July 16, 2021

IN THE MATTER OF: **THE SECURITIES ACT**

-and-

IN THE MATTER OF: **JANICE ANNE THOROSKI AND CLAIR STUART CALVERT**

REASONS FOR DECISION

OF

THE MANITOBA SECURITIES COMMISSION

Dates of Hearing: **May 17, 18, 19 and 20, 2021**
June 11, 2021

Panel:

Panel Chair:	Ms. L.A. Vincent
Member:	Ms. A.E. Martens
Member:	Mr. D.A. Huberdeau-Reid

Appearances:

Ms. R. Campbell	)	on behalf of Janice Anne Thoroski
Mr. Clair Stuart Calvert	)	on his own behalf
Ms. K.G.R. Laycock	)	Counsel for Commission Staff

Decision

Introduction

1. In a Notice of Hearing and Statement of Allegations, both dated March 26, 2014, Staff of the Manitoba Securities Commission (Staff) alleged that Janice Anne Thoroski (Thoroski) and/or Clair Stuart Calvert (Calvert) contravened the provisions of Part 3.1 (1) (a) of National Instrument 23-101 (NI 23-101).

2. Specifically, it was alleged that the Respondents engaged in trading activity in Benton Resources Corp. (Benton) that included up-ticking and spoofing, whereby, directly or indirectly, Thoroski and/or Calvert engaged in or participated in a transaction or series of transactions or method of trading relating to a trade in or acquisition of a security or any act, practice or course of conduct, whereby she/he knew or ought reasonably to have known, that such activity resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, a security and that such conduct was a form of market manipulation.

3. In our opinion, Staff have not proven the allegations against either of the Respondents for the reasons set out below.

Agreed Facts

4. Benton is a mining and resource company. It is listed on the TSX Venture Exchange (Exchange) and was so listed during the Review Period (as defined below).

5. Thoroski is a retired school teacher and resided in Winnipeg Manitoba during the Review Period.

6. Calvert is a retired securities professional. At some points during his career he was registered with the British Columbia Securities Commission.

7. Thoroski and Calvert were a couple during the Review Period.

8. Prior to and during the four (4) month period from November 1, 2009, to February 28, 2010 (the "Review Period"), Thoroski had an online brokerage account (the "Target Account") with BMO Nesbitt Burns (BMO NB).

9. The Target Account held various securities during the Review Period, including shares of Benton.

10. All trading of Benton shares in the Target Account during the Review Period was conducted online by the Respondents. None of the trades were phoned in or placed through a broker.

11. Thoroski entered four orders for Benton shares in the Target Account during the Review Period. Those orders were entered on November 13, 2009, November 19, 2009, December 10, 2009, and December 18, 2009 (collectively the "Thoroski Orders").

12. Calvert entered all other orders for Benton shares in the Target Account during the Review Period.

13. With respect to Benton shares, during the Review Period, the Target Account:

    a. Entered 174 buy orders for a total of 715,500 shares,
    b. Entered 28 sell orders for a total of 180,500 shares,
    c. 101 buy orders, for a total of 144,500 shares, were filled,
    d. 23 sell orders, for a total of 161,000 shares, were filled,
    e. 73 buy orders, for a total of 571,000 shares, were unfilled, and
    f. 5 sell orders, for a total of 19,500 shares, were unfilled.

14. With respect to Benton shares, during the Review Period, the Target Account entered between one (1) to eight (8) orders on each of the Trading Days (as defined below) that it entered orders. There were eleven (11) Trading Days on which the Exchange was open but there were no orders entered for Benton shares in the Target Account.

15. For every order filled, the Target Account was charged a commission by BMO NB that ranged from $9.95 to $19.90.

16. Calvert had been granted stock options from Benton, as compensation in his role in its Investor Relations department. In March 2009 he had been granted 200,000 stock options that permitted him, at any time, to purchase Benton shares at a price of $0.28 per share. Calvert never exercised any of his options. At all times during the Review Period the market price of Benton shares was more than $0.28 per share.

Testimony of the Parties

Staff's evidence

17. Staff called one witness, Leonard Emil Terlinski (Terlinski). Terlinski is a retired investigator at the Manitoba Securities Commission (MSC) who worked at the MSC from June 2007 to June 2019, although not continuously and not always on a full-time basis. Prior to working at the MSC he had worked as a police officer for the Winnipeg Police Department, including in the major crimes unit.

18. The investigation in this matter commenced in June 2010, following the receipt of a letter including a report (the "IIROC Report"), from the Investment Industry Regulatory Organization of Canada (IIROC). Terlinski stated that the IIROC Report was the starting point for his investigation.

19. The maker of the IIROC Report was not called to give evidence by Staff counsel. Accordingly, the Panel accepted that the IIROC Report was received by Staff but does not accept as fact any of the allegations or conclusions contained in the IIROC Report.

20. Terlinski stated that he reviewed information attached to the IIROC Report, including documentation requested by IIROC from, and provided by, BMO NB (the "BMO NB Data"). The BMO NB Data provided details, by client, as to orders that had been placed in Benton on each day the Exchange was open for trading (each a "Trading Day") during the Review Period.

21. Terlinski testified that he requested all trading data from the Exchange relative to Benton for each Trading Day during the Review Period. This information was referred to as "TOQS". The TOQS included the bids, orders and trades in Benton on each Trading Day during the Review Period. The TOQS did not identify the beneficial owners, but rather the entities that had direct access to the trading system, such as broker-dealers.

22. TOQS data was provided in excel spreadsheets. There was a TOQS spreadsheet for each Trading Day during the Review Period for which at least one order had been entered for Benton shares from the Target Account.

23. The TOQS spreadsheets contained fifty-five (55) columns of data. Depending on how busy a Trading Day was, the TOQS spreadsheets included more than one hundred (100) rows of data.

