

IN THE MATTER OF
THE SECURITIES ACT, 1988, S.S. 1988, c.S-42.2

AND

IN THE MATTER OF
DARCY LEE BERGEN

FINDINGS

Hearing Held	June 19, 2000 June 20, 2000 June 21, 2000 July 4, 2000
Before:	Marcel de la Gorgendière, Q.C., Chairman Rand Flynn, Commission Member
Appearances:	Patti Pacholek, representing Commission staff Kenneth Karwandy, counsel for Darcy Lee Bergen
Decision dated:	September 14, 2000

A Notice of Hearing, issued March 16, 2000, was issued to consider whether certain alleged conduct on the part of Mr. Darcy Lee Bergen ("Bergen") was such that it was in the public interest that orders be made that certain exemptions under *The Securities Act, 1988* not apply to him, that he cease trading or giving advice in securities, specified securities and exchange contracts or specified exchange contracts, resign any position as a director or officer of an issuer or registrant or be prohibited from becoming one and be prohibited from being employed by any issuer or registrant and pay the costs of the hearing.

The Saskatchewan Securities Commission (the "Commission") heard evidence as to sales of securities in Marina Shores Las Vegas Limited Partnership ("Marina Shores"), Barclay Las Vegas Limited Partnership ("Barclay"), Platinum Companies ("Platinum") and Foundation Financial Corporation ("Foundation") to a number of individuals in the process of which Mr. Bergen played a role that allegedly constituted trading, or an act in furtherance of a trade, and that these trades were carried out in contravention of provisions of *The Securities Act, 1988*.

In the end Mr. Bergen did not deny that this was the legal effect of his conduct and the question became one of considering circumstances affecting the degree of culpability and the sanction that should be levied in the public interest.

The Commission initially agreed, at the request of Mr. Bergen's counsel, that it would present a written decision as to its findings in regard to the facts and then deal with the question of what order it should make in the public interest after hearing from counsel.

What then were the facts related to the Commission panel?

Mr. William Bazylewski, an investigator with the Commission, presented evidence of Mr. Bergen's registration as a mutual fund salesperson with The Height of Excellence Financial Planning Group Inc. ("The Financial Group") and of his sales of certain limited partnership units, Marina Shores in particular, to one Richard Armstrong and Barclays in particular to one

Adrienne Sauer and debentures of Foundation in particular to one Grace Atherton. These offerings were not by way of prospectus but offering memorandums were filed with the Commission and form 19s were filed listing those who purchased in Saskatchewan with the consideration paid by promissory notes indicated only in the case of Foundation.

The Commission records showed Marina Shores as opening September 1997 closing March 1998 raising \$14,497,498. Barclays opened November 1995 closed February 1997 raising \$6,275,000 and Foundation opening June 1999 cease traded December 1999 closed December 2000 raising \$1,385,000 cash and \$2,690,000 by notes.

He gave further evidence of sales of Platinum, a pooling arrangement for funding supposed development in a number of fields, which issued promissory notes to pay interest at 14%. No prospectus or offering document was filed.

Mr. Bazylewski provided evidence of receiving, by fax from Mr. Bergen, a list of 85 individuals who had been referred to Mr. Kent Owens acting as Platinum (Exhibit 5). Exhibit 6, supplied to him by Mr. Bergen, was a list of investments by individuals and commissions paid totalling \$339,573.47 and \$28,863.11 respectively in Platinum involving Mr. Bergen and others working with or for him.

Exhibit 7 was a further list and includes a cheque signed by Kent Owens to Bergen Enterprises for \$7,695.62. Mr. Bazylewski provided evidence that The Financial Planning Group approved their salespersons selling Marina Shores and Barclay but not Platinum. Sales were also made by other persons employed with The Financial Planning Group.

Mr. John Howard of Montreal, Compliance Officer of The Financial Planning Group, gave evidence of their suspension of Mr. Bergen, Exhibit 8, and then termination, Exhibit 9. He admitted to having approved the Marina Shores and Barclay offerings for sale under the \$150,000 exemption but not the Platinum offering. He denied having told Bergen he could sell it.

After receiving a client complaint, he had audits carried out on four branches and then issued Exhibit 11, the Uniform Termination Notice for Mr. Bergen, May 18, 1999.

Mr. Howard was cross-examined as to the presence of Kent Owens in The Financial Planning Group. Exhibit 15 shows a connection in marketing. The cross-examination continued into the reasons for approval of the Barclay sale by offering memorandum and the fact that offering promoters had access to the salesmen. Mr. Howard indicated that while the products were reviewed by him he still expected salesmen to know what they were selling to their clients.

Under cross-examination by Commission counsel, Mr. Howard read provisions of paragraphs 4.1, 4.2 of the Exhibit 12, the 1994 employment agreement of Mr. Bergen with The Financial Planning Group in which the advisor (Bergen) agrees to keep up to date on regulatory rules and policies and give the client such disclosure, verbal and written, as required by regulators.

Counsel for Bergen questioned Mr. Howard on training in Saskatchewan regarding selling with the offering memo and he indicated that representatives might receive some advice from James Britton, an officer of the firm, or himself but that there was no established training program.

