2007 BCSECCOM 101

Foresight Capital Corporation, Gilbert Kenneth Wong, and Jill Ellen MacGregor Bock aka Jill Ellen MacGregor

Sections 161 and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Robin E. Ford	Commissioner
	Marc A. Foreman	Commissioner
	Robert J. Milbourne	Commissioner
Dates of hearing	November 28 to 30, December 2, 5 to 9, 12 to 14, and 19, 2005 and January 9 and 16, 2006	
Date of findings	February 27, 2007	

Appearing

Douglas Muir	For the Executive Director
Foresight Capital Corporation	Gilbert Wong
Gilbert Kenneth Wong	For himself
Jill Ellen MacGregor Bock	For herself

Findings of Commissioners Foreman and Milbourne

Introduction

¶ 1 The executive director issued a notice of hearing to Tara Capital Finance Corporation (formerly Foresight Financial Capital Corporation) and Parvez Nadeem Tyab on September 2, 2004. She issued a notice of hearing to Foresight Capital Corporation, Foresight Financial Services Ltd., Naeem Riaz Tyab, Gilbert Kenneth Wong, Jill Ellen MacGregor Bock aka Jill Ellen MacGregor, and Martin Raymond Hall on December 7, 2004. On January 14, 2005, the Commission granted the application of the executive director to have both matters heard at the same time and adjourned the hearings to November 28, 2005.

¶ 2 The executive director discontinued the proceedings against Tara Capital and Parvez Tyab on September 28, 2005 (2005 BCSECCOM 613). On October 13, 2005, the executive director amended the notice of hearing of December 7, 2004 to remove the respondents Foresight Financial and Naeem Tyab and discontinued proceedings against them (2006 BCSECCOM 546, 552, and 556).

¶ 3 Hall entered into a settlement agreement with the executive director on November 25, 2005 (2005 BCSECCOM 700). On November 28, 2005, the executive director discontinued proceedings against Hall (2006 BCSECCOM 552) and

issued a further amended notice of hearing to remove Hall's particulars (2005 BCSECCOM 704). For convenience, we refer to that notice as the notice of hearing.

¶ 4 The hearing began on November 28, 2005 and continued intermittently through on January 16, 2006. We heard testimony from six former clients of Bock and Foresight. Neither Bock nor Wong testified, but we accepted into evidence their sworn interviews with BCSC staff of March 12, 2003 and June 1, 2004. A senior investigator and the manager of the examinations team in the capital markets regulation division, both employees of the BCSC, also testified.

¶ 5 To correct an omission during the hearing, we now make a hand written note from Bock's client Ms. F's doctor, dated December 14, 2005, exhibit 165.

Allegations

¶ 6 In the notice of hearing, the executive director alleges among other things, that:

- Bock, Foresight and Wong breached section 48 of the *Securities Rules*, BC Reg. 194/97 when Bock recommended a leveraged investment strategy that was too risky for her client Mrs. G;
- Bock, Foresight and Wong breached section 48 of the Rules when Bock invested the funds of her clients Ms. F, Ms. AG, Mr. LS, Ms. LM and Ms. IS in mutual funds and exempt products that were too risky and unsuitable for their needs, objectives and personal and financial circumstances; and
- Bock breached section 50 of the *Securities Act*, RSBC 1996, c. 418 when she told clients Ms. AG and Ms. IS that a company would go public when she knew, or ought reasonably to have known, that the statements were misrepresentations.

¶ 7 In the notice of hearing, the executive director also alleges compliance deficiencies against Foresight and Wong. We deal with those allegations later in these findings under "Breaches by Foresight and Wong".

The respondents

Foresight

¶ 8 Foresight was incorporated in British Columbia. It was registered under the Act as a securities dealer from June 9, 1997 to October 12, 2001, and as a mutual fund dealer from October 12, 2001 to December 15, 2002. Foresight was dissolved by the Registrar of Companies for failure to file on July 25, 2005.

Bock

¶ 9 From her interview with staff, we know the following things.

¶ 10 Bock has a BA in Economics from Queens University, and an MBA from McGill. She held executive level positions with large Canadian corporations and taught commerce at Concordia University.

¶ 11 In 1986 Bock became a co-owner of a mutual fund dealer in Quebec, later licensed in Ontario, and gave retirement planning seminars to employees of large Canadian corporations. She also continued to carry on a business, started in 1983 that provided annuity quotations to brokers, and expanded it to cover RIF's, RSP's and other funds.

¶ 12 Bock relocated to Vancouver in 1994, becoming registered as a mutual fund salesperson with Vantage Securities in February 1995, and becoming registered as a securities salesperson in January 1997. From 1997, she sold exempt products the same as or similar to those which are the subject of these allegations. She did significant due diligence on the products, including, in many cases meeting with the principals of, and visiting the farming operations of, the issuers.

¶ 13 With the closure of Vantage in April of 1998, Bock "transferred" her registration and client book to Foresight. She was registered with Foresight from May 5, 1998.

¶ 14 At the time of her move to Foresight, it had some 30 to 40 representatives. The management structure was, compared to that at Vantage, minimal.

¶ 15 Bock worked at Foresight's offices in Burnaby for four months. She received a procedures manual. Subsequently, she established an office in Vancouver for her and her assistant. The office was electronically connected to that of Foresight, and all transactions were booked through, and all cash handled by, Foresight's head office. Foresight, through Wong and Naeem Tyab, visited her office on only one occasion, but did not review any client files.

¶ 16 On her move to Foresight, she received no training on her arrival or later. The fund companies and the issuers came to Foresight to educate registrants about their products.

¶ 17 Because her registration was not renewed, Bock ceased to be registered on January 8, 2001. She resigned from Foresight in February 2001. She is not currently registered under the Act, but she is licensed as a life insurance agent in British Columbia.

¶ 18 At Foresight, it was Bock's usual practice to conduct two or three interviews with her clients before settling an investment strategy with them. Generally, she

reviewed their personal circumstances, present and future income, assets and liabilities, tax returns, and insurance policies, and established with them what their investment goals were.

Wong

¶ 19 From his interview with staff, we know the following things.

¶ 20 Wong has a BA in Commerce from UBC and entered the investment industry as an investment advisor in August 1985. He worked for Great Pacific Management, RBC Dominion Securities, and Spectrum United Mutual Funds. He is a Fellow of the Canadian Securities Institute and a certified investment manager.

¶ 21 Wong was registered under the Act as a securities salesperson from August 1985 to November 1994. He joined Foresight in 1996, was appointed a director of Foresight effective on November 25, 1996, and was registered under the Act as a trading partner, director, or officer on June 9, 1997. Along with Foresight, his registration was limited to mutual funds from October 12, 2001. He was compliance manager of Foresight from June 9, 1997 until August 22, 2001. He was president of Foresight from April 28, 1997 until June 2002, and continued as a director after that. He resigned as a director effective March 8, 2004, and is not currently registered under the Act.

¶ 22 Foresight hired Wong to set Foresight up as a dealer and to act as trading director and president. He "ran most of the day-to-day operations of the company" initially with two or three employees. He was also responsible for recruiting, supervision and compliance. Having worked for two senior investment companies, he felt he had "a relatively good grasp" of the industry standards and procedures for reviewing trades and supervising advisors.

¶ 23 Wong's strategy for Foresight was to recruit only experienced representatives with an established client base. For compliance and supervision, he relied in part on "self-regulation at the advisor level" since Foresight had insufficient management depth and systems to handle the volume of clients it had acquired. He said: "suitability is really at the advisor level, where they know their clients and they know … they would have to determine … is this the right investment for their client?"

¶ 24 Wong did not review the Know Your Client or New Client Application forms of Foresight's clients as a matter of course. He had processes in place to screen the placement of a client in a particular investment, including a daily review of all paperwork and, for exempt product investments, the KYC's or NCAF's and Forms 20A. He left the assessment of the clients' risk tolerance to the judgment

of the individual representative. He arranged no training of representatives beyond providing them with a policy and procedures manual.

¶ 25 Foresight grew rapidly to a total of about 110 people and about 12,000 client accounts in June 1999.

¶ 26 Wong became the second largest shareholder of Foresight at 10 to 12%. Naeem Tyab, at about 70%, was the principal shareholder and, for a time, corporate secretary.

¶ 27 Wong started phasing out of management in April 2002 and resigned as president of Foresight in June 2002. He resumed involvement in management in October 2002 at the request of Naeem Tyab. He resigned as director in March 2004. It is not clear whether those changes were notified to the Registrar of Companies.

The exempt products

¶ 28 The businesses underlying the exempt products that Bock proposed to the clients who testified at the hearing all involved farming. They were:

- Cloud Forest Estate Coffee Limited Partnership (a BC limited partnership formed to acquire, develop and operate an organic coffee plantation in Costa Rica and to sell coffee beans to domestic and foreign markets),
- Fibrex Canada Inc. (in the business of harvesting and processing flax and industrial hemp in Quebec for export to Europe and the US),
- Imperial Ginseng Products Ltd. (a public company in the business of cultivating, processing, manufacturing and marketing American ginseng and ginseng products like teas and capsules),
- Opus Cranberries II Limited Partnership (a BC limited partnership formed to develop, own and operate a cranberry farming operation in BC),
- Pearl Seaproducts (VCC) III Corp. (a venture capital corporation formed to allow investments in shellfish aqua farming that invested in preferred shares of Pearl Seaproducts Inc. which was in the business of producing, processing and marketing oysters in BC), and
- Western Royal Ginseng (VCC) III Corporation (formed to invest in the shares of certain American ginseng farm companies).

¶ 29 The products were complex. Briefly, subscribers were generally to be allocated a portion of any income or losses of the underlying business. They could then use any losses to offset income from other sources for income tax purposes.

¶ 30 In most cases, subscribers could elect to finance some or all of the investment by way of a promissory note secured by the securities and any distributions. There

was, in the small print of the offering memoranda (OMs), a warning that failure to pay these amounts when due could result in legal action against the subscriber to enforce payment, adverse income tax consequences, and/or the loss of their investment.

¶ 31 With the exception of the VCCs (Venture Capital Corporations), subscribers could also (or were required to) purchase unsecured bonds. Purchasers of these bonds could also finance up to 100% of their purchase of the related shares or LP units.

¶ 32 Subscribers who purchased common shares in the VCCs received a tax credit certificate entitling them to a BC refundable tax credit of 30% of the amount paid for their shares.

Product characteristics

¶ 33 As the OMs disclosed, the exempt products were speculative and illiquid. The risk disclosure included: farming is risky, the markets for the farm produce were variable, the units were illiquid, there were restrictions on resale, and there was no guarantee of any return on the investments.

¶ 34 As the OM for Cloud Forest put it:

> Units are primarily suitable for Persons whose income is subject to high marginal income tax rates and who are prepared to accept the risks inherent in coffee farming. There is no assurance of a return on a Limited Partner's investment. (page 46)

¶ 35 In the case of Imperial Ginseng, the issuer had already defaulted on the repayment of certain bonds "and there is no assurance that the Issuer will be able to operate as a going concern" (OM, page 2). On page 53, under the heading "risk factors", the OM stated:

> The Issuer is currently unable to pay dividends or satisfy redemption requests.

¶ 36 Typical of all the OM's, it went on to say:

> such investment is suitable only for long-term and sophisticated investors who are able to withstand the loss of their total investment and who do not require liquidity.

¶ 37 Page 2 of the OM for the related bonds stated:

> This is a speculative offering. … The Bonds are subject to severe resale restrictions … and there is no assurance that such restrictions will expire (see "Resale Restrictions"). As there is no market for these securities it may be difficult or even impossible for the purchaser to sell them.

¶ 38 All these securities were offered in BC under exemptions from the prospectus requirements in sections 128(a), (b) or (c) of the Rules or in an exemption order.

¶ 39 Relevant to this case, sections 128(b) and (c) of the Rules stated:

> Section 61 [prospectus requirements] of the Act does not apply to a distribution in the following circumstances:
>
> **$25,000 – sophisticated purchaser**
> (b) the trade is made by an issuer in a security of its own issue if
> - (i) the purchaser purchases as principal,
> - (ii) the purchaser is a sophisticated purchaser,
> - (iii) the aggregate acquisition cost to the purchaser is not less than $25,000, and
> - (iv) an offering memorandum is delivered to the purchaser in compliance with section 133;
>
> **$25,000 – registrant required**
> (c) the trade is made by an issuer in a security of its own issue if
> - (i) the purchaser purchases as principal,
> - (ii) the purchaser, in connection with the distribution of the security, makes the acknowledgement referred to in section 135,
> - (iii) the aggregate acquisition cost to the purchaser is not less than $25,000, and
> - (iv) the offering memorandum is delivered to the purchaser in compliance with section 133.

¶ 40 Section 128(b) required that the purchaser be a "sophisticated purchaser". That term was defined in section 1 of the Rules to mean, with respect to individuals:

> a purchaser that, in connection with a distribution, gives an acknowledgment under section 135 [Form 20A] to the issuer, if the issuer does not believe, and has no reasonable grounds to believe, that the acknowledgment is false, acknowledging both that

(a) the purchaser is able, on the basis of information about the investment provided by the issuer, to evaluate the risks and merits of the prospective investment because of

(i) the purchaser's financial, business or investment experience, or

(ii) advice the purchaser receives from a person that is registered to advise, or is exempted from the requirement to be registered to advise, in respect of the security that is the subject of the trade and that is not an insider of, or in a special relationship with, the issuer of the security, and

(b) the purchaser is one of the following:

(ii) an individual who

(A) has a net worth, or net worth jointly with the individual's spouse, at the date of the agreement of purchase and sale of the security, of not less than $400000, or

(B) has had in each of the 2 most recent calendar years, and reasonably expects to have in the current calendar year,

(I) annual net income before tax of not less than $75000, or

(II) annual net income before tax, jointly with the individual's spouse, of not less than $125000.

¶ 41 Section 128(c) referred to section 135 of the Rules which required an acknowledgement pursuant to section (g) of Form 20A:

(g) I am purchasing securities under section 128(c) ($25,000–registrant required) of the Rules, and I have spoken to a person **[Name of registered person: (the Registered Person)]** who has advised me that the Registered Person is *registered to trade or advise* in the Securities and that the purchase of the Securities is a suitable investment for me.

¶ 42 Sections 128 (b) and (c) required the offering memorandum to be delivered to the purchaser in compliance with section 133. Under section 133 of the Rules, an offering memorandum required to be delivered in connection with a distribution under sections 128(b) or (c) must be delivered to the purchaser before an agreement of purchase and sale is entered into.

¶ 43 These provisions were repealed effective June 20, 2003. Multilateral Instrument 45-103, *Capital Raising Exemptions*, replaced the exemptions under section 128

of the Rules. MI 45-103 itself was replaced by MI 45-106, effective September 14, 2005.

The law

¶ 44 The respondents argue that on the repeal and replacement of the provisions, Form 20A was no longer required and so allegations that relate to Form 20A are no longer appropriate – there is no harm to the public and any findings of this panel can have no purpose (and no deterrent effect).

¶ 45 We do not agree. Not only were the requirements in place during the relevant period, and the respondents obligated to comply with them, but also they are principally directed towards ensuring the "eligibility" of the investor to enter into an exempt product investment transaction rather than to the suitability of the investment itself – which is at the core of the allegations in this case.

¶ 46 As the Alberta Securities Commission put it in *Re Marc Lamoureux* ((2001) ABSECCOM REA), at page 14, a decision referred to by the Commission in *Bilinski* (2002 BCSECCOM 102):

> Whatever forms or procedures may be used, the essential test for determining whether a registrant has satisfied their obligations is whether the registrant used due diligence, as described in section 3.2 of policy 3.1.

¶ 47 Section 3.2 of ASC Policy 3.1 states:

> Every registrant shall follow the "Know Your Client Rule" which requires the use of due diligence:
>
> 3.2.1 to learn the essential facts relative to every client and to every order or account accepted;
>
> 3.2.2 to ensure that the acceptance of any order for any account is within the bounds of good practise; and
>
> 3.2.3 to ensure that the recommendations made for any account are appropriate for the client and in keeping with his investment objectives.

¶ 48 This is entirely consistent with section 48 of the Rules. Section 48(1) requires that a registrant make enquiries concerning each client:

> (a) to learn the essential facts relative to every client, including the identity and, if applicable, creditworthiness of the client and the reputation of

the client if information known to the registrant causes doubt as to whether the client is of good business or financial reputation, and

(b) to determine the general investment needs and objectives of the client, the appropriateness of a recommendation made to that client and the suitability of a proposed purchase or sale for that client.

¶ 49 It is the registrant's sole responsibility to ensure that proposed products are suitable before recommending them. In *Bilinski*, at para. 334, the Commission quoted with approval the following extract from *Re Lamoureux*:

> The obligation to ensure that recommendations are suitable or appropriate for the client rests solely with the registrant. This responsibility cannot be substituted, avoided or transferred to the client, even by obtaining from the client an acknowledgment that they are aware of the negative material factors or risks associated with the particular investment.
>
> The obligation on a registrant to ensure that each investment recommended to a client is suitable is a particularly important protection for those clients whose investment experience and sophistication may be insufficient to enable them to fully recognize or assess the risks inherent in an investment. As noted below, disclosure to the client of the negative material factors of an investment, however important, is not necessarily relevant to a suitability determination and cannot replace a registrant's obligation to assess suitability. Acknowledgment on the part of an investor of awareness of the material negative factors or risk does not convert an unsuitable investment into a suitable one.
>
> …
>
> The suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the risks associated with the investment product with the risk profile of the investor. This comparison is probably the most critical element in the registrant's suitability obligation.
>
> …
>
> [A] registrant's obligation is to "know his client" and to ensure that any recommendations made by [him] are appropriate for the client based on the factors, both negative and positive, reasonably known to a diligent registrant at the time the investment is contemplated. Only those factors that are reasonably foreseeable at the time the investment is contemplated

> are relevant to the suitability determination. If a suitable investment actually fails due to some unforeseeable circumstance, that does not retroactively make it an unsuitable investment. If an unsuitable investment is recommended by a registrant, the fact that the investment is in fact proven to be successful does not retroactively make it suitable. It would be improper and unreasonable to assess a registrant's performance of his duties, which arise at the outset, in light of subsequent unforeseeable events.

¶ 50 Risk must be objectively, not subjectively, assessed. To quote *Bilinski*:

> … Risk assessment cannot be based on the principal's or the registrant's optimism in the venture or themselves. Assessment of risk must be based on a realistic and objective assessment of the circumstances of the investment and of the investor. Clients are entitled to receive from their registrant an objective assessment of risk. … (para. 346).

¶ 51 *Lamoureux* sets out a three stage process for assessment of suitability prior to any investment recommendation by a registrant to a client, at pages 14 and 15, as follows:

> The first stage involves the "due diligence" steps undertaken by the registrant to know the client and "know the product."
>
> …
>
> Only after the due diligence of the first stage is completed, can the registrant move to the second stage in which they fulfil their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for that client.
>
> Suitability determinations … will always be fact specific. A proper assessment of suitability will generally require consideration of such factors as a client's income, net worth, risk tolerance, liquid assets and investment objectives, as well as an understanding of particular investment products. The registrant must apply sound professional judgement to the information elicited from the know your client inquiries.
>
> If, based on the due diligence and professional assessment the registrant reasonably concludes that an investment in a particular security in a particular amount would be suitable for a particular client, it is then appropriate to the registrant to recommend that investment to the client.

> By recommending the investment to a client, the registrant enters the third stage of the process. … At this stage, when making the client aware of a potential investment, the registrant is obligated to make the client aware of the negative material factors involved in the transaction, as well as the positive factors.
>
> … It should be emphasized that such disclosure cannot ameliorate deficiencies in either of the first two stages of the process. … . The registrants failure may have been the result of not knowing the client, or not knowing the securities, or an error in the suitability determination but, once the improper recommendation has been made, it does not matter whether or how the registrant discloses the material negative factors, or whether the client claims to understand and accept the risks involved in the investment. The registrant has failed in their obligations.

¶ 52 We would summarize this three stage process as the obligations of a registrant to:

1. know the client and the product
2. apply sound professional judgement in establishing the suitability of a proposed investment
3. disclose the negative as well as the positive aspects of the proposed investment

¶ 53 The respondents argue that *Lamoureux* and *Bilinski* have limited relevance in this case. They point out that these cases deal with non-compliance with section 14 as well as section 48 (or the Alberta equivalent as embodied in Policy 3.1). In this case, the executive director has made no allegations under section 14.

¶ 54 We do not agree. In *Bilinski*, the Commission found that, as part of the second stage, registrants have an obligation to ensure that the client meets all of the conditions for exemption from the prospectus requirements (para. 332). One of the conditions for exemption under section 128 of the Rules is that clients must be able to evaluate the risks and merits of prospective investments because of their financial, business or investment experience, or because of advice from the registrant. It follows that a registrant's failure to explain the risks and merits of prospective products to clients who do not have sufficient financial, business or investment experience to understand them is to fail to ensure that all the conditions for exemption are met and is a breach of section 48.

¶ 55 The respondents also point to some important difference in the facts. While in our view *Lamoureux* and *Bilinski* correctly set out the tests for compliance with section 48, we agree that the facts in *Lamoureux* and, in particular, *Bilinski* are different in some respects and we have taken that into account in our analysis.

¶ 56 With this summary of the requirements of section 48, we deal next with the alleged breaches by Bock in her dealings with her former clients.

Abuse of process

¶ 57 The respondents' raised a wide variety of arguments that relate to alleged abuse of process and abuse of power by commission staff, and tainting of witnesses and other matters that, they say, should cause us to reject or give less weight to much of the oral evidence.

¶ 58 The respondents included many examples in their submissions that they say show unreasonable and abusive conduct and process by commission staff and bias of the witnesses to the respondents' prejudice.

¶ 59 Our duty is to consider evidence that is relevant to the allegations in the amended notice of hearing. Staff's conduct is relevant only to the extent that it may affect the credibility or weight of any of the evidence presented.

¶ 60 In assessing the credibility of witnesses, and the weight to be given to their evidence, we took into account the submissions of the respondents when we decided they were relevant.

Breaches by Bock

1. Individual clients – section 48

(a) Mrs. G

¶ 61 In 1998 Mrs. G was 59 years old, married, and, while working full-time, was nearing retirement. She in fact retired in September of 1999. Her spouse, Mr. G, also a client of Bock, participated in the investment strategy and made investments through Bock.

¶ 62 Staff made no allegations with respect to Mr. G, and he did not appear before us. Mrs. G testified in-part to his, and their combined, financial affairs.

¶ 63 We found Mrs. G to be a somewhat problematic witness for the most part, with some difficulty in recall of details of past events without access to notes written after-the-fact. Mrs. G was examined in chief by staff; and cross examined at length by the respondents.

¶ 64 In 1998 Mrs. G. was working full time as a medical secretary. Mr. G was a semi-retired musician working part-time.

¶ 65 The total quantum of their income was given to us as some $100,000 for the 1997 tax year, dropping to some $73,000 for the 1999 tax year. Of this Mrs. G accounted for some $34,000 and $14,000 in the respective years.

¶ 66 The G's assets were the subject of considerable contention before us. In her testimony, Mrs. G was unable to provide us with an estimate of their assets or net worth, although she disputed the amount of $460,000 shown on the NCAF of November, 1998. They owned a residence that had a value of some $155,000, net of a mortgage of $70,000. The documentary evidence showed that their investable assets included between $33,000 and $36,000 in Mrs. G's RRSP, and some $30,000 in his. They had a life insurance policy that Bock valued on a cash surrender basis as $20,000.

¶ 67 Mr. G had a collection of musical instruments, which Bock valued at $300,000. In testimony, Mrs. G disputed that value, maintaining that they had been appraised at about $61,000.

