

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Budzinski, 2023 ABASC 13

Date: 20230203

Gerald Michael Budzinski

Corrected Decision: A corrigendum was issued on January 2, 2024; the corrections have been made to the text and the corrigendum is appended to this Decision.

Panel: Kari Horn
Matthew Bootle
Steven Cohen

Representation: Adam Karbani
Carson Pillar
for Commission Staff

Gerald Budzinski
for himself

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Decision: February 3, 2023

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I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) alleged that Gerald Michael Budzinski (**Budzinski**) contravened Alberta securities laws by engaging in market manipulation and by not complying with regulatory disclosure requirements associated with insider, early warning, and take-over bid regulations.

[2] A hearing into the merits of Staff's allegations (the **Hearing**) was held over 12 days commencing on January 11, 2021 and during which we received documentary evidence and heard testimony from nine witnesses called by Staff and three called by Budzinski. We received written submissions and heard oral argument on the merits of the allegations from Staff and from Budzinski, the latter occurring on May 3, 2021.

[3] For the reasons set out below, we dismiss the allegation that Budzinski engaged in market manipulation and we find that he contravened securities law requirements related to insider reporting, early warning disclosure, and take-over bids.

II. STAFF'S ALLEGATIONS

[4] Staff's allegations were set out in a notice of hearing dated June 7, 2019 (the **NOH**). The allegations relate to the purchase of millions of common shares of BCM Resources Corporation (**BCM Shares** and **BCM**, respectively) in certain Raymond James Ltd. (**Raymond James**) brokerage accounts (the **Accounts**) from August 31, 2015 through to June 7, 2016 (the **Relevant Period**). Staff's allegations were premised on Budzinski's exercise of trading authority in, and control or direction over, the Accounts, despite beneficial ownership belonging to:

- Malachi 4 – Foundation for Family Unity (**Malachi**) – a charitable organization of which Budzinski was the Managing Director and its guiding mind;
- Freedom Investors (**Freedom Investors**) – an investment club whose members included Budzinski (as president) and others, most, if not all of whom were members of a religious organization founded by Budzinski;
- **LP** – Budzinski's daughter-in-law; and
- **HP** – LP's brother.

[5] Staff alleged that during the Relevant Period, Budzinski engaged in market manipulation by entering bids for BCM Shares near the end of the trading day that resulted in high-close trades and upticks of the closing bid price for BCM Shares. Staff also alleged that during the Relevant Period, Budzinski maintained direct or indirect ownership, control or direction over the BCM Shares in the Accounts and did not comply with the insider reporting, early warning disclosure and take-over bid requirements that were triggered when the aggregate number of BCM Shares in the Accounts exceeded certain prescribed thresholds.

[6] Specifically, Staff alleged that Budzinski contravened the following provisions of the *Securities Act* (Alberta) (the **Act**):

- s. 93(a)(ii), by directly or indirectly engaging or participating in an act, practice or course of conduct related to a security that he knew or reasonably ought to have known may result in or contribute to an artificial price for a security;
- s. 182, by failing to file reports and make disclosure as an insider of BCM in accordance with Parts 3 and 4 of National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (NI 55-104);
- s. 182.1, by failing to make and file early warning disclosure in accordance with Part 5 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104); and
- s. 159, by making a take-over bid that did not comply with Part 2 of NI 62-104.

[7] Staff confirmed in oral submissions that they were not pursuing the allegation that Budzinski contravened s. 93(a)(i) of the Act by engaging in a course of conduct that he knew or reasonably ought to have known may result in a false or misleading appearance of trading activity.

[8] Henry Thor (**Thor**), an advisor with Raymond James during the Relevant Period, entered into a settlement agreement with the ASC based on his involvement as investment advisor for certain brokerage accounts in respect of which he received instructions from Budzinski: *Re Thor*, 2019 ABASC 89. That settlement was not entered as evidence in the Hearing, and neither Staff nor Budzinski called Thor as a witness. Accordingly, Thor's settlement agreement did not factor into our deliberations.

III. PROCEDURAL HISTORY

[9] The Hearing was initially scheduled to take place in Edmonton in March and April 2020. Due to the rapidly evolving COVID pandemic, the Hearing was adjourned and rescheduled to take place in Calgary in January 2021. The Hearing proceeded in a hybrid manner, and some witnesses testified in-person whereas others testified remotely (in accordance with the ASC's *Remote Hearing Guidelines* adopted in response to the COVID-related challenges of in-person hearings).

[10] Budzinski was self-represented throughout the proceeding, including in hearing management sessions leading up to the Hearing. At all times, he participated via telephone from Edmonton. He was provided with information to assist his understanding of the various procedural and evidential rules and how they applied to him, and, as discussed in some detail below, Budzinski was given numerous accommodations that afforded him a reasonable and fair opportunity to test Staff's evidence and present his own defence.

[11] Specifically, Budzinski asserted at various points in the proceeding that certain personal challenges limited his ability to effectively participate in the process. The purported challenges and associated consequences included:

- limited financial resources that precluded him from retaining counsel;

- limited functional ability to use computers and other electronic devices that hindered his ability to access and print electronic documents, and communicate by email;
- health-related issues that affected his ability to travel, read electronic documents on a computer screen, and concentrate for lengthy periods of time; and
- a housing arrangement that limited his access to a telephone for any extended period of time and made it difficult for him to keep track of his documents.

[12] Despite the lack of evidence substantiating these limitations, various steps were taken to accommodate Budzinski's purported challenges, including several alterations to the standard ASC hearing process. These accommodations included, but were not limited to, the following:

- Staff's initial disclosure, provided pursuant to s. 7.1(b) of Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (the **ASC Rules**), was delivered to Budzinski in paper format in addition to the typical electronic format;
- audio records in Staff's initial disclosure were subsequently transcribed and paper copies of the transcripts were delivered to Budzinski;
- a USB device containing large spreadsheets that was delivered to Budzinski as part of Staff's initial disclosure was apparently incompatible with Budzinski's computer, so Staff subsequently delivered to Budzinski a CD containing the spreadsheets along with a paper summary of pertinent data from the spreadsheets;
- Staff's pre-hearing disclosure, provided pursuant to s. 7.1(c) of the ASC Rules, was delivered to Budzinski in paper format;
- Electronic copies of Staff's initial disclosure were provided to the Hearing clerk so that they could be available to Budzinski during his questioning of witnesses at the Hearing;
- Budzinski was provided with paper copies of the ASC Rules, the ASC's Remote Hearing Guidelines and on multiple occasions a document entitled "Enforcement Hearing Information for You as a Self-Represented Respondent" (the **Guide**);
- the ASC provided Budzinski with a basic cellular telephone including a limited cellular plan so that he could participate remotely in the Hearing (although at certain points in the Hearing, he was able to use his residential land-line);
- Staff's questioning on the second day of the Hearing was adjourned to accommodate Budzinski's apparent difficulties in managing his physical discomfort; and

- throughout the Hearing, Staff sent numerous documents to Budzinski via overnight courier, including materials previously delivered as part of Staff's pre-hearing disclosure, a copy of the NOH previously served on him, a copy of the publicly available ASC news release announcing issuance of the NOH, another copy of the Guide, and two documents that were previously delivered but that Budzinski had difficulty reading.

[13] The panel also provided information to Budzinski prior to, and during, the Hearing. Most notably, Budzinski received the Guide, which included information about the ASC hearing process to help Budzinski better understand and prepare for the Hearing. The panel also offered explanations to Budzinski of certain legal and procedural concepts at various stages throughout the Hearing. These addressed such topics as the independence of the panel members, Staff's burden of establishing their allegations on a balance of probabilities, and the anticipated process for the parties to present their case. The panel also provided Budzinski with frequent explanations of the manner in which documents were to be adduced into evidence, the distinction between evidence and argument, and the process for questioning witnesses, all of which was also explained in the Guide.

[14] At the outset of the Hearing, Staff indicated that they had recently provided Budzinski with additional documents as part of their pre-hearing disclosure. Although the documents had previously been provided to Budzinski as part of Staff's initial disclosure, to alleviate any potential unfairness, Staff suggested recalling Barbara Bauer (**Bauer**), their investigator witness who would be speaking to these documents in her testimony, at a later date in the Hearing so that Budzinski would have time to prepare his cross-examination. Budzinski considered the proposal to be reasonable and the Hearing proceeded accordingly.

[15] Budzinski was also given additional time to prepare his cross-examination of key Staff witnesses after their direct testimony and, as an exceptional accommodation and in light of Budzinski's unique circumstances in this proceeding, he was given certain rough hearing transcripts of Staff's direct examination to assist him in preparing for his cross-examination.

IV. PRELIMINARY MATTERS

A. Standard and Burden of Proof

[16] Staff bear the burden of proving the allegations in the NOH. The standard of proof for ASC enforcement matters is the civil standard requiring proof on a balance of probabilities (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 36; *Re De Gouveia*, 2013 ABASC 106 at para. 88). A hearing panel "must be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its nonexistence or non-occurrence" (*Arbour* at para. 38). As stated in *De Gouveia* (at para. 88) ". . . to succeed on the merits of their allegations, Staff must demonstrate that it is more likely than not that misconduct occurred as alleged."

B. Evidence

[17] Sections 29(e) and (f) of the Act stipulate that an ASC hearing panel shall receive evidence that is relevant to the matter being heard, and that the laws of evidence applicable to judicial proceedings do not apply. Accordingly, an ASC panel has considerable discretion in assessing the

admissibility of all relevant evidence – including hearsay evidence – and the weight to be afforded such evidence, while respecting the rules of natural justice and procedural fairness (*Arbour* at para. 45; see also *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18 and *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186).

1. Inferences

[18] A panel may draw inferences from the evidence as a whole, including from circumstantial evidence (*Arbour* at para. 39). Any inferences must be supported by evidence and not based on speculation, nor are we "to turn disbelief of a particular witness into positive proof of the opposite proposition. . . . The fact that a witness's evidence is disbelieved on a particular point may have an impact on his overall credibility, but in order to prove the opposite of what he said some positive evidence is needed" (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 26-28 and 36).

2. Witnesses

[19] Staff called nine witnesses:

- Bauer, a senior business analyst with the ASC, was Staff's primary investigator;
- Christine Ali (**Ali**), a senior investigative trading analyst with the Investment Industry Regulatory Organization of Canada (**IIROC**) whose primary role was to conduct trade reviews and assess potential violations of the Universal Market Integrity Rules (the **UMIR**);
- **SB, JG, JF** and **AE**, each involved with Malachi or Freedom Investors (or both), and at some point in the Relevant Period each was a member of the religious organization Budzinski founded; and
- Stephen Bassett (**Bassett**), Mark Heaney (**Heaney**) and Tage Cawley (**Cawley**), each an employee of Raymond James in the Relevant Period.

[20] Budzinski called three additional witnesses – LP, HP and Scott Steeds (**Steeds**), a founder of BCM and a BCM director at the time of the Hearing. Although Budzinski expressed some interest in also calling Thor to testify, he ultimately opted not to do so, ostensibly due to Thor's health issues. Budzinski chose not to testify on his own behalf.

[21] As pointed out by Staff, Budzinski often prefaced questions to witnesses with factual assertions that were not otherwise in evidence. Although addressed in the Guide and by the panel at the commencement of the Hearing, we cautioned Budzinski on numerous occasions throughout the Hearing that the questions he asked of witnesses, particularly factual assertions he made during the course of his questioning, were not evidence, and that he would need to present evidence – testimonial or documentary – through a witness (possibly by testifying himself) to establish those assertions. Accordingly, unless otherwise in evidence, we disregarded the factual assertions Budzinski made in his questioning of witnesses.

(a) **Credibility**

[22] ASC hearing panels are frequently required to assess conflicting evidence and the credibility of witnesses. The appropriate analysis requires consideration of the source of the evidence, whether the evidence is consistent with other reliable evidence, and whether the evidence makes logical sense in the circumstances.

[23] A useful statement of the law is from *R. v. Boyle*, 2001 ABPC 152 at para. 107 (citing *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 357):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[24] Similarly, O'Halloran J.A. of the British Columbia Court of Appeal in *R. v. Pressley* (1948), 94 C.C.C. 29 at p. 34 (referenced in *Springer v. Aird & Berlis LLP* (2009), 96 O.R. (3d) 325 (S.C.J.) at para. 14 and in *Shane Suman*, 2012 ONSEC 7 at para. 315):

The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[25] This is consistent with commentary in the Guide that was provided to Budzinski, which indicated: "A witness's credibility (essentially whether the Hearing Panel believes statements by the witness) will be assessed in the context of the consistency of the witness's testimony with other [e]vidence tendered during the . . . Hearing".

[26] Guided by these considerations, we found that most Hearing witnesses were credible, particularly when their testimony was consistent with documentary evidence, the testimony of other witnesses, or the overall circumstances. We generally attributed any gaps in memory, minor inconsistencies or lack of clarity to the passage of time and, in some instances, to the witness's relative inexperience with the capital market.

[27] Staff asserted that LP was not a credible witness given her overt hostility to Staff and the inconsistency of her testimony with other evidence, including her previous sworn statements in her investigative interview with Staff. Staff submitted that LP's explanations for her prior inconsistent statements were clearly contrived and that we should not give any weight to her evidence unless corroborated by other reliable evidence.

[28] We later discuss LP's evidence in detail, but note here that her testimony left us with serious reservations as to her credibility as a witness. This was due in large part to inconsistencies between LP's Hearing testimony and statements she made in her investigative interview (and with other evidence that we accepted), for which she provided perplexing and inconsistent explanations. Her credibility was also undermined by her obvious desire to protect Budzinski, having stated in her

testimony: "I would lay my life down for that man." Accordingly, we gave her testimony no weight unless supported by, and consistent with, other reliable evidence.

[29] Staff also submitted that HP was "largely honest" in his testimony, although his evidence "paints a bizarre picture". While HP's evidence was more consistent with other evidence than that of LP, much of his testimony was elicited through leading questions posed by Budzinski and was of limited assistance. When HP was confronted with contradictory statements he made during his investigative interview, he corrected some of his evidence. HP also seemed to lack direct involvement in some important events, deferring to Budzinski's understanding or knowledge of those events. For example, HP was unclear on important details regarding a significant loan (or loans) that Budzinski arranged for him. Accordingly, we gave HP's evidence limited weight, unless supported by and consistent with other reliable evidence.

[30] Budzinski challenged the credibility of certain of Staff's witnesses, particularly Bauer and JG.

[31] In respect of Bauer, Budzinski submitted that the "fears" Bauer expressed in her direct testimony seemed to suggest a biased investigation that was driven by her subjective "fears" rather than the objective facts. We note that Bauer did not reference any fear or fears in her direct testimony, and when confronted in cross-examination on this point, Bauer explained that the investigation into Budzinski's trading activity raised concerns about the effect on the market for BCM Shares and the possible control position reflected in the number of BCM Shares held in the Accounts. We found Budzinski's attack on Bauer's credibility to be baseless, and we found her testimony to be credible and forthright. We accepted both the truthfulness of Bauer's evidence and the integrity of Staff's investigation.

[32] Budzinski also focussed on certain denials made by JG in response to Budzinski's cross-examination, specifically JG's testimony that she neither recalled receiving documents that Budzinski had provided to her son, nor did she recall having spoken with Steeds or having met or spoken to Thor. These denials did not touch on any material issue in dispute, and they were not contradicted by other admissible evidence. Indeed, Steed's testimony – that he did not think he had spoken with JG – was consistent with JG's evidence.

[33] We were later presented with certain records that JG apparently provided to Staff via email after making enquiries and receiving them from her son following her testimony. To be clear, JG had indicated in her cross-examination that she would contact her son that evening to inquire about the documents Budzinski asked about when he cross-examined her. Budzinski requested that these records – consisting of Freedom Investors resolutions made in 2018 – be admitted into evidence for the purpose of demonstrating that JG had access to those documents, suggesting that "she's been constantly lying". Staff did not object, so long as JG's email was also entered into evidence. We entered the email and the attached documents into evidence. In our view, this evidence did not contradict JG's testimony that she had not previously received these materials from her son (indeed, this was reaffirmed in her email to Staff), nor did they otherwise undermine or affect our assessment of JG's credibility. For this reason, and because the records were not authenticated or otherwise shown to be relevant to Staff's allegations, we afforded this evidence no weight.