Jeffery Bryan Norton, counsel for "Assante" gave evidence that The Financial Planning Group was now a wholly owned subsidiary of "Assante." He became involved in the termination of Mr. Bergen as a result of his selling "Platinum" investments as stated in Exhibit 22 in June of 1999. It was suggested by Mr. Bergen that termination was unfair as the sales contracts were implicitly approved by Mr. Howard. Mr. Norton didn't agree because if they had been approved, a commission would have had to be submitted and it wasn't. The deals were done "off book." Counsel for Bergen questioned as to when "Assante" took over and the reply indicated May of 1998. A shareholder Advisor Agreement, Exhibit 23, was executed in August 1998 with Mr. Bergen, a copy of which was produced in which Mr. Bergen as a "contractor" was to devote full time to listed responsibilities and prohibited from engaging in any other "for profit" activity.

Evidence of one Richard Armstrong was given that he met Mr. Bergen after listening to his Sunday morning radio program that talked about an investment seminar in Las Vegas real estate. He went to the seminar and heard from Adrien Goetz about the Marina Shores investment. He heard reference to a minimum 10% gain plus capital gains. He received a handout, Exhibit 24. He then went with his wife on a later date to Mr. Bergen's office. He discussed with him the expected guaranteed return which Mr. Bergen advised should be more than 10% and he was advised if he invested more than \$100,000 he would get to go to Las Vegas. He received Exhibit 18, an offering memorandum, but did not read it and only perused it at home and found it confusing. At this meeting he signed nothing but did provide information to Mr. Bergen as to his net worth. He then took steps to take out a Canada Trust power line mortgage on his house as promoted on Mr. Bergen's radio program. In a return visit to Mr. Bergen on October 28th he decided to invest. On November 18th after negotiating the mortgage, he returned and gave Mr. Bergen a cheque for \$100,000 Canadian. He did not receive his copy of Exhibit 10, the subscription agreement, until well after that time. He recalled signing documents including the promissory note but never got a copy. The promissory note was discussed as being a formality and would "never be a factor." Mr. Armstrong advised he went with a group of investors in January 1998 to Las Vegas and was shown the Marina Shores apartment, the subject of the investment. Messers Gatz – Gabor met them indicating they should get returns on their investment in a couple of weeks. He said he received nothing until he received a letter from George Bissett of Marina Capital Inc. advising he had purchased "14 Class A units."

Mr. Armstrong said he contacted Mr. Bergen about lack of payments on his investment while he was making mortgage payments and was assured by Bergen that the investment was safe. He received Exhibit 27, a copy of a May 15, 1998 fax from Mr. Bergen's office advising Don Brady of Mr. Armstrong's concerns. He met George Bissett in Regina on June 2 and received a \$1,000 payment. He said he received the documents in Exhibit 10 on April 19 of 1999 from Mr. Bergen and it was only then he realized his investment was \$182,000 US. He advised it was never his intention to invest such an amount, that he relied and trusted Mr. Bergen. On cross-examination it was suggested Mr. Bergen only introduced him to Goetz, but Mr. Armstrong indicated he wouldn't have met Goetz without "Darcy" (Mr. Bergen). But he also indicated later that he took

some comfort from Mr. Goetz's remarks and also he had been advised that The Financial Planning Group had approved the sale and that if he had been advised they had not he probably would not have bought.

Mr. Armstrong couldn't recall who filled in the client information forms but he recalled answering questions.

Mr. Ray Sauer, a 62 year old retired mechanic, said in evidence he first heard of Mr. Bergen through his radio program. He purchased mutual funds up to a total of \$70 to \$80 thousand dollars. Mr. Bergen invited him to a seminar given by Brian Costello where he heard about using money borrowed against your house to invest. He told Mr. Bergen that this was what he would like to do. He used his mutual funds to pay off his mortgage. He obtained his loan proceeds and went back to see Mr. Bergen who said he had something better but he would have to act quickly. He trusted Mr. Bergen because he had made money for him before. He invested \$60,000 in the Barclay Las Vegas Partnership. He later had some doubts and expressed them to Mr. Bergen who introduced him to Mr. Goetz. He was told he could have his money back and said further that he did receive some payments. When the payments were considerably behind expected delivery, he went to Mr. Bergen who again suggested he would buy him out but he would regret it if he sold. Mr. Sauer testified he had not been told about his liability under the promissory note and didn't realize he had a \$150,000 investment. He hadn't read Exhibit 16, the offering memorandum for "Barclay", as he trusted Mr. Bergen. When he received Exhibit 29, the partnership certificate for 6 units, he had no idea of what it meant. Mr. Sauer decided to wait again and later contacted Mr. Bergen and the situation repeated itself but this time he asked Mr. Bergen for the money and says that Mr. Bergen asked for some time to raise the money. He said when he invested in "Barclay" he expected that Mr. Bergen would continue to be involved. Under cross-examination Mr. Sauer admitted to being told by Mr. Bergen that The Financial Planning Group had approved sale of Barclay and that while he did attend a seminar where Brian Costello talked about the house refinancing investment procedure that this was a process he had first heard of from Mr. Bergen.