24. The Panel was provided with an explanation for only a few of the fifty-five columns in the TOQS spreadsheets. The majority of the TOQS spreadsheets were not referred to in any way during the evidence of Staff. The purpose of referencing a few of the TOQS spreadsheets was to show the "raw data" from the Exchange's trading system that, in conjunction with some of the BMO NB Data, was used by Terlinski to prepare the Master Spreadsheet (as defined below).

25. From both the BMO NB Data and the TOQS spreadsheets, Terlinski prepared a bespoke spreadsheet, in which he included each bid, offer, and trade in the Target Account in Benton during the Review Period. This document was filed as an exhibit and referred to in the hearing as the "Master Spreadsheet.

26. Terlinski testified that he had refined the information on the Master Spreadsheet many times to extract from the TOQS spreadsheets and the BMO NB Data only information pertaining to the Target Account.

27. Terlinski testified that in preparing the Master Spreadsheet, he had added additional columns of information that were not derived from either the TOQS spreadsheets or the BMO NB Data, but rather was information obtained during his investigation. This additional information included:

    a. how many Benton shares were held in the Target Account,
    b. what class in high school Thoroski would have been teaching at the time an order in the Target Account was electronically entered into the trading system on the Trading Day at issue,
    c. an "IP" address column that detailed the IP address from which the orders originated; and
    d. an "Other Comments" column. The "Other Comment" column was inconsistently filled out.

28. Terlinski testified that he did not investigate or review any market data in Benton other than the bids, offers and trades in the Target Account during the Review Period.

29. Terlinski did not testify as to any relevant market information of Benton, such as press releases, material change reports and/or financial statements and financial information. Terlinski testified that press releases during the Review Period were not important to his investigation. In response to a question on cross examination, directing his attention to

the fact that between 300,000 and 400,000 Benton shares had traded on a single Trading Day during the Review Period, his response was "*We don't know who's doing the trading, or what prompted this burst of trading. It could have been a press release, it could have been a new release. That not something I looked into, like, on a day to day basis, with Benton."*

30. Terlinski was asked to identify a document in Staff's Book of Documents which was a decision of the Exchange. In 1997 the Exchange had accepted a settlement agreement against Calvert for unauthorized trading dating back to 1988. A minimal fine had been assessed. Typically, due to the potential for prejudice, past disciplinary matters are not raised in the merits portion of a hearing and are only brought up in the sanction portion of a hearing if the matter proceeds to that stage. Ultimately this was a very minor matter which the Panel found to be irrelevant to this hearing.

31. Terlinski testified, both in his direct examination and under cross examination, that he had no evidence that the trading activity in the Target Account had any impact on the price of the Benton shares during the Review Period. In response to a question on cross examination he stated: *"And you're right, this is a rising market and there's no doubt about it, and this one account is not responsible for that rise, absolutely not."*

32. Terlinski, upon being directed to information in certain of the TOQS spreadsheets during cross examination, agreed that;

    a. At least seven (7) million shares of Benton were traded during the Review Period,
    b. On December 10, 2009 there were orders for 500,000 shares of Benton placed in the Exchange's trading system. Many of these orders were placed at prices off the market price and did not fill, and
    c. On just one Trading Day, December 12, 2009, there were fifty-seven (57) upticks in the Benton share price.

33. Terlinski was not qualified as an expert witness and accordingly, was not able to provide opinion evidence. Although he had received some training on markets and market manipulation prior to commencing this investigation, it was limited. As one example, he was unaware that full market depth (all orders in the trading system) is not always available without the payment of additional market data fees. He testified that he did not know what Level II data was. This contradicted his testimony on direct that all of the bids and offers that were placed by the Target Account, including those far off the market price, were viewable to all market participants.

34. It was not clear to the Panel that all of the information in the Master Spreadsheet was complete and accurate or that Terlinski and Staff counsel fully understood what "market price" was. On several occasions, in reference to certain of the orders in the Target Account that did not fill, Terlinski was asked to state what the market price was at the time of the entry of the said order by reference to the Master Spreadsheet and the price set out in the row either above or below the said order. As the Master Spreadsheet only included orders and trades in the Target Account and not the totality of the market data, both the questions and answers were confusing and inaccurate.

35. The Panel also found the evidence on how the opening price of securities at the Exchange are determined to be questionable. At no time was the opening price of Benton securities referred to as the "Calculated Opening Price or COP", which is how it is defined in the

rules of the Exchange. In addition, the details of how the COP is calculated, which are available on the Exchange's website and referenced in other cases, including in *Re Sole* 2016 IIROC 30, were not put into evidence in this hearing. Instead, the Panel was told that the opening price was set by an "algorithm", which is not a complete or accurate description of how the COP is determined.

Calvert's evidence

36. Calvert represented himself at this hearing. He testified and was cross examined. The Panel found his evidence to be forthright, consistent, and credible.

37. Calvert readily acknowledged that he had entered all orders in the Target Account during the Review Period, other than the Thoroski Orders.

38. Calvert acknowledged the prior disciplinary matter but testified that what he had agreed to was the minimum fine permitted under the Exchange's rules at the time, and that he had not enriched himself by the trading that had been found to be unauthorized.

39. Calvert advised that he had a bankruptcy in his past.

40. Calvert testified that he was unaware that there should have been a written trading authorization on file at BMO NB in order for him to trade in the Target Account. He said that once he became aware of that requirement the required authorization was filed with BMO NB.

41. Calvert explained what he was doing in his trading of Benton in the Target Account. He stated that after years where trading in securities could only be performed by registered brokers, at considerable commission charges, sometimes up to $300 per trade, he was excited to be able to trade himself electronically, for low commissions.

42. Calvert testified that he enjoyed playing the market and liked to trade. His evidence in this area was unchallenged. "*…I was like a kid in a candy store. I love trading. I love playing online poker. I've got some ADHD problems. It was fun for me. And for $9, I mean, what the hell. You know, it was like no money."*

43. Calvert exhibited a reasonably good understanding of markets and market data and he articulated a definition of spoofing which was more accurate and detailed than Staff's witness. He was not challenged on cross examination on his definition of spoofing. He denied that his activity in the Target Account constituted spoofing.