¶ 68 Inasmuch as we were given no credible evidence as to the value of the collection, we were unable to make any determination as to Mrs. G's or the G's combined net worth or investable assets.

¶ 69 Bock became the G's financial planner in late 1998. They initiated contact with Bock as a result of strong and repeated recommendations from a couple who were social friends. The evidence before us indicated that Mrs. G attended at least two, and Mr. G one, exempt product information seminars in which Bock participated prior to their first meeting with her.

¶ 70 The G's had two meetings to review their financial circumstances and objectives with Bock prior to her assuming a significant role in the management of their financial affairs and facilitating their separate investments in the exempt products. There was general agreement that their objectives were, at least on Mrs. G's part, the achievement of a higher level of discretionary spending for their retirement over the longer term, and tax reduction.

¶ 71 To achieve these objectives, Bock proposed, and the G's elected to implement, a strategy involving accessing the asset value of their residence by way of an interest only line of credit to provide investable funds. The funds were to be deployed to income producing mutual funds, and exempt product investments.

¶ 72 On December 9, 1998, the G's signed the necessary documentation to establish a $88,000 line of credit with Canada Trust, secured by their residence, with interest payments of $350 per month or some $4,200 per year, floating rate at prime. The

documents were executed in the offices of Canada Trust, in the presence of Bock and two officials of Canada Trust.

¶ 73 Mrs. G asserted in testimony that there was no discussion of the risk of using these borrowed funds to invest, but confirmed the presence of the Canada Trust officials at the meeting in cross examination.

¶ 74 From her interview with staff and her notes, Bock indicated that both she, and the Canada Trust loan officer, and the Canada Trust lawyer who witnessed the documents, made it perfectly clear to the G's that the line of credit obligation was independent of the performance of any investments purchased with the proceeds. No leveraged loan risk disclosure documentation was presented pursuant to Bock's prior experience and her discussion with the Canada Trust officials. This sworn interview evidence was not credibly refuted in the evidentiary record or the course of the hearing.

¶ 75 Bock deployed some $48,000 of the proceeds of the line of credit to mutual funds. A systematic "10%" withdrawal plan was established, with the proceeds deposited to a dedicated Canada Trust account to service the interest obligations of the line of credit. Bock then facilitated, according to the documentary evidence, the commitment of the balance of the line of credit proceeds to exempt products over the course of December 1998 and January 1999 as follows:

- $25,000 of Quadrant Pacific Growth Fund LP units in the name of Mr. G, by way of a $9,000 cash down payment, with the balance to be covered by tax refunds due to him for 1998.

- $17,500 for units of Opus Cranberries II LP, in the name of Mrs. G, by way of a promissory note due April 30, 2007, not involving the proceeds from the line of credit.

- Contemporaneously, $17,500 for related Opus Cranberries bonds, by way of a $5,500 cash down payment, with a commitment to three roughly equal payments to be completed by March, 2001 in a registered account of Mrs. G. Mrs. G was able to claim the full $17,500 as an RRSP contribution, and tax deduction, and was able to flow through the farming losses to offset other income.

- $25,000 for Imperial Ginseng bonds, in the name of Mrs. G, paid in cash. According to Bock's notes, the interest from these bonds was to be directed towards servicing the obligations of the line of credit.

- As well, and also not involving proceeds from the line of credit, $25,000 of Pearl Sea Products VCC (III) Corp. to a registered account of Mr. G, paid for from proceeds of liquidating existing investments, for an investment of $17,500 net of the refundable VCC tax credit of $7,500.

¶ 76 From Bock's interview with staff, as a result of the G's direction of the tax rebates and refunds, and the systematic withdrawal proceeds from the mutual funds, to purposes other than those required to execute the strategy, Mrs. G became dissatisfied with the strategy. This evidence was not controverted in testimony before us and in fact was confirmed in part by Mrs. G in cross examination.

¶ 77 Mrs. G testified that she subsequently sought other legal and investment advice. As well, she complained to Foresight without satisfaction. Pursuant to the advice received, the G's did not meet the commitments to service the outstanding obligations on the Quadrant units and Opus Cranberries bonds promissory notes, and "lost" the investments.

¶ 78 There was no evidence before us as to any action taken by either Quadrant or Opus Cranberries to recover the amounts owing.

¶ 79 Pearl Sea Products went bankrupt in December 2002.

¶ 80 With respect to the net amounts invested by the G's, the quantum of any losses experienced, and the degree to which such losses had been or might be mitigated by tax recoveries through offsets against other income, the evidentiary record and the testimony was not conducive to us making such a determination. The evidentiary record before us was, however, clear to the effect that the line of credit obligation continues to be borne by the G's.

Findings – Breach of section 48

¶ 81 In the case of Mrs. G, the executive director alleges that the breach of section 48 resulted from Bock recommending a leveraged investment strategy that was too risky for Mrs. G.

¶ 82 We find that Bock did know her client Mrs. G, and did not breach section 48 in that regard.

¶ 83 Importantly, in the course of the hearing, we ruled that Bock's conduct with Mrs. G could not be used to support the allegations that Bock breached section 48 by "investing client funds in [products] that were too risky and unsuitable". This ruling was based on an analysis of the particulars of the allegations as disclosed to

the respondents by the executive director and consideration of submissions from both the respondents and the executive director in that regard.

¶ 84 That ruling as a consequence calls into question the extent to which the executive director can, in fairness, rely on the ultimate uses of the line of credit, ie. Bock's facilitation of the direction of some 40% of it to the G's investments in the exempt products, in attempting to establish that Bock breached section 48 in her conduct with respect to Mrs. G.

¶ 85 We accordingly concluded that in interpreting the phrase "leveraged investment strategy" in the allegation, that we should not take into consideration the nature of the subsequent investments per se.

¶ 86 The issue therefore turns on the question of whether Bock's strategy for Mrs. G of using the proceeds from a line of credit secured by the G's residence for investment purposes was, of and by itself, too risky and hence unsuitable.

¶ 87 Given the circumstances, it is simply not appropriate for us to consider Mrs. G's situation apart from that of her husband, Mr. G. The residence was jointly held, he co-signed the line of credit documents, and he shared in the allocation of the proceeds to the investments.

¶ 88 Mr. G did not appear before us, we were not provided with a credible description of the G's financial circumstances in general or their net worth and prospective income levels over the post-1999 period in particular.

¶ 89 The concept of redeploying equity in fixed assets such as real estate, to investments in securities, was, and continues to be, widely accepted and practised in financial planning and wealth management circles, particularly where the clients have a sufficient income level to benefit from the tax effective ability to offset the interest cost associated with accessing the funds otherwise locked in the fixed asset.

¶ 90 Given the income level of the G's at the time of the implementation of the strategy through Bock, its concordance with their agreed financial objectives, and the absence of evidence as to their true financial circumstances, we do not find that Bock failed to exercise sound professional judgement, and accordingly she did not breach section 48 in her dealings with Mrs. G by recommending a leveraged investment strategy that was too risky for her.

(b) Ms. F

¶ 91 In 1998 Ms. F was 69 years old, divorced, and working part-time.

¶ 92 We found Ms. F to be, for the most part, a candid and credible witness, albeit with some difficulty in recalling precise details of past events. Ms. F was examined in chief by staff; and her cross examination by the respondent Bock was completed; that by the respondent Wong was not completed due to Ms. F's scheduled travel, and subsequent illness.

¶ 93 In 1998 Ms. F was a retired airline stewardess with part-time employment as a theatre usher, and income from the sale of her paintings. While the total quantum of her income was not available to us, it was established from Bock's interview by staff, and her notes, that it consisted, at a minimum, of some $10,000 per year in alimony, $2,400 per year from part-time work, and $4,000 per year from her RRIF, which may or may not have included some $1,200 per year in investment income. This sum was supplemented by her OAS and CPP payments, specifics of which were not provided to us. Her KYC form indicated an aggregate income of $30,000 per year.

¶ 94 In 1998, her KYC form indicated a net worth of $600,000. Ms. F disputed that amount. The documentary evidence before us indicated that she held $93,000 in a RRIF (largely Canada Savings bonds), $62,000 in non-registered investments (principally "blue chip" equities), and owned a condominium which she valued at $220,000 before us, and at $300,000 in an earlier interview with staff - for a net worth of between $375,000 and $455,000.

¶ 95 From Bock's interview, we established that the principal difference between the KYC value, and the evidentiary based value, was Bock's capitalization of Ms. F's CPP and OAS at $92,000 and $100,000 respectively, and incorporation of those amounts into the KYC net worth.

¶ 96 While we reject that methodology on the basis that the capitalized values of non-accessible pension funds do not constitute an investable asset in the hands of the beneficiary, it is nonetheless not in dispute that Ms. F was eligible to invest in exempt products as a sophisticated purchaser should such investments be suitable for her.

¶ 97 Bock became Ms. F's financial planner in 1998 after Ms. F attended an exempt product promotional seminar with a friend who was a client of Bock's, and subsequently requested an interview with Bock.

¶ 98 Ms. F had two extensive meetings with Bock, at which her goals, as taken from Bock's interview, and not contested before us, were recorded as: to increase her income level (over that provided by the CSB's in her RRIF), to reduce her taxes, and to create an "estate" for her daughters. Bock filled out the KYC form which Ms. F signed.

¶ 99 Ms. F said that her investment knowledge was limited, that she had no experience with mutual funds, that she did not understand what a venture situation was, and that she did not recall discussing risk with Bock but that a risk tolerance of "2" was about right.

¶ 100 Over the next few months, Ms. F, through Bock, implemented a plan to meet Ms. F's objectives through redeploying the funds in her RRIF as follows:

- 100,000 common shares at $0.25 per share in Western Royal Ginseng (VCC) III Corp. on November 28, 1998, for a total investment of $17,500 net of the $7,500 refundable VCC tax credit.

- Contemporaneously, 50 Imperial Ginseng bonds bearing interest at 12% (later converted to preferred shares with a dividend rate of 13%) at $1,000 each for an investment of $50,000.

- 25 units in Opus Cranberries LP and Opus Cranberries II Financial Corp. at $1,000 per unit on January 19, 1999 by way of a $3,929 cash investment and the undertaking of a promissory note and post dated cheques. A partnership promissory note for $17,000 was due April 30, 2007.

¶ 101 In total, net of the VCC credit, Ms. F invested some $75,500 of her investable assets in the exempt products, and assumed a further obligation of $17,000 due in 8 years in the form of a promissory note.

¶ 102 By letter of October 23, 1999, Ms. F wrote to Foresight (Wong) to complain about "the nature of the investments that were selected for my RRIF account by your representative [Bock]". She wrote:

> while I may have signed the required documents I was not cognizant of the risk factors and volatility of these investments. … I am in a low tax bracket and I am too old for an RRSP so I do not even enjoy the tax breaks of these speculative investments.

¶ 103 Her request for the investments to be reversed was not granted.

¶ 104 Subsequently, Ms. F. required funds to meet a condominium obligation. She again complained to Foresight and requested that the down payment for the Opus Cranberries units be returned. Opus Cranberries cancelled the purchase and returned her $3,929.

¶ 105 In her testimony before us, Ms .F confirmed these facts.

¶ 106 We were given no evidence as to the losses, if any, that Ms. F has incurred as a consequence of investing in the exempt products as recommended by Bock.

(i) Findings - Limitation period

¶ 107 The respondents say that the allegations concerning Ms. F were out of time, contrary to section 159 of the Act which states:

> Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

¶ 108 They say that Ms. F's first two investments were made on November 28, 1998, more than six years prior to the date of the notice of hearing – December 7, 2004. Ms. F made the third investment in Opus Cranberries after December 7, 1998 (on January 18, 1999), but it was later cancelled.

¶ 109 The executive director says that, in accordance with *Dennis* (2005 BCSECCOM 65), it is the last event in a course of conduct that matters, not the first. The respondents say that we should not take the Opus Cranberries investment into account because it was later cancelled.

¶ 110 In our view, the later cancellation of the Opus Cranberries investment is irrelevant. The executive director's allegation concerns the enquiries and assessment that Bock made or should have made before she proposed the investment. Ms. F signed the subscription agreement for Opus Cranberries on January 18, 1999. In our view, Bock's obligations under section 48 continued up to the purchase of the investment.

¶ 111 We find that the investment in Opus Cranberries was within the limitation period.

(ii) Findings - Breach of section 48

¶ 112 We find that Bock did "know" her client Ms. F, but chose to ignore what she "knew" about Ms. F's financial circumstances and objectives.

¶ 113 As is abundantly clear from the text of the OM's for the exempt products, they were suitable for investors who could mitigate the potential risk of losses through offsetting those losses, if any, against other investment gains, or who were able to shelter or otherwise withstand the losses as a consequence of their "high income levels."

¶ 114 Given Ms. F's age, her limited income level and prospects, and the fact that the Opus Cranberries purchase brought the percentage of her total investable assets committed to the exempt products to 50%, to say nothing of the further $17,000 obligation she had undertaken, the investment plan was clearly at odds with her objective of "building an estate for her daughters", and was unsuitable for her.

¶ 115 We find that Bock did not exercise sound professional judgement in recommending the exempt products investment program to Ms. F, and accordingly breached section 48 on the basis that her investment in Opus Cranberries was unsuitable for her.

¶ 116 It follows from this finding that, since Bock should not have recommended the purchase of Opus Cranberries to Ms. F in the first instance, it is not necessary for us to determine whether she made Ms. F aware of the risks associated with the purchase of the products.

¶ 117 However, should a determination on that point have been necessary, we would have found that Bock failed to make Ms. F aware of the risks associated with the investment.

¶ 118 Her letter of October 23, 1999 to Foresight clearly illustrates that her understanding of, and insight into the riskiness of the products significantly post-dated the investment itself, and that the advice on which that letter was based could not have come from Bock. Ms. F's testimony before us was consistent with that view.

(c) Ms. AG

¶ 119 In 2000 Ms. AG was 50 years old, single, and working full-time.

¶ 120 We found Ms. AG to be a candid and credible witness, with for the most part, considerable recall of details of past events. Ms. AG was examined in chief by staff; and cross examined at length by the respondents.

¶ 121 In 2000 Ms. AG was a RN with extensive experience both domestically and internationally. She was working full-time, and had investment income from off shore and on-shore accounts, both registered and unregistered.

¶ 122 While the total quantum of her income was not available to us, it was established from her KYC form of March 2000 as $50,000 per year over the relevant period, apparently exclusive of investment income.

¶ 123 From the KYC form, her investable assets in 2000 were some $213,000, comprising $112,000 in RRSP's and some $102,000 in off-shore accounts. As well, she owned real estate valued at $5,000.

¶ 124 The KYC form prepared by Bock indicated estimated net liquid assets of $400,000. In testimony, Ms. AG told us that she contested this amount at the time with Bock, and that her investments were some $170,000 plus the real estate of $5,000.

¶ 125 In interview, Bock indicated that she had calculated a net worth for Ms. AG of over $400,000, by adding the capitalized value of Ms. AG's employment pensions (Canada and the UK) at $130,000, and her future OAS and CPP at some $240,000.

¶ 126 Since we reject that methodology for CPP and OAS on the basis that the capitalized values of non-accessible pension funds do not constitute an investable asset in the hands of the beneficiary, and since we had no evidence before us as to Ms. AG's accessibility to her assets in her employment pension plans, it is clear that her net worth for investment purposes was insufficient for her to qualify as a sophisticated purchaser. Accordingly Ms. AG was only eligible to invest in exempt products, should such investments be suitable for her, on the basis of being fully reliant on the advice of Bock (section 128(c)).

¶ 127 Bock became Ms. AG's financial planner in early 2000. She met Bock through an invitation received pursuant to having filled out a contact card at a Trade Show.

¶ 128 Ms. AG had two extensive meetings with Bock prior to moving her accounts to Bock from her existing financial planner. From Bock's interview with staff, Ms. AG's investment goals were summarized as "reduced taxes." This was confirmed by Ms. AG before us, with the qualifier that she did not expect to do worse on her investments.

¶ 129 A complex strategy was developed by Bock, which involved a redeployment of Ms. AG's mutual funds and savings into other mutual funds, and resulted in investments in exempt products, which took place in June of 2000 as follows:

- $25,000 for 25 Cloud Forest LP units, on June 8, 2000, by way of an interest-only promissory note for $25,000, due June 1, 2009.

- Contemporaneously, $25,000 for 25 related Cloud Forest bonds, with a coupon of 7%, by way of an asset redeployment in a registered account.

- Also contemporaneously, $25,000 in shares of Pearl Sea Products (VCC) III Corp. for $17,500 net of the $7,500 refundable VCC tax credit, by way of an asset redeployment in a registered account.

¶ 130 From Bock's interview with staff, the Cloud Forest combination contemplated deductibility of the interest payments of $2,345 per year, and the farming losses, against other income, with capital gains and income from shares arising from conversion of the LP units at maturity in June 2009 sheltered in a registered account.

¶ 131 Ms. AG confirmed in testimony that she had attended presentations in respect of both the Cloud Forest and Pearl Sea Products businesses, and received and reviewed the OM's for the investments prior to executing the transactions.

¶ 132 She did not understand the complexities of the disclosure documents and discussed them with Bock. She received, and recounted for us, assurances she received from Bock and the sponsors of the investments as to the stability and attractiveness of the investments. The risk of any catastrophic loss was not discussed.

¶ 133 She acknowledged the possibility of investment loses, but not those of a catastrophic nature, as being understood by her. Her testimony was not credibly controverted by any of the evidentiary record before us.

¶ 134 As an outgrowth of other issues surrounding Bock's on-going management of her accounts, Ms. AG sought other investment and legal advice, and became concerned as to the appropriateness of the investments in the exempt products.

¶ 135 Pursuant to that advice, she discontinued making interest payments on the Cloud Forest units in 2001, and attempted, by way of complaint to Foresight, to extricate herself from her exempt product investments in February 2001. She was unsuccessful in that attempt.

¶ 136 The was no evidence before us as to any action having been taken, or contemplated by Cloud Forest to recover the interest owing by Ms. AG pursuant to the terms of the promissory note.

¶ 137 Pearl Sea Products went bankrupt in December 2002, Cloud Forest remains in business.

¶ 138 The losses incurred by Ms. AG, and the extent to which they had been offset, and had been or could be recovered against other income, was a subject of

considerable controversy before us. The evidentiary record is insufficient to permit us to draw any conclusions in that regard.

Findings - Breach of section 48

¶ 139 We find that Bock did "know" her client Ms. AG and designed an investment strategy to meet Ms. AG's objective of reducing her taxes, and did not breach section 48 on that basis.

¶ 140 Given Ms. AG's investable asset base, her stable, long term, and above average income level, her future pension income prospects, and her minimal expenditure levels, a strategy such as designed by Bock cannot per se be considered inappropriate or unsuitable.

¶ 141 Given Ms. AG's circumstances, the commitment of some 25% of her investable assets to the exempt products, and the undertaking of a $22,000-odd interest commitment over the next nine years, to implement such a strategy, were not clearly and compellingly inappropriate.

¶ 142 The concepts of flowing through start-up losses and other expenses to be offset against income that would be otherwise taxable, of using borrowed funds to invest to enable interest deductibility, and of sheltering gains were, and are, widely recognized and accepted as sound practises in the financial planning and wealth management areas, and were not unreasonable in the case of Ms. AG. Had the investments had the characteristics as represented by the sponsors and Bock, her professional judgement would not have resulted in a breach of section 48 on that basis.

¶ 143 The matter of a breach accordingly turns on whether or not Bock properly disclosed the nature and risks of the investments to Ms. AG, particularly as Ms. AG was fully reliant on her in order to be eligible to make the investments. She did not, and accordingly we find that she breached section 48 on the basis that Ms. AG's investments in the exempt products were unsuitable for her.

¶ 144 It is clear from the evidence before us, that when Ms. AG approached Bock with questions as to the meaning and interpretation of the OM's for the exempt products, she was given platitudinous assurances as to their stability and positive prospects, rather than a blunt assessment of the potential for loss, as well as the potential for gain, that she was entitled to from a registrant.

(d) Mr. LS

¶ 145 In 2000 Mr. LS was 46 years old, married, and working full-time. His spouse, Ms. JS, was also a client of Bock and made similar investments through her.

¶ 146 Staff made no allegations with respect to Ms. JS, and she did not appear before us.

¶ 147 We found Mr. LS to be a problematic witness, with somewhat selective recall of details of past events. Mr. LS was examined in chief by staff; and cross examined at length by the respondents.

¶ 148 In 2000 Mr. LS was a printing sales representative and had extensive experience trading in speculative issues on the VSE. He was working full-time, and had realized some $100,000 in trading profits which were dispersed among his, and spousal registered accounts.

¶ 149 The total quantum of his income was not made clear to us. It was shown on his NCAF form of early 2000 as $50,000 per year, and in his testimony before us given as $36,000 per year, apparently exclusive of any investment income from speculative stock trading, which continued over the relevant period. The NCAF for Ms. JS gave her income as $68,000 per year.

¶ 150 Mr. LS's investable assets were the subject of some contention before us. From his testimony, in 2000 they were some $110,000, in cash and investments in registered and unregistered accounts. Other assets included a vacation property in the US which he valued at some $54,000, net of a $44,000 mortgage. From Bock's interview with staff, the NCAFs of December 2000 for Mr. LS and Ms. JS indicated a combined net worth of some $1,100,000, consisting of $520,000 in capitalized OAS and CPP, $140,000 capitalized value of Ms. S's employment pension plan, $225,000 Canadian equivalent value for their US vacation property, and $225,000 in other investments.

¶ 151 Given our rejection of capitalized OAS and CPP benefits, and with no evidence as to whether the terms and conditions of Ms. S's employment pension plan enabled her entitlement to be accessible for investment purposes, the NCAF information would lead us to a value of at least $450,000 for their net worth. The gap between this value and Mr. LS's testimony that its value was $164,000 was not bridged before us.

¶ 152 Bock became the S's financial planner in early 2000. They initiated contact with Bock as a result of a reference from a friend of Ms. JS. The evidence before us indicated that Mr. LS was familiar with the exempt products through seminar attendance prior to meeting with Bock. He also had on-going direct contact with sponsors of the products through his business practise and personal relationships.

¶ 153 The S's had two joint planning meetings with Bock prior to her taking over the management of Mr. LS's mutual funds, and facilitating their separate investments in the exempt products. There was general agreement, in the case of Mr. LS, that

his objectives were to achieve improved performance (10 to 12%) on the funds in the registered accounts he had "topped up" with the proceeds of speculative trading, as well as reducing taxes, and achieving long term income.

¶ 154 Mr. LS retained a speculative trading account, and a registered account, with his current initiating brokerage. These accounts totalled some $17,000 in October, 2000.

¶ 155 Bock redeployed some $21,000 of his mutual funds (book value as of June 2000), and then facilitated the commitment of Mr. LS's RRSP funds to the exempt products as follows:

- $25,000 for 25,000 Fibrex preferred shares in April/May 2000.
- $25,000 for 25 Cloud Forest LP units, in June, 2000 by way of an interest-only promissory note due July 1, 2009.
- Contemporaneously, $25,000 in related Cloud Forest bonds, by way of a $6,500 cash down payment, and a promissory note for $18,500.
- $16,000 in shares of Pearl Sea Products (VCC) III Corp. for $12,200 net of a $4,800 refundable VCC tax credit.

¶ 156 From Bock's interview with staff, the Cloud Forest combination contemplated deductibility of the interest payments of $2,345 per year, and the farming losses, against other income, with capital gains and income from shares arising from conversion of the LP units at maturity in June 2009 sheltered in a registered account.