Mr. Sauer firmly stated that he didn't know about the promissory note liability, which increased his investment to \$150,000 and wasn't told. While he received the offering memorandum, Exhibit 16, he didn't read more than bits and pieces of it, "too much" to understand and he reiterated his trust of Mr. Bergen. He acknowledged in cross-examination that Mr. Bergen had told him that The Financial Planning Group had approved "Barclay" for sale by its salespersons and had heard of the refinancing technique at a Brian Costello "seminar." He also indicated the "seminar" was recommended by Mr. Bergen. In reference to evidence given in the investigation to commission staff and a conflict over whether he arranged the refinancing loan before or after seeing Bergen, he was quite clear that the order of meeting was Bergen- bank- Bergen.

Evidence was also given by Donald Ackerman, a 54 year old produce manager for "Safeway," married with two children at home and income of approximately \$45,000. Mr. Ackerman met Bergen in 1994 or 1995 after attending a meeting with Brian Costello sponsored by "Financial Planning Group." He was interested in diversifying out of fixed income securities. Over a period of years he transferred \$50,000 from GIC to mutual funds. He met with Bergen two or three times a year for a review of his file. Up to this point it sounds like a model type relationship. However, in about February of 1998 he met with Bergen and was advised about an investment in "Platinum." His evidence was that he was told it was like a GIC at a bank and 14% would be credited to his account. He said, in answer to a question of whether that rate was guaranteed, that if it was not so stated it was certainly implied. He invested money from a maturing debenture at his bank. The transaction is shown in Exhibit 33. His transaction was effected at Mr. Bergen's office where he was "signed up" by Janice Grandel who, in later evidence, said she was an employee of Kent Owens who operated "Platinum." He invested a second time with Platinum after being advised that Platinum people would be at Mr. Bergen's office. He went to be informed and Mr. Bergen wasn't there. He replied to a question of why he didn't consult Bergen that time by stating that he "thought it was all right, it was his office, why else would they be there, all the time I had been in he never advised against it." He invested through his RRSP and that also included taking an option to compound the interest payable on the notes received for the investment because the investment was in an RRSP. The total invested for Platinum was \$31,000 about 40% of his portfolio.

Under cross-examination Mr. Ackerman admitted his second purchase was not made at Mr. Bergen's office but at Mr. Owens, Platinum office "on 13th" where he again saw Janice Grandel. He was not provided an offering memorandum only a receipt. He admitted that while Bergen brought up the idea of Platinum he made no decision to buy until meeting Grandel but he stated that he bought because he had been referred to invest by "my financial advisor" and liked the 14% offered.

Kenneth McKenzie of Regina, a retired provincial government employee, aged 69 gave further evidence. He saw a brochure on financial planning in 1996-97. He initially invested approximately \$200,000 in mutual funds and because of his success, increased it to a total of \$450,000. He stated he trusted and relied on Bergen's advice. In April of 1998 he received a call from Bergen who advised him that he was expecting a market correction and he had an investment that guaranteed 14% in real estate. He went to Bergen's office and had a quick meeting and went to an adjacent office and met Kent Owens who also described an investment in Platinum as being like a GIC. That day, or shortly after, papers were signed. Some documents were completed with Bonny Duka of Bergen's office to transfer funds from some mutual funds he purchased through Bergen and some were completed with Janice Grandel an Owens employee. In total he and his wife invested approximately \$194,000 in Platinum. He said there was no mention to him of any promissory note that increased his investment even more. He said he did not receive the offering memorandum of Regis Platinum Limited Partnership until 3:30 p.m. March 5, 1999 from Janice Grandel.

On cross-examination Mr. McKenzie was asked if Bergen ever told him he couldn't sell "Platinum" and he replied, no. He said he was taken to Owens by Darcy and heard the same representations from Owens as from Bergen. He was asked if Bergen had said the investment was secured rather than guaranteed. His reply was a clear, convincing and impressive, "no, I know the difference."

Gregory Coons, a draftsman, married with three children earning \$70,000 a year followed in giving evidence. He also stated he had been looking for a financial planner to look after his RRSP funds. He transferred approximately \$180,000 to \$200,000 in funds. Later he was called by Bergen to see him about a possible recommendation. He did so and he referred to notes he made at the April 9th meeting (Exhibit 38).

The first marks indicate the aim of a leveraged loan, the third a move of 10 to 20% to a 14% GIC like investment. Next was the reference indicating no cost to move the funds as Bergen would cover the back-end load. Reference was made to a 1 ½ to 3-year term December 1999 that Platinum could extend one year. Bergen then took him to Kent Owens. He received a copy of Exhibit 32 from him. He advised of the contractual lock-in to 1999 and advised the agreement was backed by Kelowna property.

Further evidence was given under cross-examination of being contacted by others about further investment in "Platinum." He discussed the matter later with Bergen and he was advised not to buy.

The Commission also heard evidence from Grace Atherton an 85 year old retired provincial government employee. She advised she had dealt with Mr. Bergen since 1995 and trusted him totally. In July of 1999 she invested \$50,000 in cash in Foundation Financial Corporation, after hearing about it from Bergen. Later she remembered signing documents couriered to her and had no idea about what Foundation Financial was, acknowledged her signature on a promissory note payable to it for \$100,000, Exhibit 46, but didn't know how a note "works." She advised that she took documents received to the Royal Bank near her for information about "Foundation." She recounted how she discussed the matter with Mr. Stuart J. Wicijowski, a lawyer. She gave further evidence of the return of money and interest. Correspondence filed as Exhibits 47, 48, 49 indicates the note was returned to her marked void in return for her executing a release to "Foundation Financial Corporation." It also indicated payment of her solicitor's fees and costs by Mr. Bergen.

