. Further, he continued advising and making representations about Borealis, up to and including the December 2007 Commission freeze order of the Borealis RBC account. Whilst it is true, as submitted by his counsel, that Andrew Lloyd did not take any further steps to directly facilitate purchase of Borealis GRIC after mid-May 2007, he did, as earlier mentioned, have contact with that same investor re his Borealis GRIC investments throughout 2007. Andrew Lloyd received commissions and overrides in excess of $42,000 which one would reasonably conclude are reflective of his involvement in the sale of Borealis GRIC. He therefore 'traded' in securities contrary to subsection 25(1) and section 53(1) of the Act. These trades took place while Andrew Lloyd was subject to the Sabourin Cease Trade Order, and therefore breached the order, contrary to the public interest.

[92] The evidence of his specific involvement at specific times is insufficient for us to conclude that he violated the fraud section, 126.1(b) of the Act.

[93] As discussed below, when considering the allegations against Canavista Corporate and Canavista Financial, we concluded that these corporations did not contravene Ontario securities law. Accordingly, we do not find that Andrew Lloyd violated section 129.2 of the Act.

3. Paul Lloyd

[94] Paul Lloyd has a connection to the Canavista offices in Peterborough, Ontario, which are located in the same building as Synergy. The principal evidence relating to Paul Lloyd relates to phone exchanges with Colin McCann ("McCann"), an Assistant Manager in the Enforcement Branch of the Commission who used an alias in his contacts with Paul Lloyd. McCann contacted the Borealis website-provided telephone number and left a message and phone number for them to call back. The next day, April 18, 2007, Paul Lloyd called McCann. McCann did his best to transcribe the conversation. It is not verbatim and therefore not precise. McCann acknowledges that the questions that gave rise to the answers by Paul Lloyd as transcribed to the best of McCann's ability would have given a better context to those answers. Paul Lloyd made mention of 'accredited investor', and that an investment of (at least) $150,000 would help ensure the purchaser was accredited. From the conversation it is clear that Paul Lloyd was familiar with the Borealis GRIC and even proffered information about his personal knowledge of the Laiki Bank. However, Paul Lloyd cautioned McCann to do his own due diligence and the conversation is consistent with Paul Lloyd not being a sales representative but rather assisting others in his office, which included advising McCann that the product was not yet ready to go. Paul Lloyd could be seen to be a conduit and one could conclude that he was trading in the Borealis product. However, we also believe there is an equal probability that he was assisting others before the product was ready to be sold. The evidence does not satisfy us that the onus on staff to prove on balance that Paul Lloyd participated in trades of Borealis GRIC has been met.

[95] As discussed below, when considering the allegations against Canavista Corporate and Canavista Financial, we concluded that these corporations did not contravene Ontario securities law. Accordingly, we do not find that Paul Lloyd violated section 129.2 of the Act.

[96] In conclusion, all the allegations against Paul Lloyd are dismissed.

4. Vince Villanti

[97] Villanti for over 30 years has run a very successful business of mentoring and advising small to medium-sized business clients. He provides guidance to these small to medium-sized entrepreneurs by assisting and advising them in preparation of business plans, budgets, marketing, hiring employees, structuring accounting systems, etc.

[98] Since 1983 these services have been provided through Villanti's incorporated entity IBC. This has been both a successful and profitable undertaking for Villanti, who has upward of 600 business clients for whom he provides his services for a percentage of their gross revenue.

[99] An area in which Villanti has often felt frustrated is the inability of these small to medium-sized business owners to develop adequate credit lines and bridge financing, to more successfully operate their businesses. It was his desire to better serve his clientele that caused him to create Borealis and the Borealis GRIC as a means to raise and make funds available to assist his clients, both current and future.

[100] The Borealis GRIC concept had its origin in discussions between Villanti and Smith as earlier referenced. The Borealis bank/trust concept took on a potential reality when Villanti in late December 2006, by coincidence, met Dostie, a

Montréal lawyer, who advised he had connections with a client that controlled a trust company (Atlantic) that was for sale.

[101] Without repeating much of the background described in the Smith and Andrew Lloyd portions of this decision, we accept that Villanti had a good faith intention to purchase a deposit-taking, lending-capable, bank or trust institution, to acquire deposits which could be loaned to small to medium-sized business. The scheme was not one created to bilk or take advantage of public investors. Rather, what Villanti had in mind was to offer investors an extremely generous rate of interest for their investments which would be utilized to make loans to both existing IBC clients and to entice a new and enlarged client base for IBC. The result would be to enhance Villanti's business income. What followed, however, were a series of events which saw millions of dollars invested in Borealis GRIC 'securities' sold by mostly unregistered agents connected to Synergy, for which no prospectus was filed, the proceeds of which were never utilized to assist the small to medium-sized business client as initially intended.

[102] Staff alleges, and we concur, that the investors were misled by false representations concerning the nature and the extent of the security of the investment vehicle, particularly as it related to the purported insurance/reinsurance for both principal and interest. As we have earlier referenced in paragraph 13, the promotional material for this Borealis GRIC was very specific and stressed throughout the 'guaranteed' component of the product. In particular, the materials stressed the levels of insurance, which included reinsurance as well as 'bank guarantee' and 'CDIC performance bond'. The three part investment contract each investor signed as part of the Borealis GRIC program states in part as follows: **"Insurance.** A copy of the insuring policy which generates ROI [rate of interest] and principal, issued to client. (Policy is not individual).", and "The Purchaser ... appoints [Borealis] ... to forward these funds to Atlantic Trust for enactment of the [GRIC] transaction."

[103] There is no doubt that from December 2006 until early June 2007, Villanti engaged in serious (if sometimes perhaps naive) negotiations to purchase Atlantic. However, those discussions never resulted in a contract of purchase for a number of reasons but we believe principally because Villanti realized that Atlantic had no legal or regulatory authority to achieve the intended objects of the Borealis GRIC scheme. Discussions, but discussions only, took place with other bank/trust companies but no significant results flowed from those discussions. There is little or no evidence that any discussions, let alone substantial or meaningful discussions, occurred between Villanti, Borealis, IBC, and any secondary or reinsurer.

[104] Notwithstanding Villanti's testimony that he was not aware that the Borealis GRIC promoters, Synergy and its representatives, began a series of meetings in March 2007 to sell the Borealis GRIC, we conclude that he not only ought reasonably to have known but that he actually knew that millions of dollars of the Borealis GRIC were being sold over a period of almost nine months when the underlying premise of the product simply did not exist. He made the deposits of investor funds to the RBC account. The underlying premise of the product was: (a) it was a high interest yield; (b) it would be placed in Atlantic; (c) that it was insured by CDIC or comparable 'provincial trust company' insurance, widely recognized as up to $100,000; (d) that any amount over $100,000 was covered by supplementary insurance by a separate insurer or reinsurer; and (e) the

monies were to be loaned to small to medium-sized businesses thus substantiating the rationale and legitimacy of the program.

[105] In reality, "(a)" was correct; "(b)" was false; "(c)" very misleading; "(d)" false and "(e)" correct as to intention but incorrect as to what was actually and knowingly occurring.

[106] Borealis received all of the investment contracts, totally some $16 million, all of the cheques, which they deposited, made all of the interest payments on the investments, and corresponded with each of the investors. We recognize that most of the clerical work was executed by Haliday. We also recognize that IBC and Borealis were small organizations. Although Villanti had health problems that required hospitalization during a part of the period between April and December 2007, we conclude he had knowledge of the content of the investment contracts and the terms of the investment contracts and did nothing to curtail Synergy and its agents from selling the product. IBC, through Haliday continued to accept and depoit investor funds. We also recognize that Haliday, on behalf of Borealis, sent the post-May 31, 2007 investors, after Borealis had received their money, a letter explaining the negotiations with Atlantic had not been finalized and they would be kept informed of the status of these negotiations. This was at best, an understatement and, more realistically, a substantially misleading statement. The reality was that the Atlantic negotiations had substantially floundered by that time and no further advice was provided to the investors of the complete collapse of those negotiations. There was also no mention made to the investors that they did not, as promised in their contracts, each have the benefit of the CDIC or provincial equivalent insurance and that there was no supplementary or reinsurance in place. Villanti knew the information provided the investors was incorrect yet failed to advise those same investors that the terms of the investment contract were substantially incorrect and false. Further, he failed to insure that the Borealis GRIC not be sold by Synergy and others with the false/misleading statements contained in the investment contract documents.

[107] We recognize that Villanti at substantial personal expense, and along with IBC and another company, made every investor whole, not only as to their capital investment, but also their lucrative high rate of interest. The question is, does that change the fundamental issue? Was the product sold under false premises and did Villanti know, or ought he reasonably to have known, those false premises, re security, insurance and reinsurance, were expressed to be facts upon which investors would obviously assign great weight before making these very substantial investments. 'Security' was not some 'irrelevant puffery' being touted by Borealis, Synergy and the sales agents, it was an important component of the investors' decision to purchase the GRIC. Neither Villanti, Haliday nor any of the Synergy sales team advised investors that their money was not being utilized to generate loans to small and medium-sized businesses. Neither were the investors advised that their investment was generating approximately 4% interest at the RBC whilst they were to receive 18% interest; a fact, which if known, would have caused any sensible investor to question the logic, never mind the security, of their investment.