(b) Opinion Evidence

[34] None of the witnesses were called as an expert witness, and we did not qualify any witness as an expert for the purpose of providing opinion evidence. Although certain of Staff's witnesses testified as to their qualifications and experience relative to the financial industry, Staff submitted that these witnesses were called to provide factual evidence relative to the underlying narrative. To the extent that any witnesses expressed any opinions, they were not binding on the panel and we made our own conclusions based on the totality of the evidence.

3. Documents

(a) Investigative Interview Transcript

[35] Staff may adduce into evidence any investigative interview transcript obtained pursuant to s. 42 of the Act: *Arbour* (at para. 49). The weight attributed to transcript evidence may be influenced by various factors, including whether the witness was sworn or affirmed and whether he or she was represented by counsel: *Arbour* (at para. 54). In *Re Kapusta*, 2011 ABASC 322 (at para. 10), an ASC panel commented:

The nature of the Investigative Interviews leads us to handle them with caution. Such evidence will generally be given less weight than direct evidence in the form of sworn or affirmed hearing testimony. Unlike testimony, transcripts of interviews conducted outside a hearing do not enable a hearing panel to observe interviewees as they give their interview evidence, or allow for testing or clarification of the interviewees' evidence (such as seemingly inconsistent statements) through cross-examination by other parties or panel questioning. The circumstances of the interviews must also be considered.

[36] Budzinski attended a compelled investigative interview with Staff on January 19, 2017 (the **Interview**). The evidence Budzinski provided in the Interview was given under affirmation and he was permitted, but declined, to have counsel present. Budzinski had the opportunity to testify in the Hearing but opted not to do so, and he otherwise had the opportunity to present evidence through Staff's witnesses or through his own witnesses.

[37] Staff sought to rely on portions of the Interview transcript as part of their case. Although Staff relied only on identified portions of the transcript, or the "read-ins", we admitted the entire transcript of the Interview along with the exhibits from the Interview, in part to ensure we had access to any necessary context relating to those read-ins.

[38] Mindful of the fact that Budzinski chose not to testify and was not cross-examined before us, we treated the transcript of the Interview with caution and looked for indicators that made this evidence more reliable, such as whether his Interview statements were consistent with, or corroborated by, other reliable evidence. Some of the interview statements were also against Budzinski's own interest, which lent credibility to any admissions he may have made in the Interview.

[39] Many other witnesses were interviewed by Staff prior to the Hearing. While the transcripts from these interviews were not adduced into evidence, Staff used portions of the transcripts to refresh the memories of certain witnesses and, in the case of LP, to challenge her credibility. Our factual findings are based on the Hearing testimony of these witnesses, rather than the transcripts of their investigative interviews.

(b) Section 218 Certificate

[40] According to a certificate dated December 21, 2020 and prepared pursuant to s. 218 of the Act, in the Relevant Period Budzinski did not, nor did any person on his behalf, file:

- on the System for Electronic Disclosure by Insiders, any initial or subsequent insider reports in respect of BCM in accordance with ss. 3.1, 3.2 and 3.3 of NI 55-104;
- on the System for Electronic Document Analysis and Retrieval (**SEDAR**), any early warning news releases or any early warning reports for BCM in accordance with s. 5.2 of NI 62-104;
- on SEDAR, an advertisement containing a brief summary of the take-over bid for BCM in accordance with ss. 2.9 and 2.10 of NI 62-104; and
- on SEDAR, a take-over bid or take-over bid circular for BCM in accordance with s. 2.10 of NI 62-104.

[41] At the outset of the Relevant Period, the regulation applicable to take-over bids was Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (**MI 62-104**). Effective May 9, 2016, MI 62-104 was amended and renamed NI 62-104. In light of the date range noted in the s. 218 certificate, we understood references to NI 62-104 in the certificate to mean MI 62-104 prior to May 9, 2016 and NI 62-104 thereafter. To avoid confusion, we will refer to MI 62-104 and NI 62-104 as **62-104**.

(c) Exhibits for Identification

[42] Certain documents presented to witnesses were marked as exhibits for identification on the basis that the witnesses lacked first-hand knowledge of those documents. Most of these documents outlined Budzinski's various concerns and grievances relating to Staff's allegations and this proceeding, and were more in the nature of submissions or argument rather than evidence. The panel explained to Budzinski that these documents would not be admitted into evidence unless they were presented to a witness who could authenticate them. Ultimately, unless subsequently authenticated by another witness, these documents were not admitted and did not factor into our deliberations.

(d) HP's Affidavit

[43] After the evidentiary portion of the Hearing had concluded, Budzinski provided an affidavit affirmed by HP on September 3, 2020 as part of his written submissions. HP was not questioned on this affidavit during his Hearing testimony. In the circumstances, HP's affidavit was not admitted into evidence and was not considered as part of our analysis.

4. Terminology

[44] In the evidence we received and in the submissions of the parties, we were presented with various technical terms relating to the trading of securities. We use many of those terms in these reasons. For ease of reference and to provide clarity and consistency to these reasons, we include a number of these terms and their meanings below:

- The **bid** price is the price that a buyer is willing to pay for a particular security.
- The **ask**, or **offer**, price is the price that a seller is willing to accept for a particular security.
- The national best offer (**NBO**) is the lowest price that a seller is willing to accept for a particular security across all markets.
- A **board lot** is a standard trading unit consisting of a minimum number of securities – in the case of BCM, the board lot during the Relevant Period was 500 BCM Shares.
- A **day** order is only valid on the day it is entered – if unfilled, a day order expires at the end of that trading day.
- An **open** order is an order that remains open until it is filled or until the specified expiry date.
- An **iceberg** order is an order in which only a portion of the order is publicly displayed to the market, often used for large orders to avoid upsetting the market.
- An **uptick** trade or bid is a trade executed or an order placed, respectively, at a price that is higher than the previous trade or bid, whereas a **downtick** trade or bid is a trade executed or an order placed, respectively, at a price that is lower than the previous trade or bid.
- An **active** bid is immediately executable when entered because the bid matches an open ask.
- A **passive** bid is not immediately executable when entered because there is no matching ask for the bid.
- A **market** order is active because it is immediately executable at the existing NBO.
- An **illiquid** or **thinly traded** security is one for which the daily trading volume is relatively low.

V. FACTUAL BACKGROUND

A. Relevant Individuals and Entities

1. Malachi

[45] Malachi, an Alberta Society since June 1978 and a registered charitable organization since June 1979, opened a margin account at Raymond James on March 9, 2007 (the **Malachi Margin Account**). During the Relevant Period, a significant number of BCM Shares were acquired in the Malachi Margin Account and transferred to a cash account at Raymond James (the **Malachi Cash Account**), in which Malachi acquired further BCM Shares (the Malachi Margin Account and the

Malachi Cash Account collectively, the **Malachi Account**). By the end of the Relevant Period, the BCM Shares in the Malachi Account represented 4.94% of the issued and outstanding BCM Shares.

[46] Malachi remained an active entity as of December 6, 2016, and Budzinski was Malachi's Managing Director during the Relevant Period. Malachi's registered office and records address were the same as Budzinski's personal address (as well as HP's), and also the location where Malachi meetings were held.

[47] As discussed in detail below, we found that Budzinski had trading authority for the Malachi Account and that he was the only person who exercised trading authority for that account throughout the Relevant Period.

2. Freedom Investors

[48] Freedom Investors, an investment club, opened a cash account at Raymond James on October 20, 2007 (the **Freedom Account**). During the Relevant Period, a significant number of BCM Shares were acquired in the Freedom Account, and by the end of that period, the Freedom Account held 9.14% of the issued and outstanding BCM Shares.

[49] Freedom Investors was comprised mostly, if not entirely, of people who were, at least at some point in time, members of a religious organization identified in the evidence as the Freedom Church of God or the Assemblies of the Father's Love (for which Budzinski was a pastor and founder). Budzinski became a member and the president of Freedom Investors in 2013.

[50] As discussed in detail below, we found that Budzinski had trading authority for the Freedom Account and that he was the only person who exercised trading authority for that account throughout the Relevant Period.

3. LP

[51] LP (also known as LB), a homemaker, opened a cash account at Raymond James on November 4, 2015 (the **LP Account**). During the Relevant Period, a significant number of BCM Shares were acquired in the LP Account, and by the end of that period, the LP Account held 6.92% of the issued and outstanding BCM Shares.

[52] LP is Budzinski's daughter-in-law and HP's sibling. She was also a director of Malachi, a member of Malachi's executive committee and attended Malachi board meetings. LP acknowledged that her relationship with Budzinski was a "close one" and that she had a high level of trust in him.

[53] As discussed in detail below, we found that Budzinski held trading authority for the LP Account from the inception of that account until the end of the Relevant Period and that he was the only person who exercised trading authority in the LP Account until at least the end of December 2015.

4. HP

[54] HP, a truck driver, opened a cash account at Raymond James on October 22, 2015 (the **HP Account**). Soon after, Budzinski facilitated at least one loan to HP from Malachi so that he could acquire BCM Shares. During the Relevant Period, a significant number of BCM Shares were acquired in the HP Account, and by the end of that period, the HP Account held 8.85% of the issued and outstanding BCM Shares.

[55] HP had known Budzinski for about 41 years, and had a high level of trust in him. HP and Budzinski lived at the same address, where HP rented a room from Malachi. He corresponded through email on behalf of Budzinski and assisted Budzinski with tasks requiring a computer. HP was also president of Malachi (although he could not recall the exact date when he assumed that role) and he was a member of the religious organization Budzinski founded.

[56] As discussed in detail below, we found that Budzinski held trading authority for the HP Account from the inception of that account until the end of the Relevant Period and that he was the only person who exercised trading authority for the HP Account prior to January 2016.

5. BCM

[57] BCM, a registered British Columbia (**BC**) company as of February 15, 2005, was a mineral exploration company based in Vancouver, BC. Throughout the Relevant Period, BCM was a reporting issuer as defined in the Act, and BCM Shares traded on the TSX Venture Exchange (the **TSXV**) from 7:30 am to 2 pm Mountain Time (from 9:30 am to 4 pm Eastern Time). BCM Shares were described as being relatively illiquid and thinly traded.

[58] As mentioned, one of the witnesses called by Budzinski was Steeds, who was a director of BCM at the time of the Hearing.

6. Raymond James

[59] Raymond James is a full-service a brokerage firm; its brokers enter trading orders into the market based on instructions from their clients. As mentioned, the Accounts, consisting of the Malachi, Freedom, LP and HP Accounts, were all opened with Raymond James.

[60] Budzinski was a long-standing client of Thor, the Raymond James advisor responsible for the Accounts during the Relevant Period. Shauna Garth (**Garth**) was Thor's assistant at Raymond James in the Relevant Period. Thor retired in the spring of 2019.

B. The Accounts and Trading Authority

1. Malachi Account

[61] Budzinski and SB each signed the client account agreement for the Malachi Margin Account on behalf of Malachi, and Thor signed it as the investment advisor. The agreement was updated on March 2, 2011 and again on April 13, 2016, each time signed by Budzinski and SB. Account documents indicated an address and telephone number for Malachi that were the same as Budzinski's, and identified Malachi's bank account with the "Royal Trust" (the **Malachi Bank Account**). The two updates both indicated that Malachi had net liquid assets of \$445,000, fixed assets of \$800,000, and annual income from donations of \$325,000.

[62] The April 2016 update indicated the client's investment objectives as 100% speculative (defined in the update form to mean "[m]y emphasis is on maximizing my total return potential through investments in securities including, but not limited to speculative equities, options or high risk fixed income products. I may also engage in short-term trading.") with 100% high risk tolerance, and indicated that the account holder did not, alone or as part of a group, own or control 10% or more of the voting rights of a publicly traded company or control 20% or more of the voting rights of a publicly traded company. The April 2016 update also indicated that Thor had known the client for 30 years, which was consistent with a May 2016 email in which Thor represented that Budzinski had been a client for more than 30 years. Handwritten notes in the investment advisor comments section of the April 2016 update provided:

The people managing the account are sophisticated investors. They understand risk and concentration. We have discussed this. The order's [sic] unsolicited, and their payments are prompt, and the account is always in order.

[63] The client account agreement and the updates all indicated Malachi's level of investment knowledge as "Sophisticated" (defined in the update form to mean "I am a sophisticated investor and have **extensive** experience with a wide variety of investments and strategies" (original emphasis)). However, in the Interview, Budzinski characterized the investment knowledge of members of Malachi's executive as "low to moderate" with little to no experience investing on their own. In her testimony, SB said that her investing knowledge was "very limited".

[64] The April update coincided with the transfer of the BCM Shares in the Malachi Margin Account to the Malachi Cash Account, opened on April 15, 2016. The April 2016 monthly statement for the Malachi Margin Account reflected this transfer having taken place on April 20, 2016.

[65] On April 30, 2016, Malachi's executive approved "Resolution 201605 BCM Resources" (the **Malachi Resolution**), resolving "to have Gerald Budzinski purchase 1,500,000 to 1,700,000 [BCM Shares] by . . . June 21, 2016". The Malachi Resolution further stated: "Try and purchase in small lots of 25,000 or less so as not to push the market above .31 cents [sic] per share. All purchases are to stop if the shares move above .35 cents [sic] and until the board rules." SB, who signed the document as Malachi's secretary, did not know who drafted the Malachi Resolution but said that Budzinski brought it to her for signature and that she signed it because the "group" was purchasing shares of a company (she thought was called BCM) and she was not opposed if the directors wanted to increase their holdings.

[66] In respect of the Malachi Resolution, Budzinski stated in his Interview that:

- he presented to the Malachi board the idea of purchasing 1.5 to 1.7 million BCM Shares, and advised that "if this money comes in . . . we should bring it up to that amount, at least";
- the wording about the share price developed based on the previous high price of about \$0.31, and since the BCM Shares were trading around \$0.25 - \$0.27, Budzinski said that they did not want to purchase above that threshold;

- the phrase about trying to purchase ". . . in small lots of 25,000 or less so as not to push the market . . ." was inserted because LP and HP had both asked Budzinski to purchase and if they were each going into the market to acquire BCM Shares, the objective was not to "push the market up" but instead ". . . to get it as cheap as possible"; and
- there were no previous Malachi resolutions relating to the purchase of BCM Shares.

[67] Malachi held 410,000 BCM Shares in the Malachi Account as of August 31, 2015, and acquired an additional 857,000 BCM Shares in the Relevant Period. There were no sales of BCM Shares from the Malachi Account in the Relevant Period. Based on the evidence, the particulars of the acquisitions of BCM Shares in the Malachi Account in the Relevant Period are as follows:

Month of Purchase	Number of BCM Shares Purchased	Purchase Price per BCM Share
September 2015	63,000	\$0.05
October 2015	62,000	\$0.05
January 2016	116,000	\$0.15 - \$0.20
February 2016	74,000	\$0.18 - \$0.20
March 2016	295,000	\$0.185 - \$0.24
April 2016	117,000 ⁽¹⁾	\$0.225 - \$0.28
April 2016	40,000 ⁽²⁾	\$0.27 - \$0.30
May 2016	70,000	\$0.24 - \$0.31
June 2016	20,000	\$0.23 - \$0.25

⁽¹⁾ These BCM Shares and all previous purchases were made in the Malachi Margin Account.

⁽²⁾ These BCM Shares and all subsequent purchases were made in the Malachi Cash Account.

[68] The purchases of BCM Shares in the Malachi Account from January to June 2016 were largely funded through at least 12 transfers from the Malachi Bank Account, for a sum total of \$111,750.