Under cross-examination Mrs. Atherton was asked if at the time she had "no idea of what you got" in response she said, "yeah, right, I didn't have a clue." Question – didn't have a clue. Answer - ... because as I've told you, I trusted Darcy implicitly...

The respondent then called Donald Mortenson, Janice Grandel, Stan Eric Dixon and James Britton who gave evidence involving in the greatest part as to the general conditions involving sales practices within the Financial Planning Group at the time that sales involving "Marina", "Barclay" and "Platinum" occurred.

Mr. Mortenson indicated he was a licensed salesperson from 1994 and worked under Jim Britton who was the manager and who was responsible for most of his training. He himself did not sell "Barclay" or "Marina" but had heard of them. He did hear about Platinum and started selling it and knew of several whom were selling it including Darcy Bergen. He wasn't sure whether Jim Britton knew he was selling it. As far as Roger Vallat, he didn't know either but found "it hard to believe he didn't know what was going on. He was right in the office."

He stated Kent Owens was in the office of The Financial Planning Group and his title was Marketing Manager. Exhibits 14 and 15, being fax covers for The Financial Planning Group, show Kent Owens as marketing Manager. He described Owens office as being adjacent to Jim Britton's. He believed that "Platinum" was a product that The Financial Planning Group knew about and approved it's sale. He never talked to John Howard about Platinum but assumed that The Financial Planning Group had checked it out. He and his wife had invested \$20,000 in an RRSP in Platinum. He still felt that there was some value in it as a result of conversations with Kent Owens. He also stated that Jim Britton mentioned that Platinum was an exempt product and anyone could sell it but he didn't recall asking if he should (P. 415 lines 10 – 17).

Under cross-examination Mr. Mortenson stated most of his clients lived out of Regina and Owens and Grandel would come and sell to his clients in their homes.

Janice Grandel was employed in The Financial Planning Group office and later directly by Kent Owens. She stated that Kent Owens was selling "Platinum" out of that office and she processed the paper work and that Roger Vallat, compliance officer from 1997, was aware of that. She also gave evidence of an interest of The Financial Planning Group's insurance division in a 20 million dollar Key Man life insurance policy on the people involved in Platinum being arranged by Jim Britton but she was not sure, "they were actually outwardly promoting the product." Grandel's outline of the sales procedure was clear. The salesperson would refer clients to Owens, "because the agents were not able to sell it directly to their clients." Owens would make the pitch, supply documents and cheques that came in were made out to Platinum and sent to their Vancouver office. She also gave evidence of Bergen giving instructions to her to withhold his commissions in the amount of \$85,000 for investment in Platinum.

Stanley Eric Dixon , a former mutual fund salesman with the Financial Planning Group, gave evidence of selling a considerable amount of "Platinum" having met Kent Owens, the Marketing Director, who requested referrals from his clients. He didn't get a direct representation from Owens that The Financial Planning Group had approved the product but later he heard John Stauffer of The Financial Planning Group in Saskatoon advise John Howard that people were selling it in Saskatchewan and he was not contacted to stop until he was contacted for an affidavit about his involvement in 1999.

Mr. Dixon related the same story of referring clients to Kent Owens who would describe the product and he often attended the sessions with his clients. He stated that Jim Britton was aware of the selling but didn't encourage it. He was not told to stop by Britton until the salespersons entered into contracts with Assante. He recalled being at sales seminars where Goetz and Gabor were involved in talking about limited partnerships they were marketing and believed them to be advisors of The Financial Planning Group as employees or Branch Manager status.

In cross-examination Mr. Dixon was asked about his testimony in an interview with Saskatchewan Securities Commission investigators; question P. 469 lines 25 to P. 470 line 9. A discussion arose over what he meant by Head Office Montreal or Saskatchewan but his final

reply was that it was not approved in Saskatchewan. He replied to a question about Mr. Bergen's sales method by saying he expected it was as, "the same as I did." but had to admit he didn't know that or what other products he sold.

James Britton was called as a witness by the respondent. He gave evidence that he was the provincial manager of The Financial Planning Group as he had completed the Office Partner Director course and opened the office for Saskatchewan, which expanded over time to between three to seven to eight offices. However, he related that one Roger Vallat assisted him as branch manager carrying out a compliance officer function while "he started getting his education" (P. 481 line 12). He verified "the know-your-client orders" making sure the investment matched the orders properly. Mr. Britton was away frequently acting as an insurance trainer.

In regard to Limited Partnership sales, Mr. Britton stated the company would have a list of "product" that could be sold. Promoters of the product would contact sales staff and see if they were interested in marketing it. That was the only training. Mr. Britton never looked at the "Barclays" offering memorandum.