¶ 157 Mr. LS confirmed in testimony that he was aware of the illiquid nature of the investments, but unfamiliar with their risk characteristics. We were given no corroborating evidence on this latter point. In cross examination he confirmed that he knew the investments were not "guaranteed".

¶ 158 In cross examination Mr. LS confirmed that he closely monitored the status of the financial markets in general, and his investments in particular. He conveyed an impression of substantial financial literacy. He also confirmed that he was pleased with his investments through the spring of 2001, and referred others to Bock for financial planning services.

¶ 159 In the summer of 2001, as an outgrowth of issues surrounding the performance of his mutual funds in the then general market downturn, and frustration

with difficulties in contacting Bock, Mr. LS sought other investment advice, and became disenchanted with the mutual fund and the exempt product investments.

¶ 160 Pursuant to that advice, he liquidated the mutual funds on a fee inefficient basis, and ceased making interest payments on the Cloud Forest promissory notes.

¶ 161 The was no evidence before us as to any action having been taken, or contemplated, by Cloud Forest to recover the some $7,000 in outstanding interest Mr. LS told us he owed pursuant to the terms of the promissory notes.

¶ 162 Fibrex went out of business in 2003, and Pearl Sea Products went bankrupt in December 2002. Cloud Forest remains in business, and Mr. LS continues to hold those investments.

¶ 163 The losses incurred by Mr. LS, and the extent to which they had been offset, and had been or could be recovered against other income of the S's, were not conclusively canvassed before us. The evidentiary record does not permit us to make any determination in that regard.

Findings - Breach of section 48

¶ 164 We find that Bock did "know" her client Mr. LS and facilitated an investment strategy to meet his agreed objectives, and did not breach section 48 on that basis.

¶ 165 Despite the uncertainty in the S's investable asset base, given his age, their income level of over $100,000 per year, and his demonstrated propensity for and comfort with high risk, speculative investments, the strategy as facilitated by Bock cannot per se be considered inappropriate or unsuitable.

¶ 166 Given these circumstances, the commitment of some 40% of a lowest possible view of the S's investable assets, and the undertaking of the interest and principal commitments over the next nine years to implement such a strategy, are not clearly and compellingly inappropriate.

¶ 167 The concepts of flowing through start-up losses and other expenses to be offset against income that would be otherwise taxable, of using borrowed funds to invest to enable interest deductibility, and of sheltering gains were, and are, widely recognized and accepted as sound practises in the financial planning and wealth management areas, and were not unreasonable in the case of Mr. LS. Had the investments had the characteristics as represented by the sponsors, and Bock, her professional judgement would not have resulted in a breach of section 48 on that basis.

¶ 168 Given the above circumstances, the matter of a breach accordingly could only turn definitively on whether or not Bock properly disclosed the nature and risks of the investments to Mr. LS. There was no credibly clear and compelling evidence before us to indicate that she did not, and therefore we dismiss the allegation that Mr. LS's investment in the exempt products was unsuitable.

(e) Ms. LM

¶ 169 In 1999 Ms. LM was 49 years old, divorced, and working full time.

¶ 170 We found Ms. LM to be, for the most part, a credible witness, albeit with considerable difficulty in recalling precise details of past events. Ms. LM was examined in chief by staff; and cross examined at length by the respondents.

¶ 171 In 1998 Ms. LM was working as a technical support person in telecommunications in Kelowna. She had no other tangible sources of income. It was established from testimony and her KYC form that her annual income from employment ranged from a high of $54,000 in 1998 to a more normal $47,000 over the relevant period.

¶ 172 From her KYC form, prepared by Bock in February 1999 her investable assets were given as $48,000, comprising some $19,000 of "blue-chip" shares of her employer, purchased through an employee plan, and savings held at a credit union, in both registered and unregistered accounts.

¶ 173 The KYC form also indicated a "total net worth of $168,000" with the difference, according to Bock's notes, representing the capitalized value of Ms. LM's company pension, but not her CPP and OAS.

¶ 174 Given no evidence as to the terms and conditions of the company plan, we could reach no conclusion as to whether or not Ms. LM could access her share of the plan assets for alternative investment purposes, and accordingly conclude that her net worth consisted only of her investable assets of $48,000, which was inadequate to enable her to qualify for exempt product purchases without being fully reliant upon advice received from Bock (section 128(c)). In interview with staff, Bock confirmed this fact.

¶ 175 Bock became Ms. LM's financial planner in late 1998 after Ms. LM attended a meeting at the invitation of Bock pursuant to Ms. LM having filled out a contact card Bock's booth at a Trade Show.

¶ 176 Ms. LM had one relatively brief meeting with Bock prior to becoming her client. Her investment goals were the subject of considerable contention, both in testimony before us, and from the evidentiary record available to us.

¶ 177 The gap between Ms. LM's view that her primary goal was "savings" to enable a future residence purchase, and Bock's view the Ms. LM was "seeking long term asset growth to supplement her pension income," was not bridged before us.

¶ 178 Through on-going interaction with Bock, Ms. LM made investments in exempt products over the course of 1999 and 2000 as follows:

- 25 units, at $1,000 per unit, of Opus Cranberries II LP, half LP units and half bonds, for $25,000 on February 17, 1999. Ms. LM made a cash payment of $3,929, and pursuant to the subscription agreement correspondence she received, undertook to make 3 further payments in the same amount on fixed dates ending March 31, 2000. Pursuant to a further transmittal from Opus on March 1999, a balance of $12,143 became due in September 2007.

¶ 179 Prior to making the investment, Ms. LM had attended a seminar presentation by Opus.

¶ 180 Ms. LM made two of the three payment commitments and then, according to her testimony, could not afford to make the last payment of March 31, 2001. Notwithstanding an offer from Opus to amortize the arrears at $200 per month, Ms. LM, on the advice of others, made no further payment. No evidence as to any action by Opus to recover the outstanding balance was before us.

- 3 units of NCE Energy Trust at $1,000 per unit on February 17, 1999 by way of a cash investment of $3,000 from her RRSP.

- $10,000 of Imperial Ginseng Preferred Shares with a dividend rate of 12%, on September 7, 1999, paid in cash from a maturing GIC. Prior to the purchase, Ms. LM had watched a video in Bock's office, and discussed the investment with her.

¶ 181 From the evidence before us, it is unclear as to what, if any losses Ms. LM has incurred on her net investment to date of some $25,000 in these exempt products. She continues to hold both the Opus Cranberry and Imperial Ginseng investments, albeit she remains in arrears on the Opus to the extent of $3,929, and could face a future obligation of $12,143. Both companies continue to exist and carry on business as at the time of the hearing.

Findings - Breach of section 48

¶ 182 We find that Bock did not "know" her client Ms. LM, as a result of insufficient inquiry into her financial objectives.

¶ 183 Had Bock made an appropriate effort, and taken the necessary time to understand and document Ms. LM's objectives, then they would be clearly established in the evidentiary record, and not subject to contention before us. They were not.

¶ 184 Whichever version of Ms. LM's financial objectives we consider, the investments she made are not consistent with meeting those objectives. If her objectives are taken as enhanced savings and enabling the purchase of a residence, the "long term" nature of any potential for gain through the exempt product investments, as put forward by Bock in her interview with staff, is incompatible with that goal.

¶ 185 If the objectives are taken as long term asset growth to supplement future pension income, then the riskiness of the products, as clearly delineated in the OM's, would render the commitment of some 45% of Ms. LM's investable assets, to say nothing of the outstanding obligation of a further $16,000, incompatible with that goal.

¶ 186 Given the above, we find that Bock breached section 48 in her dealings with Ms. LM by recommending investments that were unsuitable for her.

(f) Ms. IS

¶ 187 In 1999 Ms. IS was 54 years old, divorced, and working part-time.

¶ 188 We found Ms. IS to be, for the most part, a candid and credible witness, albeit with considerable difficulty in recalling precise details of past events. Ms. IS was examined in chief by staff; and cross examined at length by the respondents.

¶ 189 In 1999 Ms. IS was a de-registered RN whose qualifications had lapsed earlier as a result of health issues. She was working part-time as a geriatric care-giver, and had investment income from the proceeds of the sale of her residence, and some mutual funds. While the total quantum of her income was not available to us, it was established from Bock's interview by staff, and her notes, that from part time work it ranged from $10,000 to $20,000 per year over the relevant period, apparently exclusive of modest investment income.

¶ 190 The evidentiary record indicated her investable assets in 1999 to be some $220,000, comprising $106,000 in residence sale proceeds (invested in term deposits at 5%), $20,000 in savings, and some $100,000 in mutual funds held in registered and unregistered accounts.

¶ 191 Form 20A's prepared by Bock to enable Ms. IS's purchases of exempt products indicated a net worth of $430,000. Notwithstanding Ms. IS questioning this value, she signed the forms, and the transactions were executed. Bock's notes indicate

that the Form 20A amount was achieved by capitalizing Ms. IS's future CPP and OAS benefits at $100,000 each.

¶ 192 Since we reject that methodology on the basis that the capitalized values of non-accessible pension funds do not constitute an investable asset in the hands of the beneficiary, it is clear that Ms. IS was only eligible to invest in exempt products, should such investments be suitable for her, on the basis of being fully reliant on the advice of Bock (section 128(c)).

¶ 193 Bock became Ms. IS's financial planner in late 1999 after Ms. IS was introduced to Bock by a friend who was an existing client of Bock.

¶ 194 Ms. IS had two extensive meetings with Bock prior to her first investment with her. The evidentiary record did not fulsomely disclose her investment goals, beyond "achieving a better rate of return on the investment of the proceeds from the sale of her residence."

¶ 195 An investment plan was developed by Bock, which involved a redeployment of Ms. IS's mutual funds and savings into other mutual funds, and ultimately resulted in a series of investments in exempt products, which was took place over the course of 2000 as follows:

- $50,000 of Fibrex preferred shares, with a $416 per month dividend rate, were purchased on February 28, 2000. Prior to the purchase, Ms. IS had viewed a video describing the business and discussed the risks with Bock.

¶ 196 Ms. IS testified that beyond assurances that her capital was not at risk given Fibrex's fixed assets, no other risk factors were discussed.

¶ 197 Fibrex ceased paying dividends after several months and subsequently went out of business in 2003.

- $10,000 of common shares in Pearl Sea Products VCC on June 8, 2000. Net of the $3,000 refundable VCC tax credit, which she confirmed receipt of at a subsequent date, her investment was $7,000.

¶ 198 Prior to the purchase, Ms. IS attended a presentation on the investment, including a video which she found reassuring. She took particular comfort from the fact that the government was encouraging such investments through the VCC program.

¶ 199 Pearl Sea Products went bankrupt in December 2002.

- 25 units, at $1,000 per unit, of Cloud Forest LP on November 27, 2000. She made an initial $6,500 cash payment, and signed a promissory note for the balance of $18,500, to be amortized by monthly payments of $508 on her Visa card until July 1, 2004.

¶ 200 Prior to the purchase, she had attended a presentation, and reviewed the materials provided.

¶ 201 Ms. IS testified that she still holds the units in Cloud Forest LP, but that as a result of the cessation of dividends from Fibrex, other financial circumstances, and advice received from other advisors, she is in arrears on her obligation to amortize the promissory note as she discontinued the payments. No evidence as to any action taken by Cloud Forest LP to recover the balance outstanding was provided to us.

¶ 202 From the evidence before us, it is clear that Ms. IS lost at least $57,000 of her net investment in exempt products of $63,500, plus the payments made to Cloud Forest, and has an ongoing exposure to the residual Cloud Forest balance of $18,500 less the payments made before she discontinued them. The degree to which these losses had been or may be offset against other income was not clear from the evidentiary record.

Findings - Breach of section 48

¶ 203 We find that Bock did "know" her client Ms. IS, but chose to ignore what she "knew" about her financial circumstances and objectives.

¶ 204 As is abundantly clear from the text of the OM's for the exempt products, they were suitable for investors who could mitigate the potential risk of losses through offsetting those losses, if any, against other investment gains, or who were able to shelter or otherwise offset the losses as a consequence of their "high income levels." Given Ms. IS's age, her limited income level, her uncertain employment prospects, and the fact that some 33 percent of her total investable assets were committed to the products, to say nothing of the further $18,500 obligation she had undertaken, the investments were clearly at odds with her objective of "improving the return on the proceeds of her residence sale," in any sort of predictable fashion, and accordingly were unsuitable for her.

¶ 205 We find that Bock did not exercise sound professional judgement in recommending the exempt products investments program to Ms. IS, and accordingly breached section 48 in her dealings with Ms. IS in that the investments she recommended her were unsuitable for her.

¶ 206 It follows from this finding that, since Bock should not have recommended the exempt product purchases to Ms. IS in the first instance, it is not necessary for us to determine whether she made Ms. IS aware of the risks associated with the purchase of the products.

¶ 207 However, should a determination on that point have been necessary, we would have found that Bock failed to make Ms. IS aware of the risks involved with the investments

¶ 208 While we accept the evidence that Ms. IS attended the exempt product presentations, and signed the Form 20A's enabling their acquisition, she was clearly dependent on advice from Bock inasmuch as she did not otherwise qualify to be eligible to purchase the exempt products.

Findings – Misrepresentation – section 50

¶ 209 The executive director alleges that Bock breached sections 50(1)(c) and (d) of the Act when she told Ms. AG that Pearl Sea Products would go public, and when she told Ms. IS that Fibrex would go public, when she knew or ought reasonably to have known that the statements were a misrepresentation.

¶ 210 The executive director points to Ms. AG's evidence that Bock told her that Pearl Seaproducts would "go public" within five years. In her examination in chief, Ms. AG said:

> Q Okay. Did you discuss anything else, any other investments with Ms. MacGregor Bock?
> A Uhm, the Pearl Seaproducts was the other one.
> Q And what did you discuss with her about [Pearl Sea Products]?
> …
> A … probably was going to have income from that in the next couple of years, and then it probably was going to go public within five years, but instead, it's gone bankrupt now.
>
> (transcript, December 2, 2005, page 16, lines 4 to 18)

¶ 211 The executive director also relies on Ms. IS's evidence that Bock told her that Fibrex would "go public" in two years. In her examination in chief, Ms. IS said:

> Q … did you discuss with Ms. MacGregor Bock ever selling your shares in Fibrex?
> A She told me it was a two-year investment and that after two years, I could, they would go public or they would buy back the shares.
>
> (transcript, December 12, 2005, page 28, lines 17 to 21)

¶ 212 This is the only evidence put forward in the executive director's submissions on these allegations.

¶ 213 On cross-examination, Ms. AG said:

> Q So, what do you think "going public" means?
> A Well, that you could sell your shares.
> Q Well, that's what we just said. Okay. So, you have said that means you could sell your shares. You had private shares. Right now you couldn't sell them. If it went public, you could sell them?
> A Yes.
> (transcript, December 2, 2005, pages 223 to 229)

¶ 214 On cross-examination, Ms. IS said:

> Q …..
> Is that what you were referring to when you were talking about that it would go into common shares?
> A I, I can only say what you told me, which was that it, after two years, it would, it would go public.
> Q Go public or go into common shares?
> A I'm sorry, I don't know.
> Q Okay. Do you -- when something is public, what do you understand about that?
> A That anyone can buy it.
> Q Okay. And what do you understand that common shares are?
> A I don't.
> (transcript, December 12, 2005, page 149, lines 18 to 25 and page 150, lines 2 to 14)

¶ 215 Sections 50(1)(c) and (d) of the Act state that:

> A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:
> …
> (c) represent, without obtaining the prior written permission of the executive director,
> (i) that the security will be listed and posted for trading on an exchange or quoted on any quotation and trade reporting system, or
> (ii) …;

(d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation;

…

¶ 216 Clearly Bock intended to effect a trade in a security. Equally clearly, there is no credible evidence that she represented to Ms. AG or Ms. IS that the security would be listed and posted for trading on an exchange or quoted on any quotation and trade reporting system, and we therefore dismiss the allegation that Bock breached section 50(1)(c).

¶ 217 The most that can be said is that Bock told Ms. AG and Ms. IS that their shares would "go public". With no more evidence we cannot conclude that Bock made a misrepresentation and contravened section 50(1)(d), and we therefore dismiss the allegation.

Findings – Mutual funds – section 48

¶ 218 The executive director also alleges that Bock breached section 48 by investing client funds in mutual funds that were too risky and unsuitable for their needs, objectives and personal and financial circumstances. The executive director says there is no evidence of what steps Bock took, but there is evidence that she did not consult the clients. If no steps were taken, says the executive director, the funds could not have been suitable.

¶ 219 It is for the executive director to show that Bock did not ensure that the proposed products were suitable. In our view, the executive director has not met that burden. We know that Bock invested in mutual funds for the clients, but we have been given no evidence about the risks and merits of those products and so cannot come to a view as to whether she took reasonable steps to determine the suitability of each purchase.

¶ 220 Accordingly, we dismiss the allegation that Bock breached section 48 by investing client funds in mutual funds that were too risky and unsuitable for her clients' needs, objectives and personal and financial circumstances.

¶ 221 This conclusion notwithstanding, we noted from the testimony of some of the witnesses that Bock had made investments of some of their funds in mutual funds apparently without discussion with them. Bock had no discretionary trading authority over client accounts. Had the executive director alleged that her conduct constituted a breach of section 14 we would have so found. Under that section Bock must deal fairly, honestly and in good faith with her clients.

Breaches by Foresight and Wong

¶ 222 The executive director has alleged that the breaches of section 48 by the respondent Bock, which we have found above, are also breaches by Foresight.

¶ 223 The executive director also alleges that Foresight failed to: maintain working capital, establish prudent business procedures; and designate a compliance officer to supervise transactions and its employees, contrary to sections 19(5), 44, 47 and 65 of the Rules.

¶ 224 Further, then the executive director alleges that as the president and sole director of Foresight, Wong is liable for any and all of Foresight's breaches pursuant to section 168.2 of the Act.

¶ 225 We heard, and received in documentary form, a considerable amount of evidence on these matters. We also received extensive submissions from both the executive director and the respondents in significant part directed towards the degree to which the several, and on-going regulatory interventions by the executive director in Foresight's affairs over the relevant period either established a basis for making findings of liability (the executive director's view), or provided a basis upon which we should find that liability had not been established as the matters had been dealt with (the respondents view).

¶ 226 In order to assist us in resolving these contrary views, we established, from the evidentiary record, the following summary timeline of what we find were the material events in the relevant period. In this summary, we have noted as well the timing of the exempt transactions for the clients which gave rise to the above findings of liability of Bock.

June 1997: Wong registered as trading partner, director, and compliance officer of Foresight. Foresight has a "handful" of representatives.

December 1997: First Compliance examination

April 1998: Bock joins Foresight, with existing client book from previous employer

August 1998: Bock establishes branch office

November 1998 to January 1999: Client Ms. F exempt purchases

February 1999: Client Ms. LM initial exempt purchase

May 1999: Second Compliance examination. Foresight has grown to "a hundred or so representatives, and 12,000-odd clients"

September 1999: Client Ms. LM final exempt purchase

May 2000: Agreed Statement of Facts and Undertaking (the "Settlement") to deal with the deficiencies identified in the first and second examinations, executed between Foresight and the executive director by Wong; $10,000 penalty paid by Foresight.

In summary, here is Foresight's order:

> Foresight consents to an Order under section 161(1)(f) as a condition of its registration, in which it undertakes to not apply to register more than 10 registered representatives unless and until a program to address the agreed compliance deficiencies is implemented to the satisfaction of the executive director. This program includes, among other things: (i) review of trades and evidence of such reviews being performed; (ii) enforcement of established business procedures; (iii) maintenance of required documentation at the head office; (iv) creation of an on-site review program of branch and non-branch offices; (v) hiring of a full time compliance officer.
>
> Foresight also undertakes to provide a monthly compliance report for the next twelve months (ie. until April 2001), and, as well, undertakes to conduct on-site examinations at all branch and home based offices in BC to ensure compliance with the Act and the Rules within eighteen months from the date of the Order (ie. by October 2001).
>
> (emphasis added)

June 2000: Client Ms. AG exempt purchases

August 2000: Bock registration changed to mutual fund sales only

November 2000: Client Ms. IS final exempt purchase

November 2000: Foresight assessed as "high risk" by commission staff; third Compliance examination conducted. Among other concerns regarding ongoing compliance deficiencies, "... Commission staff express concern that Foresight would have no way of ensuring that Foresight Staff were [not] improperly recommending exempt products to clients - a problem that was revealed in the

Third Examination." The report asks Foresight to provide a plan to address the concerns "with an expected date to hire a full time compliance officer."

(emphasis added)

January 2001: Foresight's response letter to the Third examination report provides the expected date to hire a full time compliance officer as March 2001

January – February 2001: Bock deregistered, and leaves Foresight

June 2001: The executive director imposes conditions on Foresight's registration (the "Order"). In the main, Foresight does not dispute the deficiencies identified by staff, but applies for a stay of the Order pending a hearing and review of it on the basis of the Order's impairment of its business prospects.

August 2001: The Commission denies Foresight's application to stay the Order. The conditions on registration imposed include a limitation on the use of exemptions by Foresight, and a prohibition against Wong continuing as compliance officer. In its ruling, the commission panel notes that "When staff find that a registrant is not complying with regulatory standards it can respond in a variety of ways, ranging from encouraging better compliance to seeking cancellation of registration." Foresight is restricted to mutual fund sales, no exempt products.

August 2001: Wong resigns as compliance officer in concordance with the Order. Foresight continues to operate without a designated compliance officer, with the knowledge of commission staff

October 2001: N. Lihaven accepted by commission staff as Foresight's compliance officer. Procedures manual updated, remote offices visited, training sessions begun

April 2002: Wong begins to disengage from active involvement at Foresight

June 2002: A. Daudet becomes de-facto president of Foresight

July 2002: Foresight abandons its pursuit of a hearing and review of the Order

September 2002: Fourth Compliance examination. Commission staff found that while "real progress had been made in tackling earlier deficiencies, [p]rocedures appear insufficient to ensure representatives ... are not selling inappropriate products." In addition to these on-going compliance concerns,

commission staff also found, for the first time, "a deficiency in working capital." In the main, Foresight did not dispute the deficiencies identified by staff

October 2002: Wong resumes involvement with Foresight

December 2002: Foresight and Wong deregistered, Foresight ceases operations

March 2003: Bock interview by staff

March 2004: Wong resigns as director of Foresight

June 2004: Wong interview by staff

December 2004: Executive director issues notice of hearing naming, among others, Foresight, Bock and Wong, which ultimately becomes the basis for this proceeding

July 2005: Foresight removed from the Corporate Registry

1. Foresight breach of section 48

¶ 227 The actions of Bock we found to be in breach of section 48 spanned the period from January 1999 to November 2000 and involved investments in exempt products in entities unrelated to Foresight.

¶ 228 Foresight and the executive director entered into the Settlement of May 2000 to address the concerns that staff had with deficiencies in Foresight's compliance practises in respect of sections 27, 44, 47 and 48 of the Rules arising from the First and Second reviews. It allowed Foresight to continue business, with restrictions on the number of representatives, while it addressed such matters as review of trades and evidence of such reviews being performed, and enforcement of established business procedures, and rectified the deficiencies evident from the reviews. It also allowed Foresight until October 2001 to complete a review of, and bring its branch and in-home offices into compliance with the Act. October 2001 was well after the last of Bock's transactions, and subsequent to her leaving the employ of Foresight.

¶ 229 The evidence of Wong, from his interview with staff, that he "... reviewed the transactions for consistency with the client's NCAF or KYC, and the Form 20A's for eligibility," was not controverted in the case of the subject transactions.

¶ 230 Given these circumstances we do not find that Foresight breached section 48 in the cases where Bock was in breach.