2. Trading Authority for the Malachi Account

[69] Budzinski and SB each signed a trading authorization form as authorized representatives when the Malachi Margin Account was opened in 2007. That form included a certified copy of a resolution of Malachi "authorizing the establishment and maintenance of trading accounts" with Raymond James, and stated that "[a]ny 2 of the representatives" of Malachi specified in the form were authorized "to give written or oral instructions with respect to purchases and sales . . . in securities . . . in the accounts . . .". There were only two representatives specified – Budzinski and SB. The evidence did not include a specific trading authorization form for the Malachi Cash Account. However, there was no indication that the trading authority changed following the switch from the Malachi Margin Account to the Malachi Cash Account.

[70] Staff argued that the trading authorization form could be interpreted to permit any of the two representatives to provide trading instructions on behalf of Malachi, which was consistent with Bassett's interpretation that the form required approval from any one of the two representatives to process trade instructions. Further, Heaney and Bassett both testified that Raymond James's internal records and order entry system reflected that Budzinski had trading authority over the Malachi Account.

[71] Although Bassett's interpretation and Raymond James's internal records and systems were consistent with Staff's position, we considered the trading authorization form to be unambiguous – it required that trades be authorized by any two of the representatives specified in the form, not either of the two representatives specified. The fact that only two representatives were specified does not change the plain reading of the form.

[72] Despite the inclusion of both Budzinski and SB on the trading authorization form for the Malachi Account, the evidence established that the intention and expectation of Malachi, SB and Budzinski was that he alone would provide trading instructions to Raymond James. As Budzinski acknowledged in his Interview, the Malachi Margin Account was "set up" so that he could "handle" the buying and selling of securities in that account. Further, the Malachi Resolution only identified Budzinski as the individual authorized to provide trading instructions on behalf of Malachi. The June 14, 2016 letter (the **Malachi Letter**) (signed by SB and JG on behalf of Malachi, and addressed to Thor) also confirmed that Budzinski was solely responsible for providing trading instructions on behalf of Malachi in connection with the Malachi Account. It read:

It has come to the Board of Directors attention that someone at Raymond James believes that Gerald Budzinski is somehow the final authority over [Malachi's] trading account and/or our share holdings.

This is not correct. The facts are:

1. Mr. Budzinski does not own a single share or anything held in our account.
2. As Managing Director the buying and selling of the investments comes under his office and at the direction of the Board of Directors and/or the Executive Committee as to what is bought and how many shares are purchased.
3. The voting of all investments comes under the Vice President, not the Managing Director.
4. The Foundation will NOT allow any voting of their shares for takeover purposes by any Director on our Board.
5. No fees or bonuses are paid to Mr. Budzinski for carrying out his duties as Managing Director.

We hope this clears up the fantasy control issue that has blocked our right to purchase and invest as our constitutional rights permit. We are very concerned over the draconian activities carried out against this Foundation. [emphasis added]

[73] It was also established that Budzinski alone exercised trading authority for the Malachi Account throughout the Relevant Period. Our finding is based on the following evidence:

- Budzinski acknowledged in his Interview that while he and SB had trading authority on the Malachi Account in April 2016, he was managing the account in accordance with resolutions passed by Malachi, and that he alone provided trading instructions on the Malachi Account during the Relevant Period (although he speculated that another individual may have passed himself off as Budzinski to provide trading instructions to Raymond James for the purchase of 3,500 or 5,500 BCM Shares, we were unable to confirm the existence of any such order in connection with the Malachi Account in the Relevant Period);

- SB testified that she did not direct or provide trading instructions on the Malachi Account and thought that Budzinski was the one providing trading instructions to Thor at Raymond James;
- Account statements for the Malachi Account were sent to the same address as Budzinski, who handled Malachi's finances;
- Budzinski carefully monitored trades across the Accounts, including in the Malachi Account and he frequently called Raymond James to gauge the market for BCM Shares before making transactions in the Accounts;
- Budzinski deposited funds from the Malachi Bank Account into the Malachi Account, ostensibly for trading in that account;
- Budzinski persuaded the Malachi executive to adopt the Malachi Resolution, which specifically authorized Budzinski to exercise his discretion in the acquisition of additional BCM Shares;
- Budzinski said in his Interview that once the Malachi Account was closed, he obtained a BCM Share certificate from Raymond James for Malachi's shares and that it remained in his possession at the time of his Interview; and
- Garth's notes reflected that Budzinski provided trading instructions in connection with the Malachi Account.

[74] All of this was consistent with the testimony of JG and JF. When asked who chaired the Malachi board meetings, JG testified as follows: "Gerald. He did everything. . . . we just sat and listened. He did the speaking. He did everything; we didn't". She also testified that Budzinski "called all the shots", was "in charge of everything", and that he would give out orders that were followed by others. In addition, despite his purported responsibilities noted in the Malachi Letter, JF, the vice-president of Malachi, testified that he did not know about the Malachi Account and that he had no involvement with it.

[75] Accordingly, we find that Budzinski was authorized to trade in the Malachi Account throughout the Relevant Period, and – consistent with the expectations of all involved – he was the only person who provided trading instructions to Raymond James for any and all trading in the Malachi Account during the Relevant Period.

3. Freedom Account

[76] The client account agreement for the Freedom Account was signed on behalf of Freedom Investors by JG, **RS** (a pastor with the religious organization Budzinski founded), **MW** (LP and HP's mother), along with three other individuals, and by Thor as the investment advisor on behalf of Raymond James. The account documents listed Freedom Investors as having net fixed assets of \$22,000 with no current income, and indicated that Freedom Investors' levels of investment

knowledge and experience were both "None" and that the club learned about Raymond James from Budzinski and another individual.

[77] Other account documents dated October 20, 2007 included an Investment Club Agreement and a form listing the beneficial owners of Freedom Investors. These documents identified six members of Freedom Investors and their positions (where applicable) within the club, including JG (secretary) and MW. JG acknowledged during her testimony that her investment knowledge was "zilch".

[78] Budzinski's formal involvement with Freedom Investors began in 2013. In his Interview, he said that MW approached him ". . . to take over buying and selling -- or the control of their account for Freedom Investors" so that he could undertake trading on behalf of Freedom Investors. At that point, Budzinski said that he opened a bank account, asked people if they wanted to deposit funds with Freedom Investors to purchase BCM Shares, and he "lent them some more money to buy some stock" from August to December 2015.

[79] The Freedom Account documents were updated in late January 2013 to reflect changes in the membership, management, contact information and investment knowledge and experience of Freedom Investors. Budzinski was identified as one of four members (the only new one), as well as a beneficial owner, authorized person, director and president of Freedom Investors. He was also identified as a director of Malachi. The address and telephone number for Freedom Investors were also updated to the same as Budzinski's, its level of investment knowledge was updated to "Good" (defined to mean "I have a good knowledge of investing and have moderate experience with different types of investments and strategies"), and its investment experience was updated to "Extensive" for various forms of investments.

[80] The January 2013 updates also indicated that JG remained a member and secretary, and MW remained a member and was identified as treasurer and her email address was referenced for document delivery. The updated account agreement was signed on behalf of Freedom Investors by Budzinski, JG, RS, and MW, and by Thor on behalf of Raymond James. JG signed the updated documents at Budzinski's request although she said she had no understanding of the documents at the time.

[81] In his Interview, Budzinski denied that he was either a member or a beneficial owner of Freedom Investors and said that the account documents were completed so that he could oversee trading in the Freedom Account:

I'm noted as one of the directors of it because they required somebody in that position. So my name was put into it. But I only was there to buy and sell the stock. . . . But I don't own any of the stock through them. I'm not a participant member of it.

[82] Budzinski also acknowledged that he told Thor that he would be "running" and "presiding over" the Freedom Account and that Thor did not know that Budzinski was not a beneficial owner until he told Thor in June 2016.

[83] Further updates to the Freedom Account information occurred in February 2016. At that time, the membership increased to five members. Budzinski, JG, and RS remained members and

Budzinski and JG continued as president and secretary, respectively. As confirmed in a handwritten note to Raymond James dated February 9, 2016, Freedom Investors had two new members, including AE. The note also indicated that AE would be the new treasurer and confirmed that MW was no longer a director or a member of Freedom Investors.

[84] The February 2016 update also listed Freedom Investors' net liquid assets at \$440,000 (an amount consistent with the February account statement showing holdings in the Freedom Account to be approximately \$439,000), and included a handwritten note indicating that annual income was from "irregular contributions from members". The advisor comments section of the February 2016 updated client account agreement indicated: "Deposit \$25,000, adding to existing positions. Client understands risk. Paperwork update, member change."

[85] There were two separate signature pages to the client account agreement updated in February 2016. One page was signed by Budzinski, JG and RS, and the other page was signed by AE and another new member. AE said that Budzinski asked her to sign the document, which she did at Budzinski's residence. She did not recall being presented with the entire document, only the signature page. AE agreed to become treasurer for Freedom Investors when Budzinski approached her some time after MW passed away and inquired whether she wanted the position. AE said that she had very little investment knowledge and that all of her investing was done through Budzinski.

[86] The February 2016 update to the client account agreement for Freedom Investors listed the client's investment objectives as 100% speculative (defined in the update form to mean "[m]y emphasis is on maximizing my total return potential through investments in securities including, but not limited to speculative equities, options or high risk fixed income products", with possible short-term trading) with 100% high risk tolerance, and indicated that the account holder did not, alone or as part of a group, own or control 10% or more of the voting rights of a publicly traded company or control 20% or more of the voting rights of a publicly traded company. Other account documents dated February 23, 2016 listed Budzinski as a beneficial owner, authorized person and director of Freedom Investors and indicated that he was not an insider or controlling shareholder of a publicly traded company. As with the January 2013 update, Budzinski was also identified as a director of Malachi.

[87] Freedom Investors held 700,000 BCM Shares in the Freedom Account as of August 31, 2015, and acquired an additional 1,645,000 BCM Shares in the Relevant Period. There were no sales of BCM Shares from the Freedom Account in the Relevant Period. Based on the evidence, the particulars of the acquisitions of BCM Shares in the Freedom Account in the Relevant Period are as follows:

Month of Purchase	Number of BCM Shares Purchased	Purchase Price per BCM Share
September 2015	1,275,000	\$0.04 - \$0.05
October 2015	105,000	\$0.045
January 2016	100,000	\$0.20
February 2016	70,000	\$0.18 - \$0.20
March 2016	35,000	\$0.20 - \$0.235
April 2016	60,000	\$0.225 - \$0.245

[88] As of April 30, 2016, Freedom Investors held 2,345,000 BCM Shares in the Freedom Account. Account statements also showed that \$119,715 was deposited into the Freedom Account from September 2015 to April 2016, ranging in amounts from \$1,500 to \$50,540.

4. Trading Authority for the Freedom Account

[89] Updates to the Freedom Account in 2013 and 2016 each included an Investment Club Agreement signed by Budzinski (along with other Freedom Investors members) and identified Budzinski as an authorized person for Freedom Investors. These agreements each contained the following term:

Each of the person or persons whose names and signatures appear below as President, Secretary and/or Treasurer (the "Officers") are hereby appointed as attorneys for each of us and as agents for the Club, for all purposes of our dealings with you, with full power and authority to do in its name on our behalf anything that each of us can lawfully do by an attorney, including, without limitation, the authority:

- (a) to give instructions for the account, including the address for receipt of confirmations, statements, and other communications from Raymond James Ltd.;

...

[90] Bassett testified that a specific form was used by Raymond James to identify the trading authority for non-individual entities and confirmed that this document identified the officers for the investment club although he was uncertain if this provision addressed trading authority for the account.

[91] We considered this document to have clearly identified the officers appointed by the investment club each as having full authority to provide Raymond James with instructions, including trading instructions on behalf of Freedom Investors. Accordingly, we find that:

- from January 2013 to February 23, 2016, trading authority for the Freedom Account was held by each of Budzinski, JG and MW as president, secretary and treasurer, respectively; and
- from February 23, 2016 until June 2016, trading authority for the Freedom Account was held by each of Budzinski, JG and AE, as president, secretary and treasurer, respectively.

[92] This was corroborated by Heaney's and Bassett's evidence that Raymond James's records confirmed that Budzinski had trading authority over the Accounts, including the Freedom Account.

[93] JG and AE both testified that they had no involvement in the Freedom Account, that they had never met or communicated with Thor or Garth, and that Budzinski managed the Freedom Account. While HP thought that MW "must have" exercised trading authority because she held securities in Freedom Investors, we understood that MW had passed away prior to the Relevant Period. In any event, we placed no weight on HP's supposition (at least as it related to the Relevant Period) given that it was purely speculative and inconsistent with Budzinski's Interview admissions

that MW had approached him in 2013 so that he could assume trading responsibility for the Freedom Account and that he told Thor he would be "running" and "presiding over" that account.

[94] Because none of JG, AE or MW exercised trading authority relative to the Freedom Account during the Relevant Period, we find that Budzinski was the only person who exercised trading authority and provided trading instructions to Raymond James' representatives for any and all trading in the Freedom Account during the Relevant Period.

[95] This finding was corroborated by the preponderance of evidence, including:

- Budzinski told Staff in his Interview that he became involved with Freedom Investors specifically to engage in trading in the Freedom Account on behalf of Freedom Investors members;
- AE's testimony that Budzinski made all of the investment decisions for Freedom Investors, including the decision to retain the BCM Shares despite her suggestion that they should consider selling them in light of the increase in price;
- the denial by other members of Freedom Investors that they had any involvement with the Freedom Account, other than possibly sending money orders to Raymond James or signing documents at Budzinski's request;
- updates to the investor knowledge and experience sections in Freedom Account documentation coincident with Budzinski's involvement with the account;
- evidence that Budzinski solicited individuals to join Freedom Investors and that he loaned them funds so that he could invest on their behalf through Freedom Investors;
- Account statements for the Freedom Account were sent to the same address as Budzinski;
- Budzinski said in his Interview that once the Freedom Account was closed, he obtained a BCM Share certificate from Raymond James for Freedom Investors' shares and it remained in his possession at the time of his Interview; and
- Budzinski signed a Freedom Investors agreement dated January 2, 2016 as "Manager of Freedom Investors Account".

5. LP Account

[96] The LP Account was the first trading account LP had opened with any brokerage. The purpose of the account was to allow LP to invest "solely" in BCM Shares, based on what Budzinski and others told her about the company. This was her first foray to investing in the stock market.

[97] Thor signed the client account agreement for the LP Account, as the investment advisor on behalf of Raymond James. The account opening documents indicated that LP was a stay-at-home

mom with no stated income and an estimated net worth of \$35,000 (including \$20,000 of net liquid assets), that she had no investment knowledge or experience, and that her investment objectives were 20% growth and 80% speculative with a 100% "high" risk tolerance.

[98] Once the LP Account was opened, \$81,300 was deposited into the account and 1,600,000 BCM Shares were purchased in November 2015. LP testified that she used money from her inheritance to purchase BCM Shares.

[99] On November 23, 2015, Thor received the following email communication from a Raymond James compliance officer raising concerns as to the suitability of the investment in the LP Account:

During a review of the subject client's suitability, we noted a concern of concentration within subject account. It appears that 91% of the subject client account is held in a single common share equity. Also, the client indicated no investment knowledge, no annual income, and her liquid assets of \$20,000 appear to be understated. Would you kindly provide more information that may explain the reason why the client is holding such high concentration of [BCM] that has a risk rating of HIGH?

[100] Thor replied that the client "received a sum of money from her father[-]in[-]law to invest in this company", that he also had trading authorization on the account, and that "this is something her father[-]in[-]law is doing for her and she's okay with him doing so" and that he "is advising her on the purchases". In a subsequent email on November 24, the compliance officer asked for more information, including whether Budzinski had trading authority on any of Thor's other accounts, and again noted that "... [LP]'s financial information appears to be understated (20K liquid assets but her RJL account alone is 80k). This should be updated." Thor replied by email the following day, indicating that Budzinski had been an analyst for 15 years, "doing investigative analysis and contacting individuals for private placements". Thor confirmed he would update the information for the LP Account, and that Budzinski also had authority to trade over the HP Account (but failed to indicate that Budzinski also had trading authority over the Malachi and Freedom Accounts).