[108] We conclude that 'security' of the investment was a material circumstance which the investor did, and should be entitled to, rely upon. The fact that, at the end of the day, they suffered no loss, is not and should not be determinative. The investors put their money at risk on the assurance that not only their capital, but

also their interest was "guaranteed." It was not. It was not, notwithstanding that they received both the interest and the principal, as promised. That occurred only because of the 'good will' of Villanti and his company, IBC. It occurred not because of the contractual obligation, that the Borealis GRIC was secured, insured or reinsured. It occurred in spite of the fact that the GRIC was not invested as promised, to generate funds through loans to small and medium businesses. The contractual obligation entered into with the investors was based on a number of false premises. It was misleading. It was fraudulent. Borealis, Villanti and Haliday's 'after the fact' letter did not change the fact that the investment contracts entered into, with the acquiescence of Villanti were false and misleading. For all these reasons, we, therefore, notwithstanding Villanti's original honourable intention, conclude that he violated subsection 126.1(b) of the Act. Further, we find that Villanti, by his participation, in creating, managing and marketing the product, violated both subsections 25(1) and 53(1) of the Act.

[109] As discussed below, we find that Villanti, through his actions described above and as President and director of Borealis and as President of IBC, permitted or acquiesced in Borealis's breaches of sections 25, 53 and 126.1 of the Act and IBC's breaches of sections 25 and 53 of the Act, and that he therefore breached section 129.2 of the Act.

5. Larry Haliday

[110] Haliday is an employee of Villanti and of IBC. He described himself as the administrator of Borealis and the "Borealis Fund" and was described as Chief Information Officer who coordinated all of IBC and Borealis office functions. Haliday was a director of IBC but became a director only because Villanti added his name when Villanti mistakenly believed that it was necessary to have a second director. We accept that he was not in an operating or governance sense a director of IBC. Haliday, as the Administrator and Office Manager of IBC and Borealis was intimately involved in the operation of Borealis. Cheques for Borealis GRIC Investments, whether or not they were delivered directly to Borealis did come into Haliday's possession when they were sent to Borealis from Synergy and its agents. Haliday received the investment documents along with the cheque, or payment in whatever form on behalf of Borealis and sent a letter of acknowledgement to the investor on behalf of Borealis.

[111] The early investors were simply advised of receipt of the payment and when their quarterly interest would be paid. After May 31, 2007, the acknowledgement letter from Haliday was substantially the same, except it added the following:

> Our initial documentation cited a "GRIC" or Guaranteed Return Investment Certificate to be issued to you.
>
> We are presently still in negotiations with Atlantic Trust and will advise you as the status changes. At present no certificates are being issued. We are honoring [sp] the stated Borealis rate of return.

The letter continued with a paragraph related to the processing of the payments.

[112] The catalyst for this amendment to the letter was no doubt the earlier referred to letters: from CDIC to Borealis and Synergy directing them to cease and desist 'unauthorized use' of reference to CDIC; the FCAC Consumer Alert about schemes that offer a very high 'guaranteed' return on investments; and the OFSI "Warning Notice" advising that Atlantic is not authorized to take deposits, nor is

it a member of CDIC, and that Borealis has no arrangement with Atlantic. In addition, there was the May 16, 2007 FDIC Special Alert with the subject line: "Borealis International May Be Conducting Banking Operations in Canada or the United States Without Authorization" and stated that Borealis was not insured by CDIC.

[113] Meanwhile, the Borealis website, as of May 17, 2007 advised "One of our primary partners in P.E.I. coincidentally has the same name as a company in the U.S.A., which has caused problems." Further, on May 23, 2007, Dostie wrote a letter to Villanti, Chaudhary, Haliday and IBC ordering they cease making reference to Atlantic as an entity with whom Borealis has a business relationship. We can only conclude that Haliday's new 'form letter' as of May 31, 2007 was changed because he was aware of the official and unofficial, public and private, 'warnings' and 'alerts' about connecting Borealis with Atlantic.

[114] Had Haliday been more forthright, or some may say honest, he would not have included in his letter, which he continued to repeat until the Commission stepped-in in mid-November 2007: "We are presently still in negotiations with Atlantic ...". Haliday's letter makes no mention of the fact that there was no reinsurance and that the only insurance was the $100,000 that would have been attached to the RBC GIC, through CDIC. That $100,000 was the only insurance to cover the $16 million invested with Borealis. His letter did not, as one might reasonably have expected, to advise the investors along the lines of:

> We have no relationship with Atlantic Trust, we have no reinsurance (with Lloyds, Swiss Re or anyone else) that we have no business relationship with the Laiki Group, that the money is not being used to leverage loans for small to medium-sized business.

[115] Haliday could also have sent back the Participation Agreement and the Transfer Agent Agreement containing amended and correct information along with the investors' cheque inviting them to resubmit their cheque along with the 'accurate' investment documents.

[116] Haliday may have been a passive 'trader' but he was an important participant in the sale of the security. When reviewing the evidence, we are satisfied that he violated both sections 25 and 53 of the Act.

[117] Did he violate section 126.1 of the Act? By providing incomplete information, misinformation and failing to provide accurate information, Haliday clearly misled the investors in Borealis by failing to advise:

(a) that there was no working relationship of any sort with Atlantic;

(b) that there was only $100,000 in total CDIC coverage;

(c) that there was no reinsurance or supplementary-insurance of the investors money above and beyond their proportional share of the $100,000;

(d) that the Laiki Bank had no connection to Borealis;

(e) that the money being invested in its current form could not be used to in any way assist in granting loans or leveraging loans to small and medium-sized business.

[118] This partial information, this misinformation, and the failure to correctly and accurately inform clearly constitutes deceit and material misrepresentation. Haliday, therefore, violated section 126.1 of the Act.

[119] As discussed above, when considering Haliday's actual role with IBC, we found that he was not for practical purposes a director of IBC. Accordingly, we do not consider whether Haliday violated section 129.2 of the Act with respect to IBC.

6. Jean Breau

[120] Breau was nominally the President and sole director of Synergy. He was a business colleague of Villanti. During the relevant period he was not listed as part of the management team of Synergy. The evidence does not establish he was involved in the marketing, sale or distribution of any Borealis product. Borealis made no payments to him.

[121] The evidence does not establish that he knew, ought to have known, or even acquiesced in the marketing, sale or distribution of Borealis product. His involvement appears to have been only at the early stages when Villanti and Borealis were attempting to acquire Atlantic. Those actions are not sufficient to satisfy us on balance that he violated any of the sections of the Act. All of the allegations against Breau are therefore dismissed.

7. Joy Statham

[122] Statham sold $550,000 of Borealis GRIC product for which she received commissions in excess of $36,000. By those actions, she traded in the security and therefore violated subsection 25(1) and subsection 53(1) of the Act.

[123] The evidence does not support a finding that Ms. Statham violated the fraud sections of the Act and those allegations against her will be dismissed.

8. David Prentice

[124] Prentice held himself out to be Executive Vice President of Synergy and described himself as VP of Borealis. He was a co-presenter at public meetings of investors, and received more than $250,000 from Borealis in commissions and overrides. Villanti described him as a 'concept originator', as Smith's most senior person and an Administrator who dealt with the paper side of things. He participated in sales seminars for the Borealis GRIC product in Ottawa/Hull and Calgary and was directly involved as the "expert" in the sale of Borealis GRIC to investor A.

[125] Prentice was kept informed of Villanti's discussions regarding the acquisition of Atlantic. When Prentice met with the investor A in the summer and fall of 2007, he advised that the investment was fully insured. It was not; Prentice had been advised by SwissRe that they had no connection to this Borealis GRIC. There was no reinsurance. He also knew, or ought reasonably to have known, that the monies on deposit at RBC were collectively insured for $100,000 by CDIC, not for the several million dollars that were then, and would later be, in the account.

[126] Because of Prentice's role at the centre of this Borealis GRIC project, he was aware of the numerous issues surrounding this product. At the very least, he was aware of problems and the subsequent break-off of negotiations re the purchase of and/or any working agreement with Atlantic. He knew of the OSFI warning – the CDIC warning – the SwissRe cease and desist – the Alberta Securities Commission cease trade order. Throughout this period, he continued

as a senior manager of Synergy, organizing, handling the paperwork and assisting in overseeing the sales of the Borealis GRIC product. He failed to disclose to any of the investors the problems and the falsity of the information in the investment contracts. Whilst it is true that he, at least sometimes, advised investors of "problems" with Atlantic, and of "problems" with the reinsurance, he at the same time advised that suitable alternatives were or would be in place. There was no basis in fact for his assertions that suitable alternatives were or would be in place. Even when he did not explicitly express that position, it was clearly the inference he left with the investors. Although it is true that the monies were deposited at RBC, the client/investor had no control or direct claim on those funds. Further, the funds were not being used, nor were they capable of being used for the very purpose of this whole scheme, i.e., loans to small businesses for which the investor stood to share in the profits. Prentice played a pivotal role in this whole project. for which Borealis paid him well in excess of $250,000.

[127] Prentice traded without registration, in securities, for which no prospectus had been issued. He therefore violated section 25 and section 53 of the Act. Prentice was *de facto* Executive Vice President of Synergy and *de facto* VP of Borealis, and authorized and acquiesced in those corporations' failure to comply with sections 25 and 53, thereby breaching section 129.2 of the Act.

[128] Prentice misled and deceived not only investor A, but also all the investors who read the misleading literature on the Synergy and Borealis websites and the investor contracts, because of the role he played, as described at paragraph 124. He therefore also violated subsection 126.1(b) by the aforementioned deceit, false and misleading statements to the persons who invested in the Borealis GRIC.

9. Len Zielke

[129] Zielke described himself as the Western Regional Manager for Borealis and Synergy. He sold $400,000 of Borealis GRIC to investors. He received commissions and override from Borealis in excess of $133,000.