44. Calvert was consistent in stating that his trading activities in the Target Account during the Review Period had no improper purposes.

45. Calvert testified that the stock options he had been awarded by Benton were in place until 2014. He testified that once the pleadings in this matter were issued, he left the employment of Benton. He had a period of thirty days subsequent to leaving Benton in which to exercise his stock options. Calvert stated that he never exercised any of the stock options.

46. Staff counsel did not raise, on the cross examination of Calvert, the allegation of up-ticking. The Panel notes the unfairness of not putting this allegation to Calvert but later arguing

that he had committed the violative conduct. The Panel notes the following from the decision of the Alberta Court of Appeal, in *Walton* v *Alberta Securities Commission*, 2014 ABCA 273 (CanLII), commencing at paragraph 143:

[143] The biggest problem with this analysis is that it was never put to Gayle Walton in cross-examination that she was being dishonest in her evidence, and that her professed ignorance was unreasonable. The Commission not only found that she was lying under oath, but that it was "beyond belief" that an accounting professional could operate under this sort of misapprehension about the tax rules. Yet Gayle Walton was never asked anything about the nature of her practice, whether she had extensive experience with stock options, or whether she had ever had to apply the superficial loss rule before.

[144] This was a violation of the rule in ***Browne v Dunn****, (1893), 6 R 67 at p. 70 (HL):*

> *Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.*

That rule is one of simple fairness; if a witness is to be contradicted, it is only fair that the subject of the contradiction be put to the witness. It is also important to the weight of any contradictory evidence because it is unreasonable to rely on untested evidence. In this case there was no evidence to contradict Gayle Walton, and the Commission's finding of a lack of credibility rested merely on the Commission Staff's bold assertion that her testimony was "unbelievable". This considerably weakens any inferences that could be drawn."

Thoroski

47. Thoroski testified and was cross-examined. Although at times upset and frustrated with the questioning, she responded fully to all questions asked. The Panel found her to be a credible witness.

48. Thoroski testified that she had previously had a brokerage account with her brother who was an investment dealer in Toronto, prior to setting up the Target Account at BMO NB.

49. Thoroski had acquired shares of Benton prior to meeting Calvert. She had first introduced Calvert to Benton. Thoroski testified that she had first met Calvert through a school connection and that they had been friends before becoming a couple in 2007.

50. One of the courses she taught at high school was consumer math, which had a market component to it.

51. Thoroski stated that she trusted Calvert to trade in her brokerage account and provided him with her username and password. She stated that they did not discuss, in detail, any of the trading Calvert did in the Target Account, although she would look at the monthly statements and notice the months that the account was making money and the months it did not.

52. Thoroski testified that she had entered the Thoroski Orders on November 13, November 19, December 10, and December 18, 2009.

53. Thoroski testified that she did not know that she was required to file a written authorization with BMO NB in order to allow Calvert to trade in the Target Account and that as soon as she became aware of this requirement she attended to the filing of the required documentation.

Law and Analysis

Standard of Proof

54. The standard of proof in this administrative hearing is the civil standard of "on a balance of probabilities". The Panel agrees with the position taken by the hearing panel in *Re Lim* 2017 BCSECCOM 196 (CanLII), which referenced the Supreme Court of Canada in *F.H. v. McDougall, 2008 SCC 53,* which held:

> *49. In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.*
> *…*
>
> *[the evidence must] be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test."*

Integrity of the Securities Regulatory Regime

55. The Panel agrees with the statements of a hearing panel of the Alberta Securities Commission (ASC) set out in *Re Podorieszach* 2004 CarswellAlta 2140 (CanLII);

> *"[69]. Our securities regulatory regime is designed to protect investors and to foster fair and efficient capital markets and investor confidence in those markets. The achievement of these objectives turns on the integrity of the capital markets and those who participate in them. It is essential to the integrity of the capital markets that the price of publicly traded securities reflects true market supply and demand, not deception or manipulation."*

56. The Panel agrees with the position of Staff counsel that specific or calculable harm does not need to be proven in a case of market manipulation. It is often impossible to connect the manipulative conduct of one market participant to harm suffered by others. Where manipulative market conduct occurs, harm is likely to impact the company at issue and/or the marketplace in general. All users of the markets are obligated to know and follow the laws and marketplace rules and are not able to defend on the basis that no measurable harm can be calculated.

National Instrument 23-101, Part 3.1 (1) (a)

57. The Statement of Allegations alleged that the Respondents had breached the provisions of Part 3.1 (1) (a) of NI 23-101, which reads:

> 3.1 Manipulation and Fraud

(1) A person or company shall not, directly or indirectly, engage in, or participate in any transaction or series of transactions, or method of trading relating to a trade in or acquisition of a security or any act, practice or course of conduct, if the person or company knows, or ought reasonably to know, that the transaction or series of transactions, or method of trading or act, practice or course of conduct

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or a derivative of that security; or

58. Manitoba relies on NI 23-101 as there is no prohibition against market manipulation in *The Securities Act (Manitoba)* C.C.S.M. c.S50. The Panel notes that various decisions of provincial securities commissions have set out the criteria necessary to prove manipulation under NI 23-101 Part 3.1. (1) a., or under the corresponding provisions in other province's securities legislation. Some decisions have set out the required criteria in one paragraph while others have broken down the criteria in three or four parts. However, the criteria outlined in the cases are all essentially the same.