[101] LP signed an updated client account agreement on December 9, 2015 (the **December 2015 Update**), which revised her estimated net worth from \$35,000 to approximately \$150,000 (including \$135,000 of net liquid assets). The document indicated no change to her investment knowledge or experience.

[102] The only transactions in the LP Account involved BCM Shares, all of which took place in the Relevant Period and by the end of that period, the LP Account had accumulated 1,776,000 BCM Shares. Based on the evidence, the particulars of those transactions are as follows:

Month of Purchase	Number of BCM Shares Purchased/(Sold)	Purchase/Sale Price per BCM Share
November 2015	1,600,000	\$0.05
December 2015	30,000	\$0.07
January 2016	(210,000)	\$0.125
February 2016	36,000	\$0.17
May 2016	320,000 ⁽¹⁾	Unknown

⁽¹⁾ These BCM Shares were "received" into the LP Account in May 2016, and the Raymond James statements reflected the type of activity as "Stock Exchange" rather than the typical "Buy" transactions. We had no evidence of when they were purchased, the purchase price for these BCM Shares, or how they were acquired. We assumed that these BCM Shares were acquired by way of private placement.

[103] Account statements also showed that in addition to the \$81,300 deposited into the LP Account in November 2015, \$5,000 was deposited in December 2015, and in January 2016, the proceeds of the sale of BCM Shares (approximately \$26,000) were withdrawn and a further \$3,500 was later deposited into the LP Account. Following the addition of the 320,000 BCM Shares into the LP Account in May 2016, the value attributed to LP's BCM portfolio was approximately \$530,000.

[104] In respect of the sale of BCM Shares in January 2016, LP said that RS had asked Budzinski "about getting in on" a private placement at the time and that Budzinski approached her on behalf of RS about the BCM Shares in the LP Account. According to LP, RS wanted to buy at a specific price that he could afford and she agreed to sell 210,000 BCM Shares at \$0.125 per Share. BCM's publicly filed management discussion and analysis for the period ending May 31, 2016 (the **BCM MD&A**) indicated that BCM completed a non-brokered private placement on February 15, 2016, in which BCM issued 825,000 units. Each unit cost \$0.10 and consisted of one BCM Share and one-half of a share purchase warrant that could be exercised at \$0.15 for each full warrant to acquire an additional BCM Share. As this was the only evidence of a BCM private placement that closed subsequent to LP's sale of BCM Shares to RS, and considering that the trade to RS was for a higher share price and did not include purchase warrants, LP's explanation for the transaction seemed implausible.

6. Trading Authority for the LP Account

[105] Raymond James' records for the LP Account reflected that Budzinski had full authority to make trades in the account, including the ability to direct funds to and from the LP Account. LP signed documents when she opened the LP Account that granted Budzinski (identified as "GM/Managing Director and President" of Malachi) full authority over the LP Account as agent to buy or sell securities and to transfer money or securities among LP's accounts. Budzinski also signed the trading authorization acceptance section of the account opening document. Thor's comments on account opening documents reflected that he had "just met" the client, and that LP was the daughter-in-law of the referring client, which was clearly a reference to Budzinski. The comments further indicated that Thor had known Budzinski for 31 years, described him as "a sophisticated investor with moderate to extensive investment experience", and stated "full T/A (and referring client) to manage portfolio primarily". The December 2015 Update provided that Budzinski continued to have full trading authority and although Budzinski did not sign the account update documents, a handwritten note beside the trading authorization acceptance section indicated that the signature was "already on file".

[106] Also in evidence was a letter dated June 10, 2016 (subsequent to the Relevant Period) from LP addressed to Thor, stating:

There seems to be some confusion over the control of my account. I would like this put into the record that I am the sole owner and controller of my account. Mr. Gerald Budzinski assisted me in purchasing so as to not to manipulate or destabilize the market and without any fee.

I decide [sic] to use my estate funds to purchase in this company because my mom and brother have shares and I liked the information on this company. I know the risks and I still feel that a potential of a great mine is there for the proving.

Please remove Gerald Budzinski from future activation on my account.

[107] LP said that Budzinski asked her to send this letter to Thor after telling her that there was a problem with the LP Account, and she sent this letter to clarify the misunderstanding about the account.

[108] That Budzinski had trading authority over the LP Account, and that he executed trades in the LP Account (at least up to December 2015), was acknowledged by Budzinski in his Interview:

Q And my understanding was that you also had trading authority on [LP's] account?

A Yes. For -- I forgot how much she was supposed to buy, but ...

Q So in the period of June 2015 to June 2016, did you execute trades for [LP] in BCM?

A Yeah, she -- between her and [HP], they did a million shares because of some cross that was going to take place, and then I bought some more stock for her, and then she took over her account.

Q When did she take over her account?

A I think it was in December of last year -- of -- of '15.

Q She took over her account in December 2015?

A Yeah, I think so. That's when it was, because I -- once they bought what they wanted to buy, I (UNREPORTABLE SOUND). I'm out of it. ...

[109] According to Heaney, Raymond James's documents and order entry system confirmed that Budzinski had trading authority over the Accounts, including the LP Account.

[110] LP said that she placed all of the trades in the LP Account and that Budzinski did not directly trade in the LP Account. She testified that all trades in the LP Account were generally in response to telephone calls from Thor, although she may have contacted him on one or two occasions to initiate a trade. We were not provided with evidence as to whether the 2015 trades in the LP Account were solicited by Thor, but the single purchase of BCM Shares in the LP account in February 2016 was unsolicited.

[111] LP's evidence was inconsistent with Raymond James documentation and statements Budzinski made during his Interview, and we found her attempts to explain these discrepancies to be both perplexing and internally inconsistent.

[112] In her testimony, LP denied that Budzinski had access to the LP Account or that she wanted Budzinski to act as a trading authority for the LP Account. While she acknowledged that he may have had authority to trade in the LP Account, she suggested that Budzinski's authority was limited -- he could only deposit funds into the LP Account when she was unavailable -- and he "never ever

ever has traded on my account". At most, Budzinski's only involvement was to provide her with advice when she needed it and to occasionally suggest to Thor that he call LP and have her buy BCM Shares "if there was a block lot [sic] or a block up for sale".

[113] LP also said that she sent Thor a letter after receiving a copy of the December 2015 Update indicating that Budzinski was "never to have full trading authority on my account" and that he was "allowed to deposit into my account when I was unavailable to do so". There was no such letter in evidence, and we expect that any material changes to trading authority for an account would have been updated by Thor and reflected on Raymond James' system. The only letter from LP to Thor in evidence was dated June 10, 2016, seven months after the December 2015 Update and subsequent to the Relevant Period.

[114] LP's testimony was also diametrically opposed to statements she made under affirmation in her investigative interview. According to these statements, she did not execute any trades in the LP Account and Budzinski executed all of the trades on her behalf. The relevant portions of her interview statements were as follows:

Q It appears that as of the end of June, you had 1,776,000 shares of BCM. Does that sound correct?
 A Yes.
 Q So that's approximately 6.9[%] of all the issued outstanding shares of BCM. Are you aware of that?
 A Yes.
 Q And these shares, they were acquired subsequent to December 2015?
 . . .
 A Yes.
 Q And did you execute any of these trades personally?
 A No.
 Q Mr. Budzinski executed all of these trades on your behalf?
 A Yes.

[115] LP also stated in the interview:

A As [Budzinski] has more knowledge in the trading industry than what I did, I authorized him to make the judgment calls in trading for me on my behalf. He advised me that this was a good move and to make it when appropriate.
 Q And when you say "good move", are you referring to BCM?
 A Yes.

[116] When confronted with her interview statements in the Hearing, LP indicated that she did not recall making those statements, and suggested that her failure to recall was "[p]robably because the amount of stress that [she] was under from all of the questions". She acknowledged that her interview statements were inconsistent with her testimony that Budzinski never traded in the LP Account, but she denied making the interview statements. She then explained that the transcripts must have incorrectly recorded her statements and that "there could be stuff missed or not worded properly". We do not accept her contention that the court reporter made multiple transcription errors, particularly on a critical detail.

[117] After a three-hour interruption to Budzinski's redirect examination of LP (in part, to accommodate her schedule), LP made another attempt to overcome the apparent disconnect between her Hearing testimony and her interview statements. Regarding the statement that she had "authorized [Budzinski] to make judgment calls in trading for me on my behalf", she suggested that what she meant was that "I asked for the judgment calls if I should buy the block or not . . ." after Thor would call her and let her know that a block of BCM Shares was available. She then suggested that by answering the question "Mr. Budzinski executed all of these trades on your behalf?" in the affirmative, she meant that Budzinski had advised Thor to call her directly and that she would purchase blocks that were available if she had the funds to do so. We note that the explanations of her interview statements that LP offered in redirect did not accord with any reasonable interpretation of those statements, and they were also contrary to her initial reaction when confronted with those statements in cross-examination.

[118] LP's explanations for the discrepancies between her testimony and her interview statements largely contradicted one another. After first failing to recall making the particular statements in her interview (which did not impugn the accuracy of the interview transcripts), she then asserted that the certified transcript statements were inaccurately reproduced, seemingly because of an apparently clear recollection that she did not make those statements. Finally, in redirect she offered an interpretation of her interview statements in an apparent effort to make them accord with her Hearing testimony, which presupposed that she recalled making the interview statements and that they were accurately transcribed.

[119] Ultimately, we determined that LP's testimony generally lacked credibility. On the question of Budzinski's trading authority for the LP Account, her testimony was inconsistent with her prior statements and we considered that her explanations were an obvious fabrication. Accordingly, we ascribed no weight to her testimony in our analysis.

[120] Based on the remaining evidence, including the transcript of Budzinski's Interview and Raymond James' LP Account records, we find that Budzinski had trading authority over the LP Account from the inception of that account until the end of the Relevant Period, and that he executed trades in the LP Account until at least December 2015.

7. HP Account

[121] HP opened the HP Account with Raymond James so that he could acquire BCM Shares (although HP indicated that it remained an option for him to acquire other securities).

[122] Thor signed the client account agreement for the HP Account, as the investment advisor on behalf of Raymond James. HP was referred to Thor by Budzinski.

[123] HP recalled that when he opened the HP Account, Thor had explained that certain reporting requirements would be triggered if HP were to acquire 10% or more of the issued and outstanding BCM Shares, and this – along with similar discussions with Budzinski – formed the basis for his desire to "maintain a 9 to 9.5% interest" in BCM. Despite that advice, HP testified that he was still buying BCM Shares, and was considering increasing his position to 12.5% but was waiting for additional funds. He also claimed that it was his idea to invest in BCM because it held a property with "very good potential".

[124] The client account agreement for the HP Account listed HP's total net worth at approximately \$100,000, with an annual income of \$65,000. The documents also listed HP's investment knowledge as "Limited" (defined to mean that he understood "the basics of investing and [had] limited experience with different types of investments and strategies") and listed his risk tolerance as 100% "High". Also included in the agreement was Thor's notation that he spoke to HP about the speculative nature of his intended purchase and that it might result in a loss of all of his money and that HP said he was willing to take that risk. HP acknowledged that his market knowledge was at a novice level, but he was gaining more comfort buying stocks and that he could do so online.

[125] In little more than three months after opening the HP Account, HP acquired 2,270,000 BCM Shares. After that time, the only other transaction was the purchase of 1,000 BCM Shares in June 2016. All transactions in the HP Account occurred in the Relevant Period and all involved the purchase of BCM Shares. Based on the evidence, the particulars of those acquisitions are as follows:

Month of Purchase	Number of BCM Shares Purchased	Purchase Price per BCM Share
October 2015	770,000	\$0.049 - \$0.05
November 2015	511,000	\$0.04 - \$0.06
December 2015	939,000	\$0.05 - \$0.095
January 2016	50,000	\$0.20 - \$0.205
June 2016	1,000	\$0.22

[126] These transactions were predominantly funded from the deposit of \$124,175 into the HP Account from October 2015 to January 2016. Approximately \$100,000 – apparently derived from loan proceeds – was deposited in October and November 2015. One such loan was made by Malachi in the amount of \$51,000 (the **Malachi Loan**), as evidenced by a loan agreement dated November 12, 2015 that was signed by Budzinski and LP on behalf of the executive committee of Malachi. Terms of the Malachi Loan included an interest-free, two-year term, payable by \$100 monthly installments until repaid "in 2 years". HP acknowledged that the purpose of the Malachi Loan was to enable him to purchase BCM Shares.

[127] HP said that the remaining investment funds probably derived from estate funds that he deposited into the HP Account, along with other earnings and an additional loan or loans. One such loan was apparently funded either by Malachi or by Malachi's former president. HP was uncertain as to the extent of the former president's involvement, but indicated that Budzinski would know because he had arranged the loan for HP. HP also said that he was making cash payments to Budzinski to repay these loans.

8. Trading Authority in the HP Account

[128] In the client account agreement for the HP Account, HP provided Budzinski (identified as director of Malachi) with full authority on the HP Account to "buy or sell securities in my accounts" and to transfer money or securities among HP's accounts. HP acknowledged that he gave Budzinski trading authority due to his relative lack of experience and unfamiliarity with trading

securities at the time compared to that of Budzinski. Budzinski signed the relevant portion of the agreement acknowledging acceptance of his authority over the HP Account.

[129] HP testified that he sent multiple letters to Thor about Budzinski's trading authority in the HP Account. According to HP, one letter was sent in 2015, another in June 2016, and he thought that there was one more; he testified that he had typed the letters, signed them and sent them to Thor. The only letter in evidence was dated June 9, 2016 (subsequent to the Relevant Period) and addressed to Thor from HP. It stated:

Please be advised by this letter that [Budzinski] is no longer assisting me in purchasing the share position that I desire. He has not been assisting me since January and should be removed from the account.

I heard him talking about it and I wanted to buy the maximum I could as quickly as I could. He organized my purchasing so as not to be disruptive to the market, and nothing else.

Please note that:

- 1) I am the sole owner and controller of all assets in my account with Raymond James Ltd.
- 2) I do want to maintain a 9 to 9.5% interest in the company.
- 3) I am fully aware of the risks and potential of owning this company.
- 4) Gerald Budzinski does not have any control or share voting power over these shares.

[130] Although HP initially said that he drafted this letter, during cross-examination, he refreshed his memory based on his investigative interview transcript and said that Budzinski drafted the letter and HP signed it and sent it to Thor. Because the HP Account only held BCM Shares, we inferred that the shareholdings referred to in this letter pertained to BCM Shares.

[131] According to Heaney, Raymond James's documents and order entry system confirmed that Budzinski had trading authority over the Accounts, including the HP Account.

[132] We find that Budzinski had trading authority over the HP Account from the time the HP Account was opened until the end of the Relevant Period.

[133] As for the actual trading in the HP Account, HP acknowledged that Budzinski provided trading instructions in that account, but he said that he also bought BCM Shares if he was available to do so in the mornings. HP's work schedule required him to work in the evenings, so he generally slept during the day. Because of that, HP was typically unavailable to purchase shares during normal trading hours, and he said that he would ask Budzinski to trade on his behalf. HP also said that he may have occasionally executed some trades if he was still awake in the mornings and explained that ". . . when [Budzinski] was talking with [Thor], he would pass the phone to me, and I would place an order here and there" or Thor would call Budzinski if there was stock available and he would pass the telephone to HP if "we were going to buy that day". HP said that some orders may have been entered by Garth when Thor was away, based on instructions from either HP or Budzinski. Garth's notes confirmed that HP placed an order by calling Thor at 9:07 am (Mountain time) on June 2, 2016 to place an iceberg order and indicated that HP would bring in a bank draft the following day.

[134] In his Interview, Budzinski said that he held trading authority for the HP Account "for the first 2 million [BCM Shares], and after that, [HP] did his own trading". HP agreed that Budzinski was trading for him in the HP Account until January 2016 "because I was ignorant on how it went". HP also said that in the early stages he generally followed what Budzinski would tell him to do regarding trades. He denied that Budzinski had control over his BCM Shares, stating that they "are mine" and "belong to me" and that Budzinski could only buy them for HP. He also asserted that Budzinski did not force him to purchase stock.