2. Foresight breach of section 19(5)

¶ 231 Section 19(5) states that

> A mutual fund dealer that does not hold client funds or securities and is recognized by the executive director must maintain working capital ... equal to or greater than $25,000 plus the maximum amount that is deductible under any bond required under section 21.

¶ 232 We received evidence consisting of the prescribed working capital reporting forms for Foresight for the months of March through October 2002. Deficiencies ranging from $19,380 to $111,819 were apparent for the months June through October, with the exception of September. The forms for June through October were signed by A. Daudet, the de-facto president of Foresight in that period.

¶ 233 We accordingly find that Foresight was in breach of section 19(5) for the months of June, July, August and October of 2002.

3. Foresight breach of section 44(1)

¶ 234 Section 44(1) of the rules states that "A dealer, portfolio manager or investment counsel must establish and apply written prudent business procedures for dealing with clients in compliance with the Act and the regulations."

¶ 235 The evidence from Wong's interview with staff was that Foresight had an established body of written business practises and procedures and equally that it had difficulty in applying them uniformly due to the "thin" management structure. This evidence is in fact corroborated by item 2(a)(ii) of the Settlement of May 2000, which references the requirement for Foresight to demonstrate the "enforcement of its existing business practises" in the course of establishing a compliance regime acceptable to the executive director - in order to have the condition restricting its ability to apply to register more than ten representatives lifted. No timetable for this was established in the Settlement.

¶ 236 The only "new" business practice requirement embodied in the Settlement was the commitment to review, and ensure compliance with the Act and regulations at the BC branch and in-home offices of Foresight – to be completed by October 2001 as noted earlier.

¶ 237 The Settlement was, to all intents and purposes, overtaken by the events of, and flowing from the Third examination in November 2000. The evidence here is that, again, notwithstanding the number of compliance deficiencies noted, and acknowledged by Foresight, the principal remedy sought by staff is prospective, ie. a requirement for Foresight to table a plan for improvement, and an expected

date for the engagement of a full-time compliance officer. Foresight responded with a target date of March 2001.

¶ 238 The target date was not met, based on uncontested evidence from Wong's interview with staff, as a result of commission staff's reluctance to endorse the candidate proposed by Foresight.

¶ 239 The subsequent imposition of the Order of June 2001 putting conditions on Foresight's registration, and the subsequent engagement by Foresight of a new compliance officer in October 2001 occurred virtually contemporaneously with the expiry of Foresight's time window to review and ensure compliance at its branch and in-home offices by October 2001, and could be viewed as essentially rendering all of the prior interactions between staff and Foresight moot.

¶ 240 The executive director takes the position that neither the Settlement of May 2000 nor the Order of June 2001 placing conditions on Foresight's registration have any relevance to the business practice or other compliance deficiencies up until October 2001. Foresight argues the converse, that in fact all of the issues identified to that date have been dealt with.

¶ 241 Given the virtually continuous level of involvement between commission staff and Foresight over the period leading up to the Order of June 2001, and the engagement, with commission staff's concurrence, of a full time compliance officer in October 2001, we tend to subscribe to Foresight's view.

¶ 242 In order to find a breach of section 44(1) of the Rules in the period up to October 2001, we would need new, clear and compelling evidence of deliberate or wilful disregard for its established business practices on Foresight's part, beyond that which had been identified by commission staff and dealt with by the Settlement and the subsequent Order and the conditions imposed on Foresight's registration.

¶ 243 Since no such evidence was before us, it follows that any finding as to a breach of section 44(1) of the Rules would turn on events between October 2001 and Foresight's deregistration in December 2002.

¶ 244 The evidence before us is that the new full time compliance officer, N. Lihaven, set about making improvements to the then established business practises at Foresight, as well as in their application. The Fourth Compliance report makes positive mention of the improvements, while noting that deficiencies remain.

¶ 245 As the commission panel put it, in denying Foresight's request for a stay of the Order of June 2001, in August 2001:

> it is open to the executive director at any time to take regulatory action, including termination of registration in the case of a threat to the public interest by a registrant

¶ 246 Inasmuch as no such action was taken either prior to, or subsequent to October 2001, and since the executive director's principal request for a full time compliance officer to be engaged had been met as of that date, and given that there is evidence that progress was being made in improving Foresight's business practises and its conformance with them, we do not find that Foresight was in breach of section 44(1) of the Rules.

4. Foresight breaches of section 47 and section 65

¶ 247 Section 47 of the Rules states that "A registrant must designate, to approve the opening of new client accounts, and supervise transactions made on behalf of clients, a compliance officer, as designated by section 65 ...".

¶ 248 Section 65 of the Rules, in turn states that "A person applying for registration or reinstatement of registration as a dealer, underwriter, or adviser must designate at least one individual as a compliance officer to ensure compliance with the Act and the regulations by the person, its partners, directors, and other employees."

¶ 249 The evidence is that at all times, except for the period August 2001 to October 2001, Foresight had a compliance officer. This period of exception occurred as a result of Wong's resignation from the position in conformance with the executive director's Order of June 2001, and the time taken to obtain commission staff's concurrence as to the replacement for him. We do not find this three month interval to be the basis of a finding that Foresight was in breach of either sections 45 or 65 as it resulted from the executive director's Order and action, and was not within Foresight's control.

¶ 250 Accordingly any finding as to a breach would have to turn, in the case of section 47, on any failure of the compliance officer "to approve the opening of new accounts and supervise transactions made on behalf of clients," and in the case of section 65, on any failure of the compliance officer "to ensure compliance with the Act and the regulations by the person, etc.".

¶ 251 Given the evidentiary record and testimony before us, there is no doubt that Foresight was not in strict conformance with either of these requirements through the period ending in October 2001. This was well known to commission staff, and was dealt with by way of the Settlement of May 2000, and the Order of June 2001. Following analogous reasoning as we applied in dealing with the section 44 above, we conclude that any findings as to a breach would have to be based on evidence from October 2001 on.

¶ 252 The executive director has particularized the section 47 and section 65 allegations, at paragraphs 19 and 20 of the notice of hearing, as specifically with regard to the transactions of Bock. Inasmuch as these took place well before October 2001, we dismiss the allegations.

5. Wong liability for Foresight breaches

¶ 253 We have found that Foresight breached section 19(5) of the Rules for the months of June, July, August and October 2002.

¶ 254 The evidentiary record during this period is clear, that Wong had a role with Foresight, as president from October 2001 through June 2002, and, after "leave", was actively involved in a management capacity from October 2002 through December 2002. Wong continued as the sole director of Foresight throughout the period from October 2001 to December 2002 and ultimately resigned that office in March 2004.

¶ 255 Section 168.2 of the Act stipulates that:

> If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision as the case may be.

¶ 256 In submissions, the executive director has particularized the allegation against Wong at para. 19 as:

> As the former President and sole director of Foresight, Wong is liable for Foresight failures pursuant to S. 168.2 of the Act for any regulatory failures of Foresight <u>of which he had knowledge</u>, because he was the ultimate responsible authority in senior management
>
> <u>(emphasis added)</u>

¶ 257 With respect to Foresight's breach of section 19(5) in June, July, August and October of 2002, the evidence is clear and uncontroverted that Wong was not actively involved in the management or affairs of Foresight at that time, and as a director, had no knowledge of the circumstances. The relevant forms were signed by A. Daudet, the de-facto president from June 2002 through October 2002. Accordingly we find that Wong is not liable for Foresight's breach of section 19(5) as he could not have authorized, permitted or acquiesced in the contravention.

Summary

¶ 258 Based on the analysis and reasons above, we find that:

(i) Bock breached section 48 in her dealings with her clients Ms. F, Ms. LM, Ms. AG, and Ms. IS; and

(ii) Foresight breached section 19(5) in the months of June, July, August and October 2002.

Orders in the public interest

¶ 259 As indicated at the conclusion of the hearing, the parties will have the opportunity to make further submissions before the Commission renders a decision as to what, if any, orders ought to be made in the public interest.

¶ 260 We direct the executive director to file written submissions on sanctions with the secretary to the Commission and to send a copy to each of the respondents on or before March 15, 2007. Respondents wishing to make submissions are directed to file those submissions with the secretary to the Commission and send a copy to the other parties on or before April 12, 2007. Any party that wishes to make oral submissions in addition to the written submissions must request the same of the secretary on or before March 15, 2007 and a date for oral submissions will be set.

¶ 261 February 26, 2007

¶ 262 **For the Commission**

Marc A. Foreman
Commissioner

Robert J. Milbourne
Commissioner

2007 BCSECCOM 101

Findings of Commissioner Ford

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Introduction

¶ 263 These reasons should be read with the findings of Commissioners Milbourne and Foreman dated February 26, 2007.

Allegations

¶ 264 In the notice of hearing, the executive director alleges that:

- Jill Ellen MacGregor Bock, Foresight Capital Corporation and Gilbert Kenneth Wong breached section 48 of the *Securities Rules*, BC Reg. 194/97, when Bock recommended a leveraged investment strategy that was too risky for her client Mrs G;
- Bock, Foresight and Wong breached section 48 of the Rules when Bock invested the funds of her clients F, AG, LS, LM and IS in mutual funds and exempt products that were too risky and unsuitable for their needs, objectives and personal and financial circumstances;
- Bock, Foresight and Wong acted contrary to the public interest by committing the acts described above; and
- Bock breached section 50 of the *Securities Act*, RSBC 1996, c. 418 when she told clients AG and IS that a company would go public when she knew, or ought reasonably to have known, that the statements were misrepresentations.

¶ 265 In the notice of hearing, the executive director also alleges compliance failures by Foresight and Wong. I deal with those allegations later in these reasons.

The respondents

Foresight Capital Corporation

¶ 266 Foresight was incorporated in British Columbia. It was registered under the Act as a securities dealer from June 9, 1997 to October 12, 2001, and as a mutual fund dealer from October 12, 2001 to December 15, 2002. Foresight was dissolved by the Registrar of Companies for failure to file on July 25, 2005.

Jill MacGregor Bock

¶ 267 Bock has a BA in Economics from Queen's University, and an MBA from McGill. She held executive level positions with two large Canadian corporations and taught marketing at Concordia University.

¶ 268 In 1986 Bock became a co-owner of a mutual fund dealer in Quebec, later licensed in Ontario. She also gave retirement planning seminars to employees of large Canadian corporations and continued to carry on a business, started in 1983, that provided annuity (and similar fund) quotations.

¶ 269 Bock relocated to Vancouver in 1994, becoming registered as a mutual fund salesperson with Vantage Securities in February 1995, and becoming a securities registrant in January 1997. From 1997, she sold exempt products the same as or similar to those which are the subject of these allegations. Bock did due diligence on the products, including in many cases meeting with the principals, and visiting the farming operations, of the issuers.

¶ 270 With the closure of Vantage in April 1998, Bock "transferred" her registration and client book to Foresight. She was registered with Foresight from May 5, 1998.

¶ 271 Bock worked at Foresight's offices in Burnaby for four months. She received a procedures manual. Subsequently, she established an office in Vancouver for her and her assistant. The office was electronically connected to that of Foresight, and all transactions were booked through, and all cash handled by, Foresight's head office.

¶ 272 In her interview with BCSC staff, Bock said that, on her move to Foresight, she received no training on her arrival or later. The fund companies and the issuers came to Foresight to educate the individual registrants about their products. Wong visited her office on one occasion, but did not review any client files.

¶ 273 Because her registration was not renewed, Bock ceased to be registered on January 8, 2001. She resigned from Foresight in February 2001. She is not currently registered under the Act, but she is licensed as a life insurance agent in British Columbia.

Gilbert Wong

¶ 274 Wong has a BA in Commerce from UBC and entered the investment industry as an investment advisor in August 1985. He worked for Great Pacific Management, RBC Dominion Securities, and Spectrum United Mutual Funds. He is a Fellow of the Canadian Securities Institute and a certified investment manager.

¶ 275 Wong was registered under the Act as a salesperson from August 1985 to November 1994. He joined Foresight in 1996, was appointed a director of Foresight effective on November 25, 1996, and was registered under the Act as a trading partner, director, or officer from June 9, 1997 to October 7, 2002. He was compliance manager of Foresight from June 9, 1997 until August 22, 2001. He was president of Foresight from April 28, 1997 until June 2002, and continued as a director after that. Along with Foresight, his registration was limited to mutual funds from October 12, 2001. He was registered as a salesperson to trade in mutual funds with Foresight from October 7, 2002 to December 15, 2002. He is not currently registered under the Act.

¶ 276 Foresight hired Wong to set Foresight up as a dealer and to act as trading director and president. In his interview with BCSC staff, Wong said he "ran most of the day-to-day operations of the company" initially with two or three employees (interview transcript, June 1, 2004, page 10, line 1). He was also responsible for recruiting, supervision, and compliance. Having worked for two senior investment companies, he felt he had "a relatively good grasp" of the industry standards and procedures for reviewing trades and supervising advisors (interview transcript, page 13, lines 1 – 8).

¶ 277 Wong's strategy for Foresight was to recruit only experienced representatives with an established client base. For compliance and supervision, he relied in part on "self-regulation at the advisor level" since Foresight had insufficient management depth and systems to handle the volume of clients it had acquired. (interview transcript, page 14, line 6) He said: "suitability is really at the advisor level, where they know their clients and they know … they would have to determine … is this the right investment for their client?". (interview transcript, page 44, lines 22 - 25)

¶ 278 Wong did not review the Know Your Client or New Client Application forms of Foresight's clients as a matter of course. However, he had processes in place to screen the placement of a client in a particular investment, including a daily review of all paperwork and, for exempt products, the Forms 20A. He left the assessment of the clients' risk tolerance to the judgment of the individual representative. He arranged no training of representatives beyond providing them with a policy and procedures manual.

¶ 279 Foresight grew rapidly to a total of about 110 people and about 12,000 client accounts in June 1999.

¶ 280 In his interview, Wong said that he resigned as president of Foresight in June 2002, but became president again in October 2002. He said that he resigned as

director in March 2004. It is not clear whether those changes were notified to the Registrar of Companies.

¶ 281 Along with his oversight, management and compliance roles, Wong became the second largest shareholder of Foresight at 10 to 12%. Naeem Tyab, at about 70%, was the principal shareholder and, for a time, corporate secretary.

The exempt products

¶ 282 The businesses underlying the exempt products that Bock proposed to the clients who testified at the hearing all involved farming. They were:

- Cloud Forest Estate Coffee Limited Partnership (a BC limited partnership formed to acquire, develop and operate an organic coffee plantation in Costa Rica and to sell coffee beans to domestic and foreign markets),
- Fibrex Canada Inc (in the business of harvesting and processing flax and industrial hemp in Quebec for export to Europe and the US),
- Imperial Ginseng Products Ltd (a public company in the business of cultivating, processing, manufacturing and marketing American ginseng and ginseng products like teas and capsules),
- Opus Cranberries II Limited Partnership (a BC limited partnership formed to develop, own and operate a cranberry farming operation in BC),
- Pearl Seaproducts (VCC) III Corp (a venture capital corporation formed to allow investments in shellfish aqua farming that invested in preferred shares of Pearl Seaproducts Inc which was in the business of producing, processing and marketing oysters in BC), and
- Western Royal Ginseng (VCC) III Corporation (formed to invest in the shares of certain American ginseng farm companies).

¶ 283 The products were complex. In most cases, subscribers could elect to finance some or all of the investment price by way of a promissory note secured by the securities and any distributions. There was, in the small print of the offering memoranda (OMs), a warning that failure to pay these amounts when due could result in legal action against the subscriber to enforce payment, adverse income tax consequences, and/or the loss of their investment.

¶ 284 With the exception of the venture capital corporations (VCCs), subscribers could also (or were required to) purchase unsecured bonds. These too could be 'financed'. Purchasers of the bonds could also borrow to finance up to 100% of their purchase of the related shares or LP units.

¶ 285 Subscribers who purchased common shares in the VCCs received a tax credit certificate entitling them to a refundable tax credit of 30% of the amount paid for their shares.

Product risks

¶ 286 As the OMs disclosed, the exempt products were speculative and illiquid. The risk descriptions in the OMs were not (as the respondents argued) "just boiler plate". To list some of them: farming is risky, the markets for the farm produce were variable, the units were illiquid, there were restrictions on resale, and there was no guarantee of any return on the investments. As the OM for Cloud Forest put it:

> Units are primarily suitable for Persons whose income is subject to high marginal income tax rates and who are prepared to accept the risks inherent in coffee farming. There is no assurance of a return on a Limited Partner's investment. (page 46)

¶ 287 In the case of Imperial Ginseng, the issuer had already defaulted on the repayment of certain bonds "and there is no assurance that the Issuer will be able to operate as a going concern" (OM, page 2). On page 53, under the heading "risk factors", the OM stated:

> The Issuer is currently unable to pay dividends or satisfy redemption requests.

¶ 288 The OM (typical of all the OMs) went on to say:

> such investment is suitable only for long-term and sophisticated Investors who are able to withstand the loss of their total investment and who do not require liquidity.

¶ 289 Page 2 of the OM for the related bonds stated:

> This is a speculative offering. … The Bonds are subject to severe resale restrictions … and there is no assurance that such restrictions will expire (see "Resale Restrictions"). As there is no market for these securities it may be difficult or even impossible for the purchaser to sell them.

¶ 290 All these securities were offered in BC under exemptions from the prospectus requirements in sections 128(a), (b) or (c) of the Rules or in an exemption order.

Prospectus exemptions

¶ 291 Sections 128(a), (b) and (c) of the Rules stated:

Section 61 [prospectus requirements] of the Act does not apply to a distribution in the following circumstances:

50 purchasers

(a) the trade is made by an issuer in a security of its own issue if

- (i) during the 12 month period immediately preceding the trade, sales under this paragraph have been made to not more than 49 different purchasers,
- (ii) the purchaser is
  - (A) a sophisticated purchaser,
  - …
- (iii) the purchaser, in connection with the trade of the security, makes the acknowledgement referred to in section 135,
- (iv) the purchaser purchases as principal,
- (v) …, and
- (vi) an offering memorandum is delivered to the purchaser in compliance with section 133;

$25,000 – sophisticated purchaser

(b) the trade is made by an issuer in a security of its own issue if

- (i) the purchaser purchases as principal,
- (ii) the purchaser is a sophisticated purchaser,
- (iii) the aggregate acquisition cost to the purchaser is not less than $25,000, and
- (iv) an offering memorandum is delivered to the purchaser in compliance with section 133;

$25,000 – registrant required

(c) the trade is made by an issuer in a security of its own issue if

- (i) the purchaser purchases as principal,
- (ii) the purchaser, in connection with the distribution of the security, makes the acknowledgement referred to in section 135,
- (iii) the aggregate acquisition cost to the purchaser is not less than $25,000, and
- (iv) the offering memorandum is delivered to the purchaser in compliance with section 133.

¶ 292 Sections 128(a) and (b) required that the purchaser be a "sophisticated purchaser". That term was defined in section 1 of the Rules to mean, with respect to individuals:

a purchaser that, in connection with a distribution, gives an acknowledgment under section 135 to the issuer, if the issuer does not believe, and has no reasonable grounds to believe, that the acknowledgment is false, acknowledging both that

(a) the purchaser is able, on the basis of information about the investment provided by the issuer, to evaluate the risks and merits of the prospective investment because of
    (i) the purchaser's financial, business or investment experience, or
    (ii) advice the purchaser receives from a person that is registered to advise, or is exempted from the requirement to be registered to advise, in respect of the security that is the subject of the trade and that is not an insider of, or in a special relationship with, the issuer of the security, and

(b) the purchaser is one of the following:
    (i) a person registered under the Act;
    (ii) an individual who
        (A) has a net worth, or net worth jointly with the individual's spouse, at the date of the agreement of purchase and sale of the security, of not less than $400000, or
        (B) has had in each of the 2 most recent calendar years, and reasonably expects to have in the current calendar year,
            (I) annual net income before tax of not less than $75000, or
            (II) annual net income before tax, jointly with the individual's spouse, of not less than $125000.

¶ 293 This definition of "sophisticated purchaser" and sections 128(a) and (c) referred to section 135 of the Rules which stated:

Acknowledgment
(1). If an issuer distributes a security to a person under section 128(a), (b), (c) or (h) of these rules …, the issuer must obtain from the person, before the agreement of purchase and sale is entered into, an acknowledgment in the required form. …

¶ 294 The "required form" of the acknowledgment was Form 20A.

¶ 295 Sections 128(a), (b) and (c) required the offering memorandum to be delivered to the purchaser in compliance with section 133. Under section 133 of the Rules, an

offering memorandum required to be delivered in connection with a distribution under sections 128(a), (b) or (c) must be delivered to the purchaser before an agreement of purchase and sale is entered into.

¶ 296 These provisions were repealed effective June 20, 2003. *Multilateral Instrument* 45-103 Capital Raising Exemptions replaced the exemptions under section 128 of the Rules. MI 45-103 itself was replaced by MI 45-106, effective September 14, 2005.

¶ 297 The respondents argue that on the repeal and replacement of the provisions, Form 20A was no longer required and so allegations that relate to Form 20A are no longer appropriate – there is no harm to the public and any findings of this panel can have no purpose (and no deterrent effect).

¶ 298 I do not agree. The exemptions and the required form do still substantially exist. Prospectus exemptions are still available under section 2.9(3) of NI 45-106 as long as an offering memorandum is delivered and the issuer obtains a signed risk statement from the purchaser in the required form. That form (BC Form 45-903F1) is substantially the same as Form 20A except there is no longer a paragraph to allow acknowledgement of net worth or income since that condition has been removed in BC. Apart from that, its intent remains broadly the same, to ensure that purchasers understand the risks before they buy. Any decision we make that relates to that aspect of the Form 20A will, therefore, still have relevance under the current law.

¶ 299 Nor do I think that allegations relating to the net worth or income threshold for a "sophisticated purchaser", conditions which have been removed in BC, are now redundant or inappropriate. As I explain below, part of a registrant's obligation under section 48 is to ensure that the conditions of any exemption are met. Any later change to those conditions is irrelevant to our assessment of whether a registrant met its 'gatekeeper' obligation to ensure the purchase complied with the law.

Client losses

¶ 300 At least two of the exempt product issuers failed. Beyond that, with the exception of client F, we found it difficult, if not impossible, to decide how much each client may have lost as a result of their investments. We have little specific information on the tax advantages actually available to or used by each client. It appears that some clients' losses may have been higher as result of taking poor or incorrect advice from others later. Some clients stopped payment on their loans under promissory notes. As a result, in some cases, their investments were cancelled; in other cases, it appears they were not. We do not know if any clients have been, or may be, pursued by an issuer for the balance owing under a promissory note.

Section 48 of the Rules

¶ 301 Section 48(1) requires that a registrant make enquiries concerning each client:

> (a) to learn the essential facts relative to every client, including the identity and, if applicable, creditworthiness of the client and the reputation of the client if information known to the registrant causes doubt as to whether the client is of good business or financial reputation, and
>
> (b) to determine the general investment needs and objectives of the client, the appropriateness of a recommendation made to that client and the suitability of a proposed purchase or sale for that client.

¶ 302 Section 48(2) goes on to state that if a registrant considers that a proposed purchase or sale is not suitable for the investment needs and objectives of a client that is an individual, the registrant must make a reasonable effort to so advise the client before executing the proposed transaction.

¶ 303 The executive director makes allegations only with respect to the second half of section 48(1)(b) (appropriateness of a recommendation and suitability of a proposed purchase).