He described Kent Owens role in The Financial Planning Group offices as "Marketing Director for Western Canadian Brokerage Group selling life insurance." As such he was to visit The Financial Planning Group offices and teach how to sell life insurance. Mr. Britton was aware of "Platinum" because he was asked to assist in a large case of insuring "key players at Platinum." By the spring of '98 Britton was aware Owens was meeting with Goetz and "a lot of his duties were not in insurance." He was aware that salesmen were referring investors to Owens, "all sales were done by Mr. Owens." However, none of the material on Platinum "went through our office." People seeing Mr. Owens in the office could have been seeing him in respect to insurance or "going out for lunch." "He had people come by the office, but very few because most of the brokers were outside Regina." When he became aware that Owens was making a lot of sales Owens resigned "to set up his new position."

In the spring of '99 Mr. Britton became aware from Mr. Goetz, that a four or a six percent commission was paid to The Financial Planning Group to allow access to the salesman for distribution of Barclay and "Mariner". He didn't know if any such fee was paid.

Under cross-examination Mr. Britton denied referring five individuals to Mr. Owens or selling "Platinum."

Mr. Bergen gave evidence of his start in 1990-91 as a life insurance salesman with Jim Britton. He was licensed for mutual funds in 1992. When he heard about "Barclay" from Adrien Goetz, he believed he was a shareholder or manager in B. C. for the Financial Planning Group. He was advised that John Howard said he had done "seven feet of due diligence" on that product. Paper work on both "Barclay" and "Marina" was forwarded through the branch to head office for approval and they would have the "know your client form."

Mr. Bergen felt after Goetz's description of "Barclay" that there was no risk in the project and he invested \$100,000 in it through his wife. He believed in the product and it is why he sold it to Mr. Sauer. When he offered to buy it back it would be from commissions earned earlier on mutual funds or later on "Mariner" of which \$250,000 was owing to him.

He didn't encourage Sauer to get a return of principal when they met Adrien Goetz because he felt only a year was left before the project would be turned into a condo and a profit returned.

Mr. Bergen became a branch manager of The Financial Planning Group in 1997. It wasn't until a meeting of branch managers in Calgary in March or May of 1998 that anyone in the organization questioned Barclay, "Mariner" or Platinum and that was a Calgary branch manager. His understanding was that The Financial Planning Group would take care of compliance issues and he would sell approved product. His instruction on the products Barclay and "Mariner" was from Adrien Goetz and on Platinum it was Goetz as well as Kent Owens and "not much from George Bissett." When it came to the sale of Foundation to Mrs. Atherton his instructor was Don Britton a branch manager of The Financial Planning Group. It was a project sold as an

exempt product under the \$150,000 "sophisticated rule." He trusted Don Britton and the properties where the money was going. He stated, P. 525 line 6, "I did mention to Don that in order for me to go behind this product - - remember, I wasn't with The Financial Planning Group at this time, so I was relying more or less on myself and the due diligence - - I would have to have some comfort of where the money was going. At this time, remember Platinum was over, and no one really knew where the money from Platinum went. So in this case, I wanted to at least be on the signing of - - joint signing on the cheques so I would know the money was going to the investment and not to whatever else money would go to."

Those investments also ran into difficulty and he and two partners took "over those properties from Foundation" and he invested some \$70,000 plus expenses and feels the investors will get back "more than they were promised."

In regard to Grace Atherton he agrees in hindsight that "she shouldn't have bought the investment" but "as always, through the last years with Limited Partnerships if I believed in them, I believed in them and that was my problem." P. 528 line 15. He paid the equivalent of GIC interest to Mrs. Atherton when the investment was refunded by Foundation after the demand by Mrs. Atherton's solicitor.

When asked about his belief that The Financial Planning Group had approved Platinum's sale, Mr. Bergen said "approved of it maybe. I should rephrase that. Approved of it, meaning my superiors knew about it and never said anything negative about it." (P. 532 line 10)

In reply to his counsel's question about the risk level of Platinum he stated (P. 532 line 13), "I didn't think there was a risk level because, again, I trusted Adrien Goetz who I specifically asked two or three times, 'Is there a mortgage or caveat against the property that you're securing this with at the bank?' and the answer was yes. And I also asked that to Kent as well, and the answer was always yes. Find out later there was no property, there was no caveat securing the Platinum money raised."

Mr. Bergen described steps he took to mitigate the loss that was going to occur to investors in "Mariner"(Marina Shores), Barclay and Platinum. He had a concern that the General Partner might call the notes.

Mr. Bergen stated in response to a question about having read the Barclay Offering Memorandum that, "I would have skimmed it and got confused and put it down" and further "I understood parts of it." Mr. Bergen stated he was relying on Mr. Howard's decision as to whether the investment was either speculative or suitable for a growth account (which is how he categorized his clients) defined as "basically a three to five year investment." He said he would not have sold the limited partnerships if they were not approved by The Financial Planning Group.

He also stated that he underestimated whatever estimates of profit were made by the promoters when he discussed the investments with his customers.

He sold "Barclay" to his mother-in-law for \$60,000 cash and also some "Mariner" (Marina Shores).