Re Kilimanjaro Capital Ltd. 2021 ABASC 14 (CanLII) at paragraphs [153 -154]
Re Lim 2017 BCSECCOM 196 (CanLII) at paragraph [100]
Re Coastal Pacific Mining Corp. 2016 ABASC 301 (CanLII) at paragraphs [27-29] and paragraphs [34-39]
Re Reynolds 2013 BCSECCOM 15 (CanLII) at paragraph [7]
Re De Gouveia 2013 ABASC 106 (CanLII) at paragraph [99]

59. The Panel has determined that, in order to find that one of both of the Respondents have violated the provisions of Part 3.1(1) (a) of NI 23-101, the following four elements must be proven:

a. Did the conduct of the Respondent(s) relate to securities?

b. Was there a misleading appearance of trading activity in, or an artificial price for, the security or securities at issue?

c. If so, was that misleading appearance of trading in, or artificial price for, the security at issue, due, in part or in whole to manipulative behavior on the part of the Respondents?

d. If so, did the Respondent(s) have the required intent; that is, did the Respondent(s) know, or should the Respondent(s) have reasonably known, that their conduct had the requisite causal connection to the misleading appearance of trading in, or the artificial price for, the security at issue?

First Element- Did the conduct of the Respondent(s) relate to securities?

60. The Panel finds that the conduct of the Respondents in this matter related to a security. Benton was a publicly traded company and its shares were traded on the TSX Venture Exchange. The Benton shares were securities.

Second Element - Was there a misleading appearance of trading activity in, or an artificial price for, the security?

61. In *Re Kilimanjaro Capital Ltd.* 2021 ABASC 14 (CanLII), the hearing panel of the ASC, extensively reviewed the relevant caselaw and outlined the definitions of both a misleading appearance of trading activity and an artificial price.

"*A false or misleading appearance of trading activity may result where it is motivated by something other than bona fide investment interest and thereby creates a distorted projection of supply or demand (or both) for a security (De Gouveia at para 97)". [para 156].* and

"*In very general terms, the distinction between manipulative trading schemes that result in a misleading appearance of trading activity and an artificial price, is that the former often involves a distortion of the quantitative nature of trading whereas the latter more commonly relates to the qualitative nature of the security being traded. For example, wash trades and matched trades – where there are no genuine counterparties to the trades, - are archetypal means of creating a misleading appearance of trading activity by giving the impression of considerable interest in the subject security from the number of orders and trading volumes." [para 159]*

"*On the other hand….an artificial price more typically results from a distorted impression of the quality of the issuer's business prospects, financial results and similar attributes pertaining to the value underlying the issuer's securities." [para 160]*

62. In *Re Podorieszach*, the hearing panel of the ASC defined an artificial price as follows:

"89. Our conclusion is that in assessing whether a price is artificial, it is relevant to consider whether one party or another to a transaction is or is not acting in response to real demand for or supply of a security. For this purpose, the circumstances surrounding a transaction, including any special attributes of the parties and the manner in which it is carried out, can indicate whether or not the transaction reflects or does not reflect real demand and supply. "

63. In *Re Poonian* 2014 BCSECCOM 318 (CanLII), the hearing panel of the British Columbia Securities Commission (BCSC) took a different approach, by looking at whether certain "hallmarks" of manipulative conduct were in evidence which, in turn, would lead to a finding of market manipulation.

"¶131. It is important to look not only at the voluminous detailed evidence, but also to examine the overall picture to determine if market manipulation took place.

¶132. Effective market manipulation generally entails the existence of certain circumstances. These include:

- *Control over a significant proposition of the securities of a relatively thinly-traded issuer listed on a credible marketplace with securities trading at the outset at a low price*
- *The ability to orchestrate trades in those securities that result in a substantial increase in the market price of those securities, through targeted trades in those securities, and maintaining for a significant period of time the price of the securities at or near the highest price attained*
- *Developing or creating a pool of prospective purchasers at or near the high price and inducing them to buy where the sellers are primarily the alleged market manipulators*
- *Insofar as possible, the beneficial ownership by the alleged market manipulators is disguised through multiple account, multiple nominees or account names and wash trading*
- *To the extent that nominees are involved in the disguising of trading activities, their purchases are funded by or through the alleged manipulators."*

64. The Panel carefully reviewed the caselaw that we were directed to by counsel as well as other relevant cases. During the hearing, the Panel advised the parties that, as one of the Respondents was unrepresented, it was incumbent upon the Panel to ensure that the relevant caselaw was fully canvassed and considered. We have set out our review of the relevant caselaw in considerable detail. We determined that such detail was necessary to fully articulate our reasoning and decision in this matter.

65. Staff counsel directed the Panel to *Re Podorieszach,* where two Respondents, John and Peter, were found by the hearing panel to have engaged in market manipulation that resulted in a misleading appearance of trading activity and an artificial price of a security, Anthony Clark International Insurance Brokers Ltd. (ALC). In this case:
    a. John and Peter each held approximately 25% of the shares of a company, ACL, before it went public. Subsequent to the IPO they held over 350,000 shares each, which constituted approximately 5 to 6% of the issued and outstanding shares.
    b. Subsequent to the IPO, ALC was seeking additional capital through a special warrant private placement. It was viewed as desirable for the trading volumes and share price of ALC to increase in the lead up to the special warrant private placement.
    c. The Respondents engaged in promotional activities including news releases and internet promotions. They coordinated their promotional activities with a view to increasing the value of the ACL shares.
    d. One of the Respondents was a mutual fund dealer who actively promoted purchasing ACL shares to his clients.
    e. The hearing panel was provided with extensive market data on ACL, including trading volumes before and during the alleged market manipulation.
    f. Staff called an expert who testified that the increased trading volume and increased share price of the ACL shares was directly attributable to the promotional activities of John and Peter.