¶ 304 It is the registrant's sole responsibility to ensure compliance with section 48. In *Bilinski* (2002 BCSECCOM 102), at para 334, the Commission quoted with approval the following extract from *Re Marc Lamoureux*, a decision of the Alberta Securities Commission (2001 ABSECCOM REA pages 16 - 17, [2001] ASCD No. 613 (QL)):

> The obligation to ensure that recommendations are suitable or appropriate for the client rests solely with the registrant. This responsibility cannot be substituted, avoided or transferred to the client, even by obtaining from the client an acknowledgment that they are aware of the negative material factors or risks associated with the particular investment.
>
> The obligation on a registrant to ensure that each investment recommended to a client is suitable is a particularly important protection for those clients whose investment experience and sophistication may be insufficient to enable them to fully recognize or assess the risks inherent in an investment. As noted below, disclosure to the client of the negative material factors of an investment, however important, is not necessarily relevant to a suitability determination and cannot replace a registrant's obligation to assess suitability. Acknowledgment on the part of an investor

> of awareness of the material negative factors or risk does not convert an unsuitable investment into a suitable one.
> …
>
> The suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the risks associated with the investment product with the risk profile of the investor. This comparison is probably the most critical element in the registrant's suitability obligation.
> …
>
> [A] registrant's obligation is to "know his client" and to ensure that any recommendations made by [him] are appropriate for the client based on the factors, both negative and positive, reasonably known to a diligent registrant at the time the investment is contemplated. Only those factors that are reasonably foreseeable at the time the investment is contemplated are relevant to the suitability determination. If a suitable investment actually fails due to some unforeseeable circumstance, that does not retroactively make it an unsuitable investment. If an unsuitable investment is recommended by a registrant, the fact that the investment is in fact proven to be successful does not retroactively make it suitable. It would be improper and unreasonable to assess a registrant's performance of his duties, which arise at the outset, in light of subsequent unforeseeable events.

¶ 305 Risk must be objectively, not subjectively, assessed. To quote *Bilinski*:

> … Risk assessment cannot be based on the principal's or the registrant's optimism in the venture or themselves. Assessment of risk must be based on a realistic and objective assessment of the circumstances of the investment and of the investor. Clients are entitled to receive from their registrant an objective assessment of risk. … (para 346)

¶ 306 *Lamoureux* sets out three steps or obligations for compliance with the Alberta equivalents to sections 14 and 48 of the Rules. In my view, the first two steps (reflected in the quotation above) are required under section 48:

- The 'know your client' obligation, and
- The 'suitability' obligation.

¶ 307 In *Bilinski* , the Commission found that, as part of the second step, registrants also have an obligation to ensure that the client meets all of the conditions for exemption from the prospectus requirements.

> This means that if a client relies on the sophisticated investor exemption to purchase the securities, the registrant must make sure the client meets all conditions of the exemption. It is not sufficient for a client to simply meet the minimum net worth threshold. Clients must not only have the prescribed minimum net worth, clients must also be able to evaluate the risks and merits of the prospective investment ... (paragraph 332)

¶ 308 Clients must be able to evaluate the risks and merits of prospective investments either because of their financial, business or investment experience, or because of advice from the registrant. In my view, it follows that a registrant's failure to explain the risks and merits of prospective products to clients who do not have sufficient financial, business or investment experience to understand them is to fail to ensure that all the conditions for exemption are met and is a breach of section 48.

¶ 309 The respondents argue that *Lamoureux* and *Bilinski* have limited relevance in this case. They point out that these cases deal with non-compliance with section 14 as well as section 48 (or the Alberta equivalent). In this case, the executive director makes no allegations of breach of section 14. They also point to some important difference in the facts. In my view, *Lamoureux* and *Bilinski* correctly set out the tests for compliance with section 48. I agree, however, that we must take care to disengage the analysis relevant to section 48 from that relevant to section 14 before applying it to the facts of this case. I also agree that the facts in *Lamoureux* and *Bilinski* are different in some important respects and I have taken that into account in my analysis.

¶ 310 With this summary of the law on the suitability assessment in mind, I deal next with the alleged breaches of Bock in her dealings with her former clients.

Abuse of process

¶ 311 The respondents' raised a wide variety of arguments that relate to alleged abuse of process and abuse of power by BCSC staff, and tainting of witnesses and other matters that, they say, should cause us to reject or give less weight to much of the oral evidence.

¶ 312 The respondents included many examples in their submissions that they say show unreasonable and abusive conduct and process by BCSC staff and bias of the witnesses to the respondents' prejudice.

¶ 313 It is our duty to consider evidence that is relevant to the allegations in the notice of hearing. Staff's conduct is relevant to the extent that it may affect the credibility or weight of any of the evidence presented.

¶ 314 In assessing the credibility of witnesses, and the weight to be given to their evidence, when we decided they had merit, we took into account the submissions of the respondents.

Client Mrs G

Facts

¶ 315 In late 1998 Mrs G was 59 years old, married and, although still working full-time as a medical secretary, near retirement. She retired in September 1999. Her husband Mr G, aged 68, was working part-time as a musician and was partly retired. The executive director makes no allegations with respect to Mr G or his investments and he was not called as a witness.

¶ 316 I found Mrs G to be, for the most part, a candid and credible witness, although she had some difficulty in recalling the details of past events.

¶ 317 Mrs G attended a dinner and presentation about "oysters and cranberries" (Pearl Seaproducts and Opus Cranberries) in October 1998. Bock was one of the presenters. Initially Mrs G was not interested, but her friend praised the investments and persuaded her to attend a second seminar.

¶ 318 The second presentation was about ginseng and oranges in Costa Rica. Mrs G also watched a 15 or 20 minute video about a cranberry farm.

¶ 319 Again she decided the investments were "not for us" due to the large sums of money mentioned - $25,000 and $50,000. Bock phoned Mr and Mrs G shortly after the presentation. Mr G told her they were not interested in investing. Bock phoned again a day or two later and again Mr G told her they were not interested. Bock phoned again, and this time they agreed to meet her. Mr and Mrs G met with Bock in November 1998.

¶ 320 Mrs G's New Client Application Form (NCAF), signed by Bock in November 1998 and signed to show Foresight's approval on December 16, 1998, states that Mrs G had a net worth of $460,000.

¶ 321 Mrs G did not see the NCAF until BCSC staff gave her a copy. She testified that she and her husband did not have a net worth of $460,000, although she did not say specifically what their net worth was.

¶ 322 Mrs G testified that they owned a condominium that had a net worth of about $155,000, taking into account a mortgage of about $70,000. Mrs G had about $33,000 in her RRSP and her husband had about $29,000 in his RRSP.

¶ 323 Mr G had musical instruments that Bock valued at $300,000. Mrs G told us that the instruments were worth much less. She said one had been appraised at about $61,000. We have no credible evidence on their market worth.

¶ 324 Notes that Bock provided to BCSC staff show that she had estimated Mr and Mrs G's total net worth at $1,043,000. To achieve this, Bock capitalized Mrs G's future pension payments (OAS and CPP) at $71,000 and $34,000 respectively and, although he was already collecting his pensions, capitalized Mr G's employment pension payments at $257,000 and his OAS and CPP payments at $71,000 and $85,000 respectively.

¶ 325 The NCAF states that Mrs G had an annual income of $37,000 and Mr G had an annual income of $74,000. Mrs G's tax return for 1997 shows total income of $37,505 and net income before tax of $33,844. In 1999, her total income was $32,475 and her net income was $14,141. Mrs G's RRSP deduction limit for 1998 was $28,101 and for 2000 was $15,818.

¶ 326 Mr G's tax return for 1997 shows total income of $70,191 and net income before tax of $66,285. In 1999, his total income was $63,763 and his net income was $57,252.

¶ 327 The NCAF states that Mrs G's investment knowledge was fair, her risk tolerance was 3 out of 5 (highest), and she had experience with GICs, mutual funds, stocks, and bonds. Her objectives for investment were said to be income 33%, long term growth 34%, and venture situations 33%.

¶ 328 Mrs G strongly disagreed that she and her husband wanted 33% of their investments to go into venture situations. She said she did not know what 'venture situations' meant; nor had Bock discussed it with her. She said her investment knowledge was not fair, it was poor.

¶ 329 Mrs G testified that she told Bock that they wanted more retirement income and to reduce taxes. They did not want to add to their savings and, in fact, wanted to cut back on the amounts they were saving and free up extra spendable cash.

¶ 330 Bock told them it would be a good idea to get involved in the sorts of products discussed at the presentations On Bock's advice, to avoid monthly forced savings, they decided to invest by relying in part on a line of credit, secured by their condominium. On December 9, 1998, Mr and Mrs G signed the loan documents

at Canada Trust in the presence of Bock. The principal amount of the loan was $88,000. Mrs G testified that monthly interest-only payments were then about $350 ($4,200 per year). The interest payments were potentially deductible from Mr or Mrs G's taxable income.

¶ 331 Part of the loan was to be invested in mutual funds, the return on which was to be used to pay part of the interest on the line of credit. The rest was to be used to make a $9,000 down payment for an exempt product in the name of Mr G, and a $5,500 down payment for Opus II Cranberries and a full payment for Imperial Ginseng, both in the name of Mrs G. The income earned from the Imperial Ginseng bonds was to be used to pay down the line of credit (along with the regular withdrawal from the mutual funds account).

¶ 332 Accordingly, on December 9, 1998, Mrs G purchased Imperial Ginseng bonds for $25,000 cash using proceeds from the line of credit.

¶ 333 On January 28, 1999, Mrs G subscribed for 35 units of Opus Cranberries II LP at a price of $35,000 (half LP units and half bonds). The bonds, valued at $17,500, were added to her RRSP. She made an initial payment of $5,500 cash on subscription and committed to later payments of $5,500 on September 30, 1999, $5,500 on March 31, 2000 and $4,924 on March 31, 2001 and to pay a promissory note for the LP units in the amount of $17,000 due April 30, 2007. She was able to treat the full amount of $17,500 for the bonds as an RRSP contribution and tax deduction, and to claim farm losses on the LP units. The part of the payments attributable to interest on the loan for the LP units would also have been tax deductible.

¶ 334 The balance of the amount owing for the Opus Cranberries investment was to be paid from her tax refunds and (in due course) by redeeming the bonds.

¶ 335 In her interview with BCSC staff, Bock said that she never used leveraging. By that she explained she meant "borrowing money or pledging investments to obtain the leverage or funds to further invest" (interview transcript, page 36, lines 20 – 22). She went on to say she was not comfortable with leveraging because:

> if the stock goes down, then there's a call on the people's money and they're in deep trouble, perhaps. So I felt that was scary. I would never do it myself, and I therefore wouldn't feel comfortable advocating to anyone else to do what I wouldn't do. (interview transcript, page 37, lines 3 – 8)

¶ 336 Bock agreed, however, that she had advised Mrs G to obtain the line of credit. She said that in her view at the time, in the worst case scenario, life insurance, home

equity, the mutual funds or the musical instruments would be available to more than pay off the line of credit.

¶ 337 In her interview, Bock said that she and the loan officer and lawyer for Canada Trust made it clear to Mr and Mrs G that the line of credit would have to be repaid no matter how well or badly the investments performed.

¶ 338 Mrs G testified that no one discussed with her and her husband the risks of using borrowed funds, secured by their home, to invest and Bock did not ask them to sign a disclosure document acknowledging the risks. She said Bock did not make clear to them how the investments were to be managed to ensure that the interest was paid on the line of credit and the line of credit eventually paid down. Mrs G said they had not really understood how it all worked and they told Bock several times they did not understand it.

¶ 339 In her testimony, Mrs G showed a considerable amount of confusion about the investments and the line of credit. She thought that the line of credit was to buy the investments, which in two to three years would yield a good income, allowing them to pay off the loan, and then continue to receive a good income for a number of years.

¶ 340 She said:

> We didn't know what monies were coming in or going out because they were in a chequing account, and which we didn't receive statements. The -- the line of credit was going up steadily and I kept having to put money into it to stop [them] from sending us those nasty letters and I didn't -- we didn't know what was going on. That was the puzzle. (transcript, November 30, 2005, page 61, lines 19 – 25 to page 62, line 1)

¶ 341 When asked how she would respond to a statement that the strategy was beyond Mrs. G's comprehension, Bock replied that Mrs G:

> doesn't want to understand. She was told repeatedly that the money in the Canada Trust account and the tax refunds were not for her and her husband's pleasure. They were part of the entire investment strategy over a four-year period of time. … And she was given second chances, and she constantly refused and wanted to spend the money. (interview transcript, March 12, 2003, page 143, lines 8 – 15)

¶ 342 Bock said that the strategy did not work only because Mr and Mrs G failed to exercise the self-discipline necessary to make it work. For example, tax refunds

which should have been used to make further payments were used instead for travel.

¶ 343 Mrs G disputed this. She testified that they used the tax refunds to pay off another loan they had and that Bock knew this. They had taken a two-week trip to Europe on her husband's full retirement, but this had been relatively inexpensive.

¶ 344 Mrs G testified that the Imperial Ginseng investment had dropped in value from $25,000 to $2,000 in 2005. She fell into arrears on the Opus Cranberries payments and the investments were cancelled.

¶ 345 In 2005, Mr and Mrs G remained liable to repay the line of credit (and interest), the principal amount of which was now about $100,000.

Breach of section 48

¶ 346 The executive director alleges that Bock breached section 48 of the Rules by recommending a leveraged investment strategy that was too risky for Mrs G. The executive director makes no allegations with respect to Mr G or his purchases.

¶ 347 Bock says that she did not recommend leveraging. Her recommendation was to obtain a line of credit, secured by the equity in Mr and Mrs G's home, to purchase certain investments. Whether one defines this as "leveraging", or not, it was clear that the executive director was alleging that, in recommending to Mrs G that she use a line of credit to purchase investments, Bock had breached section 48.

¶ 348 More problematic, we ruled during the hearing that Bock's conduct with respect to her client Mrs G could not be used by the executive director to support related allegations that Bock breached section 48 by "investing client funds in [products] that were too risky and unsuitable". We decided that it would be unfair. The particulars of this allegation, provided by the executive director to the respondents following the issue of the notice of hearing, did not refer to Mr and Mrs G. Until the executive director provided the will-say statement for Mrs G to the respondents, just two days before the hearing started, nothing in the executive director's disclosure revealed that the executive director would rely on Mrs G's evidence to prove that allegation.

¶ 349 This ruling called into question the extent to which the executive director could, in fairness, rely on the recommended use of the line of credit (that is, to buy allegedly unsuitable exempt products) in attempting to prove that Bock's conduct in recommending a leveraged investment strategy to Mrs G breached section 48.

¶ 350 In all the circumstances, we concluded that, in assessing the appropriateness of the "leveraged investment strategy", to be fair, we should not take into account the

nature of the investments that Bock proposed that Mrs G should buy with the borrowed funds.

¶ 351 That left for us the question whether Bock's recommended strategy to use a line of credit of $88,000 to make investments (secured on her home) was too risky and inappropriate for Mrs G. Mrs G was also, with her husband, making payments on her mortgage and another smaller loan, and planned to borrow even more, in executing the investment strategy, to buy the Opus Cranberries investment. The loans were to be repaid from Mrs G's pension income, income from the mutual funds and the exempt product investments, and tax refunds, and (in due course) by redeeming the Opus Cranberries bonds.

¶ 352 The investment strategy was made riskier by Bock's failure to set out in writing for Mrs G what she and her husband had to do to ensure the repayment of the loans. Mrs G did not understand how the line of credit arrangement was supposed to work. With nothing in writing to guide her, and little information provided to her after her purchases, it is not surprising that she failed to appreciate the importance of sticking to the original plan and, for example, using the tax refunds to pay down the line of credit.

¶ 353 Having said that, even if we were able to devise a formula for attributing some part of the line of credit to her, it is unreal to consider Mrs G's situation separately from that of her husband. Bock recommended a joint strategy for both Mr and Mrs G. Mr and Mrs G jointly signed the line of credit and were liable together to pay it back. I infer that they were joint owners of their home and jointly liable to repay the mortgage and the smaller loan. Although they subscribed individually for the investments purchased using the proceeds from the line of credit, the investments were very much part of a package and both Mr and Mrs G relied on the line of credit. In the circumstances of this case, in my view, in assessing the strategy and Bock's conduct, we must look at Mr and Mrs G together.

¶ 354 Even if it were fair to do so, it is not possible to assess Mr and Mrs G together. We have not heard evidence from Mr G. Mrs G did not testify as to his expected income after retirement, or hers for that matter. We do not have complete evidence on their net worth.

¶ 355 I dismiss this allegation because of a lack of evidence.

Client Ms F

Facts

¶ 356 In 1998, F was 69 years old and divorced. She was a retired airline stewardess with part-time employment as a theatre usher. She also sold a few paintings each

year and received some alimony and investment income, as well as Old Age Security and Canada Pension Plan payments.

¶ 357 I found F to be, for the most part, a candid and credible witness, although she had some difficulty in recalling all the details of the events.

¶ 358 F told us that she attended a presentation about investments in ginseng and cranberries in 1998 in which Bock was involved, along with the principals of the companies. She did not remember much about it other than the fact there was a slide show and pictures and being told it was a good investment. She later met with Bock in her office where they discussed F's financial circumstances.

¶ 359 F's New Client Application Form (NCAF), signed by Bock on November 28, 1998, states that she had a net worth of $600,000 and annual income of $30,000.

¶ 360 There is no dispute about her income, but F testified that her net worth in 1998 was not $600,000. She said that her condominium was worth about $225,000 (although in her interview with BCSC staff on May 24, 2002, she said it was worth about $300,000). Her RRIF was worth about $93,000 and she had at least $62,000 in non-registered investments. It appears that her net worth was between $375,000 and $455,000.

¶ 361 Most of the difference between Bock's and F's assessments of F's net worth is explained by the fact that Bock included an amount for F's Old Age Security and Canada Pension Plan payments by "capitalizing" them at $92,000 and $100,000 respectively. In her interview with BCSC staff, Bock said capitalizing pensions was very common in the industry. People, she said, were putting money aside for their pensions, or it was deducted from their pay, and this was a method of saving.

¶ 362 However, no party provided us with credible evidence that capitalizing OAP and CPP for the purpose of assessing net worth was, or was not, in common use at the time and generally accepted.

¶ 363 The NCAF states that F's investment knowledge was fair and her risk tolerance 2 out of 5 (highest). Her investment objectives were described as income 50%, long term growth 25%, and 25% venture situations. The Form also states that F wanted "a lot more income than [Canada Savings Bonds]", "lower taxes", and "estate for 2 daughters".

¶ 364 F testified that she had very limited investment knowledge acquired only through her purchase of the Canada Savings Bonds and her limited stock portfolio, which she described as "blue chip stock" acquired on the advice of a stockbroker friend of her father's. She had no experience of mutual funds.

¶ 365 F told us that she did not recall discussing risk with Bock, but she agreed that a risk tolerance of 2 was about right. She also told us that she did not want, and did not consent to, any investments that were venture or high risk. Although she had signed the NCAF, she had not filled it in. She had not understood what a venture situation was.

¶ 366 Bock developed an investment plan for F under which Bock sold F's stock portfolio and purchased mutual funds. Bock advised F that she could obtain a better return by selling the Canada Savings Bonds in her RRIF and investing in ginseng and cranberries. Over the next few months, F (through Bock) implemented the plan to meet her investment objectives as follows.

¶ 367 On November 28, 1998, F subscribed for 100,000 common shares at $0.25 per share in Western Royal Ginseng (VCC) III Corp (totalling $25,000). F received a refundable tax credit of $7,500.

¶ 368 In the Form 20A (signed by her), by the circling of the relevant paragraphs, F appears to have acknowledged having received the OM and that her net worth was not less than $400,000.

¶ 369 In the Form 20A, paragraph 6(b) was also circled. It contained the acknowledgement that:

> on the basis of information about the Securities furnished by the Issuer, I am able to evaluate the risks and merits of the Securities because … I have received advice from [Jill Bock] who has advised me that [she] is:
>
> (i) registered to advise …, and
> (ii) not an insider of, or in a special relationship with, the Issuer.

¶ 370 On November 28, 1998, F purchased 50 Imperial Ginseng bonds for $50,000 bearing an interest rate of 12%.

¶ 371 In the Form 20A (which she signed), F appears to have acknowledged receipt of the OM and that her net worth was not less than $400,000. Paragraph 6(b) was also completed by the hand written insertion of “Jill Bock” in the space for the name of the advisor.

¶ 372 On January 18, 1999, F subscribed for 25 units in Opus Cranberries II LP and Opus Cranberries II Financial Corp bonds for a total of $25,000. For the bonds, she paid part in cash ($3,929) and part by way of promissory note and post-dated

cheques. She made no cash payment, but signed a promissory note for the LP units for $17,000 due April 30, 2007.

¶ 373 In the Form 20A (which she signed), F appears to have acknowledged receipt of the OM and that her net worth was not less than $400,000. Paragraph 6(b) was also circled.

¶ 374 F told us that she could not recall receiving an OM or discussing it with Bock and did not know what it was. She told us that she had not circled the paragraph indicating her net worth was not less than $400,000. She told us that she did not circle any of the paragraphs in the Forms 20A, but we do not know whether the circles were added before or after she signed.

¶ 375 The OM for the Opus Cranberries LP units stated on page 1 that the investment was "speculative" and "as there is no market for these securities, it may be difficult or even impossible for the purchaser to sell them". On page 2, the OM stated:

> There are certain risks inherent in investing in the cranberry industry and there is no assurance that the Partnership or Financial Corp will be able to operate profitably. … [T]his investment is suitable only for Investors who are able to withstand the loss of their total investment and who do not require liquidity.

¶ 376 In the section on risk factors, on page 81, the OM went on to say:

> The purchase of Investment Units … is suitable only for Investors who are in high marginal income tax rates … There is no assurance of any return of, or on, an Investor's Investment.

¶ 377 In total, net of the VCC credit of $7,500, F invested $71,429 in the exempt products and assumed a debt of $21,071.

¶ 378 F found herself liable to pay some condominium costs and, without any spare savings to pay them, she complained to Foresight and asked that her down payment on Opus Cranberries be returned. Opus Cranberries returned the $3,929 down-payment to F and cancelled the investment.

Limitation period

¶ 379 The respondents argue that the allegations concerning F were out of time, contrary to section 159 of the Act which states:

> Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

¶ 380 They say that F's first two investments were made on November 28, 1998, more than six years prior to the date of the notice of hearing – December 7, 2004. F made the third investment in Opus Cranberries after December 7, 1998 (on January 18, 1999), but it was later cancelled.

¶ 381 The executive director says that, in accordance with *Dennis* (2005 BCSECCOM 65), it is the last event in a course of conduct that matters, not the first. The respondents say that we should not take the Opus Cranberries investment into account because it was later cancelled.

¶ 382 In our view, the later cancellation of the Opus Cranberries investment is irrelevant. The executive director's allegation concerns the enquiries and assessment that Bock made or should have made before she proposed the investment. F signed the subscription agreement for Opus Cranberries on January 18, 1999. In our view, Bock's obligations under section 48 continued up to the date of purchase of the investment.

¶ 383 We find that the proposed investment in Opus Cranberries was within the limitation period. In assessing its suitability and Bock's compliance with section 48 of the Rules, we may take into account Bock's conduct relevant to the proposed Opus Cranberries investment (whether within or outside the limitation period). We do not need to make a finding on the Western Ginseng and Imperial Ginseng investments

Breach of section 48

¶ 384 Did Bock ensure that the proposed Opus Cranberries investment was suitable for F?

¶ 385 Bock made enquiries to learn the essential facts about F and to determine her objectives. In my view, apart from the reference to 25% venture situations, Bock set out F's objectives and risk tolerance broadly accurately in the NCAF.