When he dealt with clients he stated his approach was as follows, "I'd have said, You know, I'm aware of a product that I can't sell, but I can refer you to the company. It's paying 14 percent. It could be a good diversification tool. The markets are high, you might want to take some profits, and we're suggesting if you're interested you can meet with Kent and he's here today. Do you have any interest in that?" After that they would see Kent Owens. If they decided to invest he would discuss with the customer what amount they wanted to invest "or how much I thought was a reasonable amount." (P. 552 line 27) and he then or his staff arranged redemptions to fund the purchase. He believed that selling Platinum was "in compliance" because he was told "on repeated occasions by people I trusted such as Kent Owens and Adrien Goetz, that it was compliant." (P. 552 line 12) He reinvested at least \$85,000 of his commissions in Platinum or "with Kent."

Under cross-examination he mentioned the approximately 85 radio shows he did over two years entitled S.M.A.A.R.T. which stood for: Save Money, Accumulate Assets, Reduce Taxes. It was done at a cost of ten to twelve thousand dollars a year. Topics included paying off a house loan and borrowing for investment purposes to enable deduction of the interest cost. He also did one-minute or 30 second clips, Monday to Friday later for a six-month period. He also held seminars covering the same topics on the radio. He advertised (Exhibit 54) for these as the Money Doctor. His phone book advertisement includes estate planning and elimination of foreign content rules. He also used mail drop advertisements, an example being Exhibit 55, three or four times a year. He had taken the securities course in 1998 the Investment Funds course and the Chartered Financial Planning 1 course and the Certified Financial Planning course on personal relationships. He also had life insurance courses LUA 1 and LUA 2. He also went to a financial planning convention in Banff. He described the process of directing a customer to Kent Owens as a referral saying it was not a sale "because I didn't sell it."

He talked of Mr. Sauer buying and that he had referred to Barclay as "a hundred percent unbelievable product," "it's incredible, yeah." He felt "Mariner" was the same. He also classified them as the same risk or less as mutual funds. He also referred clients to other limited partnerships through The Financial Planning Group one called Synlan involved a loss of \$600,000 for his clients. He trusted Adrien Goetz because he worked with the Financial Planning Group in Vancouver, did seminars for Barclay in Regina.

He felt Foundation, which he became involved with in May-June of 1999, was different from what he knew about Barclays and "Mariner," "because I trusted the investments, the person advising on the investments in B.C. and I specifically asked to be on the signing of any cheques with regards to the money raised." (P. 588 line 22) At that time he knew Kent Owens, "was behind the scenes as an administrator. He's the one that found the realtor in BC in the projects." That made him nervous but when questioned (P. 590 line 23):

"Q But you still put - -

A But I was dealing with Don and Foundation, and Kent was not a shareholder.

Q But he's involved?

A Well, when we, found out the extent of his involvement, that's when we, with the realtor, worked on the ways to get the properties out of that involvement."

His testimony was that even in 1999 when people were not getting their money from the investments, as expected, he felt the investments were not at risk because the properties had not been sold. "Well, remember we weren't burnt on "Mariner" and Barclay not until December of '99 on "Mariner" and March of 2000 on Barclay."

"Q So Foundation was - -

A So at that point, Barclay and "Mariner" are fine. So the only thing I'd been burnt on up to that point, and that hadn't even been proven yet, was Platinum."

Platinum, he felt, was George Bissett, Adrien Goetz then Kent Owens. Kent was the sales manager of Platinum and he felt he was "set up" by George Bissett.

When Bergen became involved in "Foundation" he was no longer working for "The Height" anymore but he trusted Don Britton but as he "mistrusted" Owens who was in the background so he made an arrangement to have "the joint signature." He also met a realtor out of Vancouver who wasn't involved with the promoters of "Mariner" or Barclay.

In the sale of Platinum, Bergen admitted he never saw the offering memorandum until "way after I was done.referring people." (P. 602 line 4) He relied on George Bissett who was the General Partner and promoter. Relying on the promoter didn't "seem odd to me because I'm a commissioned salesperson, I get paid by commissions and I sell products." (P.604 line 20)

Bergen gave evidence of the last limited partnership he sold, "Cascade" in which he, with Doug Taylor and Denis Gauthier, "ran all aspects of that and the due diligence." (P. 607 line 5) with about a million invested.

While he stated he was currently switching his customers from mutual funds to segregated funds, he denied it was because he could no longer sell mutual funds but was because it was in the "best

interests of the clients." He said it made sense as life insurance "seg funds" avoid the foreign content rule for RRSPs.

Mr. Bergen stated that he didn't believe there was any liability attached to his customers signing promissory notes even though it was possible if the property was not sold at a profit. "they are simply just a way to make up the exemption amount," as he was advised by the promoter.

After being asked by Commissioner Flynn, "If you don't have to worry about the note then in reality you don't have a \$150,000 investment do you?" He believed the investments in Platinum where there was no note taken and less than \$150,000 invested was legal because, "I was told by Kent that they didn't need notes on Platinum because they were pooling the money."

In regard to selling units of Foundation to an 84-year-old woman, he felt it a suitable investment because the properties being invested in could be sold within a year. He also felt being involved with the projects of Foundation didn't cloud his judgement and wouldn't affect his client's view of the transaction.