[130] In January 2008, in response to Staff's allegations, Zielke advised Staff that at the Borealis GRIC seminars in which he participated, he clearly informed those in attendance that the Borealis product was "not currently for sale and this was an information session only". We accept that that was said. Nevertheless, the evidence clearly establishes that Zielke traded in the security without being registered and for which no exemption applies and no prospectus was issued and therefore contravened subsection 25(1) and section 53(1) of the Act.

[131] Although Zielke received a phone message from Anthony Mormino ("Mormino") of SwissRe in June 2007, it is unclear whether he was directly informed of SwissRe's position with respect to the Borealis GRIC. We are of the view that the evidence does not clearly establish that he violated subsection 126.1(b) of the Act.

10. John Stephan

[132] Stephan sold $850,000 of Borealis GRIC product to three investors. (On December 4, 2007, he also sold one investor a Borealis/CCU product.) Stephan had a long-term relationship with investor E. After many discussions, on August 2, 2007, investor E purchased a $150,000, two-year, 18% Borealis GRIC from

Stephan. He did so on Stephan's advice, and his promise that there was virtually 'no risk', in part because both principal and interest were insured through multiple layers of insurance with the Laiki Group and SwissRe. Although investor E knew, because of his repeated questioning of Stephan, that Atlantic was not involved and the money would be deposited at RBC, he believed that there was ample (multiple layers) insurance (with Laiki Group and SwissRe) to cover risk. This was false and Stephan as a Regional Manager knew, or ought reasonably to have known, it was false. This is particularly so since Mormino contacted Andrew Lloyd, Zielke and Stephan, by telephone or e-mail to specifically address Borealis's claim that SwissRe insured the Borealis product, and subsequently sent a cease and desist letter to Borealis, Synergy, Smith and Murphy on June 21, 2007.

[133] It is worth noting that an email from Stephan on December 26, 2007 clearly acknowledges his engagement with the Borealis GRIC. This e-mail, although generally factual, like so many of his communications with investors, is incorrect in a number of specific ways. It stated, for example that: "their monies were merely deposited into an escrow account which was held in trust at the Royal Bank" (emphasis added). Both of those assertions were false.

[134] Stephan was clearly an integral and active participant in selling the Borealis GRIC and had Regional Management responsibility of others who sold the product in his region. For this he received over $127,000 from Borealis as commissions.

[135] His participation was such that he, a non-registrant, violated both subsections 25(1) and 53(1) of the Act by trading in a security for which no prospectus was issued.

[136] His conduct, his misleading and false statements, which he knew or at the very least ought reasonably to have known, were both misleading and false, were material concerning the Borealis investment, especially as it concerns the 'security' it provided. That conduct and those actions put him clearly in violation of section 126.1 of the Act.

11. Ray Murphy

[137] Murphy sold two Borealis GRICs, having a value of $400,000. As a Regional Representative he received commissions and overrides of just more than $71,000.

[138] One of the persons with whom he worked was Dickerson, who will be referred to later in this decision. The evidence relating to Murphy consists of his attending at investor B's home in December 2007 with Dickerson to sell Borealis GRIC; that he had a telephone conversation with Mormino of SwissRe and was copied on a 'cease and desist' letter from Mormino dated June 21, 2007 which notified Borealis, Synergy, Smith and Murphy that SwissRe did not insure them and had no business connection with them; and that he attended a meeting at an Ottawa Senator's hockey game in January 2008 with Prentice, Smith, Dupont and investors. Murphy continued to receive commission and override payments for sales of the Borealis GRIC after receiving SwissRe's cease and desist letter, which also referred to the OSFI Warning Notice and the FDIC Special Alert.

[139] This evidence, when considered along with the fact he sold two Borealis GRICs and received compensation in excess of $70,000, clearly establishes that Murphy

was a part of the Borealis/Synergy sales team that traded in securities without being registered to do so, which trades were not in any exemptive category and for which no prospectus was issued. He therefore breached subsections 25(1) and 53(1) of the Act.

[140] Murphy continued to receive override commission payments after being informed that the SwissRe security promised investors was not in place, including for one Borealis GRIC sale made on June 26, 2007, after his phone call with Mormino. Murphy's conduct as a Regional Manager for Synergy establishes that he violated section 126.1 of the Act.

12. Derek Grigor

[141] The evidence against Grigor, although suggestive of his being engaged in trading is not clear and convincing evidence that would justify a finding adverse to him.

13. Earl Switenky

[142] The evidence against Switenky, although highly suggestive of being engaged in trading, is not clear and convincing evidence that would justify a finding adverse to him.

14. Michelle Dickerson

[143] Dickerson sold over $1 million in Borealis GRIC securities, for which she received approximately $39,000 in commissions. Dickerson's contacts and communications with CDIC unequivocally informed her that the investments were not insured by CDIC. The same communications also disclosed that she was doing her best to inform herself of the true state of affairs, *vis a vis,* the product she was selling. These inquiries, however, do not relate to the fundamental question of whether she was selling a 'security' which may only be traded by a registrant.

[144] Although we believe her intentions were honest, she nevertheless did 'trade in securities' without registration and for which no prospectus was issued and thus violated subsections 25(1) and 53(1) of the Act.

[145] The evidence does not establish that she violated subsection 126.1(b) of the Act.

15. Derek Dupont

[146] Dupont sold $740,000 of the Borealis product to three investors and received just over $55,000 in commissions. In October 2007, investor C met with Dupont at Synergy offices regarding 'tax strategies.' Investor C inquired of other investments. Dupont advised investor C about the Borealis GRIC, which was insured both as to principal and interest. Dupont said money would be placed in Atlantic and loans would be leveraged. He said they were negotiating with SwissRe to cover the guarantee of principal and interest. Dupont also at the very least inferred that the Borealis investment would be part of a 'tax strategy'.

[147] On October 19, 2007, investor C, through Dupont, invested $425,000 in a Borealis GRIC. In late November, investor C received a letter dated November 14, 2007 from Haliday which indicated that Borealis was "presently still in negotiations with Atlantic Trust and will advise you as to the status changes. At present no certificates are being issued. We are honouring the stated Borealis rate of return." After receipt of that letter, investor C arranged a meeting in Toronto in early December with Dupont, Smith, himself and two other investors. At that meeting Smith advised that discussions with Atlantic floundered because

they discovered Atlantic was not federally regulated. Smith advised that Prentice could not attend because he was occupied negotiating with another trust company or bank. Smith also showed investor C a deposit slip with RBC showing $425,000 deposit in investor C's name, "in trust".

[148] There is no evidence that such an account existed and the paper document trail causes us to conclude that one did not.

[149] On the same day as the December meeting with Smith, Dupont, and others, investor C was introduced to Villanti who they met in a restaurant following the above-mentioned meeting. Villanti was described to investor C as being the President of IBC. There was no mention of any connection between Villanti and Borealis.

[150] In January 2008, investor C attended a Senator's game in Ottawa where he was hosted by Dupont, Smith, Prentice and Ray Murphy in a private box. Prior to the game, Smith and Prentice made a presentation about Synergy and about Borealis.

[151] Subsequent to investor C recovering his initial investment from the Court-appointed Receiver, PriceWaterhouseCooper, he re-invested through Dupont with the CCU and still later through Dupont with IBC.

[152] It is clear beyond doubt that Dupont traded in the Borealis GRIC, a security where no exemption was available and for which no prospectus had issued. He therefore breached subsections 25(1) and 53(1) of the Act.

[153] We do not conclude the threshold for fraud has been established.

16. Alexander Poole

[154] Poole sold more than $1 million Borealis GRIC securities to foreign investors for which he received commissions in excess of $83,000. He also negotiated with investors for $600,000 to be deposited in the CCU.

[155] According to investor D, Poole, who advised him on tax strategies, in March or April 2007, introduced him to the Borealis GRIC product. Poole advised that the money invested in the GRIC would be placed in Atlantic, owned by the partners, and that the investment was insured, first by CDIC up to $100,000 and the excess was insured by SwissRe. Poole also advised that not everything was "in place", presumably including Atlantic and SwissRe, but they were working on it.

[156] On or about April 23, 2007, investor D invested $340,000 in a Borealis GRIC. Investor D believed that by this time, April 23, 2007, the bank, trust company and insurance uncertainty had been resolved by Borealis and the investment and interest were both guaranteed and insured. The extent, if any, that Poole contributed to this false belief is unclear.

[157] In June 2007 when investor D discovered the OSFI Warning Notice, he telephoned Poole. Poole advised him "not to worry, everything is safe." Poole continued by advising that "the problem was related to a confusion because of a similarly-named Atlantic Trust in the US." When the Commission froze the Borealis RBC account in early December 2007, Poole, when contacted by investor D, advised again that there was "nothing to worry about" and left investor D with the impression that Borealis was purchasing or had purchased a credit union.

[158] Poole at no time advised investor D that he and others connected to the Borealis investment were ordered to cease trading, nor that they were the subject of Staff's allegations as of mid-November 2007.

[159] On the proven facts, because Poole was a registrant, we do not find that he violated subsection 25(1) of the Act, but we find that he violated subsection 53(1) of the Act.

[160] Although many of his acts and declarations are evidence of fraud in the sense of misleading by commission and omission, we cannot be satisfied on balance of clear and convincing evidence that the fraud threshold has been reached to find Poole liable under section 126.1.