¶ 386 However, Bock was wrong to say in the NCAF that F wanted 25% venture situations. I accept F's testimony that she was not prepared to take on that much risk. In addition, by capitalizing F's pensions, Bock overstated her net worth. I reject Bock's submission that capitalizing OAS and CPP for the purpose of assessing net worth was common in the industry at the time and generally acceptable.

¶ 387 OAS and CPP cannot be surrendered or cashed out. In my view, these non-accessible funds should not be treated as part of net worth for the purposes of the suitability assessment or the calculation of the net worth threshold. The resulting overstatement, taken with the apparent objective of 25% venture situations, also created a misleading impression of F's financial circumstances and objectives in the NCAF, part of the back-drop against which suitability is assessed.

¶ 388 Taking into account F's age, her limited income, her reliance on her investments for income, and her conservative objectives, Bock's proposal that F invest such a high proportion of her investable assets in high risk exempt farming products, to say nothing of the further obligation to repay a loan of $21,071, was clearly unsuitable. Bock could not have appropriately assessed the suitability of the Opus Cranberries investment before she proposed it to F.

¶ 389 In my view, Bock 'knew' her client and 'knew' the investment, but chose to ignore what she knew in assessing the suitability for F of the Opus Cranberries investment. She breached section 48 of the Rules.

¶ 390 Bock was also obliged to ensure F met that the conditions for exemption under section 128(b) of the Rules. There is insufficient evidence of F's net worth to allow us to say whether or not F met that condition. However, Bock also needed to ensure that F could, on the basis of information about the Opus Cranberries investment furnished by the issuer, evaluate the risks and merits of the prospective investment because of her financial, business or investment experience or advice that she had received from Bock.

¶ 391 In my view, F could not evaluate the risks and merits of the prospective investment because of her financial, business or investment expertise. Her investment knowledge was poor and the product was complex. Nor was she able to evaluate the risks and merits of the product because of advice she had received from Bock.

¶ 392 Whether or not F received the OM, I accept F's evidence that Bock did not tell her about the risks of the investment or, if she did, she did not explain them in a way that F could understand. I accept F's evidence that Bock expressed positive views about the investment without making clear the risks. I reject the respondents' submissions that F was aware of, understood, and accepted the risks.

¶ 393 Bock did not take steps to ensure that F received and understood appropriate information from the issuers (ie, the OMs) and so could evaluate the merits and risks of the Opus Cranberries products before she subscribed. That responsibility is all the greater where, as in this case, the registrant has encouraged an

inexperienced client to rely on her, and has not raised the subject of risk in any meaningful way at all.

¶ 394 Bock failed to ensure that that the conditions for exemption were met and so, for the reasons set out in *Bilinski*, failed to comply with her suitability obligation under section 48 of the Rules.

¶ 395 I find that Bock breached section 48 when she failed to ensure that F's investment in Opus Cranberries was suitable for F's needs, objectives, and personal and financial circumstances.

Client Ms AG

Facts

¶ 396 In March 2000 AG was 50 years old and single with no dependents. She worked full-time as a registered nurse and rented her home. She had worked offshore from 1995 to 1999 and thought she might do so again.

¶ 397 I found AG to be a candid and credible witness who had a relatively good recollection of the details of the relevant events.

¶ 398 After an investment fair, Bock contacted AG to suggest a consultation about her financial affairs and AG accepted. At their first meeting in March 2000, AG signed a document authorizing Bock to replace her existing advisor on her three RRSP accounts. Bock redeployed AG's mutual funds in her RRSPs into other mutual funds.

¶ 399 AG's Know Your Client Application (KYC) Form, signed by Bock in March 2000, states that AG had estimated net liquid assets of $400,000. Bock had written beside this figure that it included "capitalized pension offshore". Taking into account the documentary evidence, at the end of 1999, AG had about $100,000 in cash and securities held overseas and about $100,000 in registered and unregistered mutual funds in Canada. She also owned real property valued at $5,000. In my view, she had investable or liquid assets of about $205,000.

¶ 400 In her interview with BCSC staff, Bock said that she capitalized AG's future Old Age Security, Canada Pension Plan, UK state pension and nurses pension payments to arrive at an overall net worth of more than $400,000. In her interview, Bock agreed that it was not right to view these amounts as "liquid". The OAS, CPP and UK state pension could not be cashed out or surrendered. We do not know whether the nurses pension could be surrendered or cashed out, but it is very unlikely that its cash value, if any, would have been sufficient to bring AG's net worth to $400,000.

¶ 401 AG told us that she had reviewed the KYC Form with Bock at the time and disputed the amount of $400,000. She refused to sign the form. Bock told her that they would come back to it later, but she did not later produce an amended form.

¶ 402 The KYC Form states that AG's annual income from all sources was "$50,000 in Canada + offshore income tax free". There is no dispute about the figure of $50,000, but we do not have specific evidence of AG's annual offshore income.

¶ 403 The Form states that AG's investment knowledge was fair with experience of mutual funds, stocks, and bonds. Her objectives for investment were said to be mid-term gain 50% and long-term gain 50%. Risk factors were – low 25%, medium 60% and high 15%.

¶ 404 AG told us that she had no training or experience in financial matters other than what she had learned through her own investments. She had wanted to reduce her taxes and was interested in exploring tax deductions, other than an RRSP deduction, since she didn't have much RRSP room.

¶ 405 At a second meeting later in March, Bock told AG that Cloud Forest would be a good investment for her. Bock also recommended investing in Pearl Seaproducts. With an invitation from Bock, AG attended a presentation on Cloud Forest and Pearl Seaproducts. AG testified that she could not recall any mention of risks during the presentation.

¶ 406 On June 8, 2000, AG subscribed for 25 units in Cloud Forest LP at a price of $25,000. She signed a promissory note for $25,000 with interest only payments of $2,345 per year until July 1, 2009, the due date of the promissory note. The interest payments and any farm losses were potentially deductible from her taxable income.

¶ 407 She also subscribed for 25 of the related bonds for $25,000 by cashing in investments in her RRSP. The bonds were to earn 7% interest annually. Bock intended that when the promissory note came due in 2009, the LP units would be converted to shares and the bonds swapped with the shares and redeemed to pay off the loan. Any capital gain and income from the shares would then be sheltered in the RRSP.

¶ 408 On June 8, 2000, AG also subscribed for 25,000 shares in Pearl Seaproducts (VCC) III Corp for $25,000. She received a refundable tax credit of $7,500. Bock intended that AG would "swap" the Pearl Seaproducts investment, which she knew would increase in face value under subsequent offerings to $75,000, for other investments. This would allow AG to "bring home" her overseas

investments and tax shelter them in the RRSP. (AG did not take advantage of this opportunity.)

¶ 409 In total, net of the VCC credit of $7,500, AG invested $42,500 and took on an obligation to pay $25,000 (with annual interest-only payments of $2,345).

¶ 410 As the OM's clearly stated, the exempt products were speculative and illiquid and so highly risky. They were fit only for sophisticated investors, generally in the top income tax brackets, with substantial net worth, who could afford to lose their investment.

¶ 411 In the Forms 20A for Cloud Forest and Pearl Seaproducts, signed by her, AG acknowledged receipt of the OM, but no subparagraph in paragraphs 5 or 6 was circled to show on what basis an exemption from the prospectus requirements of the Act was claimed.

¶ 412 When asked by BCSC staff about her failure to complete the Forms 20A, Bock said she recognized this was an important point, but could not explain the omission. Bock said that she would have circled paragraphs 5(b) and 6(b). These paragraphs state (respectively) that the purchaser has a net worth of not less than $400,000 and is able to evaluate the risks and merits of the securities. The Forms 20 (Reports of Exempt Distribution) for each purchase state that the purchase was made in accordance with the exemption in section 128(b) of the Rules.

¶ 413 AG testified that she had asked Bock why none of the subparagraphs had been circled. She said that Bock told her – "that doesn't apply to you because you are using RRSP money" (transcript, December 30, 2005, page 32, lines 2 – 4 and page 33, line 25 to page 34, line 3).

¶ 414 AG testified that she reviewed the OMs for Cloud Forest and Pearl Seaproducts then returned them to Bock and told her she did not understand them. She said that Bock did not explain that the investments were illiquid and speculative and therefore highly risky, and that AG could lose all her money. On the contrary, apart from pointing out that the products could not be sold on for a period, she limited her advice to assurances about the positive prospects for the businesses and the potential benefits of the products.

¶ 415 In interview, Bock said AG felt comfortable with the VCC because:

> it is … an exempt market product which, unlike other exempt market products, is thoroughly investigated by the appropriate investigators as part of the BC VCC program. So some fly-by-night company cannot be

> accepted for the program … it is very carefully examined first. (interview transcript, page 47, lines 12 – 19)

¶ 416 On February 26, 2001, AG wrote a letter to Wong indicating:

- Confusion about the nature of the exempt products,
- Concern that her working overseas would mean she could not claim all the tax benefits,
- A financial planner had told her she was not eligible for the products as her income and net worth were too low.

¶ 417 She asked for a refund of her exempt product investments. Wong did not reply.

¶ 418 On advice, AG stopped making payments on her Cloud Forest investment in 2001. Pearl Seaproducts went bankrupt in 2002.

Breach of section 48

¶ 419 Did Bock ensure that the proposed investments in Cloud Forest and Pearl Seaproducts were suitable for AG?

¶ 420 Bock made enquiries to learn the essential facts about AG and to determine her objectives. However, by capitalizing AG's pensions, Bock overstated AG's net liquid assets and net worth at $400,000. The overstatement created a misleading impression of AG's financial circumstances in the KYC Form, part of the back-drop against which suitability is assessed.

¶ 421 Taking into account the tax credit for Pearl Seaproducts, AG invested $42,500 in high risk exempt products. She also borrowed $25,000. The exempt products then formed about 33% of her gross investments. The rest was held in mutual funds and cash.

¶ 422 Although in my view AG could afford the interest only payments of $2,345 per year, putting such a high proportion of her investable assets in high risk exempt products was unsuitable. At the age of 50, although she did not need liquidity, AG could not afford to put this amount into venture situations. It was not within the objectives in her KYC Form that limited high risk investments to a more reasonable 15% of her portfolio.

¶ 423 In my view, Bock 'knew' her client and 'knew' the investments, but chose to ignore what she knew in assessing the suitability for AG of the investments. At best, her optimism about the products caused her to lose her objectivity in

comparing the risks associated with the products with AG's risk profile and objectives. She breached section 48 of the Rules.

¶ 424 Bock was also obliged to ensure that AG met the conditions for exemption under section 128(b) of the Rules.

¶ 425 Bock overstated AG's net worth at $400,000. It was not appropriate for Bock to rely on a capitalized value for future OAP, CPP and UK state pension payments in calculating net worth under section 128 of the Rules. AG did not meet the net worth threshold of $400,000.

¶ 426 In addition, Bock failed to explain the risks and merits of the products to AG who, in my view, did not have sufficient financial, business or investment experience to understand them without Bock's advice. Finally, Bock did not obtain from AG the required acknowledgements in Form 20A, duly completed.

¶ 427 Bock failed to ensure that that the conditions for exemption were met and so, for the reasons set out in *Bilinski*, failed to comply with her suitability obligation under section 48 of the Rules.

¶ 428 I find that Bock breached section 48 when she failed to ensure that AG's investments in Cloud Forest and Pearl Seaproducts were suitable for AG's needs, objectives, and personal and financial circumstances.

Client Mr LS

Facts

¶ 429 In 2000 LS was 46 years old, married with no dependents, and working full-time as a printing sales representative. The executive director makes no allegations with respect to his wife and she was not called as a witness.

¶ 430 I found LS to be a candid and credible witness although he had some difficulty recalling some of the relevant details.

¶ 431 LS had made about $100,000 by trading "penny stocks" which he had then contributed to his and his wife's registered retirement savings plans. He attended two presentations for exempt products and first met with Bock to discuss his financial plans in early 2000. He told us:

> I was a penny stock investor and experienced with high-risk stuff, … and was tired of it, and my wife convinced me that was the right thing to put [recent gains from penny stocks] into conventional and long-term types of things and get a proper planner. My wife came with me, because a couple of times I was willing to throw my money at … tech, at that time tech was

> going crazy, so I was willing to throw a lot of money at tech because I would make big gains, and [my wife and Bock] said this isn't the right way. We agreed on very conservative, 10 or 12 percent is the most conservative, … and we talked about buying a condo and talked about building up our RSP for retirement. (transcript, December 6, 2005, page 7, lines 9 – 25)
>
> The first meeting I think was more of a general nature, talking about us, what our objectives were for our money and a little bit about us …. And there was references to things because we had of course gone to a coffee seminar, we had gone to one other …, but it wasn't detailed stuff on any of the investments, it was more references to do we want to have RSP savings, and … RSP catch up, that wasn't of any interest, because we had -- my RSPs and hers were totally caught up because of this investment -- all of the money I had made on this investment was in RSPs. Yes, we wanted income, we felt that bonds were a really good thing because it fit into the conservative thing … (transcript, page 8, lines 10 – 25 and page 9, lines 1 - 5)

¶ 432 LS's New Client Application Form (NCAF), signed by Bock and signed to show Foresight's approval in December 2000, states that LS had a net worth of $560,000 and annual income of $50,000. LS testified that his total net worth in 2000 was about $110,000 in cash and investments in registered and unregistered accounts and $45,000 US in a vacation property in the US (net of a mortgage of about $45,000 US).

¶ 433 In her interview with BCSC staff, Bock said she had estimated a combined net worth for LS and his wife of $1,100,000. She did this in large part by capitalizing their future OAS and CPP payments at $520,000 and his wife's employment pension at $140,000. She also valued their vacation property at $225,000 ($140,000 US). In his interview with BCSC staff, LS said that his wife had about $100,000 in investable assets. It appears that Bock also took this into account in her estimate of their joint net worth.

¶ 434 In his interview, LS said that his annual salary in 2000 was about $41,000, not $50,000 as set out in the NCAF. We have no evidence of his annual income from all sources, but I infer that it did not exceed $50,000. I also infer that LS's wife's annual income from all sources did not exceed $68,000 – the amount set out in her NCAF prepared by Bock.

¶ 435 LS's NCAF states that his investment knowledge was good and risk tolerance 4 out of 5 (highest). It says that he had experience with GICs, mutual funds, stocks, and bonds. His objectives for investment were said to be long term growth 50%,

and venture situations 50%. Under "representative's comments" Bock wrote – "wants tax reduction now, RSP catch-up & future long term income".

¶ 436 LS testified that Bock had not given him a copy of the NCAF. He obtained it in February 2001 from Wong. He said that Bock had not asked him specific questions about the matters in the NCAF. LS told us that apart from trading "penny stocks", he had no experience in financial matters. He said that his penny stock trades had been done largely on the advice of a broker and his investment knowledge was at best "fair" and was not "good". He disputed the stated objective of 50% venture situations. He said he had not been interested in venture situations and had not asked for them. Bock had not used the word "venture" in their meetings. He told us his risk tolerance was zero to one and not four.

¶ 437 LS agreed that he had wanted tax reduction and future long-term income. He had no need of RRSP catch-up since he was up-to-date, but he wanted to obtain a 10 – 12% return on his investments in his RRSP and to save to buy a condominium with his wife.

¶ 438 After the first meeting, Bock made an investment plan. Bock met with LS and his wife to discuss the plan. After that, LS and his wife dealt with Bock separately and made separate investments.

¶ 439 On March 31, 2000, after Bock arranged the transfer of the funds, LS had a cash balance of $75,001 in his RRSP. (LS also retained an RRSP and a cash account with his then broker, largely in "penny stocks". On October 31, 2000, he held a total of about $17,000 with the broker.) Bock purchased mutual funds for him ranging from relatively conservative blue chip funds to more risky small companies and emerging markets funds. On June 30, 2000, these totalled $21,000 book value and $22,784 market value.

¶ 440 In addition, Bock proposed Fibrex, Cloud Forest and Pearl Seaproducts. In April or May 2000, LS purchased 25,000 Fibrex preferred shares at a price of $25,000 from his RRSP.

¶ 441 In June 2000, with a down payment of $6,500, LS purchased 25 Cloud Forest bonds at a price of $25,000, again from his RRSP. He signed a promissory note for the bonds for $18,500 and agreed to periodic payments of principal plus interest. He also signed a promissory note for 25 Cloud Forest LP units for $25,000. Under this note, he was to make annual interest only payments until 2009, the due date for the note. Bock intended that his interest-only payments would be deducted from his taxable income, along with farming losses.

¶ 442 In June 2000 LS also purchased 16,000 shares in Pearl Seaproducts (VCC) III Corp at a price of $16,000 and received a refundable tax credit of $4,800.

¶ 443 Taking into account the tax credit, LS invested a total of $42,700 in exempt products. He also assumed a debt of $43,500 with annual interest-only payments of $2,345 until 2009 for the Cloud Forest LP units and about $5,500 annually for four years for the Cloud Forest bonds. This amounted to almost $8,000 per year for the first four years.

¶ 444 As the OM's clearly stated, the products were speculative and illiquid and so highly risky. They were fit only for sophisticated investors, generally in the top income tax brackets, with substantial net worth, who could afford to lose their investment.

¶ 445 LS testified that he understood that the products were illiquid, but he thought they were safe. In the case of Cloud Forest, although he recognized that they were not "guaranteed", he was reassured by the fact they were bonds. He was also reassured by Bock's advice that she had investigated the business, which she said had enormous potential, with a management that was highly successful, dedicated and focused. Bock told LS that she had invested her own money in the business. Bock also told him that the Fibrex bonds were guaranteed because the bonds were backed by the assets of the company. He discovered later this was not true when he was informed, on the bankruptcy of Fibrex, that the liabilities exceeded the assets.

¶ 446 LS testified that Bock did not explain that the products were speculative and suitable only for clients in the higher income tax brackets. He said he did not appreciate how risky they were.

¶ 447 No Forms 20A for LS's exempt product investments were put into evidence, however, the Forms 20 (Reports of Exempt Distribution) show that LS purchased the Cloud Forest and Fibrex securities under the prospectus exemption in section 128(b) of the Rules. He purchased Pearl Seaproducts under the exemption in section 128(a). LS testified that he received the OMs after subscribing for the investments.

¶ 448 On June 4, 2001, Fibrex wrote to LS to say that the company continued to "face serious challenges". The company set out what it intended to do to "provide Fibrex with the necessary 'breathing room' to continue operating". LS told us that Fibrex later went bankrupt.

¶ 449 LS made all the payments on the loan for the Cloud Forest bonds and now holds bonds valued at $25,000 in his RRSP. He made the interest-only payment on the

loan for the LP units in 2001, and so the bond interest was also paid into his RRSP. He did not make the payments from 2002 to 2005 and, accordingly, bond interest was not paid either. LS testified that he owed $7,000 on the Cloud Forest LP investment. He was told that if he did not pay the whole amount, then the tax authorities would reassess the tax benefits he had claimed.

¶ 450 After Pearl went bankrupt in 2002, since he held it outside his RRSP, it appears that LS was able to treat the investment as a loss for tax purposes.

Breach of section 48

¶ 451 Did Bock ensure that the proposed investments in Fibrex, Cloud Forest and Pearl Seaproducts were suitable for LS?

¶ 452 Bock made enquiries to learn the essential facts about LS and to determine his objectives. In my view, however, Bock was wrong to conclude that LS's investment knowledge was good. In my view, it was fair.

¶ 453 In addition, Bock overstated his net worth (at $560,000). His net worth was no more than $180,000. She was also wrong to say that LS wanted 50% venture situations. Accordingly, LS's NCAF created a misleading impression of his financial circumstances and objectives, part of the back-drop against which suitability is assessed.

¶ 454 Taking into account the tax credit for Pearl Seaproducts, LS invested a total of $42,700 in exempt products. After his investments, the exempt products formed more than 40% of his gross portfolio. The rest was held in mutual funds, some penny stocks, the vacation property, and cash. Some of those investments were also higher risk.

¶ 455 I accept LS's evidence that he did not want to put 50% of his investments into venture situations as Bock set out in the NCAF. In any event, on an objective test, putting 40% of his portfolio into high risk exempt products was not suitable. At the age of 46, with an annual income of $50,000 and moderate net worth, LS could not afford to put such a high proportion of his investments into venture situations.

¶ 456 LS also assumed a debt of $43,500 with annual interest-only payments of $2,345 until 2009 for the Cloud Forest LP units, and about $5,500 annually for four years for the Cloud Forest bonds. This amounted to almost $8,000 per year for the first four years. This too was unsuitable. His annual income from all sources did not exceed $50,000 and it was not right to count on income from the high risk exempt products to cover the payments. His wife had made her own investments through

Bock and there is no evidence that she would have had sufficient income or funds to support LS's annual payments.

¶ 457 In my view, Bock 'knew' her client and 'knew' the investments, but chose to ignore what she knew in assessing the suitability for LS of the investments. At best, her optimism about the products caused her to lose her objectivity in comparing the risks associated with the products with LS's risk profile and objectives. She breached section 48 of the Rules.

¶ 458 Bock was also obliged to ensure that LS met the conditions for exemption.

¶ 459 Since we have no evidence of the cash value (if any) of LS's wife's employment pension, we cannot say whether, with his wife, LS did or did not meet the net worth threshold of $400,000. However, Bock failed to explain the risks and merits of the products to LS who, in my view, did not have sufficient financial, business or investment experience to understand them without her advice. LS was not able to evaluate the risks and merits of the prospective investments. I reject the respondents' submissions that LS was aware of, understood, and accepted the risks.

¶ 460 In addition, Bock failed to give the OMs to LS before his purchase of the exempt products.

¶ 461 Bock failed to ensure that that the conditions for exemption were met and so, for the reasons set out in *Bilinski*, failed to comply with her suitability obligation under section 48 of the Rules.

¶ 462 I find that Bock breached section 48 when she failed to ensure that LS's investments in Fibrex, Cloud Forest and Pearl Seaproducts were suitable for LS's needs, objectives and personal and financial circumstances.

Client Ms LM

Facts

¶ 463 In 1999 LM was 49 years old, had three adult children, and was working full time in a technical support position with a telecommunications company.

¶ 464 I found LM to be, for the most part, a candid and credible witness, although she had considerable difficulty in recalling some of the details of past events.

¶ 465 LM first met with Bock in late 1998. LM's Know Your Client Application (KYC) Form, signed by Bock in February 1999, states that LM had estimated net liquid assets of $48,000. She did not own her own home. She participated in an employee share purchase plan and had some cash savings, in registered and

unregistered accounts. These investments totalled about $19,000. There is no evidence that she had investments other than these employee shares and savings.

¶ 466 In the net fixed assets box in the KYC Form is the figure $120,000 with the words "capitalized pensions" written above the box. In her interview with BCSC staff, Bock said that this took into account LM's company pension, but not CPP or OAS. It appears that LM's company pension could be cashed out, but we have no evidence of its cash surrender or vested value in 1999.

¶ 467 The annual income box in the Form is empty. LM testified that, after an unusual amount of over-time, her total income in 1997 was $54,331. In 1999, it was a more normal $46,789. Her RRSP deduction limit for 1998 was $1,936. For 2000, it was $1,372.

¶ 468 The Form states that LM's investment knowledge was fair with experience of stocks and bonds. Her objectives for investment were said to be mid-term gain 25% and long-term gain 75%. Risk factors were – medium 50% and high 50%.

¶ 469 LM testified that she had a grade 12 education and no experience or training in financial matters. Her aim in 1999 was to achieve a better rate of return on her savings than what she was getting in her savings account. She was also interested in tax savings. She told Bock that, having raised three daughters with very little child support, and now without much of a pension, she wanted to improve her financial position, but also to keep her existing assets safe.