[135] Based on this evidence, we find that Budzinski exercised his trading authority over the HP Account and made all of the trades in the HP Account prior to January 2016.

C. Raymond James Oversight of the Accounts

[136] Raymond James's compliance department was responsible for monitoring trading activity on the brokerage's platforms, in part to ensure compliance with the UMIR but also to confirm that trade orders were properly identified with industry markers (such as those used for insiders). This monitoring was accomplished in part by an alert system that warned of any high-close trades or high-close bids, which might then be reviewed by compliance personnel.

[137] Heaney, Manager of Trading Compliance with Raymond James, reviewed certain trading activity in the Accounts that had triggered alerts on their system. Heaney's evidence was that several orders made in the Accounts during the Relevant Period raised concerns about possible high-close trades or "artificial price", including three of the 25 high-close trades and two of the five high-close bids identified in the NOH. While the first four problematic orders took place between the beginning of November 2015 and the end of April 2016, we had no evidence that Thor had been contacted in respect of these concerns until May 26, the day following a trade that triggered another alert. The apparent approach taken by Raymond James to that point was to continue monitoring "future trading patterns".

[138] We heard testimony and admitted documentary evidence regarding certain trades and bids placed by Budzinski in the Accounts, including some that triggered alerts or were otherwise concerning to Raymond James's compliance department. We also received evidence touching on internal Raymond James communications in connection with the decision to close the Accounts. This evidence is summarized in the following paragraphs.

1. May 25 Trading Activity

[139] On May 25, 2016, an unsolicited day order was placed in the Malachi Account for the purchase of 500 BCM Shares at \$0.275. The order, placed within three minutes of market close, increased the bid for BCM Shares by \$0.03 and expired after the market closed. That order was followed by another Malachi order for the purchase of 16,000 BCM Shares at \$0.285. This second order was an unsolicited open order placed within 2 minutes of market close, and the price was amended in the last minute from \$0.285 to \$0.295. Nine thousand BCM Shares were acquired at the lower price, followed by a purchase of 6,000 BCM Shares at \$0.29, increasing the closing price by \$0.005.

[140] Heaney considered this activity to be suspicious and questioned whether the orders were for investment purposes based on the timing and the relatively small volume of shares. He therefore

contacted Thor by email and indicated that the activity could be construed by regulators ". . . as an attempt at manipulating the closing bid/price of the shares".

[141] Thor explained in a reply email that he had received an unsolicited order for 16,000 BCM Shares at \$0.295, but he mistakenly entered the order at \$0.285 and had to correct it. He also said that Budzinski typically had appointments throughout the day, and that "[h]e calls when he is between appointments". In a subsequent email, Thor indicated that Budzinski had been a client for more than 30 years and he did not believe there was "anything nefarious about his motives or intentions". Heaney did not recall receiving an explanation for the uptick bid and testified that his concern was not limited to the timing of the trading activity but also to the effect the two orders had on the market.

2. May 30 Trading Activity

[142] On May 30, 2016, a purchase of 2,000 BCM Shares at \$0.26 occurred in the Malachi Account. This trade, based on an unsolicited day order placed within 40 minutes of close, increased the closing price by \$0.005.

[143] According to notes compiled by Garth, Budzinski called several times that day (at 8:51 am, 11:58 am, 12:50 pm, 1:53 pm and at 1:56 pm, all Mountain Time) seeking trading information on BCM Shares – notably "current quote, floor market by price and order details, trade details" – from Garth. After Budzinski left a message at 12:50 pm (Mountain Time), she called him back, at which point he placed an order in the Malachi Account for 10,000 BCM Shares at \$0.26. Garth's notes (as confirmed by a trade ticket) indicated that this trade was immediately filled. The last 2,000 Shares obtained pursuant to this order resulted in the above noted high-close trade.

[144] Garth's notes recounted that Budzinski called again at 1:56 pm (Mountain Time) to "do some trades", and she provided him with certain market information. Budzinski instructed Garth to amend an earlier order (partially filled with 1,500 BCM Shares remaining) to a market order. Garth was able to make that revision (once she removed the "iceberg restrictions") and the order was immediately filled in the Malachi Account. Budzinski then instructed Garth to place another order in the Malachi Account to buy 7,500 BCM Shares at market, but the order could not be processed before close. Garth's notes indicated that the order was "queued for the morning but [Budzinski] said if it does not drop off the system to cancel it (which I did at 2:20 pm)" and that he put in another day order in the Malachi Account to purchase 5,000 BCM Shares at \$0.245 queued for the following morning.

3. May 31 Trading Activity

[145] On May 31, 2016, the last trading day of the month, another high-close trade and a high-close bid occurred in the Malachi Account. Immediately before the trade, the NBO was \$0.26 for 11,500 BCM Shares. An unsolicited order for 12,000 BCM Shares at market was placed within seven minutes of close, and resulted in the purchase of 11,500 BCM Shares at \$0.26. The remaining portion of the order (500 BCM Shares) was then filled at \$0.30, increasing the closing price by \$0.04.

[146] Following that high-close trade, an unsolicited day order to purchase 500 BCM Shares at \$0.26 was placed in the Malachi Account. The order, made within the last minute of trading, was

not filled and expired after the market closed that day. It increased the closing bid for BCM Shares by \$.025.

[147] Garth's notes for this day indicated that she was in communication with Budzinski throughout the day – he called her at 7:26 am (he left a message, and she returned his call at 7:38 am), 8:18 am, 10:09 am, 1:36 pm, and again at 1:52 pm (all Mountain Time). According to her notes, Garth provided Budzinski with trading data for BCM Shares ("current quote, floor market by price and order details and trade details") on each of these calls. Her notes for the last call summarized her interaction with Budzinski leading up to the last-minute trading that day:

[Budzinski] called @ 1:52 pm – gave him info on BCM – current quote, floor market by price and order details, trade details. [Budzinski] put in an order to buy 12,000 shs of BCM at mkt, he got filled right away. He wanted to enter another order to buy 500 shs at .26. We were minutes from the close and I told him that there are rules about entering orders like this right at the close. I said if Henry is comfortable entering orders for him, that's between them, but I was not comfortable entering the order. He said that it's not a high close trade because it traded at .30 already and he traded for the day already. I was flustered about being challenged and what to do and having issues with the order, kept getting an error message because the wrong info was entered in the account number line. I thought the order did not go through, but as it turned out, it was entered at 1:59pm and 26 seconds.

[148] Prior to the high-close trade on May 31, the highest price paid for BCM Shares that day was \$0.25 (for 5,000 BCM Shares) from a third-party account. Malachi had also acquired 5,000 BCM Shares earlier in the day at a price of \$0.24.

[149] This trading activity in the Malachi Account generated another alert, and Heaney sent an email to Cawley (Thor's supervisor and branch manager) on June 1, 2016 indicating that the Malachi Account "high closed and high bid the stock for the close (month-end close)". Heaney explained that he escalated the matter to Cawley to ensure that he was aware of the trading activity. In the email to Cawley, Heaney indicated that "regulators" might not accept Thor's explanation that the orders were for investment purposes and that the timing was due to the client's schedule, and he advised that the client was "putting us at risk of accepting orders that may be for the purpose of manipulation" and that "we will be enforcing a restriction on his buying to no [upticks] nor high bids for [BCM] in the last hour of trading". Heaney characterized this as a "soft restriction", and that future orders could still be made on the system but that the restriction was meant to curtail the trading behaviour that had continued despite having been brought to Thor's attention.

[150] Cawley confirmed in a reply email to Heaney that he agreed with Heaney's concerns, that Budzinski "calls in several times per day for quotes, depth and to see who is buying/selling", that Thor was away for the week, and that the Malachi Account was restricted from trading until Thor was back in the office. Garth's notes from June 1, 2016 corroborated this information, and indicated that she told Budzinski (at 1:43 pm Mountain Time) that the Malachi Account had been flagged by compliance and that trading was restricted until June 6 when Thor was back in the office. Cawley testified that he understood that Budzinski was an "extremely knowledgeable investor and had been doing it for . . . 50 years or something like that".

[151] On June 2, 2016, Heaney indicated in an internal email that he would prepare a gatekeeper report once Cawley was able to speak with Thor.

4. June 7 Trading Activity

[152] On June 7, 2016, a purchase of 500 BCM Shares at \$0.25 was made in the Malachi Account, resulting in a high-close trade that increased the closing price of BCM Shares by \$0.02. According to the trade ticket, this was an unsolicited day order placed within 46 minutes of close, and the price was amended from \$0.23 to \$0.25 within 35 minutes of close.

[153] In an email to Cawley on June 7, 2016, Heaney stated that "[h]e placed another uptick today" and inquired whether Thor had been informed about "the restriction of no upticks" of BCM Shares in the last hour of trading. Heaney sent this email because they "just had a discussion" about the trading patterns (and Cawley agreed with the concerns) but another trade had been entered in the last hour of trading despite attempts to "curb this sort of trading". Although Cawley advised in a reply email later that day that he "talked to [Thor] about it yesterday morning", Heaney's initial gatekeeper report (discussed below) indicated that the account restriction was imposed when Cawley met with Thor on the morning of June 8.

5. Account Restrictions and Closing of the Accounts

[154] On June 9, 2016, Raymond James restricted the Accounts from all trading in BCM Shares. Cawley testified that the Accounts were singled out because Budzinski had "either trading authority or he was directly involved with them". In an email to Thor on that date, Bruce Krutow (**Krutow**), Vice-President, Corporate Compliance with Raymond James indicated that the primary concern was with the number of BCM Shares accumulated in the Accounts:

As we discussed, our primary concern at this point is with the four accounts (Malachi, Freedom Investor, [HP], [LP]) that [Budzinski] holds t/a over. Based on their collective 7.6 million share holdings (out of 25.7 issued/ outstanding) a strong argument could be made that [Budzinski], while he doesn't beneficially *own* these shares, certainly could be seen to have control or direction over this pool of shares, which would put him significantly over both the 10% insider and 20% control person limits.

I had recommended that Budzinski seek legal advice on this issue, and that until this is sorted out, that you refrain from any further buying or selling of BCM. [original emphasis]

[155] On June 9, Thor confirmed that Budzinski was told that trading was shut down on the Accounts "effective immediately until further notice" and advised that Budzinski was willing to withdraw himself from having trading authority on the Accounts. Krutow expressed doubt that this would "solve the issues with the prior trades", and explained that Budzinski "could still be seen as 'controlling' the account, even if he wasn't actually formally named".

[156] As mentioned, letters dated June 9, 10 and 14 were sent to Thor by HP, LP, and Malachi, respectively. While the letters contained no specific reference to Budzinski's trading authority, each seemingly sought to clarify Budzinski's involvement in the respective accounts. HP's letter indicated that "[Budzinski] is no longer assisting me in purchasing the share position that I desire", that Budzinski ". . . should be removed from the account" and that ". . . Budzinski does not have any control or share voting power over these shares". The Malachi letter indicated that Budzinski was not "the final authority over [Malachi's] trading account and/or our share holdings" and that the hope was that the letter "clears up the fantasy control issue . . .". LP's letter indicated that she

was "the sole owner and controller" of the LP Account and requested that Budzinski be removed "from future activation on [her] account".

[157] A subsequent email dated June 16, 2016 from Krutow to Kevin Whelley (**Whelley**), a senior vice-president at Raymond James (copied to several others at Raymond James) indicated that "we are leaning towards advising the four clients to transfer their [A]ccounts to a new firm/advisor . . .".

[158] On June 20, 2016, Thor, Cawley and Whelley had a conversation regarding trading in the Accounts. A summary of that discussion, sent by email later that day from Whelley to others at Raymond James, included the following conclusions:

- Thor did not intend to accumulate "a control block for this group of clients," and "the mistake was made by multiple clients in the granting" of trading authority to Budzinski, "who was apparently a keen optimist for the prospects for BCM";
- Thor was very apologetic for his inadvertent error, was committed to correcting the position, and would contact the various clients and advise them to transfer their accounts to other dealers and warn them to be "cautious in providing trading authorization to anyone who may also have authorization for other investors, given the size of the holdings, as compared to the current float";
- There would be no trading of BCM Shares in Thor's other client accounts until the Accounts had "all been transferred out";
- Because BCM Shares are thinly traded and "a large portion of the float already in a small group of investors [sic] hands", it might be necessary to liquidate ". . . some clients [sic] positions . . . over time"; and
- "We wish to have no further involvement with [Budzinski] as a client, or as a person with trading authority over any client account".

[159] According to documents from Raymond James, the clients had been advised by June 22 to close the Accounts and transfer their shares to another brokerage.

[160] On June 27, 2016, Cawley confirmed in an internal email that the Accounts had "all taken the certificates for the shares and they are off our books", and that this represented more than 7.6 million BCM Shares.

[161] After the Accounts were closed, the securities in the Accounts were not transferred electronically to another brokerage, rather Budzinski took physical delivery of certificates representing the BCM Shares in the Malachi and Freedom Accounts. The LP Account was closed, the 1,776,000 BCM Shares in the account were delivered to LP and the cash balance in the LP Account was withdrawn. HP said that he did not know why the HP Account was closed and that it was Budzinski who informed him of the closure. The evidence was unclear as to who received the certificates for the BCM Shares in the HP Account.

6. Gatekeeper Reports

[162] A gatekeeper report is submitted to IIROC by an IIROC-regulated firm, such as Raymond James, when the firm suspects activity executed through any of its accounts may have violated the UMIR.

[163] Heaney indicated that he filed two gatekeeper reports with IIROC. The first was submitted on June 8, 2016 (the **First Report**) and was based on his own review and investigation. The First Report noted Budzinski, with trading authority over the Malachi Account, was the client and addressed trading from February 19, 2016 to May 31, 2016. The UMIR rule referenced in the First Report was rule 2.2 – "Manipulative or Deceptive Method of Trading".

[164] The stated purpose of the First Report was "to advise on trades that may be of a manipulative nature". Identified in the First Report were three high-close trades (on February 19, May 25, and May 31, 2016) and three high-close bids (April 29, May 25, and May 31, 2016), all related to orders for BCM Shares made by Budzinski in the Malachi Account and entered or executed on the TSXV less than seven minutes prior to close. The First Report recounted that on June 1, 2016, Heaney had contacted Cawley to restrict Budzinski's trading in the hour prior to close to "lower or even ticks (no [upticking] the price nor bid)", and that Cawley met with Thor on June 8, 2016, at which point the trade restriction was implemented.

[165] Another gatekeeper report (the **Second Report**) was submitted to IIROC on June 24, 2016. Heaney said that this report was based on an investigation by the compliance department at Raymond James and that he submitted the Second Report at the request of Krutow. The information Krutow sent Heaney included a document summarizing the compliance department's investigation with the heading "Potential control block violation/ takeover bid violations – BCM Resources". The subject of that investigation was the quantity of BCM Shares held in the Accounts and whether the Accounts should be considered and "marked as a control position" as a result of their collective ownership of more than 20% of the issued and outstanding BCM Shares.

[166] The Second Report indicated that the total number of BCM Shares held in the Accounts represented approximately 30.2% of the issued and outstanding BCM Shares. The report noted that Budzinski had trading authority over the Accounts – Heaney explained that this was reflected in Raymond James's documents and order entry system – which raised concerns that "the group had an undisclosed [c]ontrol [p]osition as defined under the various Securities Acts" and that takeover bid requirements may have been breached. The Second Report confirmed that the Accounts were restricted from further trading of BCM Shares, that the clients were later advised to close their accounts and transfer their BCM Shares to another firm, and that the share certificates had been ordered for the clients.

D. IIROC Trading Review and Analysis

[167] Upon receipt of the First Report on June 8, 2016, IIROC initiated a trade review to assess potentially manipulative and deceptive trading activities involving BCM Shares. IIROC received the Second Report on June 24, 2016.