17. Bartosz Ekiert

[161] The evidence establishes that Ekiert, along with Poole, met with investors F and G at their home in mid to late November 2007 for the purpose of selling them Borealis GRIC securities. Poole and Ekiert attempted to persuade investors F and G to invest $1 million. When investor F, a farmer with significant assets but limited cash, and no investment knowledge, advised he did not have $1 million to invest, Poole suggested he get some friends together who would collectively invest $1 million. Investor F declined. Poole then advised he would permit them to invest $150,000 if it was invested by December 1, 2007. On November 29, 2010, Poole and Ekiert returned to the home of investors F and G, had the investment documents signed and received their cheque for $150,000. Because of the actions of the Commission, stepping in and seizing the Borealis bank account, their cheque was returned in mid-December and at the suggestion of Poole and Ekiert it was rewritten designating the payee as CCU. Poole did not disclose to investor F at any time that he was subject to a cease trade order in relation to Borealis as of November 15, 2007.

[162] It is important to note that Poole advised investor F that Atlantic played no part in the Borealis GRIC and that the insurance was not yet in place, but they were working on it. Further, they advised investor F that they were looking into buying a bank but had not yet done so.

[163] In our view, it is difficult to determine what specific role Ekiert played in investors F and G's transaction. Poole was unquestionably the leading sales person. Nevertheless, the records advise that Ekiert participated in the $150,000 investment transaction involving investors F and G and other transactions which totalled an additional $300,000 and for which he received total commissions slightly in excess of $5,400. That commission is only about 1% of the $450,000 investment in which Ekiert played some part. We are not satisfied that there is sufficient clear and convincing evidence to establish on balance of probabilities that Ekiert did play a part that would result in a violation of either section 25 or section 53 of the Act. The allegations against Ekiert will therefore be dismissed.

18. Ross Macfarlane

[164] The documentary evidence establishes without a doubt that Macfarlane sold more than $3.5 million in Borealis GRIC securities to about a dozen and a half investors. He received commissions of more than $200,000 from those sales. He was not registered and no exemptions were available. There was no prospectus. He therefore violated subsections 25(1) and 53(1) of the Act.

19. Brian Nerdahl

[165] Nerdahl sold more than $2.2 million in Borealis GRIC securities to at least ten investors. For those efforts he received more than $136,000 in commissions.

[166] The witness investor H testified he dealt with Nerdhal in or about May/June 2007. Nerdhal advised investor H that negotiations were not yet finalized with Atlantic. In June 2007 investor H invested $216,000 and in November 2007 he invested a further $250,000. The money for the purchase came from placing a second mortgage on his parents' home and the proceeds from the sale of his own condo. Although Smith, who also spoke with investor H, was not straightforward with him, there is no clear evidence that Nerdhal deceived investor H. The evidence therefore does not support a finding of fraud but does establish that Nerdhal did trade in securities for which there had been no prospectus and he was not a registrant. He therefore violated subsections 25(1) and 53(1) of the Act.

20. Hugo Pittoors

[167] Pittoors sold over $2 million of Borealis securities and received commissions from Borealis of more than $135,000.

[168] Although some of the evidence in this regard is hearsay, it nevertheless leads, on the balance of probabilities, to the logical conclusion that Pittoors actively participated in the sale of the Borealis security whilst unregistered and for which no exemption was available and for which no prospectus was issued. He therefore violated subsections 25(1) and 53(1) of the Act.

[169] The evidence however does not support a finding of fraud against Pittoors.

21. Larry Travis

[170] Travis received commissions of almost $12,000 from Borealis for the sale of the Borealis GRIC.

[171] Investor A, who testified at the hearing, agreed in cross-examination that his memory of these events to which he testified is somewhat foggy. In any event, it appears not to be in question that investor A invested $300,000 in mid-October 2007. About five weeks later, because of serious doubts he had about the investment, he requested and received a full refund.

[172] There is no question that Travis was the salesperson who persuaded investor A and his wife to invest. Travis brought Prentice, who he described as 'the expert' to meet with investor A and to assist Travis in his sales pitch. There is little evidence, direct or circumstantial, that informs of Travis' involvement and the extent of his knowledge regarding what was, and perhaps more importantly, what was not occurring concerning the structuring of Borealis or the reliability of the information he was presenting to investor A.

[173] The only clear and unequivocal finding that can be determined from the evidence adduced is that Travis traded in the security, without registration, and for which no exemption was available. He therefore contravened subsection 25(1) of the Act. Further, the product in which he traded was not supported by a prospectus and therefore contravened subsection 53(1) of the Act.

[174] The evidence adduced does not support a finding of fraud against Travis.

C. The Corporate Respondents

1. Borealis International Inc.

[175] The evidence against the Corporate Respondent Borealis is the evidence that relates to all of the transactions that involved Borealis directly; i.e., in the creation of the corporation to be the vehicle to process the Borealis GRIC product and the solicitations misleading and deceitful advertising by Synergy on behalf of Borealis. In addition, its direct involvement in having its name on a website using its name and corporate structure as the vehicle for this product, and for the involvement of Borealis in receiving, acknowledging and putting into their corporate bank account at RBC the investors money, we are satisfied on the balance of probabilities, on the clear and convincing evidence that the corporation has violated subsections 25(1), 53(1) and 126.1(b) of the Act.

2. Synergy Group (2000) Inc.

[176] Because of the pivotal and fundamental role in the sale of the Borealis GRIC product played by Synergy as the corporate umbrella entity which was responsible for the sales of more than $16 million of the product, we are satisfied on balance by clear and convincing evidence that Synergy has violated subsections 25(1), 53(1) and 126.1(b) of the Act.

3. Integrated Business Concepts Inc.

[177] The evidence as set out earlier in this decision clearly makes frequent and almost constant references to IBC. The actual participation of IBC, however, is somewhat unclear. Funds did flow between the Borealis bank account and IBC's bank account, with the net result being that approximately $400,000 went from LBC to Borealis to 'top up' the Borealis account. In addition, a Staff witness testified that commissions were paid using funds from IBC. We also heard evidence that one investor was refunded his investment of $150,000 through a cheque from IBC in June 2007.

[178] The evidence of IBC's involvement is sufficient for us to find that it breached subsections 25(1) and 53(1) through its activities in furtherance of trades in the Borealis GRIC.

[179] We are on balance left with doubt as to whether Staff has established by clear and convincing evidence on the balance of probabilities that IBC had a significant causal connection to the misleading deceitful statements to satisfy us that they have violated subsection 126.1(b) of the Act.

4. Canavista Corporate Services Inc.

[180] Their involvement in the violations of the Act that we have earlier referred to is both peripheral and insubstantial. We therefore do not find them liable of any violations of the Act.

5. Canavista Financial Center Inc.

[181] Their involvement in the violations of the Act that we have earlier referred to is both peripheral and insubstantial. We therefore do not find them liable of any violations of the Act.

V. CONCLUSION

[182] Accordingly, given our analysis above, we make the following findings with respect to the Respondents:

(a) we find that Smith traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary

to subsection 53(1) of the Act; that he engaged in conduct relating to securities that he knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; that as a *de facto* director and officer of Synergy and Borealis, he authorized permitted and acquiesced in Synergy's and Borealis's breaches of the Act, contrary to section 129.2 of the Act; and that he breached the Sabourin Cease Trade Order; all of which is contrary to the public interest;

(b) we find that Andrew Lloyd traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he breached the Sabourin Cease Trade Order; all of which is contrary to the public interest;

(c) we dismiss the allegations against Paul Lloyd;

(d) we find that Villanti traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; that he engaged in conduct relating to securities that he knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; that as a director and officer of Borealis and IBC, he authorized, permitted and acquiesced in Borealis's and IBC's breaches of the Act, contrary to section 129.2 of the Act; and that he acted contrary to the public interest;

(e) we find that Haliday traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; that he engaged in conduct relating to securities that he knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; and that he and that he acted contrary to the public interest;

(f) we dismiss the allegations against Breau;

(g) we find that Statham traded in securities without being registered, contrary to subsection 25(1) of the Act; that she made illegal distributions contrary to subsection 53(1) of the Act; and that she acted contrary to the public interest;

(h) we find that Prentice traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; that he engaged in conduct relating to securities that he knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; that as a *de facto* officer of Synergy and Borealis, he authorized permitted and acquiesced in Synergy's and Borealis's breaches of the Act, contrary to section 129.2 of the Act; and that he acted contrary to the public interest;

(i) we find that Zielke traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(j) we find that Stephan traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; that he engaged in conduct

relating to securities that he knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; and that he acted contrary to the public interest;

(k) we find that Murphy traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; that he engaged in conduct relating to securities that he knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; and that he acted contrary to the public interest;

(l) we dismiss the allegations against Grigor;

(m) we dismiss the allegations against Switenky;

(n) we find that Dickerson traded in securities without being registered, contrary to subsection 25(1) of the Act; that she made illegal distributions contrary to subsection 53(1) of the Act; and that she acted contrary to the public interest;

(o) we find that Dupont traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(p) we find that Poole made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(q) we dismiss the allegations against Ekiert;

(r) we find that Macfarlane traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(s) we find that Nerdahl traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(t) we find that Pittoors traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(u) we find that Travis traded in securities without being registered, contrary to subsection 25(1) of the Act; that he made illegal distributions contrary to subsection 53(1) of the Act; and that he acted contrary to the public interest;

(v) we find that Borealis traded in securities without being registered, contrary to subsection 25(1) of the Act; that it made illegal distributions contrary to subsection 53(1) of the Act; that it engaged in conduct relating to securities that it knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; and that it acted contrary to the public interest;

(w) we find that Synergy traded in securities without being registered, contrary to subsection 25(1) of the Act; that it made illegal distributions contrary to subsection 53(1) of the Act; that it engaged in conduct relating to securities that it knew or reasonably ought to have known was fraudulent, contrary to subsection 126.1(b) of the Act; and that it acted contrary to the public interest;

(x) we find that LBC traded in securities without being registered, contrary to subsection 25(1) of the Act; that it made illegal distributions contrary to subsection 53(1) of the Act; and that it acted contrary to the public interest;

(y) we dismiss the allegations against Canavista Corporate; and

(z) we dismiss the allegations against Canavista Financial.