¶ 470 In her notes about LM dated September 15, 2000, prepared for the BCSC, Bock wrote that LM wanted more future income for her retirement to supplement an estimated pension of $25,000 per year. She described LM as wanting to be "conservatively aggressive". Bock said in her notes that, in addition to seeking additional income, LM wanted to achieve greater diversification to reduce risk.

¶ 471 Bock proposed that LM buy Opus Cranberries by selling the shares in her employee share purchase plan. In interview, Bock said she recommended Opus Cranberries because:

> if everything came about as Opus was planning, [it] would provide her with long-term income in addition to her pension incomes (interview transcript, March 12, 2003, page 124, lines 22 – 24).

¶ 472 In her notes, Bock wrote that she recommended Opus Cranberries as "excellent for long-term income from a healthy food-farming project". She identified benefits including potential RRSP deductions, and deductions for farming losses

and interest expenses, with income expectations of $5 - $7,000 per year starting in the fifth year and lasting for 60 – 75 years.

¶ 473 LM attended a presentation by Opus Cranberries in February 1999. She testified that she could not recall the content of the oral presentations or the video. She met with Bock the next day. LM could remember Bock telling her about the benefits of the investment, that is, some of the tax benefits and the income expected from 2007. She said she was aware of some of the "negatives" in an agriculture product, but could not recall any mention of risks in the video or the presentation, or by Bock.

¶ 474 On February 17, 1999, LM subscribed for 25 investment units in Opus Cranberries II LP at a price of $25,000 (half LP units and half bonds). LM paid $3,929 cash, to be followed by similar payments on September 30, 1999, March 31, 2000 and March 31, 2001. A further payment of $12,143 was due in September 2007.

¶ 475 LM testified that she could not afford the payments. She said Bock had never discussed the payments with her. There is, however, a payment plan for LM included with her subscription agreement for Opus Cranberries of February 17, 1999. It sets out payment dates and, for each payment, the source of the funds (ie, RSP, cash savings, tax refunds).

¶ 476 The payment plan for Opus Cranberries II does not mention the payment of $12,143 due on September 2007, but this amount is set out in a letter to LM from Opus Cranberries of March 18, 1999, along with a description of the tax statements that Opus Cranberries would provide to her to enable deduction of farm losses and investment interest expense.

¶ 477 In her notes, Bock wrote that she was careful to plan the sources for the loan payments for the units since LM did not qualify as a sophisticated investor and to "ensure that [LM] was happy with the nature of the investment".

¶ 478 In the Form 20A, which she signed, LM acknowledged receipt of the OM. LM testified that Bock had given the OM to her, but told her not to read it, that she had to give it to LM by law, but she wouldn't understand it. LM told us that she "flipped through it", but did not understand it. She said that Bock did not explain the risks set out in the OM.

¶ 479 An exemption order issued by the BCSC on September 5, 1997 enabled purchasers to buy Opus Cranberries on the basis they were a "sophisticated purchaser" as defined in section 1 of the Act or had received advice in respect of

the units (and would purchase units which had an aggregate acquisition cost of not less than $25,000).

¶ 480 Subparagraph (g) of paragraph 5 of the Form 20A is circled. It is LM's acknowledgement that she purchased the securities after having spoken to Jill Bock, a registered person, who advised her "that [she] is registered to trade or advise in the Securities and that the purchase of the Securities is a suitable investment for me".

¶ 481 On February 17, 1999, on Bock's advice, LM also purchased 3 units in NCE Energy Trust for $3,000 from cash within her RRSP. Bock described this as "a further diversification" intended to pay 10% or more income into her RRSP. Bock also invested about $2,000 in LM's RRSP in international mutual funds.

¶ 482 On September 7, 1999, after watching a video about the business in Bock's office, LM subscribed for 10,000 preferred shares in Imperial Ginseng bearing a dividend rate of 12%. LM paid $10,000 for the shares using funds from a maturing term deposit in her RRSP.

¶ 483 In her notes of September 15, 2000 about her meeting with LM on April 12, 1999, Bock wrote:

> Jill [Bock] explained that [LM's] small portfolio was over weighted in private placements, but [LM] said because she had a company pension and no dependents, she was not really worried about risk as she would have enough to live on.

¶ 484 LM denied she made this statement.

¶ 485 In the Form 20A (which she signed) LM acknowledged that she had received the OM and that her annual net income before tax was not less than $75,000 in each of the two most recent calendar years. In fact her net income in 1997 was $46,728 and in 1999 was $41,142. I infer that her net income in 1998 was also in that range. When asked whether she had discussed the Form 20A with Bock, LM answered 'no'. She testified that she had not circled the paragraph stating her net income was not less than $75,000. When asked why she had signed the Form 20A, LM replied that she had signed it because Bock told her to sign it.

¶ 486 Although paragraph 6(b) is not circled in the Form 20A, paragraph 6(b) has been completed by the printing by hand of the words "Jill Bock" in the space left for the name of the advisor.

¶ 487 LM invested a total of $13,929 in the exempt products and took on a debt of $21,071. Her portfolio was then almost entirely comprised of high risk investments in the farming sector.

¶ 488 As the OM's clearly stated, the exempt products were speculative and illiquid and so highly risky. They were fit only for sophisticated investors, generally in the higher income tax brackets, with substantial net worth, who could afford to lose their investment.

¶ 489 LM testified that Bock had not explained the risks of the "cranberries" or "ginseng" investments and had not told her she could lose all her money. LM had not understood that the products were highly risky.

¶ 490 LM made the payments in 1999 and 2000. She defaulted on her March 2001 payment for Opus Cranberries and her bonds were cancelled. She testified that the income she had expected to receive from the Imperial Ginseng investment had not materialized and so she had been unable to make the Opus Cranberries payments. She did not take advantage of an extended payment offer from Opus Cranberries on the advice of several people that the investment had been unsuitable.

¶ 491 LM told us that the value of her investment in Imperial Ginseng dropped from $10,000 at $1 per share to less than $.01 per share. She cashed out all or part of that investment to pay her self-directed RRSP fee. In 2005, there was nothing left.

Breach of section 48

¶ 492 Did Bock ensure that the proposed investments in Opus Cranberries and Imperial Ginseng were suitable for LM?

¶ 493 Bock made enquiries to learn the essential facts about LM and to determine her objectives. However, she overstated LM's net liquid assets at $48,000. We do not have sufficient evidence on which to decide whether or to what extent Bock may have overstated LM's net worth at $168,000.

¶ 494 Bock was clearly wrong to state in the KYC Form that LM could tolerate 50% high risk investments.

¶ 495 At the age of 49, with investable assets of $19,000, low net worth, and annual income of about $47,000, LM could not afford to invest virtually her entire portfolio in high risk products and take on a debt of $21,071. The exempt products were clearly unsuitable for LM. Bock could not have appropriately assessed the suitability of the investments before she proposed them to LM.

¶ 496 In my view, Bock 'knew' her client and 'knew' the investments, but chose to ignore what she knew in assessing the suitability for LM of the exempt products. She breached section 48 of the Rules.

¶ 497 Bock was also obliged to ensure that LM met the conditions for exemption. Under the exemption order, the conditions for exemption for Opus Cranberries were not as strict as under section 128 of the Rules. It appears that LM may have met the condition for the Opus Cranberries purchase because, although she was not a "sophisticated investor", Bock did give LM advice about the product.

¶ 498 However, in asking LM to sign the Form 20A for Imperial Ginseng to acknowledge that her annual net income before tax was not less than $75,000 in each of the two most recent calendar years, Bock did not ensure that LM met this condition. LM's annual net income clearly did not exceed the threshold required under section 128 of the Rules.

¶ 499 To qualify, LM also needed to be able to acknowledge that she could evaluate the risks and merits of the prospective investment because of her financial, business or investment experience or advice that she had received from Bock.

¶ 500 In my view, LM could not evaluate the risks and merits of the proposed investment because of her financial, business or investment expertise. Her investment knowledge was poor and the product was complex. Nor was she able to evaluate the risks and merits of the investment because of advice she had received from Bock. I accept her evidence that Bock expressed positive views about the Imperial Ginseng product without making clear the risks. I reject the respondents' submissions that LM was aware of, understood, and accepted the risks.

¶ 501 Bock did not take steps to ensure that LM received and understood appropriate information from the issuer (ie, the OM) and so could evaluate the merits and risks of the product before she subscribed. That responsibility is all the greater where, as in this case, the registrant has encouraged an inexperienced client to rely on her, and has not raised the subject of risk in any meaningful way at all.

¶ 502 Bock failed to ensure that that the conditions for exemption were met and so, for the reasons set out in *Bilinski*, failed to comply with her suitability obligation under section 48 of the Rules.

¶ 503 I find that Bock breached section 48 when she failed to ensure that LM's investments in Opus Cranberries and Imperial Ginseng were suitable for LM's needs, objectives and personal and financial circumstances.

Client Ms IS

Facts

¶ 504 In 1999 IS was 54 years old and divorced with two adult children. She had qualified as a registered nurse and worked part-time as a receptionist or a caregiver.

¶ 505 I found IS to be, for the most part, a candid and credible witness, although she had considerable difficulty recalling the details of past events.

¶ 506 We did not receive in evidence a copy of a New Client Application or KYC Form for IS.

¶ 507 IS testified that in 1999 her net worth was about $225,000 comprising about $106,000 from the recent sale of her condominium (held in term deposits earning about 5% interest), about $20,000 in savings, and about $100,000 in mutual funds in registered and unregistered accounts. Her annual income from work varied from about $10,000 to $20,000. She also received (and relied on) income from her mutual funds. In 1999, her RRSP deduction limit was $97 (18% of earned income of $540).

¶ 508 According to Bock, IS's net worth was $430,000. This figure she achieved by capitalizing IS's anticipated Old Age Security and Canada Pension Plan payments at $100,000 each.

¶ 509 IS testified that her investment knowledge was close to nil and her risk tolerance low. Her objectives for investment were additional income in retirement from the proceeds of the sale of her condominium. Although she had sold her condominium, she remained embroiled in a leaky condo lawsuit.

¶ 510 Bock developed an investment plan for IS, under which Bock redeployed IS's mutual funds and savings into other mutual funds and IS used the proceeds of the sale of her condominium to make investments in exempt products as follows.

¶ 511 IS testified that she saw a video on the business and on February 28, 2000 purchased $50,000 worth of Fibrex preferred shares. Bock told IS that the investment would pay $416 per month in dividend income. Bock also told IS that her capital was not at risk because Fibrex held so much in land and equipment that, even if the farm ran into difficulties, IS would get her money back. Other than that, Bock did not discuss the risks of the product with IS.

¶ 512 On June 8, 2000, IS purchased $10,000 worth of common shares in Pearl Seaproducts. She had attended a presentation on the business and found a video

persuasive. She drew comfort from the fact that the government was encouraging people to invest through the VCC program. She received a $3,000 tax credit.

¶ 513 IS attended a presentation for Cloud Forest LP and reviewed the information she was given. On November 27, 2000, she bought 25 units for $25,000 with a down payment of $6,500. She signed a promissory note for the balance in the amount of $18,500. The balance of principal plus interest was to be paid by monthly instalments of $508 on her VISA card until July 1, 2004. IS expected the payments to be covered by the dividends from Fibrex and, in two years, Pearl Seaproducts.

¶ 514 Taking into account the tax credit, IS invested a total of $63,500 in the exempt products and took on a debt of $18,500 with annual payments of about $6,100 for four years.

¶ 515 As the OM's clearly stated, the exempt products were speculative and illiquid and so highly risky. They were fit only for sophisticated investors, generally in the higher income tax brackets, with substantial net worth, who could afford to lose their investment.

¶ 516 The Forms 20A prepared by Bock were all marked to show that IS had a net worth of not less than $400,000. IS testified that she did not notice this when Bock asked her to sign the Forms 20A for Fibrex and Pearl Seaproducts, but she questioned it in the Cloud Forest form. Bock told IS she would be worth that amount when she won her leaky condo lawsuit.

¶ 517 IS testified that when she received a copy of the Form 20A for Cloud Forest she also added question marks beside paragraphs 4(c), (d) and (f) which state that:

- I may lose all of my investment,
- there are restrictions on my ability to resell the securities, and
- because I am not purchasing the securities under a prospectus, I will not have the civil remedies that would otherwise be available to me.

¶ 518 She telephoned Bock to ask whether the investment was suitable for those reasons. Bock urged IS to sign, and so she did.

¶ 519 Although paragraph 6(b) is not circled in the Forms 20A for Fibrex and Pearl Seaproducts, in the Form 20A for Cloud Forest, paragraph 6(b) has been completed by hand by the printing of the words "Jill Bock" in the space left for the name of the advisor.

¶ 520 IS received dividends from Fibrex for several months, but Fibrex ceased to pay dividends later that year (and ceased operations in 2003). Pearl Seaproducts went bankrupt in 2002. Since she was no longer receiving income from Fibrex she began to have trouble making her payments on Cloud Forest. On the advice of her accountant and new financial adviser, IS stopped making payments and fell into arrears on her Cloud Forest payments.

¶ 521 IS testified that, apart from Cloud Forest, she had no idea that she might lose all her investment or that there were restrictions on resale of the products. She believed that Bock had the investment knowledge and credentials and "she was advising me on good things". (transcript, December 12, 2005, page 58, line 18) Bock did not tell her about the risks or, if she did, she did not explain them in a way that IS could understand.

¶ 522 In her interview, Bock said that IS was well aware that Cloud Forest in particular was a farm and so was a long-term investment. Nevertheless, she said, both Fibrex and Cloud Forest should have "come liquid" after two years.

Breach of section 48

¶ 523 Did Bock ensure that the proposed investments in Fibrex, Pearl Seaproducts and Cloud Forest were suitable for IS?

¶ 524 Bock made enquiries to learn the essential facts about IS and to determine her objectives, although Bock overstated her net liquid assets and net worth.

¶ 525 IS was not by any stretch a higher rate taxpayer. She already relied on her investment income to supplement her limited part-time income. At the age of 55, with moderate net worth, conservative objectives, and a low risk tolerance, IS could not afford to put 35% of her gross investable assets into illiquid venture situations, to say nothing of taking on a debt of $18,500. The high risk exempt products were clearly unsuitable. Bock could not have appropriately assessed the suitability of the investments before she proposed them to IS.

¶ 526 In my view, Bock 'knew' her client and 'knew' the investments, but chose to ignore what she knew in assessing the suitability for IS of the exempt products. She breached section 48 of the Rules.

¶ 527 There is also the question whether Bock properly ensured that IS met all the conditions for exemption under section 128 of the Rules. IS's net worth was about $225,000. She did not meet the net worth threshold for the exemption. As IS's case illustrates well, capitalizing OAS and CPP drove a coach and horses through the net worth condition.

¶ 528 To qualify for the exemption, IS also needed to be able to acknowledge that she could evaluate the risks and merits of the products because of her financial, business or investment experience or advice that she had received from Bock.

¶ 529 IS could not evaluate the risks and merits of the proposed investments because of her financial, business or investment expertise. Her investment knowledge was poor and the products were complex. Nor was she able to evaluate the risks and merits of the investments because of advice she had received from Bock. I accept IS's testimony that Bock expressed positive views about the products without making clear the risks. I reject the respondents' submissions that IS was aware of, understood, and accepted the risks.

¶ 530 Bock did not take steps to ensure that IS received and understood appropriate information from the issuers (ie, the OMs) and so could evaluate the merits and risks of the products before she subscribed. That responsibility is all the greater where, as in this case, the registrant has encouraged an inexperienced client to rely on her, and has not raised the subject of risk in any meaningful way at all.

¶ 531 Bock failed to ensure that that the conditions for exemption were met and so, for the reasons set out in *Bilinski*, failed to comply with her suitability obligation under section 48 of the Rules.

¶ 532 I find that Bock breached section 48 when she failed to ensure that IS's investments in Fibrex, Cloud Forest and Pearl Seaproducts were suitable for IS's needs, objectives and personal and financial circumstances.

Mutual funds

¶ 533 The executive director also alleges that Bock breached section 48 by investing client funds in mutual funds that were too risky and unsuitable for their needs, objectives and personal and financial circumstances. The executive director says there is no evidence of what steps Bock took, but there is evidence that she did not consult the clients. If no steps were taken, says the executive director, the funds could not have been suitable.

¶ 534 It is for executive director to show that Bock did not ensure that the proposed products were suitable. In my view, the executive director has not done that. Failure to consult the clients, if proved, does not necessarily mean that the products were unsuitable or that the registrant failed to make a reasonable assessment of suitability. We know that Bock invested in mutual funds for the clients, but we have been given almost no evidence about the risks and merits of those products and so cannot form a view ourselves on their suitability or whether Bock took reasonable steps to assess suitability in each case.

¶ 535 I dismiss the allegation that Bock breached section 48 by investing client funds in mutual funds that were too risky and unsuitable for her clients' needs, objectives and personal and financial circumstances.

Breach by Foresight

¶ 536 Did Foresight breach section 48 by virtue of Bock's conduct? To the extent that Bock breached section 48, so did Foresight, her employer.

¶ 537 However, Foresight entered into a settlement with the executive director on May 10, 2000, agreeing that it had breached section 48 during the period covered by the first and second compliance examination reports and agreeing to a penalty. (I discuss the first and second compliance reports below in the section dealing with the alleged compliance failures.) Since the settlement contains no language limiting it to the specific facts supporting the compliance examination reports, we cannot treat the conduct of Bock during this period as new facts. Accordingly, we can find Foresight liable only for Bock's conduct after May 26, 1999, the end of the period covered by second examination report.

¶ 538 I find that Foresight breached section 48 of the Rules by virtue of Bock's conduct after May 26, 1999. The breaches of Bock occurring after May 26, 1999 are with respect to the purchases of clients AG, LS, and IS, and the purchase of Imperial Ginseng by client LM.

Wong – responsibility for Foresight's breaches

¶ 539 The executive director alleges that, by virtue of section 168.2 of the Act, Wong committed the same breaches as Foresight. Section 168.2 states:

> If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.

¶ 540 "Regulation" is defined in section 1 of the Act to include a Commission rule.

¶ 541 Did Wong, as employee, officer or director of Foresight, authorize, permit or acquiesce in Foresight's contravention of section 48 of the Rules? There is no evidence that Wong knew about Bock's breaches of section 48 at the time. On the other hand, he was sole director, president, head of compliance, and responsible for day-to-day operations and the hiring of employees during the period November 1998 to January 2001. He was the senior manager responsible for compliance and for the supervision of Bock.

¶ 542 In my view, in failing to ensure that Foresight had in place adequate systems and controls for compliance and for the supervision of its employees, and in failing to supervise Bock, Wong permitted or acquiesced in the contravention by Foresight of section 48 of the Rules and so also contravened section 48.

Public interest

¶ 543 Did Bock, Foresight and Wong act contrary to the public interest in breaching section 48 of the Rules? In my view, they did.

Misrepresentation

¶ 544 The executive director alleges that Bock breached sections 50(1)(c) and (d) of the Act when she told AG that Pearl Seaproducts would go public, and when she told IS that Fibrex would go public, when she knew or ought reasonably to have known that the statements were a misrepresentation.

¶ 545 The executive director points to AG's evidence that Bock told her that Pearl Seaproducts would "go public" within five years. In her examination in chief, AG said:

> Q Okay. Did you discuss anything else, any other investments with Ms. MacGregor Bock?
> A Uhm, the Pearl Seaproducts was the other one.
> Q And what did you discuss with her about that product?
> …
> A And probably was going to have income from that in the next couple of years, and then it probably was going to go public within five years, but instead, it's gone bankrupt now.
> (transcript, December 2, 2005, page 16, lines 4 to 18)

¶ 546 The executive director also relies on IS's evidence that Bock told her that Fibrex would "go public" in two years. In her examination in chief, IS said:

> Q Right. And did you discuss with Ms. MacGregor Bock ever selling your shares in Fibrex?
> A She told me it was a two-year investment and that after two years, I could, they would go public or they would buy back the shares.
> (transcript, December 12, 2005, page 28, lines 17 to 21)

¶ 547 This is the only evidence put forward in the executive director's submissions on these allegations.

¶ 548 On cross-examination by Bock, AG said:

Q … Now, just before we sort of look at the exact words there, let's go back in your memory. Do you remember me telling you that there were some specific rules or restrictions, one might say, about British Columbia venture capital investments regarding the amount of time that you needed to hold the investment?
A You said for the Pearl Seaproducts five years.
Q What did I say about the five years? I mean, how did -- what, what was the rule?
A You said you -- that you probably wouldn't be able -- wouldn't be able to trade it for five years, but it probably was going to be public in three to five years I think were your words.
…
Q Exactly. So, since this was a private placement and you -- you testified earlier that you understood that the shares were not liquid, that you couldn't sell the shares?
A For the five years.
Q Yes. So, would it be reasonable that you asked me at the time, "How could I sell my shares during the five years" –
A And I think I did ask you.
…
A You explained to me about all the income I was going to be making and probably in the second year they were going to make so much and I would get 15 percent of my investment as income, and on and on and on, and it probably was going to be public in three to five years, and then I was of the impression that I could get rid of them --
Q So --
A -- if it went in probably three to five years.
Q … Do you understand that going public means that your shares are sold?
A Well, I didn't really understand the ins and outs of it, but yes, I knew that it was going to be on the stock market or something. But the fact is --
…
Q So, what do you think "going public"means?
A Well, that you could sell your shares.
Q Well, that's what we just said. Okay. So, you have said that means you could sell your shares. You had private shares. Right now you couldn't sell them. If it went public, you could sell them?
A Yes.
(transcript, December 2, 2005, pages 223 to 229)

¶ 549 On cross-examination, IS said:

Q Thank you. And then [the OM] goes on:
Subject to the provisions of Canada Business Corporations Act, the preferred shares are also convertible at the election of the issuer only into common shares of the issuer on the basis of one preferred share for each one common share at any time after two years from the date of issuance.
Is that what you were referring to when you were talking about that it would go into common shares?
A I, I can only say what you told me, which was that it, after two years, it would, it would go public.
Q Go public or go into common shares?
A I'm sorry, I don't know.
Q Okay. Do you -- when something is public, what do you understand about that?
A That anyone can buy it.
Q Okay. And what do you understand that common shares are?
A I don't.
(transcript, December 12, 2005, page 149, lines 18 to 25 and page 150, lines 2 to 14)

¶ 550 Sections 50(1)(c) and (d) of the Act state:

> A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:
>
> …
>
> (c) represent, without obtaining the prior written permission of the executive director,
>
> (i) that the security will be listed and posted for trading on an exchange or quoted on any quotation and trade reporting system, or
>
> (ii) …;
>
> (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation;
>
> …

¶ 551 Clearly Bock intended to effect a trade in a security. Equally clearly, there is no credible evidence that she represented to AG or IS that the security would be listed and posted for trading on an exchange or quoted on any quotation and trade reporting system. Even assuming, in the light of BC Notice 47-701, that written permission was still required, the best that can be said is that AG and IS recalled that Bock told them that their shares would "go public".

¶ 552 IS's testified on cross examination that she understood from "go public" only that she would be able to sell her shares, or that anyone would be able to buy them. AG testified that she thought Bock meant "it was going to be on the stock market or something". However, taking into account the length of time that had passed since the transaction, AG's (understandable) failures to remember all the details of her relationship with Bock, and her obvious confusion about the characteristics of the products, this evidence is not sufficiently reliable.

¶ 553 We would need more or better evidence to draw an inference that by "go public" Bock meant "listed and posted for trading on an exchange or quoted on any quotation and trade reporting system". We would need more or better evidence before concluding that this is what AG and IS understood at the time or, in context, this is what a reasonable person would have taken from the phrase "go public".