66. Staff counsel also directed us to the ASC's decision in Re *Gouveia* 2013 ABASC 106 (CanLII), where the hearing panel found that the Respondent knew or ought to have known that his trading activity was contributing to a false or misleading appearance of trading in, and artificial price for, a security. In this case:
    a. Gouveia was a day trader who also became a news commentator and used social media accounts to "bump" threads of others bullish on the shares of a publicly traded company, Magellan Minerals Ltd. (Magellan).
    b. Gouveia had set up several trading accounts at more than one brokerage firm and traded in Magellan shares in all of the accounts throughout the material time.
    c. Gouveia offered to provide communications service to Magellan's management, which he claimed would provide positive information on Magellan's corporate story.
    d. Gouveia was provided with share options in exchange for these promotional efforts. He was granted 200,000 share options which could be exercised in equal 50,000 amounts at 3, 6, 9 and 12 month increments following the granting of the options. Gouveia exercised all the options as soon as he was able to, netting a profit of approximately $122,000.00.
    e. The hearing panel was provided with all market data relevant to the Magellan shares, including best bid and offer prices, all market depth (all other bids and offers) and all trading volumes before and during the period that Gouveia was alleged to have manipulated the market.
    f. An expert witness testified, giving his opinion that Gouveia's promotional activities impacted the price of Magellan shares by increasing the share price and the

volume of trading. The expert then tied those increases to the profit made by Gouveia when he exercised the stock options.

g. Finally, staff counsel's case including calling an IIROC investigator with expertise on markets.

67. In *Re Poonian*, a hearing panel of the BCSC found the Respondents' conduct had resulted in, or contributed to, a misleading appearance of trading in or an artificial price for the shares of OSE Corp. (OSE). In this case:

a. The Respondents had acquired, in advance of commencing the manipulative scheme, a dominant market position in OSE through two private placements.
b. The Respondents' trading activities during the review period dominated the trading in OSE.
c. The Respondents had entered into an agreement with a brokerage firm to have certain of the brokerage firm's clients (the "Secondary Participants") buy and trade shares of OSE on the direction of the Respondents. The Respondents paid the brokerage firm for following these directions.
d. The Respondents directed the trading of the Secondary Participants in the OSE shares to that they would take the other side of orders placed by the Respondents. The evidence showed that the resulting wash trades occurred approximately 50% of the time.
e. The evidence before the hearing panel was extensive and included relevant market information pertaining to OSE including news releases, regulatory filings, information circulars and financial statements. In addition, all market data, trade summary and surveillance reports, matching trade reports and High-Low-Close reports were in evidence.
f. There were some telephone recordings for the trade directions given by the Respondents to the brokerage firm.
g. There were some emails between a broker and one of the Respondents (who was using a false name) that evidenced the trading directions for the Secondary Participants' accounts.
h. There were cheques in evidence supporting that a Respondent had made payments to the brokerage firm, and a handwriting expert was called to support that the signatures were that of the Respondent; and
i. The Respondents' trading constituted 64.47% of the overall buy volume and 88.52% of the sell volume.

68. In *Re Coastal Pacifica Mining Corp* 2016 ABASC 301 (CanLII), the hearing panel of the ASC found that the although the Respondents had not been proven to have caused a misleading appearance of trading activity, their behavior did cause an artificial price. In this case:

a. the Respondents had implemented a promotional campaign which included numerous news releases and emails which included incorrect information including inflated estimated mineral reserve calculations.
b. Prior to the promotional activities by the Respondents, trading volumes in the security had been low, with only 37,500 shares trading on three trading days over a two month period.
c. The hearing panel was provided with all trading data leading up to the alleged manipulative conduct, including the daily share volume and the daily "last price" information, and all market data including that of all market participants trading in the company.

d. The hearing panel found that there was both increased trading volume and an increased share price because of the promotional campaigns.
e. The hearing panel determined that, subsequent to the Respondents selling off their shares, they ceased the promotional campaign and the share volumes and prices decreased in response.
f. The hearing panel determined that the market participants who had traded in the shares following the promotional campaign had been misinformed and that they traded at higher prices than they otherwise would have based on the false information. The hearing panel found that the promotional campaign of the Respondents had caused this artificial price.

69. In *Re Lim*, three respondents, Lim, Mugford and a company, EHT, were alleged to have caused or contributed to, a misleading appearance of trading in, and/or an artificial price for, shares of a company called Urban Barns Inc. (Urban Barns). This case involved a lengthy and complex set of facts, a brief overview of which follows;

a. Lim and Mugford were friends. Lim was an investment advisor at a B.C. brokerage firm (PT). EHT was a wealth management firm in Switzerland.
b. The Respondents identified a US public shell company and merged it with a Canadian private placement company,
c. Lim set up a company in the Marshall Islands, called Concerto. Concerto set up a bank account at a Swiss bank.
d. The Respondents set up an escrow agreement with four of them as unnamed principals and EHT as the escrow agent. The escrow agent set up a bank account at a Swiss bank.
e. Lim and Mugford retained a third-party firm in the US to conduct an aggressive promotional and touting campaign. The hearing panel found the claims to be grossly promotional and inaccurate, including the claim that Urban Barn had *"….patented technology that would solve the global food crisis by growing crops 4 to 5 times faster, in 1/400ths of space and with 99% less water"*.
f. Lim directed both the wording and the direction of the campaign but disguised his role by having another individual send the emails. The monies for the promotional campaign, which totalled US $1.2 million, were sent from the escrow agent.
g. The Respondents purchased significant shares of Urban Barn before it commenced trading through two private placements. These shares were sent to EHT to be sold through its four North American brokerage firms. Lim directed the sale of these shares through use of a private messaging service.
h. Just prior to the first day of trading, Lim approached many of his clients to solicit them to purchase shares of Urban Barn.
i. On the first two days of trading, one of EHT's US brokerage firms was responsible for 100% of the Urban Barn shares that were sold.
j. The price of Urban Barn shares commenced trading at USD $0.85 per share and rose to USD $1.27 a share.
k. The Respondents sold over 3.7 million shares.
l. Notwithstanding the above proven facts, the hearing panel did not find that the respondents had caused a misleading appearance of trading in the shares of Urban Barns since they found the trading activity to be actual trading activity.
m. However, the hearing panel did find that an artificial price for the shares of Urban Barn had been proven. The key elements to the finding of an artificial price for the Urban Barn shares were: 1) the promotional campaign, which distributed "*…grossly promotional tout sheet materials"*, 2) the large initial demand created by

Lim, through his and his clients' trades, and 3) the CBH brokerage accounts that dominated the sell side of the trading in Urban Barn shares.

n. The hearing panel noted that this *"…behavior in the price of the Urban Barns shares, without any corresponding news releases by the issuer that could account for such a price increase, is supportive of a finding of there being an artificial price for these securities*."