[183] To protect the personal information of all investors, we request that Staff provide a redacted version of the record.

[184] The parties against whom findings have been made are directed to contact the Office of the Secretary within 10 days to set a date for a sanctions and costs hearing, failing which a date will be set by the Office of the Secretary.

Dated at Toronto this 13th day of January, 2011.

"Patrick J. LeSage"
Patrick J. LeSage

"Paulette L. Kennedy"
Paulette L. Kennedy

Certified to be a true copy
Dated at Toronto this 12th day
of September, 2018
Daisy G. Arunha
Secretary,
Ontario Securities Commission.

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: An allegation against **DAVID PRENTICE**, a suspended member, under CMA Ontario Bylaws **section 21(a)(iii)** and **section 21 (d)(ii)**, as amended.

TO: Mr. David Prentice

AND TO: The Professional Conduct Committee

DECISION AND ORDER MADE MAY 28, 2019

DECISION

The Panel was satisfied that David Prentice ("Mr. Prentice") had proper notice of today's hearing and determined that the hearing would proceed in his absence.

The Panel was satisfied that the amended Allegation was proven and constituted a breach of CMA Ontario Bylaws section 21(a)(iii) and section 21 (d)(ii). The Panel determined that, having breached these sections, Mr. Prentice committed professional misconduct.

ORDER

The Panel orders the following:

1. Mr. Prentice be reprimanded in writing by the Chair of the hearing.

2. Mr. Prentice shall pay a fine of $50,000 to CPA Ontario by November 28, 2019.

3. Mr. Prentice's membership with CPA Ontario is revoked.

4. Notice of this Decision and Order, disclosing Mr. Prentice's name, is to be given in the form and manner determined by the Panel:

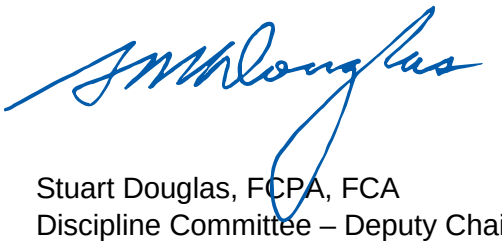
   (a) to all members of CPA Ontario;
   (b) to all provincial bodies;

   and shall be made available to the public.

5. Notice of this Decision and Order disclosing Mr. Prentice's name is to be given by publication on the CPA Ontario website, in the *Toronto Star*, and in *The Globe and Mail*. Mr. Prentice shall pay all costs associated with the publication, which shall be in addition to any other costs ordered by the Panel.

6. Mr. Prentice shall pay costs of $14,000 to CPA Ontario by November 28, 2019.

DATED at Toronto this 28th day of May, 2019



Stuart Douglas, FCPA, FCA
Discipline Committee – Deputy Chair

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: An allegation against **DAVID PRENTICE**, a suspended member, under CMA Ontario Bylaws **section 21(a)(iii)** and **section 21 (d)(ii)**, as amended.

BETWEEN:

Chartered Professional Accountants of Ontario
Professional Conduct Committee

-and-

Mr. David Prentice

APPEARANCES:

For the Professional Conduct Committee:	Tamara Center, Counsel Julia McNabb, Counsel
For Mr. Prentice:	Not Present and Not Represented
Heard:	May 28, 2019
Decision and Order effective:	May 28, 2019
Release of written reasons:	August 20, 2019

REASONS FOR THE DECISION AND ORDER MADE MAY 28, 2019

I. OVERVIEW

[1] This hearing was held to determine whether the Allegation that Mr. Prentice had failed to act with competence and committed an act discreditable to the profession, due to findings made against him by the Ontario Securities Commission ("OSC"), was established and amounted to professional misconduct.

[2] Mr. Prentice obtained his CMA designation in 1998. He was suspended from membership by the Discipline Committee of the Certified Management Accountants of Ontario ("CMA Ontario") on March 12, 2014. On March 19, 2014, the CMA Ontario Discipline Committee ordered Mr. Prentice's membership with CMA Ontario to remain

suspended pending the determination of the allegations that are the subject of this proceeding by a Panel of the Discipline Committee.

[3] Mr. Prentice was involved with two companies, Synergy Group (2000) Inc. (“Synergy”), incorporated in 2004, and Borealis International Inc. (”Borealis”), incorporated in 2007. He was a vice-president of both companies. Although he was not registered with the OSC, or any other securities commission in Canada, to trade in securities, Mr. Prentice promoted and sold investment products in Ontario and elsewhere. While promoting these products, Mr. Prentice made representations to potential investors that the OSC later found he know or ought to have known were misrepresentations, misleading or untrue.

[4] In November 2007, OSC staff commenced proceedings against Mr. Prentice and others with respect to their trading in Synergy and Borealis securities. By decision, dated January 13, 2011, the OSC found that Mr. Prentice had breached the Ontario *Securities Act* in various ways, including the illegal trading of securities and making fraudulent misrepresentations to the public.

[5] By order dated April 29, 2011, the OSC permanently prohibited Mr. Prentice from trading in securities or being an officer or director of any reporting issuer. Mr. Prentice was assessed an administrative penalty of $550,000 and order to pay costs of $115,000.

[6] The decisions of the OSC were brought to the attention of CMA Ontario by an anonymous complaint on April 18, 2013. CMA Ontario subsequently learned that three criminal charges, comprising three counts of fraud over $5,000, were initiated against Mr. Prentice and others involved with Synergy and Borealis on March 24, 2014.

[7] Allegations of professional misconduct were set out by CMA Ontario in a Notice of Referral, dated February 24, 2014. In March 2014, CMA Ontario sought an order for the interim suspension of Mr. Prentice’s membership pending a decision with respect to the allegations of professional misconduct. On March 12, 2014, a hearing of the interim suspension order was adjourned on the basis that Mr. Prentice was suspended on an interim basis.

[8] On March 19, 2014, the Discipline Committee of CMA Ontario issued an order, with the consent of the parties, suspending Mr. Prentice’s membership “until a Discipline Committee panel varies or cancels this Order, or adjudicates on whether Mr. Prentice is guilty of professional misconduct,…whichever is earlier.”

[9] On July 12, 2018, in the matter of *R. v. Villanti et al.,* Justice Croll of the Ontario Superior Court stayed the criminal charges against Mr. Prentice and his co-accused because a trial judge could not be assigned in a timely manner, thereby depriving the accused of a trial within a reasonable time.

[10] The original allegations against Mr. Prentice had been made prior to the amalgamation of the Institute of Chartered Accountants and CMA Ontario and, accordingly, were framed within the procedural framework of CMA Ontario. Due to the amalgamation of the professions in 2014, that procedural framework ceased to exist and was replaced by the processes of CPA Ontario. Consequently, the Professional Conduct Committee (“PCC”)

issued an amended Notice of Application within the new procedural framework on September 17, 2018.

[11] The substantive allegations remained the same in the amended Notice of Application and relied on the Bylaws of CMA Ontario that were in effect at the time of the subject findings of the OSC.

[12] The onus was on the PCC to show on a balance of probabilities that Mr. Prentice's conduct breached the CMA Ontario Bylaws, and constituted professional misconduct.

II. PRELIMINARY ISSUES

[13] Mr. Prentice did not attend the hearing nor did he have a representative attend on his behalf. A denial of the amended Allegation was entered on Mr. Prentice's behalf.

[14] To proceed in the absence of Mr. Prentice, the Panel had to be satisfied that he had received proper notice of the amended Allegation and the hearing, and that it was consequently appropriate to proceed in his absence. In the unique circumstances of this case, the Panel also had to consider whether the arguments that Mr. Prentice had advanced in correspondence regarding a hearing date justified deferring the hearing date.

Proper Notice

[15] As established by his Affidavit, sworn October 16, 2018 (Exhibit 1), Mervyn Archdall, Process Server, had personally served Mr. Prentice on October 15, 2018 with a letter dated October 5, 2018 from Ms. Center, on behalf of the PCC, which informed Mr. Prentice of the amended Allegation of professional misconduct made against him. A copy of the signed Allegation and information regarding the procedure related to disciplinary hearings were enclosed in the letter.

[16] The Affidavit of Caroline Kelly, the Legal Coordinator at CPA Ontario, sworn on May 24, 2019 (Exhibit 2), demonstrated that several emails had been exchanged between February 13, 2019 and February 28, 2019, between the Adjudicative Tribunals Assistant Secretary and Mr. Prentice and Ms. Center to establish mutually agreeable dates for the hearing of the Allegation. Mr. Prentice and the PCC agreed that they were available on May 28 and 29, 2019 and the hearing could be set for those dates (Exhibit B to the Affidavit of Caroline Kelly, Exhibit 2).

[17] On March 5, 2019, a Notice of Hearing was sent to Mr. Prentice by email. The Notice of Hearing confirmed that the hearing was scheduled to proceed on May 28 and 29, 2019, at 10:00 a.m. That Notice (Exhibit C to the Affidavit of Caroline Kelly, Exhibit 2) indicated that if Mr. Prentice (or the PCC) did not attend at the hearing the Discipline Committee could proceed in his absence. The Adjudicative Tribunals Assistant Secretary asked Mr. Prentice to acknowledge receipt of the Notice of Hearing by signing a letter enclosed with the Notice. Mr. Prentice did not respond to this email.