[168] IIROC assigned Ali to undertake the trade review. Her objective was to verify the allegations in the First Report by independently analyzing the trading data.

[169] As part of her review, Ali obtained information from various sources including additional records from Raymond James relating to the Accounts. Her analysis did not apparently involve interviewing Budzinski or any of the Account holders.

[170] Ali summarized her findings and conclusions from the trade review in a Trading Review and Analysis Preliminary Investigation Report dated September 14, 2016 (the **IIROC Report**). While the IIROC Report focussed on the concerns raised in the First Report, the Second Report was also referenced, specifically that the concerns raised therein – that "the group had an undisclosed control position as defined under the various Securities Acts and may have breached takeover bid provisions" – had been referred to the ASC.

[171] The IIROC Report indicated that from January 1, 2016 to June 30, 2016:

- BCM Shares were thinly traded, with a total of 666 executed trades and daily trades ranging from 1 to 42 (although we note that there were no trades in BCM Shares on 22 of the trading days in the review period);
- The BCM Share price increased from a closing price of \$0.125 on January 4 to a high of \$0.32 on May 2, before closing at \$0.15 on June 30, with no apparent correlation to BCM news releases;
- The Accounts were collectively responsible for 172 buy trades, including 44 uptick trades – representing almost 30% of the market total during the period reviewed – all but one of which were the result of active orders;
- The uptick trades did not appear timed to coincide with or reverse share-price movements, and there was no apparent pattern of small volume uptick trades;
- 25 of the 44 uptick trades were high-close trades, and two of those high-close trades occurred at month-end (in March and May);
- On 18 of the 25 days involving a high-close trade, BCM Shares were either not offered at a lower price at any time during the day or if they were, they were purchased by one of the Accounts at the lower price; and
- Five buy orders executed from the Malachi Account increased the closing-bid price for BCM Shares. While the IIROC Report indicated that only one of the five orders was entered at month-end (in May), Ali confirmed in her testimony that there were actually two month-end high-close bids, the second occurred on the last day of April.

[172] The IIROC Report also confirmed that the Accounts were restricted from trading in BCM Shares as of June 9, 2016, that the Accounts were subsequently closed, and that Raymond James

submitted two gatekeeper reports to IIROC. The IIROC Report noted that there were no concerns regarding "Raymond James' supervisory obligations".

[173] The IIROC Report concluded:

During the 6 month Review Period, the [Accounts] were the top purchasers of [BCM Shares]; and were responsible for the highest number of upticks and high closing trades. Overall, their pattern of trading activity appeared consistent with an accumulation strategy in a thinly traded security. Also, there was minimal high closing bidding activity by one Target Account.

However, given that the ASC is currently looking into [the Second Report] (2017-000516) where Budzinski and the [Accounts] "may have breached takeover bid positions", this file will be forwarded to the attention of Marc Arsenaault at the ASC for whatever action is deemed appropriate.

[174] The conclusion in the IIROC Report – that the trading pattern was consistent with an accumulation strategy and that the high-close bidding was "minimal" – seemed to be at odds with the recommendation to refer the matter to the ASC for further investigation. Indeed, it appears that the referral decision was driven by the fact that the ASC was looking into any potential breaches of the take-over bid requirements. Accordingly, we placed little, if any, weight on the fact that the matter was referred to the ASC for further investigation.

[175] As for the statement in the IIROC Report that the activity was consistent with the accumulation of shares, Ali explained that her trade review was not meant "to prove that manipulation exists" or to determine whether "manipulation did, in fact, occur", rather that the objective was to consider whether it "may" have occurred. When pressed as to whether the apparent accumulation strategy rebutted the possibility of manipulative activity, she stated:

. . . it can be both in that if someone is accumulating the shares, manipulative activity could occur. So the manipulative activity may have occurred because they were accumulating shares and not because of any manipulative intent. So I'm trying to say that . . . this activity that occurred met the standards for IIROC that IIROC considers potentially manipulative or deceptive.

So there were 25 high-closing trades and 5 high-closing bids. That's a fact. And then I'm saying here that these shares were – – these accounts appear to be accumulating the shares. So just because they were accumulating the shares does not excuse manipulative activity from being - - occurred. That's all I'm trying to say. Just trying to present both sides.

[176] We accepted Ali's explanation, particularly in light of her suggestion that the IIROC Report was only meant to identify whether the impugned activity could have been the result of market manipulation and not whether such manipulation had actually occurred. This limited scope is consistent with the quantitative analysis underlying the IIROC Report, which did not involve any attempt to interview Budzinski or the beneficial Account holders to ascertain the motivation underlying the trading activity. While we discuss in greater detail below the significance of a market participant's intentions and motivations in our assessment of the market manipulation allegations, we note here that an assessment of whether trading activity resulted in an artificial price ". . . may – perhaps inevitably it will – involve a consideration of what motivated the relevant market participant or participants": *De Gouveia* (at para. 93); see also *Re Podorieszsch*, [2004] A.S.C.D. No. 360 (at para. 75).

[177] Accordingly, while the IIROC Report provided a useful summary of the relevant trading data, it offered limited assistance on whether Budzinski's impugned trading activity reflected an intent to produce an artificial price for BCM Shares.

E. ASC Investigation

[178] Bauer first learned of Budzinski in June 2016, when she received a telephone inquiry from Raymond James about a potential manipulative trading case and advised Raymond James to file a gatekeeper report with IIROC. The ASC subsequently received a referral from IIROC, including one of the gatekeeper reports from Raymond James and the IIROC Report, at which point Bauer was assigned as the ASC's primary investigator for this matter.

[179] Bauer worked with another ASC investigator to review the IIROC Report and determine whether there was potential manipulative trading. Various individuals were interviewed during the course of the ASC's investigation including Budzinski, LP, HP, Thor, Heaney, Cawley, Bassett, SB, JG, AE, Steeds, as well as one or two others.

[180] Staff also collected numerous documents as part of their investigation, including:

- monthly statements and other documents (such as broker notes, written communications and compliance communications) from Raymond James covering the period January 1, 2015 to June 30 2016 for the Accounts;
- monthly statements for the Malachi Bank Account covering the period January 1, 2015 through to December 6, 2016;
- documents from BMO InvestorLine Inc. (**BMO**) and from QTrade Securities Inc. related to accounts in Budzinski's name; and
- the BCM MD&A, which provided information about the number of issued and outstanding BCM Shares and financing activities involving the issuance of BCM Shares in the Relevant Period.

[181] Based on her review of trading data for BCM, Bauer indicated that in August 2015, trading in the respective Accounts (the LP and HP Accounts had not been opened at that time) was relatively quiet, and there were days that BCM Shares did not trade at all. She also noted that from January 2016 to the end of May 2016, the Accounts were "extremely active" while the BCM Share price reached new highs. Upon the closing of the Accounts, Bauer noted that BCM Shares experienced a drop-off in price, although a subsequent improvement in the price of BCM Shares occurred in July before they trended downward after August 2016. This gave Bauer the impression that the Accounts were being used to help BCM Shares "trend up", in terms of price and volume.

F. Subsequent Trading in Online Accounts

[182] Staff tendered evidence demonstrating that Budzinski used self-directed online trading accounts to continue acquiring BCM Shares after the Relevant Period. Staff argued that the evidence was relevant to the issue of whether Budzinski was directing the trading in the Accounts because it demonstrated a similar pattern of high-close, end-of-day trading and that Budzinski was

a "fairly sophisticated and experienced investor who knew what he was doing by engaging in such trading" in the Accounts. Budzinski indicated that the documents could be "qualitatively" accepted. Some of these documents in question were the subject of the late pre-hearing disclosure described previously in these reasons.

1. BMO Account

[183] On or about June 14, 2016, Budzinski opened a self-directed, order execution only account with BMO (the **BMO Account**), which he used from June 2016 to March or April 2017 to acquire BCM Shares. In his Interview, Budzinski stated that he opened the BMO Account after "everybody else had got what they wanted or done what they wanted," and that he wanted to buy about 500,000 BCM Shares. Budzinski's trading in the BMO Account apparently involved some high-close trades, including one on June 22. Budzinski's trading activity was later scrutinized by BMO's compliance group and he was asked to close or transfer the BMO Account in April 2017.

2. QTrade Account

[184] In May 2018, Budzinski opened another online trading account, this time with QTrade Securities Inc. (the **QTrade Account**). His application to open the QTrade Account indicated that he did not "own or have control or direction over, directly or indirectly, alone or as part of a group, 10% or more of the voting rights of an issuer or publicly traded company or other entity", and represented that the intended use of the QTrade Account was for short-term investment strategies.

[185] From May 2018 through early March 2019, Budzinski acquired nearly 120,000 BCM Shares in the QTrade Account. His trading activity reflected "almost daily" purchases in relatively small amounts, including what appeared to be approximately a dozen high-close trades.

[186] Although the allegations in the NOH did not relate to Budzinski's trading activity in online trading accounts, we admitted the evidence, subject to the panel's discretion as to how much weight to give that evidence. In their written submissions, Staff did not rely on this evidence other than to support their contention that Budzinski was able to trade at times other than at the end of the day.

[187] In the circumstances, we afforded no weight to this evidence and it did not factor into our analysis. As mentioned, the evidence pertained to trading activity after the Relevant Period and was of marginal, if any, relevance to our analysis.

VI. ANALYSIS

A. Market Manipulation

[188] Staff alleged that Budzinski exercised his trading authority in three of the four Accounts during the Relevant Period to engage in a form of market manipulation. The NOH specifically alleged that Budzinski regularly entered bids for BCM Shares near the end of the trading day, resulting in at least 25 high-close transactions and five high-close bids, which he knew or reasonably ought to have known may result in or contribute to an artificial price for BCM Shares. Accordingly, Staff's position was that Budzinski breached s. 93(a)(ii) of the Act. As mentioned, Staff withdrew the allegation that Budzinski breached s. 93(a)(i).

1. Law

[189] Throughout the Relevant Period, s. 93 of the Act stated:

- 93 No person or company shall, directly or indirectly, engage or participate or attempt to engage or participate in any act, practice or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know may
- (a) result in or contribute to
- . . .
- (ii) an artificial price for a security . . .

[190] Section 93(a) supports the ASC's dual objectives of protecting investors and fostering a fair and efficient capital market by prohibiting market participants from improperly interfering with the market's ability to establish a fair and objective price for a security (*Podorieszach* at paras. 69-70):

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.

If market participants improperly interfere with the price of securities, that price is no longer a true reflection of genuine market supply or demand. Not only might investors unknowingly pay or receive a distorted price for a security but, more broadly, the fair and efficient functioning of the capital market and investor confidence in the market are placed in jeopardy. As Judge Woolsey said in *United States v. Brown*, 5 F. Supp. 81 (S.D.N.Y. 1933) at 85, affirmed on other grounds, 79 F.2d 321 (2nd Cir. 1935):

When an outsider, a member of the public, reads the price quotations of a stock listed on an exchange, he is justified in supposing that the quoted price is an appraisal of the value of that stock due to a series of actual sales between various persons dealing at arm's length in a free and open market on the exchange, and so represents a true chancing of the market value of that stock thereon under the process of attrition due to supply operating against demand.

[191] To establish a contravention of s. 93(a)(ii), Staff must show that: (i) the respondent's activity constituted or involved an act, practice or course of conduct relating to a security; (ii) the activity may result in or contribute to an artificial price for the security; and (iii) the respondent knew or reasonably ought to have known that the activity may have resulted in or contributed to an artificial price for the security (*De Gouveia* at para. 99, *Re Cohodes*, 2018 ABASC 161 at para. 42). It is necessary that all three elements be proved in order to find a breach of s. 93(a)(ii) (*Podorieszach* at para. 73).

2. Course of Conduct Relating to a Security

[192] We start the analysis by considering the first element of the test: did the impugned activity constitute or involve an act, practice or course of conduct relating to a security? There was no question that BCM Shares were securities within the meaning of s. 1(ggg) of the Act. BCM was a reporting issuer and the BCM Shares were listed on the TSXV throughout the Relevant Period.

[193] There was also no dispute that the impugned high-close trades and high-close bids were an act, practice or course of conduct relating to a security. Aside from the single high-close trade in the HP Account, all of the high-close trades and high-close bids occurred in the Malachi Account or the Freedom Account. We earlier found that Budzinski had trading authority over these two accounts and that he was the only person who provided trading instructions to Raymond James for the Malachi and Freedom Accounts throughout the Relevant Period. Accordingly, we find that Budzinski engaged in an act, practice or course of conduct relating to a security.

[194] Staff acknowledged that it was "less clear" whether Budzinski provided instructions for the one high-close trade in the HP Account on January 21, 2016. While Budzinski and HP each had trading authority over the HP Account during the Relevant Period, the evidence did not clearly establish whether it was Budzinski or HP who provided the instructions for this trade and HP was not asked about this trade during his testimony.

[195] Having found that Budzinski engaged in an act, practice or course of conduct relating to a security by virtue of the high-close trades and high-close bids he made in the Malachi and Freedom Accounts, it is not necessary for us to make a finding as to whether Budzinski was responsible for the January 21, 2016 high-close trade in the HP Account and we decline to do so.

[196] We therefore find that the first element of the test in s. 93(a)(ii) has been proved.

[197] Budzinski asserted in his closing arguments that he frequently instructed Raymond James to place orders on the next trading day, only to find that they "constantly" had been entered before the close of trading and he was told that the orders were entered as such because they were unlikely to be filled in the circumstances. We find it wholly improbable that Raymond James would intentionally and repeatedly disregard a client's express trading instructions and risk a high-close trade or a high-close bid by doing so, or that Budzinski would condone his instructions being repeatedly ignored. In any event, this argument was unsupported by any evidence, and stands in stark contrast with the evidence that Budzinski pressured Garth into placing a last-minute order that resulted in a high-close bid on the last trading day of May 2016.

3. An "Artificial Price" for a Security

[198] In assessing the second element required to establish a breach of s. 93(a)(ii), we consider whether Budzinski's trading activity may have resulted in or contributed to an artificial price for BCM Shares. This, in turn, requires an understanding of what is meant by "artificial price" (*Podoriesz* at para. 83). While not defined in the Act, the term "artificial price" has been described as "a price that differs from the price that would result from the market operating freely and fairly on the basis of information concerning true market supply and demand" (*Podoriesz* at para. 85). That assessment considers whether the activity in question was intended to improperly influence and distort market supply and demand, such that the market price differs from what would otherwise have occurred based on genuine trading activity under normal market conditions:

The capital market is the venue in which buyers and sellers come together and trade on the basis of their own investment decisions, assessments and preferences. The accumulation of their interactions makes up market supply and demand and establishes market prices. Any transactions between buyer and seller can affect market price. Normal-course transactions between buyers and sellers, operating at arm's length, reflect real demand and supply; whatever the effect on price, it can be said to be a

genuine market effect. If, however, demand or supply is distorted, then price will likely also be distorted – no longer reflective of real market demand and supply, it will be artificial.

Investors must have confidence that they can trade in a marketplace in which the available information properly reflects genuine trading activity. Investors in the capital market base their behaviour and their investment decisions on posted trading prices. They are entitled to assume that the posted prices reflect bona fide transactions in a market operating free of improper influence. Their own transactions are then reflected in subsequent prices. If any investor makes an investment decision in reliance on a posted price that does not reflect genuine trading activity, that investor may be harmed. Subsequent transactions could also be materially affected by that single instance of a misleading posted price. The result could be harm to investors generally and the undermining of investor confidence in the marketplace.

An individual's trading activity may have the intended effect of raising or lowering the price of a security to a level different than it would be under normal market conditions. Alternatively, the trading activity may maintain a price when it would otherwise have risen or fallen. In our view, both situations create an artificial price because the price is not reflective of the market's unimpeded judgment of the value of the security being traded. Such conduct that is designed to affect artificially the prices on the market is contrary to the public interest because it misleads other buyers and sellers. As the US Securities and Exchange Commission observed in *Mawod* at 871-72:

When investors and prospective investors see activity, they are entitled to assume that it is real activity. They are also entitled to assume that the prices that they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be. Manipulations frustrate these expectations. They substitute fiction for fact. . . .The vice is that the market has been distorted and made into 'A stagemanaged performance'.