70. The above noted cases have several similar hallmarks or indicators that led the hearing panels to find that the manipulative conduct caused the misleading appearance of trading activity and/or artificial price. These include:

a. Respondents having an insider role in the company or companies at issue. In some cases, the respondents controlled the companies but in other they had jobs adjacent to the companies.
b. Respondents with the ability to control a significant number of outstanding shares. This was described, in some cases, as having market dominance.
c. Respondents taking steps to hide or disguise their involvement with the company. The most extreme example is in the *Re Lim* case, but in others the respondents used accounts in other firms or held accounts in other countries, or directed nominee accounts.
d. Respondents directing or encouraging significant trading in the shares of the company, such as soliciting clients at investment firms, or paying investment firms to direct their clients to purchase shares.
e. Respondents selling and buying shares in concert with others to effectively wash trades. Wash trading is a significant hallmark for a misleading appearance of trading activity.
f. The use of promotional or touting campaigns, sometimes performed by the respondents, and sometimes through the payment of monies by the respondent(s) to a third-party company.

71. The Panel noted that in all these cases, in order to assess whether there had been a misleading appearance of trading in, or an artificial price for, the security, the hearing panels had detailed factual evidence to review in making their determinations. This factual evidence included many or all of the following:

a. All market and trading data of the security at issue, including the market data for all market participants. It is not possible to determine these allegations by reference only to the market data of the alleged market abusers.
b. Market and trading data of the security at issue both before and after the period in which it is alleged that the market manipulation took place.
c. Market information on the security at issue, including press releases, material change reports, financial statements or any other relevant information that could have an impact on trading volumes or share price movement.
d. Information on any ancillary market activities that a respondent is engaged in, including promotional or touting activities, private placements, stock transfers, mergers with other companies, and similar.
e. Information on benefits such as stock options the respondents are entitled to, and when and how they are exercised by the respondents.
f. Evidence from one or more expert witnesses with expertise in market data and market manipulation cases.

Analysis

72. The only evidence led by Staff counsel on Benton was trading activity in the Target Account during the Review Period. Terlinski testified that he did not investigate or review information on what the rest of the market in Benton was doing during the Review Period including at the time of the bids, offers and trades in the Target Account. The admissions that were made by Terlinski during cross examination, on the wider market data of Benton during the Review Period, concerned the Panel as we were clearly not receiving all necessary and relevant information.

73. The following market information on Benton was not in evidence for each Trading Day during the Review Period:
    a. Calculated Opening Price,
    b. Calculated Closing Price,
    c. Trading volumes,
    d. The percentage of trading that the Respondents conducted relative to the trading by the rest of the market participants,
    e. Bid/ask spread,
    f. Information of trading and bid/offer activity in Benton surrounding the trading and bid/offer activity in the Target Account,
    g. The number of Benton shares issued and outstanding and the percentage of those shares that the Respondents owned or controlled,
    h. The number of all up-ticks in Benton shares on each trading day and the trading activity surrounding the trades that resulted in up-ticks,
    i. The number of all downticks in Benton shares on each trading day and the trading activity surrounding the trades that resulted in downticks.

74. Although it is possible that the TOQS spreadsheets may have contained some of this information, the Panel was not directed to it and there was no *vive voce* evidence on it. Terlinski's testimony on the matter was that "*...the TOQS are very difficult to read."* The Panel had no ability to do a deep dive into the TOQS spreadsheets to determine information on the Benton market during the Review Period. A hearing panel cannot be expected to read and analyze raw market data from an exchange's electronic trading system. This information must be put into evidence by Staff counsel.

75. There was no evidence on Benton for any period of time other than the Review Period.

76. There was no evidence of any relevant market information of Benton, including press releases, material change reports and/or financial statements and financial information.

77. The Panel questions why Staff's case did not include readable information on the totality of the Benton marketplace during the Review Period. Regulators, as well as securities and derivatives exchanges in both Canada and the U.S. utilize trade surveillance technology that can provide clear graphic support of market analysis including alleged market abuse scenarios. For example, IIROC utilizes SMARTS®, a robust and well-regarded trade surveillance program. The benefits of these trade surveillance programs are that they allow the hearing panels to view the entire market at issue including the respondents' trading activity and the responses of other market participants to that activity. The Master Spreadsheet was an incomplete and ultimately unhelpful document for the purposes of this hearing as it contained only the orders in the Target Account and no other relevant information.

78. Terlinski testified, both in his direct examination and under cross examination, that he had no evidence that the trading activity in the Target Account had any impact on the price of the Benton shares during the Review Period.

79. Given the lack of the relevant and necessary evidence as outlined above, the Panel does not find that there had been either a misleading appearance of trading in, or an artificial price for, the shares of Benton during the Review Period.

Third and Fourth Elements

If so, was that misleading appearance of trading in, or artificial price for, the security at issue, due, in part or in whole to manipulative behavior on the part of the Respondents?

If so, did the Respondent(s) have the required intent; that is, did the Respondent(s) know, or should the Respondent(s) have reasonably known, that their conduct had the requisite causal connection to the misleading appearance of trading in, or the artificial price for, the security at issue?

80. As there was no evidence of a misleading appearance of trading activity in, or an artificial price for, the shares of Benton, elements three and four did not need to be considered.

81. However, the Panel considered the evidence to determine whether there was manipulative conduct.

82. Staff had alleged the Respondents had conducted two forms of manipulative conduct, "spoofing" and "up-ticking". For the reasons set out below, the Panel found that there was no evidence of either spoofing or up-ticking in the Target Account.