Mr. Howard, when recalled, gave evidence of payments made to The Financial Planning Group or DPM with respect to "Mariner." Some had been previously entered in evidence but they showed all the monies received on Barclay and another cheque for \$29,000 was received from "Mariner" to cover commissions to its salesperson. He was questioned about Goetz and Gabor's relationship with The Financial Planning Group. They were never licensed by it or part of it in terms of Branch Managers. "They were a separate company and separate entity" (P. 629 line 23) a supplier of products. In BC Mr. Goetz had a service company, AGM Financial, that provided space to its representatives.

In regard to client information forms that Mr. Howard had been requested to review, a sample of investors in Barclay or "Mariner", only one indicated speculation as an investment objective. The rest indicated growth and two wrote tax shelter.

Mr. Howard went on to explain that they took some measures to highlight risk. In the "Mariner" transaction they required a Risk Disclosure Form signed if money was being borrowed and, "if there is a question on their net worth or assets in terms of that (investment objective), we made them fill out a different sheet of paper called a Limited Partnership Form, and we had the client sign it because that was a way of hopefully sending a message that this was a higher risk investment and they should really think twice or three times before going ahead." (P. 636 line 1-7)

We have presented the facts that were brought forward to the Commission panel. We will now present our findings in regard to these facts that relate to the Respondent Darcy Lee Bergen.

Two things should be clear about this. Firstly, in the course of the hearing a considerable amount of discussion took place as to the conduct of others. We are, however, restrained from taking action or making findings on this evidence pertaining to others because our conclusions will not be warranted until those other parties are able to present evidence in a hearing that involves their own conduct. As much as we might like to have other issues decided they cannot be decided in this hearing.

The second is that we carefully considered the evidence of the witnesses with the benefit of listening to them directly. We have considered it knowing that all the participants to the proceeding have interests that conflict and might reasonably be expected to be disputed in this forum and in others. After carefully observing and considering what we have heard, we find that where there is conflict between the evidence of Mr. Bergen and that of his customers, we accept the evidence of the customers. In regard to Mr. Bergen the basic question is for us to determine whether it is in the public interest that he continue to be prohibited from being employed by any issuer or registrant. We are led to the conclusion that he, by his conduct, has not demonstrated the requisite knowledge and attitude necessary for the proper fulfilment of his duties as a registrant.

We are going to relate some of the factors that we accept as evidence of this. It is clear that early in his career Mr. Bergen did well advising his customers on mutual funds. They achieved good results and they developed a strong trust in Bergen and they considered him their financial advisor. Success may have been easier in regard to mutual funds for Bergen as it is a straightforward product that he comprehended well or it could have been an illustration of the adage that a rising tide lifts all boats. In any event, Bergen would be well aware of his strong acceptance as an advisor because of that success and because it was a reasonable expectation for customers who dealt with him, as a result of his extensive advertising. They would equate him with SMAART investing and the Money Doctor that he held himself out as.

There are two main justifications presented for Bergen being able to continue as a registrant. One is that he was a victim of a shipshod approach to authorizing investment products by the firm he worked for. The firm, in either approving for sale "Barclay" and "Marina", or by allowing a situation to exist in the Saskatchewan office of The Financial Planning Group that would reasonably allow him to infer approval of the sale of "Platinum", had placed him in a position that he should not be held responsible for the sale of those products.

We do not accept what happened as a justification of Bergen's conduct in those instances. We think that Bergen's fundamental problem is that he still doesn't understand that a registrant cannot absolve himself for responsibility for his conduct because he relies on others and says as he did, "I'm a commissioned salesperson, I get paid by commissions and I sell product." While he may be paid commissions, his responsibility as a registrant is more than to sell product. It is to properly exercise his duties in a manner compatible with his fiduciary duty to his customer. He cannot carry out this duty if he doesn't understand the nature of what he is selling. He clearly admits he had no understanding of "Barclay" and "Mariner." While not understanding these limited partnership offerings, while they were clearly different from mutual funds, he did have access to offering memorandums that clearly warned, on their face page, that they were speculative. Looking only at the risk factors shows ample reason to avoid these offerings for his

conservative minded customers. The tax position of those investing via RRSPs is a matter of interest and the warning about there being no tax opinion is a particular cause of concern.

The fact that two entities were on a list of product that could be sold means that they could be of interest to some customers. The registrant has to weigh that fact in the light of his own personal knowledge of the investment or as Mr. Howard stated, he expects a salesman to know what he is selling. He must then apply this knowledge to decide if it is suitable given the circumstances of his customer and considering the degree of reliance the customer is placing upon him. The fact that others removed from the relationship are examining any purchase as part of their supervisory duties does not relieve the salesperson from responsibility for a recommendation. A responsibility on the part of the salesman exists because they are often the only direct link of the customer to the firm. This is all the more reasonable to assume when the salesman has entered into a customer relationship by virtue of vigorously advertising his expertise.

We also do not think a salesman can remove himself from his fiduciary duty by saying others were involved in making the sale, that all he did was refer customers on to others. Here we have more evidence than just referring. We have a payment of an 8.5% commission for a mere referral. It was not just a token \$100 "thank you" regardless of results. It is also clearly conduct in furtherance of a trade and contrary to the Securities Act unless an exemption can be established. The customers went to see Mr. Owens and bought Platinum because, after seeing Bergen, they thought it was like a G.I.C. They did this because Bergen was their advisor and they relied on him to send them to a good place to invest. We find the client's expectation reasonable, given Bergen's characterization of the investment and his position as their "advisor." He had a duty to be more informed but he admits he never saw an offering memorandum until after he was done "referring" Platinum.