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. [*Podoriesz* at paras. 86-89]

[199] The implication from this discussion is that the underlying motivation for a respondent's trading activity may, in context, be relevant to the assessment of artificial price (*Podoriesz* at para. 75). As explained in *De Gouveia* (at para. 93):

The determination of whether a transaction or a trading order reflects real demand or supply (or both) may – perhaps inevitably it will – involve a consideration of what motivated the relevant market participant or participants (see *Podoriesz*, at para. 75). A trading order prompted by a decision to buy or sell, arising from a bona fide investment intention, can fairly be said to reflect real demand or supply; the order price would not be artificial. The converse is equally true: trading orders not reflecting bona fide investment decisions and genuine demand or supply send artificial pricing signals.

[200] Staff's allegations focused on Budzinski's high-close trades and high-close bids of BCM Shares. Because market activity such as this establishes closing prices, and in turn forms the basis for future market activity, these trading techniques are often utilized by market manipulators to create an artificial price for a security:

. . . the importance of closing prices can make them a target for manipulators, and high closing an effective manipulative technique. In this pejorative sense, "high closing" would typically connote

placing an order for an exchange-traded security close enough to the end of the trading day that it is unlikely to be followed by other trades. A late-day buy order not prompted by a genuine investment intent might thus be expected to maintain or raise the closing price (or, if the bid is not filled, the closing bid price) above what genuine market demand would have produced. [*Re Workum and Hennig*, 2008 ABASC 363 at para. 1169]

[201] Although high-close trades are a frequent, and normal, market occurrence, such trades are ". . . not the sort of thing one expects to see repeatedly, and certainly not from the same trader" (*De Gouveia* at para. 49). Similarly, placing or amending trading orders that do not lead to consummated transactions may, in the circumstances, also give rise to an artificial price (*De Gouveia* at para. 92).

[202] Both Heaney and Ali testified about general market concerns relating to manipulative high-close trades and high-close bids. Heaney indicated that high-close trading attempts to increase the share price to make a stock look better and gives the appearance that "the price is a healthy price" and that "it's worth more". He also said that month-end trading activity can hold particular significance because the figures are reflected on the clients' monthly statements and "there can be a motivation to have a higher bid [sic] price so the clients see a higher valuation for the stock on their monthly statement". He acknowledged that any increase to the bid price could be flagged and require further investigation to determine whether it reflected normal market activity. Ali said that high-close trades and high-close bids fall within the UMIR as potentially manipulative and deceptive conduct because they can increase the closing share price or the closing bid price, as they case may be, "from what they normally would be under the ordinary operation of the market".

[203] We earlier determined that Budzinski provided trading instructions for at least 24 of the 25 impugned high-close trades of BCM Shares and all five of the impugned high-close bids. Accordingly, our focus was on whether this trading activity was meant to produce an artificial price.

(a) High-Close Trades

[204] In the NOH, Staff alleged that Budzinski regularly entered bids for BCM Shares near the end of the trading day that would match an offer price higher than the last trade that occurred that day, resulting in a "high close". The IIROC Report adopted a slightly different characterization of a high-close trade based on the thinly traded nature of BCM Shares, namely as a trade that was the last uptick trade not followed by a downtick executed in the last hour of the trading day. While the following summary is based on the latter definition, our analysis focussed on whether the trading activity particularized in the NOH contravened s. 93(a)(ii) of the Act.

[205] From February 19 to June 7, 2016, Budzinski placed 24 unsolicited orders resulting in high-close trades for BCM Shares. All orders were placed in the Malachi Account, other than the trades made on February 26, March 2, March 23, April 5 and April 12, which occurred in the Freedom Account. Particulars of each high-close trade and each associated order are included in the table below:

High-Close Trade Particulars					Order Particulars (High-Close Trades are bolded)	
Date	Time (Mtn)	Price	Uptick Amount	Trade Volume	Total Volume	History (+): upticks / (-): downticks
Feb. 19	1:56:49 pm	\$0.20	\$0.005	11,500	35,000	<u>Feb. 19:</u> <ul style="list-style-type: none"> 1:56:49 pm – open order placed at \$0.20 1:56:49 pm – partial fill: 5,000 at \$0.195/leaving 30,000 (+) 1:56:49 pm – partial fill: 5,000 at \$0.195/leaving 25,000 1:56:49 pm – partial fill: 11,500 at \$0.20/leaving 13,500 (+) 1:56:49 pm – partial fill: 5,000 at \$0.20/leaving 8,500 1:56:49 pm – partial fill: 500 at \$0.20/leaving 8,000 1:56:49 pm – partial fill: 5,000 at \$0.20/leaving 3,000 1:57:16 pm – order filled: remaining 3,000 at \$0.20
Feb. 26	1:57:34 pm	\$0.20	\$0.005	10,000	20,000	<u>Feb 26:</u> <ul style="list-style-type: none"> 1:57:34 pm – day order placed at \$0.20 1:57:34 pm – partial fill: 5,000 at \$0.195/leaving 15,000 1:57:34 pm – partial fill: 10,000 at \$0.20/leaving 5,000 (+) 1:57:34 pm – order filled: remaining 5,000 at \$0.20
Mar. 2	1:56:39 pm	\$0.20	\$0.015	10,000	15,000	<u>Mar. 2:</u> <ul style="list-style-type: none"> 1:56:39 pm – market order placed 1:56:39 pm – partial fill: 10,000 at \$0.20/leaving 5,000 (+) 1:56:39 pm – order filled: remaining 5,000 at \$0.20
Mar. 3	1:57:21 pm	\$0.205	\$0.005	1,000	25,000	<u>Feb. 19:</u> <ul style="list-style-type: none"> 1:49:46 pm – open iceberg order placed at \$0.185 <u>Mar. 2:</u> <ul style="list-style-type: none"> 8:42:34 am – partial fill: 2,000 at \$0.185/leaving 23,000 (-) <u>Mar 3:</u> <ul style="list-style-type: none"> 11:29:02 am – partial fill: 500 at \$0.185/leaving 22,500 (-) 12:29:30 pm – order amended (iceberg) to \$0.19 12:29:30 pm – partial fill: 3,000 at \$0.19/leaving 19,500 (+) 1:57:21 pm – order amended to market 1:57:21 pm – partial fill: 13,500 at \$0.20/leaving 6,000 (+) 1:57:21 pm – partial fill: 5,000 at \$0.20/leaving 1,000 1:57:21 pm – order filled: remaining 1,000 at \$0.205 (+)
Mar. 15	1:52:01 pm	\$0.225	\$0.015	5,000	30,000	<u>Mar. 15:</u> <ul style="list-style-type: none"> 1:52:01 pm – open order placed at \$0.225 1:52:01 pm – partial fill: 5,000 at \$0.225/leaving 25,000 (+) 1:52:01 pm – partial fill: 20,000 at \$0.225/leaving 5,000 1:52:01 pm – order filled: remaining 5,000 at \$0.225
Mar. 17	1:53:05 pm	\$0.23	\$0.01	2,500	25,000	<u>Mar. 17:</u> <ul style="list-style-type: none"> 1:53:05 pm – market order placed 1:53:05 pm – partial fill: 20,000 at \$0.22/leaving 5,000 (-) 1:53:05 pm – partial fill: 2,500 at \$0.22/leaving 2,500 1:53:05 pm – order filled: remaining 2,500 at \$0.23 (+)
Mar. 18	1:55:14 pm	\$0.235	\$0.005	5,000	15,000	<u>Mar. 18:</u> <ul style="list-style-type: none"> 1:55:14 pm – day order placed at \$0.235 1:55:14 pm – partial fill: 5,000 at \$0.235/leaving 10,000 (+) 1:55:14 pm – partial fill: 5,000 at \$0.235/leaving 5,000 1:55:14 pm – order filled: remaining 5,000 at \$0.235

Mar. 23	1:57:20 pm	\$0.235	\$0.015	9,000	20,000	<u>Mar. 23:</u> <ul style="list-style-type: none"> • 1:57:20 pm – open order placed at \$0.235 • 1:57:20 pm – partial fill: 9,000 at \$0.235/leaving 11,000 (+) • 1:57:20 pm – partial fill: 5,000 at \$0.235 leaving 6,000 <u>Mar. 28:</u> <ul style="list-style-type: none"> • 7:53:31 am – partial fill: 5,000 at \$0.235/leaving 1,000 (-) • 8:02:44 am – order filled: remaining 1,000 at \$0.235
Mar. 31	1:51:53 pm	\$0.235	\$0.005	5,000	30,000	<u>Mar. 31:</u> <ul style="list-style-type: none"> • 1:51:53 pm – day order placed at \$0.235 • 1:51:53 pm – partial fill: 20,000 at \$0.23/leaving 10,000 (-) • 1:51:53 pm – partial fill: 5,000 at \$0.23/leaving 5,000 • 1:51:53 pm – order filled: remaining 5,000 at \$0.235 (+)
Apr. 4	1:55:38 pm	\$0.235	\$0.005	2,000	25,000	<u>Apr. 4:</u> <ul style="list-style-type: none"> • 1:55:38 pm – day order placed at \$0.235 • 1:55:38 pm – partial fill: 5,000 at \$0.23/leaving 20,000 (-) • 1:55:38pm – partial fill: 5,000 at \$0.23/leaving 15,000 • 1:55:38pm – partial fill: 2,000 at \$0.235/leaving 13,000 (+) • 1:55:38pm – order filled: remaining 13,000 at \$0.235
Apr. 5	1:54:42 pm	\$0.245	\$0.005	5,000	35,000	<u>Apr. 5:</u> <ul style="list-style-type: none"> • 1:50:27 pm – open iceberg order placed at \$0.24 • 1:50:27 pm – partial fill: 500 at \$0.24/leaving 34,500 • 1:50:27 pm – partial fill: 14,000 at \$0.24/leaving 20,500 • 1:54:42 pm – order (iceberg) amended to \$0.245 • 1:54:42 pm – partial fill: 5,000 at \$0.245 leaving 15,500 (+) • 1:54:42 pm – partial fill: 5,000 at \$0.245/leaving 10,500 • 1:54:57 pm – order filled: remaining 10,500 at \$0.245
Apr. 8	1:55:03 pm	\$0.25	\$0.005	8,000	20,000	<u>Apr. 8:</u> <ul style="list-style-type: none"> • 1:55:03 pm – market order placed • 1:55:03 pm – partial fill: 3,500 at \$0.245/leaving 16,500 (+) • 1:55:03 pm – partial fill: 8,000 at \$0.25/leaving 8,500 (+) • 1:55:03 pm – partial fill: 5,000 at \$0.25/leaving 3,500 • 1:55:03 pm – order filled: remaining 3,500 at \$0.25
Apr. 12	1:55:34 pm	\$0.24	\$0.015	9,500	25,000	<u>Apr. 5:</u> <ul style="list-style-type: none"> • 1:55:17 pm – open iceberg order placed at \$0.225 <u>Apr. 6:</u> <ul style="list-style-type: none"> • 9:23:22 am – partial fill: 5,000 at \$0.225/leaving 20,000 (-) <u>Apr. 12:</u> <ul style="list-style-type: none"> • 7:30:00 am – partial fill: 7,500 at \$0.225/leaving 12,500 (-) • 9:22:14 am – partial fill: 3,000 at \$0.225/leaving 9,500 • 1:55:34 pm – order amended to market • 1:55:34 pm – order filled: remaining 9,500 at \$0.24 (+)
Apr. 13	1:19:21 pm	\$0.235	\$0.01	9,000	25,000	<u>Apr. 12:</u> <ul style="list-style-type: none"> • 1:55:37 pm – open order placed at \$0.225 <u>Apr. 13</u> <ul style="list-style-type: none"> • 12:29:41 pm – partial fill: 16,000 at \$0.225/leaving 9,000 (-) • 1:19:21 pm – order amended to \$0.235 • 1:19:21 pm – order filled: remaining 9,000 at \$0.235 (+)

Apr. 14	1:58:19 pm	\$0.245	\$0.005	5,000	22,000	<u>Apr. 14:</u> <ul style="list-style-type: none"> 1:58:19 pm – day order placed at \$0.245 1:58:19 pm – partial fill: 14,000 at \$0.24/leaving 8,000 1:58:19 pm – partial fill: 5,000 at \$0.245/leaving 3,000 (+) 1:58:19 pm – order filled: remaining 3,000 at \$0.245
Apr. 15	1:49:06 pm	\$0.28	\$0.01	4,500	25,000	<u>Apr. 13:</u> <ul style="list-style-type: none"> 1:20:18 pm – open iceberg order placed at \$0.225 <u>Apr. 14:</u> <ul style="list-style-type: none"> 7:30:00 am – partial fill: 10,500 at \$0.225/leaving 14,500 (-) <u>Apr. 15:</u> <ul style="list-style-type: none"> 1:08:22 pm – order (iceberg) amended to \$0.26 1:49:06 pm – order amended to market 1:49:06 pm – partial fill: 5,000 at \$0.27/leaving 9,500 (+) 1:49:06 pm – partial fill: 5,000 at \$0.27/leaving 4,500 1:49:06 pm – order filled: remaining 4,500 at \$0.28 (+)
Apr. 18	1:55:30 pm	\$0.275	\$0.005	4,000	10,000	<u>Apr. 18:</u> <ul style="list-style-type: none"> 1:55:30 pm – market order placed 1:55:30 pm – partial fill: 6,000 at \$0.27/leaving 4,000 (+) 1:55:30 pm – order filled: remaining 4,000 at \$0.275 (+)
Apr. 21	1:58:19 pm	\$0.29	\$0.015	10,000	14,000	<u>Apr. 21:</u> <ul style="list-style-type: none"> 1:58:19 pm – open order placed at \$0.29 1:58:19 pm – partial fill: 10,000 at \$0.29/leaving 4,000 (+) <u>Apr. 22:</u> <ul style="list-style-type: none"> 6:42:46 am – order (iceberg) amended to \$0.275 1:58:19 pm – order (iceberg) amended to \$0.30 1:58:19 pm – partial fill: 500 at \$0.30/leaving 3,500 <u>Apr. 25:</u> <ul style="list-style-type: none"> 7:32:43 am – order filled: remaining 3,500 at \$0.30
May 6	1:58:18 pm	\$0.31	\$0.01	2,000	3,500	<u>May 6:</u> <ul style="list-style-type: none"> 1:58:18 pm – market order placed 1:58:18 pm – partial fill: 1,500 at \$0.30/leaving 2,000 1:58:18 pm – order filled: remaining 2,000 at \$0.31 (+)
May 20	1:58:12 pm	\$0.30	\$0.025	1,000	10,000	<u>May 20:</u> <ul style="list-style-type: none"> 1:58:12 pm – market order placed 1:58:12 pm – partial fill: 9,000 at \$0.275/leaving 1,000 1:58:12 pm – order filled: remaining 1,000 at \$0.30 (+) *this trade was followed by a high-close bid at \$0.265
May 25	1:59:26 pm	\$0.29	\$0.005	6,000	16,000	<u>May 25:</u> <ul style="list-style-type: none"> 1:58:45 pm – open iceberg order placed at \$0.285 1:58:45 pm – partial fill: 9,000 at \$0.285/leaving 7,000 (+) 1:59:26 pm – order (iceberg) amended to \$0.295 1:59:26 pm – partial fill: 6,000 at \$0.29/leaving 1,000 (+) <u>May 26:</u> <ul style="list-style-type: none"> 7:25:12 am – order (iceberg) amended to \$0.27 <u>May 30:</u> <ul style="list-style-type: none"> 7:30:00 am – partial fill: 500 at \$0.26/leaving 500 7:36:52 am – order filled: remaining 500 at \$0.26

May 30	1:20:13 pm	\$0.26	\$0.005	2,000	10,000	<u>May 30:</u> <ul style="list-style-type: none"> • 1:20:13 pm – day order placed at \$0.26 • 1:20:13 pm – partial fill: 3,000 at \$0.25/leaving 7,000 (+) • 1:20:13 pm – partial fill: 2,000 at \$0.255/leaving 5,000 (+) • 1:20:13 pm – partial fill: 3,000 at \$0.255/leaving 2,000 • 1:20:13 pm – order filled: remaining 2,000 at \$0.26 (+)
May 31	1:53:47 pm	\$0.30	\$0.04	500	12,000	<u>May 31:</u> <ul style="list-style-type: none"> • 1:53:47 pm – market order placed • 1:53:47 pm – partial fill: 6,500 at \$0.26/leaving 5,500 (+) • 1:53:47 pm – partial fill: 5,000 at \$0.26/leaving 500 • 1:53:47 pm – order filled: remaining 500 at \$0.30 (+) * this trade was followed by a high-close bid at \$0.26
Jun. 7	1:25:07 pm	\$0.25	\$0.02	500	20,000	<u>Jun. 7:</u> <ul style="list-style-type: none"> • 1:14:13 pm – day order placed at \$0.23 • 1:14:13 pm – partial fill: 9,500 at \$0.23/leaving 10,500 • 1:14:13 pm – partial fill: 10,000 at \$0.23/leaving 500 • 1:25:07 pm – order amended to \$0.25 • 1:25:07 pm – order filled: remaining 500 at \$0.25 (+)

[206] As noted, these high-close trades were all unsolicited orders, meaning that the orders were not based on the advice of a broker but initiated by Budzinski. Most of the high-close trades (14 of the 24 high-close trades, including the closing trade for the months of March and May) were day orders, seven of which were also market orders filled immediately at the NBO (including the closing trade for the end of May). The remaining 10 high-close trades all derived from open orders, six were amended to market or to a higher bid price immediately before the relevant high-close trade, whereas four were placed within eight minutes of market close, resulting in the high-close trade. Three orders were filled on a day subsequent to the high-close trade.