Spoofing

83. Spoofing was defined twice by Terlinski as placing bids or offers in the market without an intent to trade. The evidence that there is no intent to trade is that the orders were placed outside of the market price. During cross-examination he also stated that spoofing is "*…entering an order knowing that it has no reasonable expectation to fill."*

84. In cross-examination, when directed to large volume orders placed by other market participants, that were placed well outside the market price, Terlinski stated that there were "*various different trading strategies"* that could cause such orders to be entered. He did not explain what those trading strategies were or explain why the orders placed in the Target Account were not placed as one of those "*various different trading strategies*".

85. Terlinski testified that he was able to see a pattern of spoofing in the first eight orders in the Target Account during the Review Period. He noted that the first three orders were entered in the pre-open period and were below the current market price. He argued that these first eight rows evidenced spoofing on their face, without reference to any other trading activity in Benton during the Trading Days at issue. The table that follows is excerpted from the first eight rows of the Master Spreadsheet.

	Trading Day of order(s)	Time order entered	Buy order volume	Sell order	Order good till	Order price	Fill price (if filled)	Buy cost	Change
1	2009-11-02	06:59	10,000		2009-11-06	0.300			
2	2009-11-02	07:02	10,000		2009-11-06	0.200			
3	2009-11-02	07:03	5,000		2009-11-06	0.250			
4	2009-11-03	Target Account placed no orders on Trading Day 2009-11-03							
5	2009-11-04	07:55	5,000		Order cancelled at 08:49	0.386			
6	2009-11-04	14:58	2,500		End of Trading Day	Market	0.430	$1,075.00	0.01
7	2009-11-05	07:51	5,000		End of Trading Day	0.39			
8	2009-11-05	09:17	500		End of Trading Day	Market	0.435	$ 217.50	0.035

Note that the time of order entry on the Master Spreadsheet was provided only to the minute which is imprecise and inconsistent with how an electronic trading system records order entry / trade times.

86. The Panel does not agree with Terlinksi's definition of spoofing or that there is evidence, in the orders and trading in the Target Account, of spoofing. At its essence, spoofing is placing orders with the intent to fool the market and thereby to induce other market participants to respond in a way that provides the spoofer with some benefit. Proving that trading is spoofing requires more than showing that orders were entered which fell outside of the best bid/ask spread. If that were the case, then all market participants submitting bids or offers outside of the best bid/ask spread would be spoofing. The submission of bids or offers that are not immediately or subsequently filled is not, in absence of other facts, evidence of spoofing.

87. There are few reported cases in which the provincial securities commissions have dealt with and/or defined spoofing. The Panel reviewed the decision in *Re Sole*. In this case the IIROC hearing panel was asked to approve a proposed settlement agreement. Although the charges were pursuant to the Universal Market Integrity Rules to which registrants of IIROC are subject, the issue was whether the orders entered by the registrant had resulted in a false or misleading appearance of trading activity in, or interest in, the purchase or sale of securities or an artificial price for securities. The violative conduct alleged to have been used by Sole included "spoofing".

88. The hearing panel in *Re Sole* reviewed the proposed settlement agreement which included a statement describing how the TSX Venture Exchange determines the Calculated Opening Price (COP) for each security listed. There was extremely detailed information on each of the orders Sole entered, the response to those orders by other market participants, which orders were visible or not during pre-open, the timing of Sole's orders, and how each order did or did not impact the COP of the securities he was trading in. There was also extensive information in Schedule B to the decision which is set out in both narrative and chart formats and extends for thirty-four pages.

89. The information and evidence set out in the *Re Sole* decision is a good example of the evidence necessary to support allegations of improper conduct relative to NI 23-101 Part 3.1 (1) (a).

90. The Panel notes that spoofing may take various forms, but often involves placing non-bona-fide orders on one side of the market to create, or attempt to create, a false or misleading impression of trading or interest. These orders may then induce or bait other

market participants to enter better priced orders. The spoofer may benefit from baiting or spoofing the other market participants by securing a price advantage for the shares he currently holds or for orders he has placed on the other side of the market. The intent of the spoofer can also be to alter the appearance of supply or demand to artificially move the price and mislead other market participants, while also benefiting the spoofer's own positions. There was no evidence of this behavior in the Target Account.

91. Spoofing is often performed by "layering" the order book. A trader will enter one or more non-bona fide orders on one side of the market, usually a large order, which is outside of the best bid or offer. At the same time, the trader will "layer" orders on the other side of the market. These "layered" orders are the orders that the trader wants to have filled. Once the market notices the larger non-bona-fide order(s) and starts to respond, the trader quickly cancels the non-bona-fide order(s) and takes the benefit of his filled orders on the other side of the market. The trader has made a profit from the reaction by the market to those spoofed order(s) which he never intended be filled. There was no evidence of layering activity or of quick cancellations of orders in the Target Account.

92. Another example of spoofing is submitting and/or cancelling so many orders that it overloads the trading system and/or prevents others from entering orders into the trading system. There was no evidence of such activity in the Target Account. There were never more than eight orders entered by the Target Account on any one Trading Day. On Trading Days when more than one or two orders were entered they were often spread out over the Trading Day. Most of the orders that were entered by the Target Account, other than market orders which were filled shortly after entry, remained in the trading system for minutes or hours, and in some cases remained in the trading system for days.

93. Spoofing can also occur in conjunction with activity outside the trading system. Disseminating false promotional or "touting" materials can be used by a trader to get attention for the security at issue which can increase trading volumes and/or the price of the shares. The spoofer will make a profit through shares already owned or by taking advantage of stock options. There was no evidence that the Respondents did any promotional or other touting activity. Calvert never exercised any of his stock options, although had he done so, at any point during the Review Period or thereafter, he would have made a significant profit.

94. The Panel finds that the trading activity in the Target Account during the Review Period had none of the criteria of spoofing.

Up-ticking

95. The second manipulative behavior alleged by staff was "up-ticking".

96. Up-ticking was defined by Terlinski as *"…entering succeeding orders that uptick the price again, and again and again, which is, of course, against the interests of someone who is buying."* However, there was no trading activity in the Target Account that met this definition.