We also find it unacceptable, as a registrant selling an exempt product such as "Barclay" and "Marina", to have a customer enter into a sale by signing documents that are not clearly explained to them in regard to highly material matters. We accept the evidence that Bergen either did not tell his customers they were signing promissory notes making them liable for a

potential investment of \$150,000 or he explained it away in a fashion that was not correct, that the note was "not an issue." If it wasn't an issue, i.e. if the full sum of \$150,000 was not at risk, the investment was not an exempt transaction and shouldn't have been made. If anyone, whether a registrant or not, is going to take any part in an exempt trade then the law requires it to be exempt in fact or they should not be a party.

In the case of "Platinum" one can have some sympathy for Bergen as he says he was misled by the promoter as to the legality of its sale in less than \$150,000 amounts. However, given that his firm had not explicitly authorized any transactions, and the information he received came from a promoter, he was in a situation where he was clearly acting on his own and should have requested independent evidence of the legal status of the product. Whether there was implicit approval due to Owens being in the office or Howard having knowledge of the sales didn't absolve Bergen from the need to be certain of an exemption before acting in furtherance of a trade.

In this case the reason given and accepted by Bergen was a particularly lame one. He was told that there was no necessity for meeting the \$150,000 exemption because there was a "pooling of funds." Almost every security involves a pooling of funds; it is their fundamental attribute. That answer should have sent Bergen to get outside advice.

The attempt to lay blame on others fails completely in the case of the transaction involving Mrs. Atherton, a widow in her eighties. The transaction was explained so poorly she had no understanding of it and certainly no idea of the extent of her liability on the note signed. While this transaction was reversed it was only done so after a demand from her solicitor. While there was some contention that the investment in "Foundation" was not a security, we would consider that it was in an investment contract where she was placing money and relying on the efforts of others to obtain a profit and as a result clearly a security. Bergen defended the suitability because he was involved, to some extent, in controlling the placing of the funds. We do not consider that a justifiable assumption regarding an investment where potential conflicts are undisclosed and investments are in real estate which is not conducive to classification as a liquid

and liquidity is a prime requirement for someone of that age for estate settlement purposes if for nothing else.

We have considered the witnesses understanding after talking to Mr. Bergen. Mr. Ackerman, a small conservative investor, concludes "Platinum" has a 14% guaranteed return. All he saw was Exhibit 32, a single sheet hand out with nothing much concrete on it other than the repetition of 14% coming from a list of unspecified investments. He clearly bought on Bergen's recommendation. \$31,000 invested out of \$80,000 of savings was not suitable and even if it was, it was not properly explained so that Ackerman was aware of the true nature of the investment. Mr. McKenzie was certain he was being guaranteed 14% and we accept that he wasn't told it was just "secured." Mr. Coons was very impressive as a witness as to what he was told, it was a 14% GIC like investment. All his transactions took place in Bergen's office with no reliance on The Financial Planning Group. It is not hard to realize how these customers formed such an opinion. Bergen himself when asked, P. 551 line 6, Question: Now when you referred people over to Kent Owens, did you introduce the product at all to the people? Answer: yeah, the way I did it was when I booked an appointment in March, or late February-March I'd have said, "You know, I'm aware of a product that I can't sell but I can refer you to the company. It's paying 14%. It could be a good diversification tool..." With this example of his own words, Bergen offers nothing in the slightest that shows anything conditional to the payments, it's paying 14%.

Bergen failed his customers by leading them to an investment he himself characterized as "unbelievable" and "secure." Yet his idea of security of a real property investment was to ask if "there is a mortgage or a caveat" against it. Considering that even if there was property in fact there are many other factors that can cause a loss and remove the investment from being equivalent to a GIC. This is what he led customers to believe and he had no reasonable grounds upon which to base it.

He continued to show a reckless attitude towards his customers in recommendations made after "Barclay", "Mariner" and "Platinum" where he could not put any blame on his former employer. He knew Kent Owens was behind the scenes in "Foundation" yet he proceeded to get involved.

He states that "we weren't burnt on Mariner and Barclay not until December of 99 on Mariner and March 2000 on Barclay." He apparently felt that the missed payments on these investments, which he knew of by May of 1998 and on which he had written at least one letter on behalf of a customer who complained, was not being burned. We feel this was ample grounds for caution that was not exhibited, as the circumstances clearly required.

These concrete results of Mr. Bergen's conduct with investors leads us to the conclusion expressed earlier that he is not demonstrating the knowledge and attitudes necessary for fulfilment of his duties as a registrant and to the public.

As stated at the Hearing, the panel is issuing these findings and will hear representations as to sanctions. This matter will be heard on Wednesday, October 11, 2000 at 9:00 a.m. at the Commission Hearing Room.

DATED at Saskatoon, Saskatchewan,

Marcel de la Gorgendière, Q.C.
Chairman