[18] There was a further email exchange between counsel for the PCC, the Adjudicative Tribunals Assistant Secretary and Mr. Prentice on May 22 and 27, 2019 (Exhibit 3). In

response to an email confirming that the hearing would proceed on May 28 and 29, 2019 (Exhibit D to the Affidavit of Caroline Kelly, Exhibit 2), Mr. Prentice indicated, by email, dated May 27, 2019, that he would not be able to attend. In his email, Mr. Prentice indicated that he had been unable to communicate with relevant witnesses because they were under "gag orders" in relation to criminal proceedings that had been commenced against Mr. Prentice in relation to the same underlying events. However, in the same email, he indicated that the police had "requested" witnesses not to speak with him. Mr. Prentice further stated that, although the charges against him had been stayed, the Crown had appealed, and thus the purported ban on his speaking to the witnesses remained in effect. Mr. Prentice indicated that he could not defend himself without being able to speak to these witnesses.

[19] In his email of May 27, 2019, Mr. Prentice also indicated that the PCC had not honoured the agreement regarding a delay of the hearing on the merits, which, according to him, precluded the matter from proceeding before the Panel until the criminal proceeding was completed.

[20] In response to Mr. Prentice, the PCC indicated, as they repeated at the hearing, that any issue that Mr. Prentice wished to raise should be raised by him, in person, at the hearing before the Panel. The PCC also took the position that Mr. Prentice had not complied with prehearing orders about bringing forward evidence to challenge the findings of the OSC (and whether he was entitled to challenge those findings). Due to this non-compliance, and the law restricting the re-litigation of matters determined by an administrative tribunal, they argued that Mr. Prentice should be precluded from bringing any other evidence forward. Counsel for the PCC also noted that the appeal of the stay of the criminal charges had not been perfected and was not yet scheduled for hearing.

Waiver of September 17, 2014

[21] As noted above, by order dated March 19, 2014 (Exhibit 4, Tab 3), the Discipline Committee of CMA Ontario, by agreement of the parties, suspended Mr. Prentice until the allegations were decided or the order was set aside by the Discipline Committee. At the same time, the hearing of the allegations was postponed indefinitely so that the criminal process could proceed. At a prehearing on June 16, 2014 (Exhibit 4, Tab 5), Mr. Prentice agreed, through his counsel at the time, to waive any delay in the discipline proceedings that was caused by the adjournment of the proceedings pending the conclusion of the criminal proceedings.

[22] On September 17, 2014, Mr. Prentice signed a written "Waiver of Expedited Discipline Hearing" (Exhibit 4, Tab 6), confirming the earlier waiver given by his counsel. In the body of the Waiver, Mr. Prentice agreed that he would not assert at any time that his rights had been violated due to the delay in the holding of the hearing. In response to a question from the chair, counsel for the PCC confirmed that Mr. Prentice had counsel at the time of signing the Waiver.

[23] In the final paragraph of the Waiver, Mr. Prentice acknowledged that "notwithstanding this Waiver, CMA Ontario retains the right to schedule my discipline hearing at any time

with reasonable notice to me." As reflected above, the PCC gave Mr. Prentice notice in September 2018 that they intended to schedule a hearing, and Mr. Prentice agreed to the scheduling of the hearing.

[24] During preliminary submissions to the Panel, counsel for the PCC indicated that the decision to proceed with the hearing of the Allegation was based on the fact that the criminal charges had been stayed in July 2018. That decision raised the real possibility that the charges would never be determined on their merits, and, even if the Crown's appeal was successful, the conclusion of the criminal process would be delayed significantly. In the PCC's submission, this reflected a significant change of circumstances from when the Waiver was signed.

Fairness

[25] At several times since the amended Allegation was served on him, Mr. Prentice raised the issue that he was prohibited through the criminal proceedings from communicating with witnesses he wanted to call. He maintained that this could negatively impact his ability to respond to the Allegation. In response, the PCC had submitted that it would be an abuse of process for Mr. Prentice to challenge the findings of the OSC during the hearing of the Allegation.

[26] Counsel for the PCC noted that the criminal proceedings had been stayed, but she conceded that she did not know whether any terms imposed on Mr. Prentice as conditions of his judicial interim release pending the trial of the charges (commonly referred to as "bail") remained in effect.

[27] This issue had been the subject of a prehearing conference, with a second prehearing conference regarding the same issue being cancelled when Mr. Prentice failed to comply with the terms of the order from the first prehearing conference and advised that he was unable to attend.

[28] At the first prehearing conference on November 29, 2018, Mr. Prentice was ordered to produce a list of witnesses and their anticipated evidence and "evidence of any current restrictions on communications between Mr. Prentice and these witnesses", among other items (Exhibit 5, Tab G), so that there could be a further discussion of the issues. Implicit in that discussion was a consideration of whether Mr. Prentice was entitled to bring forward the proposed evidence given the findings of the OSC. As noted by counsel, under Rule 12.08(1)(b) of CPA Ontario's Rules of Practice and Procedure, directions could only be made at a prehearing conference if they were agreed to by the parties.

Decision on Preliminary Matters

[29] Having reviewed the affidavits and documents presented by the PCC, including Mr. Prentice's email responses, the Panel was satisfied that Mr. Prentice had received proper and sufficient notice of both the hearing and the Allegation. The uncontradicted evidence was that the Allegation and the Notice of Hearing had been served on Mr. Prentice. This documents clearly set out the date of the hearing and the nature of the

Allegation.

[30] The Panel was also satisfied that the terms of the Waiver, signed September 17, 2014, with the assistance of counsel, did not preclude the PCC from seeking to proceed with a hearing of the Allegation prior to the conclusion of the Crown's appeal in the criminal proceeding. Specifically, the Waiver provided that CMA Ontario (and thereafter the PCC by effect of the amalgamation) could proceed with a hearing on reasonable notice to Mr. Prentice. Notice was given on September 24, 2018, more than seven months before the scheduled hearing dates. Mr. Prentice agreed to these dates when they were scheduled. The Panel found that reasonable notice had been provided when the relevant circumstances regarding the criminal charges had changed.

[31] Finally, the Panel concluded that, if Mr. Prentice sought to rely on an order restricting the ability of potential witnesses to speak with him, he had an obligation to bring forward evidence of that order. Despite being provided with opportunities to bring this evidence forward prior to the hearing through the pre-hearing conference process, he had failed or declined to do so. In the absence of evidence of an ongoing prohibition on the ability of witnesses to speak with Mr. Prentice, the Panel could not conclude that Mr. Prentice was unable to speak to these individuals.

[32] Given the absence of any evidence from Mr. Prentice, it was not necessary for the Panel to decide whether Mr. Prentice could bring forward evidence to challenge the findings of the OSC. Although the member had been permitted by the Discipline Committee in *Re Robert L. Morton* (unreported, February 11, 2019) to adduce evidence to provide context to findings by the OSC, Mr. Morton had given notice of the evidence that he sought to bring forward and had attended at the hearing with counsel. This enabled the Discipline Committee to assess Mr. Morton's situation based on an evidentiary record. That was not possible in Mr. Prentice's case.

[33] As set out above, the Panel concluded that there was no reason established by the available evidence to adjourn the hearing. On the other hand, the Panel was concerned that there was evidence that Mr. Prentice had been holding himself out as a CMA up to the time of the hearing. In a letter, dated February 4, 2019 (Exhibit 5, Tab K), counsel for the PCC flagged to Mr. Prentice that he had referred to himself as "David Prentice, MBA, CMA" and expressed concern that he had used this designation to obtain employment. By letter, dated March 4, 2019 (Exhibit 5, Tab O), Tom Litzgus, the Vice President and Associate General Counsel of CPA Ontario advised Mr. Prentice that he could not use the CMA designation, which remained in his email signature block, and directed him to discontinue use of this designation by March 18, 2019, failing which he could be prosecuted. When Mr. Prentice did not stop holding himself out as having the CMA designation, Mr. Litzgus wrote to Mr. Prentice again on April 8, 2019 (Exhibit 5, Tab P) to reiterate the earlier warning. Ultimately, by his email of May 27, 2019 (Exhibit 3), Mr. Prentice had removed this designation from his email, at least those to CPA Ontario.

[34] In the Panel's view, the fact that Mr. Prentice had continued to hold himself out as a CMA, long after his membership was suspended, created a risk to the public that needed to also be weighed in its decision as to whether to proceed, and the risk to the

public clearly weighed in favour of proceeding with the hearing.

[35] Due to these reasons, the Panel was satisfied that they were able to proceed with the hearing on the merits in the absence of Mr. Prentice.

III. ISSUES

[36] The Panel identified the following issues arising from the allegation:

A. Did the evidence establish, on a balance of probabilities, the facts on which the Allegation by the PCC was based?

B. If the Allegation by the PCC was established on the evidence on a balance of probabilities, did that allegation constitute professional misconduct?

IV. DECISION

[37] The Panel found that the PCC presented clear, cogent and convincing evidence which established, on a balance of probabilities, the facts upon which the Allegation was based.

[38] The Panel was satisfied that the facts proven by the PCC relating to the Allegation constituted a breach of CMA Ontario Bylaws section 21(a)(iii) and section 21 (d)(ii). The Panel found that having breached these sections, Mr. Prentice had committed professional misconduct.