97. The overwhelming majority of the fills of orders in the Target Account were based on market orders. Terlinski had testified that the actual price of market orders originating from clients were intermediated by BMO NB which put in prices prior to forwarding the orders to the Exchange's trading system. Of the orders that were placed in the Target Account

as other than market orders, only twelve (12) resulted in an uptick in the Benton share price. The Panel does not accept that twelve (12) orders over a four (4) month period supports an allegation of improper up-ticking.

Inferences

98. During closing arguments, Staff counsel urged the Panel to make inferences on which to find the Respondents guilty of the manipulative conduct alleged against them.

99. The Panel accepts that with allegations of improper trading activity often the evidence is largely circumstantial and that inferences may be drawn from facts. In *Re Holtby* 2013 ABASC 45 (CanLII), a hearing panel of the ASC held:

> *[463] To summarize, when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one – one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences. That said, a reasonable inference need not be the only inference that can be drawn, not eh one that is most obvious or most easily drawn (Suman, at para.308). As for considering the totality of the evidence, as noted in The Law of Evidence in Canada, 3rd ed. (at para.2.77), " [p]ieces of evidence, each by itself insufficient, may…when combined, justify the inference that the Facts exist."*

100. In *Re Deyrmenjian* 2018 BCSECCOM 125 (CanLII), a hearing panel of the BCSC also considered when a hearing panel can make inferences based on circumstantial evidence. It accepted that inferences can be made but also noted the corollary in the OSC decision in *Re Suman* 2012 LNONOSC 176 (CanLII), that;

> *"…facts cannot be assumed which have not been proven and … any inference made must be reasonably and logically drawn from facts, established by clear, convincing and cogent evidence."*

101. The Panel was unable to accept any of the inferences Staff counsel argued for. The lack of any evidence of the Benton marketplace other than the orders and trades in the Target Account during the Review Period, did not provide the facts required on which to make the inferences Staff requested.

Other Matters

102. The Panel also wishes to address two matters; an allegation of fraud that was raised at the conclusion of the evidentiary portion of the hearing, and the delay in the prosecution of this matter.

Allegation of Fraud

103. Fraud is a separate offense which is set out in NI 23-101 at Part 3.1 (1) (b). The offence of fraud was not pled in the Statement of Allegations. No evidence was led on fraud by Staff, and there were no questions directed to the Respondents during cross examination. There was no case law pertaining to fraud provided by Staff in its Book of Authorities.

104. Staff counsel first raised this allegation in her closing argument on June 11, 2021.

105. She argued that because the Panel is a not a criminal court, and the allegations are not "*charges*" the Panel was not bound by the "*four walls*" of pleadings. Staff counsel argued that the Panel could make a finding of fraud in this matter, even though fraud had not been pled and the Respondent(s) had received no prior notice of such allegation.

106. The Panel categorically rejects this argument.

107. The MSC is an administrative body created by provincial legislation. It has the statutory jurisdiction to hold hearings and make orders that impact on individuals. As such, under Canadian law, hearing panels of the MSC are bound by the rules of natural justice and procedural fairness.

108. Fundamental to a fair process is one in which a respondent is entitled to have notice of the allegations made against him or her, hear all evidence relative to those allegations, the right to cross examine on the allegations and the right to give evidence on the allegations. None of these fundamental rights were accorded to the Respondents in relation to the allegation of fraud which was not raised until closing arguments by Staff counsel.

109. In *Cardinal v Director of Kent Institution,*1985 CanLII 23 (SCC), [1985] 2 SCR 643, the Supreme Court of Canada (SCC) held that the right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the procedural fairness which all persons affected by an administrative decision are entitled to. The court held;

> "…*there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual". (para 14)*

110. The SCC further held that if an applicant for judicial review is denied a fair hearing in the first instance, then the tribunal's decision will be invalid regardless of whether the Court is of the view that the tribunal would have reached the same conclusion without the breach.

111. In the many cases that have followed *Cardinal,* Canadian courts have consistently held that procedurally unfair administrative procedures constitute an excess of jurisdiction rendering the impugned actions or decisions of administrative bodies void.

Delay

112. This matter took eleven years and two months or one hundred and thirty-four (134) months from the end of the events at issue to the commencement of the hearing. That is an extraordinary delay.

113. The events at issue occurred between November 2009 and February 2010. Terlinksi testified that the investigation was essentially completed in early 2011. The pleadings were filed on March 26, 2014. The hearing commenced on May 17, 2021.

114. The delay in this matter is very concerning to the Panel.

115. Under Canadian law, individuals and companies who are charged by administrative tribunals, including provincial securities commissions, are entitled to be treated fairly. It is

fundamentally unfair for investigations and hearings to take years to be completed. Individuals suffer significant stress. Outstanding allegations may negatively impact job opportunities or job promotions. Memories fade and tangible evidence becomes difficult or impossible to locate. Legal costs increase with lengthy delays, and for most individuals, legal advice is already extremely expensive. And, even if the respondents are found not to have committed the offences, there is no ability for them, under the legislation, to recover any costs.

116. Equally, the public interest is harmed. One of the overriding purposes of securities legislation is to protect the investing public. If hearings are unduly delayed, investor protection is lost.

117. The provincial securities commissions across Canada, in their oversight of self-regulatory organizations, such as IIROC, the MFDA and exchanges and clearinghouses, have consistently held those organizations to standards that require investigations and hearings to be conducted expeditiously. Written policies and procedures, with effective oversight are mandatory. The Panel is of the opinion that these same standards should be applied to Commission staff.

118. The Panel strongly urges Commission Staff to review and revise its internal policies and procedures to ensure that all future investigations and hearings proceed expeditiously.

Dated this 16th day of July 2021.

Original signed by "L.Vincent"
Linda Vincent, Hearing Chair

Original signed by "A. Martens"
Andrea Martens, Member

Original signed by "D. Hubederdeau-Reid"
David Huberdeau-Reid, Member