¶ 554 Nor does the evidence support the allegation that Bock made a statement that she knew, or ought reasonably to have known, was a misrepresentation, contrary to section 50(1)(d).

¶ 555 Section 1(1) of the Act defines "misrepresentation" to mean:

> (a) an untrue statement of a material fact, or
> (b) an omission to state a material fact that is
> (i) required to be stated, or
> (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made;

and defines "material fact" to mean:

> where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities;

¶ 556 The executive director's submissions do not take us through the elements of section 50(1)(d) that she is required to prove. We assume she alleges that Bock's representations were "untrue statements of a material fact". Whether the statements were of a "material fact" is highly debatable. The executive director makes no submissions on that issue. Nor does the executive director make submissions on Bock's knowledge. Regardless, it is clear that the executive director has not discharged the burden of proving that the representations were untrue.

¶ 557 We find that the allegations of misrepresentation are not proved and we dismiss them.

Alleged compliance failures

Allegations

¶ 558 The executive director alleges that Foresight failed:

- to establish and apply written prudent business procedures for dealing with clients in compliance with the Act and regulations, contrary to section 44 of the Rules;
- to designate a compliance officer to supervise transactions made on behalf of clients, contrary to section 47 of the Rules. Specifically, Foresight's compliance officer Wong failed to supervise the transactions of Bock described above;
- to designate a compliance officer to ensure that Foresight and its partners, directors, officers and employees complied with the Act and the Rules, contrary to section 65 of the Rules. Specifically, Foresight's compliance officer failed to ensure that Bock complied with the Act and Rules, and that Foresight complied with its capital requirements and had written prudent business procedures, all as described in the notice of hearing;
- to maintain working capital in the amount required by section 19(5) of the Rules.

¶ 559 The executive director also alleges that Wong contravened the same provisions as Foresight and that Foresight and Wong acted contrary to the public interest.

Compliance examinations

¶ 560 The manager of the examinations team in the capital markets regulation division, testified that compliance reviews of Foresight began in 1997. After the first review, BCSC staff decided to review the dealer more frequently than usual because it was selling riskier exempt products and it had not adequately rectified deficiencies identified in the first review (and then the second and third reviews).

¶ 561 In the second review, for the period ending on May 26, 1999, in Foresight's client files, BCSC staff found no evidence of any review of trades by compliance staff at Foresight. As recorded in the report of June 29, 1999, BCSC staff also found:

- Lack of comparison of information in new client account forms to the securities the client was buying;
- Some KYC forms missing or incomplete;
- Some KYC forms not signed in a timely manner by the compliance officer to show approval;

- Some trades that appeared to be unsuitable, and no evidence that these were questioned;
- Some representatives were allowed to process their own orders, unchecked, from home or branch office locations;
- Some order documents were not forwarded to Foresight's head office;
- In many cases Foresight recommended an exempt security for tax reasons, but Foresight did not appear to have prepared a report that clearly outlined the tax benefits that clients would receive;
- Insufficient resources devoted to review of client investments beyond the initial approval of the account opening KYC form; and
- The trade blotter description for sales of exempt securities was not complete.

¶ 562 In an Agreed Statement of Facts and Undertaking of May 10, 2000, Foresight agreed that it had failed:

- to establish and apply written prudent business procedures for dealing with clients contrary to section 44(1) of the Rules,
- to properly supervise the compliance officers and branch managers to ensure that they adequately performed their duties and followed company procedures, contrary to section 47 of the Rules, and
- to make enquiries, contrary to section 48 of the Rules.

¶ 563 In addition to agreeing to a financial penalty, Foresight consented to an order by the executive director under section 161(1)(f) of the Act that Foresight, as a condition of its registration, would:

> (a) from the date of this agreement, not make application to register more than ten (10) registered representatives under its registration unless and until it establishes and implements a compliance program acceptable to the Executive Director. Such a compliance program for Foresight would rectify the deficiencies identified in the 1999 examination, including, but not limited to:
>
> (i) review of trades and evidence of such reviews being performed;
> (ii) enforcement of established business procedures;
> (iii) maintenance of required documentation at the head office in British Columbia;
> (iv) creation of on-site review program of branch and non-branch offices; and,
> (v) hiring of a full time compliance officer.

¶ 564 In the third compliance review during November 2000, reported on December 11, 2000, BCSC staff found that, despite the strong recommendation in the second

review report, Foresight still did not have a full-time compliance officer. Wong, in his role as compliance officer, appeared to be performing other business activities and was either not taking compliance seriously or did not have the time to perform the compliance role adequately. BCSC staff concluded that Foresight had not improved its supervision and compliance program to comply with the Rules. Nor had Foresight yet implemented a system to supervise trades and to ensure suitability to comply with section 48 of the Rules.

¶ 565 In a sample of a dozen client files, BCSC staff found:

- Not all KYC forms were signed by the client so there was no assurance that the representative had reviewed the form with the client and correctly identified client objectives;
- Little evidence on any file that there was an independent review by the compliance officer of exempt products sold;
- Some Forms 20A appeared to have been completed after the client had signed them;
- Some Forms 20A were incomplete and so it was not clear what exemption the registrant was relying on.

¶ 566 Foresight had made no progress in improving its compliance and supervision. BCSC staff planned to downgrade Foresight's registration to mutual fund dealer and prevent Foresight from taking advantage of certain of the exemption under the Act. BCSC staff asked Foresight to provide a plan to address the concerns set out in the report "with an expected date for hiring a full-time compliance officer" (page 4).

¶ 567 In response to the third review report, by letter dated January 24, 2001, as he had done in his responses to the first and second examination reports, Wong (signing as president of Foresight) agreed that Foresight needed more compliance and supervisory staff. In section 2.0 of his response, he wrote – "Obviously a larger amount of financial resources and personnel needs to committed [sic] to the compliance function." In section 7.0, he agreed that "we have not provided enough documentary evidence of due diligence performed".

¶ 568 BCSC staff did not think Foresight's response was adequate. They reported to the Director of Capital Markets Regulation that Foresight continued to fail to implement an adequate system to supervise trades and to ensure the suitability of investments.

¶ 569 By letter of April 24, 2001, the Director of Capital Markets Regulation proposed to impose conditions on Foresight's registration under sections 165(3) and (4) of

the Act, including the condition that Foresight cease to sell exempt products and that Wong cease to act as compliance officer of Foresight. Foresight asked for a hearing which was held in writing by way of a letter of June 1, 2001 from Foresight's lawyers. Foresight objected to the conditions, while continuing to up-date the Director about its apparently difficult search for a full-time compliance officer.

¶ 570 Foresight's lawyers wrote:

> The Company advised that its policies and procedures manual that was written in early 1997 required some revision and supplemental information to properly reflect the Company's current business practice. The Company advised the revised version of the manual would be available in January 2000.
>
> As at today's date the Company has confirmed that its policies and procedures manual is being reviewed subject to MFDA/IDA applications during the spring and summer of 2001. (page 8)
> …
>
> The Company confirmed that they aimed to have a new compliance officer hired by March 1, 2001. (page 17)

¶ 571 Foresight did not persuade the Director to withdraw the conditions. In his letter of June 28, 2001, the Director of Capital Markets Regulation said:

> It is apparent … that Foresight is still in the process of developing a compliance program … Considering the length of time that has passed since Foresight's management first was made aware of the firm's significant compliance deficiencies, and the lack of results to date, I have little reason to believe that waiting an additional 90 days before imposing conditions is either in the public interest … or that the dealer will have in place by that time a functioning effective compliance program.
> …
>
> … it is apparent that Mr Wong has failed to meet his compliance responsibilities and cannot be relied upon to be an effective part of the Company's compliance program.

¶ 572 By letter of August 9, 2001, Foresight applied to the Commission for a hearing and review of the June 28 decision of the Director of Capital Markets Regulation under section 165(3) of the Act, and a stay of the conditions pending the hearing.

¶ 573 After hearing Foresight's application for a stay, on August 20, 2001, in *Foresight Capital Corporation* (2001 BCSECCOM 848), the Commission found:

> Commission staff examined Foresight in December 1997, after it had been registered for six months, and found some significant deficiencies in its compliance with regulatory requirements. Staff sent its examination report to Foresight with a letter stating that 'Failure to adequately address these issues may affect Foresight's ongoing registration'.
>
> Staff did a second examination in May 1999 and found many of the same deficiencies and some additional ones. Based on the results of the second examination, staff entered into a settlement in May 2000, in which Foresight admitted that it had failed to properly supervise its employees and had violated the know-your-client and suitability rules. Foresight also agreed to limit its growth until it had developed an acceptable compliance program. It also agreed to provide monthly compliance reports to the Commission and to conduct compliance examinations of all of its branch and home-based offices. Finally, Foresight agreed to pay a $10,000 penalty.
>
> In November 2000, staff did a third examination and again found significant deficiencies, many of them the same as those found in the first two examinations. Staff also found that Foresight had not complied with the requirements it had agreed to in the settlement. In the letter accompanying its examination report, staff advised Foresight that it planned to impose conditions on its registration in order to restrict its activities.
>
> After staff and Foresight exchanged further correspondence over the next several months, the Director sent Foresight a letter on June 28, 2001, imposing the following conditions:
>
> 1. With limited exceptions, Foresight and its employees are not permitted to rely on the exemptions in the Act. As a result, Foresight would have to discontinue its business of selling securities of non-reporting issuers under exemptions.
>
> 2. Gilbert Wong, Foresight's president, must cease to act as compliance manager or branch manager.
>
> 3. Foresight is not permitted to employ registrants who require strict supervision.

> The Director has suspended the first two conditions, and the third condition for current employees, pending this stay application.
> …
>
> Foresight does not point to any defect in the Director's decision or any flaws in the procedure by which it was made. Nor does it seriously challenge staff's findings of numerous compliance deficiencies. It simply wants more time to resolve issues that have been outstanding for several years.

¶ 574 The Commission declined to grant a stay. Foresight did not proceed with its application for a hearing and review, and the conditions on registration came into effect on August 1. Wong resigned as compliance manager. In October 2001, Foresight hired a full-time compliance manager, Norm Lihaven.

¶ 575 In September 2002, BCSC staff did a fourth review and reported on it to Lihaven, the then compliance manager of Foresight, by letter dated October 3, 2002. Again BCSC staff identified deficiencies in Foresight's compliance practices and procedures, but this time Lihaven had made real progress in tackling earlier deficiencies. However, "[p]rocedures appear insufficient to ensure representatives … are not selling unacceptable products" (page 8) and "trade orders submitted to the head office are processed with very few referrals to compliance" (page 9).

¶ 576 BCSC staff concluded that Foresight's policy and procedures manual was still deficient since it did not cover:

- Trading processes and operational procedures;
- Training procedures and programs;
- Maintenance of records. (page 11)

¶ 577 On a review of client files and trading records BCSC staff found:

- Some files did not contain KYC forms or contained forms unsigned by the client;
- KYC forms on file bore no evidence of review and approval by the branch manager or compliance officer;
- In some cases, review and approval of updated KYC's was inadequate because they were not compared to the client's file for reasonableness and accuracy of information. (page 12)

¶ 578 In his interview with BCSC staff of June 1, 2004, Wong said that he wrote a "comprehensive" policies and procedures manual in 1997, but that it was not up-dated until Lihaven took over as compliance manager.

¶ 579 In his interview, Wong agreed that no training programs were in place. He thought they were not needed because Foresight had hired only skilled and experienced people. Lihaven set up the first training program for the representatives.

¶ 580 Lihaven responded to the fourth report by letter of October 31, 2002 to say:

- Immediate measures had been implemented to ensure that all trades would be reviewed by the compliance officer prior to processing and to ensure all representatives were aware of the requirement;
- An updated policy and procedures manual would be finished by November 8, 2002;
- Progress had been made in updating new account application forms and the compliance officer was paying closer attention to review of updates;
- A new policy had been implemented for daily review of client files for all transactions and to ensure all KYC forms were signed and updated if necessary.

¶ 581 It appears from handwritten notations on the letter that BCSC staff broadly accepted these assurances.

Working capital reports

¶ 582 We reviewed copies of BC Forms 33-905F Reports of Working Capital for Foresight for the months of March to October 2002. The Forms reporting on the months June to October were signed by Alfonse Daudet, as president of Foresight. There were working capital deficiencies in the months of June, July, August and October of between $19,380 and $111,819.

¶ 583 Wong signed the Reports for the months of March to May 2002 as president of Foresight. There were no capital deficiencies during this period. He resigned as president in June 2002.

¶ 584 In his interview, Wong said he was not around much during the period from the end of June to September 2002. He took a break from the business. In his view, his role as trading director also ceased at that point. He said he was brought back into the senior management fold in September or October. It appears he was unaware of the capital deficiencies or related financing issues during his time away from the business.

Analysis

Business procedures

¶ 585 Did Foresight fail to establish and apply written prudent business procedures for dealing with clients in compliance with the Act and regulations, contrary to section 44 of the Rules?

¶ 586 Section 44(1) of the Rules states:

> A dealer, portfolio manager or investment counsel must establish and apply written prudent business procedures for dealing with clients in compliance with the Act and the regulations.

¶ 587 We know that Foresight had written business procedures for dealing with clients. The question is whether they were adequate to provide reasonable assurance that Foresight (and its employees) would deal with its clients in compliance with the Act and regulations and, if so, whether they were applied.

¶ 588 Wong said that he wrote a "comprehensive" policies and procedures manual in 1997, but that it was not up-dated until Lihaven took over as compliance manager. Meanwhile, Foresight had grown quickly and was doing an increasing amount of business in an inherently risky area, the sale of exempt products. The manual was not up-dated until November 2002. No training programs were in place prior to October 2002.

¶ 589 Foresight did not supervise Bock to ensure her compliance with regulatory requirements. Wong visited Bock's office only once and did only a cursory review. He did not review any of her client files.

¶ 590 Wong described the management structure as "thin" or "flat" and said that "there is some self-regulation at the advisor level … [and] in retrospect, I would say that we – we should probably have had more supervisors". (interview transcript, June 1, 2004, pages 14 - 16).

¶ 591 At the time of the third compliance examination review in November 2000, Foresight had not yet implemented a system to supervise trades.

¶ 592 On the fourth review in September 2002, BCSC staff concluded that Foresight's policy and procedures manual was still deficient since it did not cover:

- Trading processes and operational procedures;
- Training procedures and programs;

- Maintenance of records.

¶ 593 In addition, Foresight's supervision of client files continued to be deficient.

¶ 594 Wong says that we should not rely on evidence from the third review since those issues were dealt with by the conditions later imposed on Foresight's registration. I agree with the executive director that it is open to us to make findings of liability where the executive director has imposed conditions on registration. The conditions were imposed under section 36 of the Act and were aimed at limiting the operations of Foresight to protect the public interest. We are performing a different function under sections 161 and 162 of the Act, with respect to somewhat different (but overlapping) allegations and respondents, to consider and decide whether we should make findings of liability and enforcement orders.

¶ 595 On May 10, 2000, Foresight agreed it had breached section 44 of the Rules in the period ending on May 26, 1999 and consented to an order under section 161 of the Act. Accordingly, we cannot made findings of breach with respect to that period.

¶ 596 I find that Foresight did not establish and apply adequate written prudent business procedures for dealing with clients in compliance with the Act and regulations. From June 1999 to October 2002, Foresight was in breach of section 44 of the Rules.

Compliance officer to supervise

¶ 597 Did Foresight fail to designate a compliance officer to supervise the transactions made on behalf of clients, contrary to section 47 of the Rules? The executive director says that, specifically, Foresight's compliance officer failed to supervise the transactions of Bock at issue in these proceedings.

¶ 598 Section 47 of the Rules states:

> A registrant must designate, to approve the opening of new client accounts and supervise transactions made on behalf of clients,
>
> (a) a compliance officer, as required by section 65 [see below], …

¶ 599 Foresight did designate a compliance officer, namely Wong, to perform those functions. Wong said in interview that he accepted that part of his job was to approve the opening of new client accounts and supervise transactions made on behalf of clients.

¶ 600 On May 10, 2000, Foresight agreed it had breached section 47 of the Rules in the period May 18 to 26, 1999 and consented to an order under section 161 of the Act. The third and fourth compliance examination reports show that Wong continued to fail to perform the required compliance functions, or performed them wholly inadequately. Foresight did not replace Wong until it hired Lihaven who started in October 2001.

¶ 601 It was clear from the time of the second compliance review that a part-time compliance officer was wholly inadequate for a firm of the size and nature of Foresight. Alternatively, Wong was not functioning in that capacity.

¶ 602 However, I had some concerns about finding a breach of section 47 in the face of the terms of the consent order and subsequent events. On May 10, 2000, after a lengthy negotiation, Foresight agreed that it would, as a condition of its registration:

> from the date of this agreement, not make application to register more than ten (10) registered representatives under its registration unless and until it establishes and implements a compliance program acceptable to the Executive Director … [to] rectify the deficiencies identified in the 1999 examination, including … hiring of a full time compliance officer.

¶ 603 This might appear on first glance to suggest that Foresight did not need to rectify the compliance deficiencies or hire a full-time compliance officer unless and until it decided to hire more than ten registered representatives.

¶ 604 The report of December 11, 2000 on the third examination in November made it abundantly clear that Foresight's compliance continued to be deficient. Foresight had made no progress in improving its compliance and supervision. BCSC staff planned to downgrade Foresight's registration to mutual fund dealer and prevent Foresight from taking advantage of certain of the exemptions under the Act. BCSC staff asked Foresight to provide a plan to address the concerns set out in the report "with an expected date for hiring a full-time compliance officer" (page 4). Foresight did this in its response letter of January 24, 2001.

¶ 605 BCSC staff did not think Foresight's response was adequate. Foresight continued to fail to implement an adequate system to supervise trades and to ensure the suitability of investments. By letter of April 24, 2001, the Director of Capital Markets Regulation proposed to impose additional conditions on Foresight's registration, including the condition that Wong cease to act as compliance officer of Foresight. Foresight asked for a hearing.

¶ 606 Foresight did not persuade the Director to withdraw the conditions. He imposed them effective August 1 and Wong resigned as compliance manager. Shortly after that, Foresight was able to hire a full-time compliance manager, Lihaven, who started work in October 2001.

¶ 607 In my view, the conditions on registration were not intended and should not be taken to mean that BCSC staff in some way excused the ongoing failures to comply with sections 47 and 65. The first condition, imposed in May 2000, was intended to stop Foresight from expanding until it had an acceptable compliance program in place and to give an additional incentive to Foresight to bring itself into compliance, not to excuse past or continuing breaches of securities law.

¶ 608 Similarly, BCSC staff's request for a plan and information about the timing of the hiring of a full-time compliance officer in December 2000, and the imposition of additional conditions effective August 1, 2001, were tools designed to push Foresight to a resolution of the ongoing deficiencies. The fact that the deficiencies were eventually rectified does not mean that BCSC staff cannot or should not bring an enforcement action. That is particularly so in a case such as this one where there is good evidence that Foresight and Wong made no real effort to perform or improve the performance of the required compliance functions prior to Wong's resignation as compliance manager.

¶ 609 On May 10, 2000, Foresight agreed it had breached section 47 of the Rules in the period ending on May 26, 1999 and consented to an order under section 161 of the Act. Accordingly, we cannot made findings of breach with respect to that period.

¶ 610 I find that Foresight breached section 47 of the Rules from June 1999 to September 2001, when it failed to designate a compliance officer to approve the opening of new accounts and to supervise transactions made on behalf of clients.

Compliance officer to ensure compliance

¶ 611 Did Foresight fail to designate a compliance officer to ensure that Foresight and its partners, directors, officers and employees complied with the Act and the Rules, contrary to section 65 of the Rules? The executive director says that, specifically, Foresight's compliance officer failed to ensure that Bock complied with the Act and Rules, and that Foresight complied with its capital requirements and had compliant written business procedures.

¶ 612 Until 2003, section 65 of the Rules stated:

> A person applying for registration, renewal of registration or reinstatement of registration, as a dealer, underwriter or adviser must designate at least one individual as a compliance officer to ensure compliance with the Act

> and the regulations by the person, its partners, directors, officers and other employees.

¶ 613 Clearly the compliance officer, Wong, failed to ensure that Foresight and Bock complied with the Act and Rules.

¶ 614 On May 10, 2000, Foresight agreed it had breached section 47 of the Rules in the period ending on May 26, 1999 and consented to an order under section 161 of the Act. While Foresight did not specifically acknowledge a breach of section 65 under the settlement, and section 65 is wider than section 47, section 65 is referred to in section 47 and the two provisions are linked. Accordingly, in my view, we should not make a finding of breach of section 65 with respect to that period.

¶ 615 Foresight did designate a compliance officer, namely Wong. However, for the reasons set out above on section 47, I find that, from June 1999 to September 2001, Foresight failed to designate a compliance officer to ensure that that Foresight and its employees complied with the Act and Rules, contrary to section 65 of the Rules. The executive director says that Foresight continued wilfully to ignore its compliance obligations during Lihaven's tenure as compliance manager and that compliance continued to be wholly inadequate. I do not think these submissions are supported by the evidence and I decline to make a finding of breach continuing after September 2001.

Capital deficiencies

¶ 616 Did Foresight fail to maintain working capital in the amount required by section 19(5) of the Rules?

¶ 617 Section 19(5) of the Rules states:

> A mutual fund dealer that does not hold client funds or securities and is recognized by the executive director must maintain working capital, calculated in accordance with the required form, equal to, or greater than, $25 000 plus the maximum amount that is deductible under any bond required under section 21.

¶ 618 There is no dispute about the deficiencies. We find that Foresight breached section 19(5) of the Rules in the months of June, July, August and October 2002.

Wong – responsibility for Foresight's breaches

¶ 619 Was Wong responsible for Foresight's breaches?

¶ 620 Section 168.2(1) states:

> If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.

¶ 621 "Regulation" is defined in section 1 of the Act to include a Commission rule.

¶ 622 Did Wong authorize, permit or acquiesce in Foresight's contraventions of sections 44, 47 and 65 of the Rules? In my view, he did. He was both sole director and president of Foresight and was responsible for day-to-day operations until June 2002. It was his decision that he should continue as compliance officer until August 2001 and he was responsible for Foresight's ongoing deficiencies set out in the third compliance review report of December 11, 2000 and for any remaining deficiencies set out in the fourth report of October 3, 2002.

¶ 623 In my view, Wong authorized, permitted or acquiesced in Foresight's failure:

- to establish and apply written prudent business procedures for dealing with clients in compliance with the Act and regulations, contrary to section 44 of the Rules;
- to designate a compliance office as required by section 47 of the Rules; and
- to designate a compliance office as required by section 65 of the Rules.

¶ 624 Did Wong authorize, permit or acquiesce in Foresight's contravention of section 19(5) of the Rules? Although he resigned as compliance officer in August 2001 and as president in June 2002, and so was no longer operationally responsible for (or involved with) the working capital reports, he continued as the sole director of Foresight. He was not around much during the period end June to August 2002 and was not participating in day-to-day business decisions. He rejoined senior management in September or October.

¶ 625 It appears that Wong did not know about the capital deficiencies. To the extent that he may have known about the deficiency in October, there is no evidence that at that stage he could have done anything about it. However, as the sole director, he was responsible to ensure compliance with the important capital requirements. The board cannot walk away from or ignore those responsibilities and so avoid liability. Wong, as a director, must be viewed as permitting or acquiescing in the contraventions.

¶ 626 I find that Wong contravened sections 44, 47, 65 and 19(5) by virtue of section 168.2(1) of the Act.

Public interest

¶ 627 In my view, Foresight and Wong acted contrary to the public interest by contravening the Rules as described above.

¶ 628 February 27, 2007

Robin E. Ford
Commissioner