V. REASONS FOR THE DECISION

Findings regarding Conduct of Mr. Prentice

[39] The PCC advised the Panel that it was relying wholly on the findings made by the OSC regarding Mr. Prentice in its two decisions in 2011 in *In the Matter of Borealis International Inc.* The first of these decisions, dated January 13, 2011 (Exhibit 6, Tab 1) related to the findings regarding the allegations against the various respondents, including Mr. Prentice. The second of these decisions, dated April 29, 2011 (Exhibit 2, Tab 2) related to the sanctions imposed by the OSC.

[40] The relevant findings from the Reasons for Decision of the OSC, dated January 13, 2011, were the following:

> [1] . . . . Staff also allege, among other allegations, that this scheme was fraudulent and therefore some of the respondents violated not only the trading sections of the Act, but also the fraud section of the Act. The product in question is a Borealis Guaranteed Return Investment Certificate ("Borealis GRIC"). It offered an annual return of between 10% to 18%. All of the more than $16 million of the Borealis GRIC was sold on the basis of an 18% annual return, payable at 4.5% quarterly.
>
> . . .

[3] The investors were advised that the monies raised through the Borealis GRIC would be placed in a trust company, Atlantic Trust Company Inc. ("Atlantic"). The monies so placed would permit Atlantic to provide loans to small and medium-sized businesses, in particular businesses with a connection to Vince Villanti ("Villanti") and/or Integrated Business Concepts Inc. ("IBC").

. . .

[10] Notwithstanding that even by early June, 2007, no constructive or concrete progress had been made to purchase or form a firm alliance with Atlantic, Smith and David Prentice ("Prentice") who together operated Synergy, began in March 2007 to market the Borealis GRIC product. The formal launch for the product occurred in Hull, Québec, in late March 2007. At that meeting, Smith and Prentice described via PowerPoint the features of the Borealis GRIC. The features described included:

1. Borealis had purchased a Bank … Atlantic;
2. Investors' funds would sit in a trust account at Atlantic which could be leveraged to provide loans to struggling small to medium-sized businesses to keep them afloat;
3. The investment was subject to no risk;
4. Atlantic was the first level of guarantee;
5. As a federally-regulated trust company Atlantic would have $100,000 Canada Deposit Insurance Corporation ("CDIC") coverage for each investor;
6. Atlantic mitigated risk by placing a performance bond;
7. The balance of any investment would be insured through SwissRe, Credit Suisse and/or Lloyds of London;
8. Synergy had arranged a proprietary strategic alliance with Borealis/Atlantic/Laiki Group; and
9. Regulation of Borealis would come under The Financial Consumer Agency of Canada ("FCAC").

[11] None of those above statements, except that Synergy had arranged an alliance with Borealis, were true at the time presented (March 2007). Furthermore, none came to be true between then (March 2007) and December 2007 when the Commission froze the Borealis bank account at the Royal Bank of Canada ("RBC") in which most of the more than $16 million raised from investors had been deposited.

[12] It is very important to note that the presenters at the Hull, March 2007 meeting, Smith and Prentice, told the audience that the arrangements had not yet been completed, however, in the words of one investor, attendees were informed that "the lawyers were in the final process of dotting all the Is and crossing all the Ts, but by the time [the investors] got home, it should be all *fait accompli*". (Hearing Transcript, January 21, 2010 at page 149)

[13] The Borealis GRIC was principally promoted and sold by Smith and Prentice through Synergy and its network of agents across Canada. The Borealis/Synergy promotional documents for this GRIC were very descriptive and stressed throughout the 'guaranteed' component of the product. In particular, they stressed the levels of insurance which included reinsurance. . . .

[14] Investors consistently testified that they were each promised their investment was guaranteed, with multiple levels of protection that included CDIC protection and reinsurance coverage.

[15] The sales documents included a Participation Agreement, a Transfer Agent Agreement, and a Business Referral Agreement. These documents were the creation of Synergy, Smith and Prentice. These documents, were, even if intended to be accurate when they were drafted, misleading and false in important characteristics.

. . .

[82] We are satisfied that most if not all of those notices and orders would have come to the attention of Synergy, Smith and Prentice. Notwithstanding all of those warnings, orders, cease and desist directions, Smith continued to market the Borealis GRIC to investors on a very large scale and without changing the contractual documents that investors utilized to purchase that product. In other words, the documents continued to misrepresent the form of insurance, reinsurance and general 'security.'

[83] It is no defence for Smith or others to say or to infer that the invested monies were safe, because they were at least substantially invested with RBC, and that at the end of the day no investor lost money and they were paid the promised interest rate. The marketing of the Borealis GRIC was fraudulent, it was deceitful. The investors were both advised and led to believe by the written and spoken comments of Smith/Synergy that the money would be deposited with Atlantic, that the money would be used for the purpose of leveraging loans to small and medium-sized businesses, that the principal and interest (18% annually) was secure because each of the investors' monies was both insured by a Bank or Trust Company, CDIC or equivilant [*sic*], and additional insurance would cover any excess not covered by CDIC or similar institutional insurance. All of that was false.

. . .

[124] Prentice held himself out to be Executive Vice President of Synergy and described himself as VP of Borealis. He was a co-presenter at public meetings of investors, and received more than $250,000 from Borealis in commissions and overrides. Villanti described him as a 'concept originator', as Smith's most senior person and an Administrator who dealt with the paper side of things. He participated in sales seminars for the Borealis GRIC product in Ottawa/Hull and Calgary and was directly involved as the "expert" in the sale of Borealis GRIC to investor A.

> [125] Prentice was kept informed of Villanti's discussions regarding the acquisition of Atlantic. When Prentice met with the investor A in the summer and fall of 2007, he advised that the investment was fully insured. It was not; Prentice had been advised by SwissRe that they had no connection to this Borealis GRIC. There was no reinsurance. He also knew, or ought reasonably to have known, that the monies on deposit at RBC were collectively insured for $100,000 by CDIC, not for the several million dollars that were then, and would later be, in the account.
>
> [126] Because of Prentice's role at the centre of this Borealis GRIC project, he was aware of the numerous issues surrounding this product. At the very least, he was aware of problems and the subsequent break-off of negotiations re the purchase of and/or any working agreement with Atlantic. He knew of the OSFI warning – the CDIC warning – the SwissRe cease and desist – the Alberta Securities Commission cease trade order. Throughout this period, he continued as a senior manager of Synergy, organizing, handling the paperwork and assisting in overseeing the sales of the Borealis GRIC product. He failed to disclose to any of the investors the problems and the falsity of the information in the investment contracts. Whilst it is true that he, at least sometimes, advised investors of "problems" with Atlantic, and of "problems" with the reinsurance, he at the same time advised that suitable alternatives were or would be in place. There was no basis in fact for his assertions that suitable alternatives were or would be in place. Even when he did not explicitly express that position, it was clearly the inference he left with the investors. Although it is true that the monies were deposited at RBC, the client/investor had no control or direct claim on those funds. Further, the funds were not being used, nor were they capable of being used for the very purpose of this whole scheme, i.e., loans to small businesses for which the investor stood to share in the profits. Prentice played a pivotal role in this whole project for which Borealis paid him well in excess of $250,000.
>
> [127] Prentice traded without registration, in securities, for which no prospectus had been issued. He therefore violated section 25 and section 53 of the Act. Prentice was *de facto* Executive Vice President of Synergy and *de facto* VP of Borealis, and authorized and acquiesced in those corporations' failure to comply with sections 25 and 53, thereby breaching section 129.2 of the Act.
>
> [128] Prentice misled and deceived not only investor A, but also all the investors who read the misleading literature on the Synergy and Borealis websites and the investor contracts, because of the role he played, as described at paragraph 124. He therefore also violated subsection 126.1(b) by the aforementioned deceit, false and misleading statements to the persons who invested in the Borealis GRIC.

[41] The OSC concluded, at paragraph 182(h) on page 32 of its Reasons, that Mr. Prentice had traded in securities without being registered, made illegal distributions, engaged in conduct relating to securities that he knew or reasonably ought to have known was fraudulent and acted contrary to the public interest.

[42] Rule 19.06 of the *Rules of Practice and Procedure* of CPA Ontario provides that proof of the fact that a person has been found by another adjudicative body to have committed an offence is proof before this Panel, in the absence of evidence to the contrary, that the offence was committed. There was no evidence to the contrary presented to the Panel, and there was no evidence that the decision had been appealed. As a result, the Panel accepted that Mr. Prentice had violated the Ontario *Securities Act* as found by the OSC.

[43] Rule 19.07 of the *Rules of Practice and Procedure* of CPA Ontario provides that "[s]pecific findings of fact contained in the reasons for decision of an adjudicative body are proof, in the absence of evidence to the contrary, of the facts so found". This premise was subject to two conditions: first, either no appeal was taken in a timely way or the appeal had been concluded; and, second, the member regarding whom the findings were made was a party to that proceeding.

[44] In the present case, Mr. Prentice had been a party to, and an active participant represented by counsel in, the hearing before the OSC. He had also not appealed the decision. In these circumstances, the Panel was satisfied that it could accept the findings of the OSC, in both of its decisions, as facts proven in the current proceeding.

Finding of Professional Misconduct

[45] Unlike the provisions of Rule 201.2 of the CPA Ontario Code of Professional Conduct, the CMA Ontario Bylaws did not include a provision that findings by the OSC created a "rebuttable presumption" that a member "has failed to maintain the good reputation of the profession or serve the public interest", in the absence of evidence to the contrary. As a result, the Panel had to consider whether these findings regarding Mr. Prentice amounted to professional misconduct.

[46] The OSC found unequivocally that Mr. Prentice had "misled and deceived" "all of the investors who read the misleading literature". The OSC specifically centered out Mr. Prentice and one other individual as the people who had engaged in fraudulent conduct. The Panel had no difficulty in concluding that clear findings of fraudulent conduct demonstrated that Mr. Prentice had failed to act with competence, to the extent that, under CMA Ontario Bylaw section 21(a)(iii), competence included acting with high ideals of professional conduct. The Panel was also satisfied on a balance of probabilities that the findings against Mr. Prentice constituted actions discreditable to the profession. Findings of fraudulent conduct could not be reconciled with the reputation of the accounting profession, given that its foundation was integrity and the trust the public places in its members.

VI. DECISION ON SANCTION

[47] After considering the evidence and the submissions of counsel for the PCC, the Panel ordered a written reprimand, a $50,000 fine, and the revocation of Mr. Prentice's membership. The Panel ordered publication of the decision to all members and other provincial bodies and that the decision be available to the public. The Panel also ordered publication of the fact of the revocation of Mr. Prentice's membership in the *Toronto Star*

and the *Globe and Mail* newspapers.

VII. REASONS FOR DECISION ON SANCTION

Preliminary Issue

[48] At the outset of her submissions on sanction, counsel for the PCC advised the panel that there was an issue as to Mr. Prentice's membership status. Specifically, there was a question as to whether Mr. Prentice's membership had been suspended or revoked prior to this hearing. Given that the PCC was taking the position that the proven misconduct warranted the termination of Mr. Prentice's membership, this issue was relevant to the Panel's deliberations on sanction. To state the obvious, Mr. Prentice's membership could not be revoked if it had already been revoked.

[49] As noted above, Mr. Prentice's membership as a CMA had been suspended on an interim basis by an order of the CMA Ontario Discipline Committee on March 19, 2014 (Exhibit 4, Tab 3). The interim suspension was to continue "until a Discipline Committee panel varies or cancels this Order, or adjudicates on whether Mr. Prentice is guilty of professional misconduct". Prior to the current hearing, the Discipline Committee of either CMA Ontario, or since amalgamation, of CPA Ontario, had made no further order regarding Mr. Prentice, so this suspension continued when CPA Ontario was established.

[50] At some time after the order of March 19, 2014, Mr. Prentice stopped paying his professional fees. As a result, he was suspended administratively under the authority of section 35 of Regulation 4-2, as it was at the time, three months after the fees were due. In the usual course, under section 37 of the same Regulation, revocation of membership would follow the suspension of membership for non-payment of fees if the suspension continued for two months. However, the section provided that revocation would not occur if the member was "the subject of an investigation, proposed settlement agreement or Allegation by the Professional Conduct Committee." Amended Allegations were issued by the PCC on September 17, 2018.

[51] On October 31, 2018, despite the provisions of section 37 of Regulation 4-2, as it was at the time, CPA Ontario purported to revoke Mr. Prentice's membership based on the continuing non-payment of his fees. There was consequently an issue as to whether Mr. Prentice's membership had actually been revoked, or whether he remained a suspended member.

[52] The PCC took the position that the Panel did not need to resolve this issue. Counsel for the PCC proposed that, if the Panel was satisfied that revocation was appropriate, the Panel could make an order revoking his membership (if he was still a suspended member) *or in the alternative* prohibiting him from reapplying for membership for another five years (if his membership had been revoke). This alternative had the effect of giving the administrative suspension the same effect as a disciplinary revocation.

[53] Independent legal counsel to the Panel advised the Panel that the issue of Mr. Prentice's

membership status had to be determined by the Panel, at least for the purposes of this proceeding, because that status determined the scope of the orders that the Panel could make. The Panel could only make orders that were supported by the facts that it found to be established. Ultimately, Mr. Prentice had to either be a member or not be a member of CPA Ontario. If he was not a member, then it was not open to the Panel to revoke his membership, and any order to that effect would be unsupported, even if it was in the alternative to a valid option.

[54] The Panel accepted the advice of counsel in this respect and decided that it was necessary to resolve this issue so that its order would have a proper factual foundation. The Panel concluded that the membership of Mr. Prentice had not been revoked prior to this hearing for two reasons. First, the Order, dated March 19, 2014, indicated that Mr. Prentice was *suspended* (not revoked) until the allegations were adjudicated. Given that this Order had not been varied, the Order, and Mr. Prentice's suspension remained in effect at the time of the hearing. There was no authority for the Registrar to usurp the jurisdiction of the Discipline Committee in this regard.

[55] Second, prior to November 18, 2018, the provision authorizing the revocation of an individual's membership if their fees remained unpaid, section 37 of Regulation 4-2, expressly precluded the revocation of the membership of an individual who was "subject to an . . . Allegation by the Professional Conduct Committee." Mr. Prentice fell into this category since at least September 17, 2018. Given that Mr. Prentice's membership was purportedly revoked on October 31, 2018, the Regulation in effect at that time did not authorize the revocation of Mr. Prentice's membership.

Appropriate Sanction

[56] The Panel found the conduct of Mr. Prentice to be egregious and unbecoming of a member of CPA Ontario (and its predecessor entities). He violated not only the provisions of several *Securities Acts* but the directions and orders of the regulators who were dealing with Synergy and Borealis. Mr. Prentice was dishonest in his representations to the public and specifically the clients and prospective clients of Synergy and Borealis. Although this type of behaviour would justify the revocation of Mr. Prentice's membership, his subsequent interactions with his regulator affirmed this conclusion. His disrespectful conduct was displayed during his dealings with CPA Ontario during the PCC's efforts to accommodate his wishes to put forward his case at the pre-hearing conferences. The Panel also found his continued use of his CMA designation while he was suspended to be a further indication that he did not respect the Rules and Regulations of the body of which he was a member. As a result, the Panel felt that severe sanctions were warranted. The sanctions levied against Mr. Prentice would assist in protecting the interests of the public, and send a message to CPA Ontario members that this form of conduct was unacceptable and would not be tolerated.

[57] As noted in paragraph 74 of the OSC's "Reasons for Decision", Prentice (and Smith) became the principal marketers of the Borealis product. Prentice was one of the leads in marketing the product. He was the primary speaker in the "false" representations to the public that raised $16 million from the public. His efforts continued despite the warnings

issued by OSFI (Office of the Superintendent of Financial Institutions) in May 2007, a special alert from the Federal Deposit Insurance Corporation in May 2007; and, a cease trade order from the Alberta Securities Commission in June 2007. The OSC noted in their Decision that these orders would have come to the attention of Mr. Prentice. The misrepresentations to the public continued despite the warnings and alerts. Mr. Prentice continued to market the product which showed a wanton disregard to the regulators and to the public. They continued to put the public at risk until the operation was closed in September 2007. The total at risk was $16 million. Due to the actions of Mr. Prentice and his unwillingness to obey and abide by his regulators, and despite the position of the PCC, the Panel thought that a minimum fine of $50,000 was warranted and, in fact, considered a higher fine than this amount.

[58] The Panel accepted the submission on behalf of the PCC that the sanctions needed to be published, both in the normal course, that is to members and other provincial regulatory bodies and to be available to members off the public, and in the two newspapers. This conclusion was not only well-founded in the language of the Regulation, but it reflected the fact that publication of the sanctions imposed on members for serious professional misconduct is necessary to deter other members and to affirm the public's confidence in the profession's ability to regulate itself.

VIII. COSTS

[59] The PCC sought an order requiring Mr. Prentice to pay two-thirds of the cost of the investigation and prosecution of this matter. Although this was the standard order sought by the PCC regarding costs in recent cases, there were several ways identified by counsel by which Mr. Prentice had increased the costs incurred by the PCC. For example, at the initial prehearing conference, Mr. Prentice had taken the position that he intended to challenge the findings of the OSC. As a result, the prehearing panelist directed the PCC to provide written submissions as to the law regarding the restrictions on a member's ability to relitigate a previous decision of another tribunal. He also directed Mr. Prentice to disclose his anticipated evidence, in accordance with the Rules. The PCC prepared these additional submissions; Mr. Prentice did not disclose the evidence upon which he intended to rely. The submissions were ultimately not required, as Mr. Prentice elected not to attend the hearing. The hearing date had been set with Mr. Prentice's consent.

[60] The costs outline submitted by the PCC (Exhibit 7) indicated that the total costs incurred for the hearing of the application were $21,260.06. This figure was calculated in such a way as to avoid double counting the time of the two counsel who appeared, including only those hearings hours in which counsel had carriage of the matter for the PCC. Counsel to the PCC proposed an order for $14,000, being two-thirds of that amount.

[61] Costs are imposed as an indemnity, not as an additional fine. They are intended to reimburse the PCC, and thereby the profession, for part of the costs of the investigation and discipline hearing. While the profession should bear some part of this cost as part of its obligation to maintain public confidence in the profession, the member should bear

the majority of the costs given that his actions led to the need for the proceedings. This argument is strengthened where, as here, the member's conduct increases those costs.

[62] The Panel was satisfied that $14,000, payable within six months, was an appropriate order as to costs.

Dated at Toronto this 20th day of August, 2019

Stuart Douglas, FCPA, FCA
Discipline Committee – Deputy Chair

Members of the Panel
Anthony R. Davidson, CPA, CA
Rebecca Huang (Public Representative)
Barry Solway (Public Representative)
Peter-John Vaillancourt, CPA, CGA

Independent Legal Counsel
Glenn Stuart
StuartLaw