[207] From our review of the trading data relative to these high-close trades, we discerned that:

- other than one order for 3,500 BCM Shares, the trade orders that produced the high-close trades sought BCM Shares in amounts that ranged from 10,000 to 35,000 BCM Shares, ultimately resulting in the acquisition of considerably more than a single board lot per order;
- the orders often resulted in trades at prices equal to, or less than, the last trade;
- the trades establishing the high-closing price were frequently followed by additional trades at that same price, often as part of the same trade order although on a few occasions the trades were made by a third-party;
- all but one of the high-close trades occurred at the highest price for BCM Shares that particular day, although on six of those days there was at least one other trade by a third-party at that same daily high; and
- on 16 of the 24 days involving a high-close trade, trading in the Accounts constituted at least 50% of the trading volume for BCM Shares for that day.

(b) High-Close Bids

[208] From April 29 to May 31, 2016, Budzinski placed five high-close bids for BCM Shares in the Malachi Account. Ali described a high-close bid as a buy order that increases the closing bid price for a security. Particulars of the high-close bids are as follows:

Date	Bid Price	Number of Shares	Last Trade Price	Bid/Ask Before Order	Bid/Ask After Order	Bid Uptick
April 29	\$0.25	2,000	\$0.28	\$0.24/0.28	\$0.25/0.28	\$0.01
May 5	\$0.29	5,000	\$0.30	\$0.28/\$0.30	\$0.29/0.30	\$0.01
May 17	\$0.28	500	\$0.295	\$0.24/0.295	\$0.28/0.295	\$0.04
May 20	\$0.265	500	\$0.30	\$0.245/0.30	\$0.265/0.30	\$0.02
May 31	\$0.26	500	\$0.30	\$0.235/0.30	\$0.26/0.30	\$0.025

[209] Each high-close bid was based on an unsolicited day order placed in the Malachi Account within one or two minutes of market close. Three of the high-close bids were entered within 40 seconds of market close, and two occurred as the final closing bid for the month. The last two high-close bids also occurred immediately after Budzinski placed what would prove to be a high-close trade for the day, both at prices higher than the impugned bids, while the high-close bid on April 29 was placed at \$0.25 immediately after Budzinski purchased BCM Shares at \$0.28. Staff also observed that the Malachi Account held well over 1 million BCM Shares and the last three high-close bids only sought a single board lot (500 BCM Shares).

[210] The evidence also established that at the time of these high-close bids, the cash balance in the Malachi Account was minimal and in most, if not all instances, would have resulted in a negative balance if the bids were accepted. This was reflected by the trade tickets for the high-close bids on April 29, May 5 and May 17, each of which included a notation indicating that the account credit limit was exceeded by the trade order. Further, the Malachi Account statement for the month of May indicated that the cash balance in the Malachi Account was nominal at the time of the May high-close bids.

[211] This market activity was notably different from Budzinski's trading orders that produced the high-close trades. For instance, the high-close bids were for considerably smaller share volumes, mostly single board lots. The high-close bids were also passive and remained on the market for minutes (at most), whereas the high-close trades were all active. Finally, the bids, had they been accepted, would have resulted in a downtick to the closing price for BCM Shares.

(c) Parties' Submissions on Artificial Price

[212] Staff asserted that Budzinski's impugned trading activity – the high-close trades and high-close bids – seemed to have a considerable effect on the price of BCM Shares, as reflected by the steady increase in the closing BCM Share price from January (\$0.125) to early May (\$0.32), followed by a drop in the BCM Share price by the end of June (\$0.15). Staff observed that the closing of the Accounts in June 2016 "coincided almost perfectly" with a drop in price for BCM Shares, and submitted that an inference could therefore be drawn that the high-close trades and high-close bids contributed to the increase in the price of BCM Shares from January to May.

[213] Although Staff suggested that BCM's public disclosure did not reflect any significant developments that might explain the BCM share price movements, the BCM MD&A stated that the company's business activities had "increased significantly" in the "first and second quarters of 2016", and that the originally scheduled closing date for a proposed transaction was extended from May 30, 2016 to August 31, 2016.

[214] In light of the fact that the Accounts were responsible for approximately one third of the trading volume for BCM Shares in the first five months of 2016, the decrease in demand for BCM Shares following the closure of the Accounts in June 2016 would logically place downward pressure on BCM's share price. However, Staff did not address the extent to which the claimed effect on the BCM Share price was specifically attributable to the 24 high-close trades and five high-close bids, as opposed to the overall trading in the Accounts from January to June 2016 that were not part of Staff's market manipulation allegations.

[215] We were not persuaded that the circumstances warranted the inference suggested by Staff, as the evidence failed to establish a sufficient link between the asserted drop in price for BCM Shares and the cessation of Budzinski's high-close trades and bids in the Accounts. In particular, the closing price for BCM Shares in the month of June remained relatively stable – typically in the range of \$0.24 to \$0.25 – after the Accounts were closed, and the closing BCM Share price for the month of June was attributable to a trade for 500 BCM Shares from an unknown account in the last hour of trading, which reduced the price from \$0.235 to \$0.15.

[216] Although we were unable to make the inference sought by Staff, we nevertheless considered the extent to which Budzinski's impugned trading activity influenced the price of BCM Shares.

[217] While Budzinski did not expressly deny that his trading activity influenced the price of BCM Shares, he suggested that he lacked the financial resources to engage in activity that could manipulate the market. However, Staff's submissions focussed on whether he had control or direction over the Accounts (which would, of course, include any money in the Accounts). The impugned trades were made possible by the deposits of considerable funds into the Accounts for the purpose of acquiring BCM Shares, and the high-close bids did not ultimately require any outlay of funds. As such, Budzinski had sufficient resources at his disposal to engage in potentially manipulative misconduct.

[218] Certain isolated high-close trades seemed to have had limited, if any, effect on the closing price for BCM Shares. For example, we questioned whether it was appropriate to include the trades made on March 17, March 31 and April 4 in the list of impugned trades given that the execution of the trade orders initially resulted in a downtick from the previous trade followed by an uptick trade at a price equal to the last trade prior to the order. That is, but for the fact that the orders each involved a partial fill at a lower price than the last trade, instead of being entirely filled at the bid price, these trades would not have been identified as high-close trades.

[219] Excluding trades like those just described, high-close trades and high-close bids, by their nature, will increase the closing price or the closing bid price, respectively, for a particular security. For example, among Budzinski's trading activity was a series of high-close trades on five

consecutive trading days in mid-April, when the closing BCM Share price increased from \$0.24 to \$0.275. On the last trading day of April, Budzinski made the first of five high-close bids, and he proceeded to execute five more high-close trades in May. In that time, the price of BCM Shares peaked – on May 2 – and the closing price hovered around \$0.30 through the remainder of the month. Accordingly, Budzinski's high-close trades and high-close bids likely had some influence on the price of BCM Shares.

[220] Ultimately however, the issue is not whether Budzinski's trading activity influenced the price of BCM Shares, but whether his high-close bids and high-close trades may have contributed to an "artificial" price within the meaning of s. 93(a)(ii) of the Act. As indicated in *Workum* at para. 1143:

. . . the fact that trading changes a price does not by itself mean that the price is artificial. The test is whether the trading itself was an expression of bona fide investment decisions by both parties to the trade – that is, genuine market demand and supply. If so (and absent some other factor), then the resulting price is not artificial. Artificiality is, rather, essentially the product of intentional misrepresentation of genuine demand or supply.

[221] Accordingly, we considered whether Budzinski's impugned trading activity was designed to create an artificial price for BCM Shares.

(d) Circumstantial Evidence as to Motive and Intent

[222] Because Budzinski opted not to testify, we had little direct evidence as to his investment plans, objectives or strategies and whether they revealed a motive or intent to establish an artificial price. This is not uncommon in market manipulation cases, where it often becomes necessary to assess whether the available evidence supports reasonable inferences about the respondent's intent or motive (*Workum* at para. 1216). Any unusual trading pattern or a change in a reported price may factor into the reasonableness of any inference as to intent (*Podoriesz* at paras. 76-78). Given that the standard of proof is based on a balance of probabilities, where the evidence points to two equally plausible inferences – one innocent and the other not – the panel must find no improper motive (see *Workum* at paras. 1216-1217).

[223] The reasonableness of any inferences may also be informed by whether the evidence is consistent with the parties' positions about the respondent's motivation. As set out below, the parties presented two competing alternatives about Budzinski's motivation for the impugned trading activity: Budzinski maintained that he was executing a legitimate accumulation strategy whereas Staff submitted that he sought to artificially support the BCM Share price.

[224] Previous ASC decisions have assessed a respondent's claimed accumulation strategy by considering whether the explanations for the impugned trading activity were supported by the evidence. A notable example of this occurred in *Podoriesz*, where the respondents submitted that their pattern of high-close trades was consistent with their stated objective of accumulating shares in a target company (which they considered "a good buy") and that their strategy was to pick away at the market with low volume orders so as not to significantly increase the price in a thinly traded market. That contention was unsupported by the facts in evidence, specifically that the respondents' share purchases represented very small increments (approximately 1-2%) compared to their existing holdings, they occurred when considerably larger volumes were

available at the same price, and they were inconsistent with their prior trading pattern, which included significantly larger increments (see paras. 117-123). The panel observed that the respondents – both registrants who were sophisticated and experienced in securities trading – should have avoided trading near the end of the day "so that they do not inadvertently engage in a high closing" (para. 128).

[225] Similarly, an ASC panel in *De Gouveia* (at para. 114) rejected the respondent's claim that he was motivated by a bona fide intent to accumulate a target company's shares because it "was belied by almost everything he did". The trading activity did not lead to the accumulation of shares and was entirely uneconomic. Moreover, the constant revision or cancellation of orders reflected the respondent's apparent intent to have his trading orders go unfilled, as they left little ability for market responses (see para. 117). Finally, the panel noted that the constant acquisition of a particular share at an uptick "repeatedly buying it, and repeatedly buying it at a higher price than the same trader paid in the last trade" was uncommon.

(e) Parties' Positions

[226] Budzinski's position was that he was a long-term investor seeking to accumulate BCM Shares and that he wanted to purchase BCM Shares for himself once others – Malachi, Freedom Investors, HP and LP – had acquired their desired positions. He claimed to have waited years to find an investment opportunity such as the one presented by BCM, and his apparent view was that the price of BCM Shares could reach \$100 (or more) based on his assessment of the underlying value of BCM's assets. He also heard rumblings that BCM would be making "a 25 to 30 cent private placement", which made him think that "anything under 30 cents is a bargain". While he claimed to be focused on the inherent value of BCM Shares, Budzinski indicated that he, as a long-term investor, was unconcerned about ". . . ½ cent moves" in securing his "fixed share position", although he did not want to "go chasing the stock up to a dollar" to acquire his position.

[227] Staff's position was that Budzinski's trading activity was meant to provide artificial price support, with the objective of generating the appearance of strength and stability for BCM Shares. Staff contended that Budzinski had invested significant amounts of money in BCM Shares on behalf of individuals and organizations closely connected to him, and that he did not want them to lose money on their investments. Staff also asserted that Budzinski's objective of providing price support became more pressing as he acquired more BCM Shares in the Accounts.

[228] In the present matter, Staff considered Budzinski's position to be "implausible" in light of the "persistent pattern of high-close trades", whereas Budzinski submitted that Staff's argument illogically presumed that he intentionally increased the BCM Share price despite his objective of acquiring BCM Shares at the lowest possible price.

[229] Faced with these two alternatives as to Budzinski's motive – one a bona fide investment intent, and the other a motive to artificially distort the BCM Share price – we assessed each in turn, taking into account whether each was supported by the available evidence, and considering whether reasonable inferences could be made in light of that evidence.

(f) Budzinski's Accumulation Strategy

[230] Budzinski's claim that he was engaged in an accumulation strategy for BCM Shares was largely consistent with the evidence. We accept that he maintained a positive outlook for BCM's prospects, and that he believed the BCM Share price was significantly undervalued and likely to increase at some future date. He told Staff in his Interview that he thought BCM's assets had considerable potential and that the BCM Share price could reach \$100 (or more). While we were cautious about the potentially self-serving nature of Budzinski's Interview statements, his optimistic view of BCM's inherent value was supported by other evidence that he willingly shared his views with many of his associates, including Malachi's board of directors (resulting in the Malachi Resolution), members of Freedom Investors, LP, and HP. It was also consistent with his trading activity, which resulted in the cumulative acquisition of a significant number of BCM Shares over a relatively short period of time and which involved only one sale of BCM Shares (though those shares remained within the religious group Budzinski founded, having been sold from the LP Account to RS).

[231] As observed in the IIROC Report, Budzinski's trading activity was largely consistent with an accumulation strategy in a thinly traded security. Specific findings in the IIROC Report included that:

- the numerous uptick trades in the Accounts in the first six months of 2016 "did not appear timed to coincide with or reverse [BCM Share] price movements" and "a pattern of small volume uptick trades was not observed";
- on all but one day in which a high-close trade was made, other trades were executed in the Accounts; and
- on most of the days involving a high-close trade, the BCM Shares were either not offered at a lower price during the day or had been purchased at a lower price by one of the Accounts.

[232] Aside from the 24 high-close trades, at least 148 buy trades were made in the Accounts from January through the end of June 2016. Of those trades, 20 resulted in an uptick that increased the price for BCM Shares whereas at least 25 trades produced a downtick that decreased the BCM Share price. In essence, Budzinski acquired BCM Shares at prices that were above *and* below the last reported trade. While some of his trades produced an uptick relative to the previous BCM Share price, this ensured the acquisition of the available BCM Shares without significantly overpaying to do so. Budzinski also used various techniques to acquire BCM Shares, including the use of open orders that remained available to be filled at later times. Although the volume of his trading activity seemed to decrease compared to the six-month period prior to January 2016, this seemed a rational approach in light of the overall increase in BCM Share prices.

[233] Evidence also tended to support Budzinski's assertion that he acquired BCM Shares for himself once others had acquired their positions. HP and LP acquired most of their BCM Shares in the last few months of 2015. By 2016, purchases made in the HP Account had largely subsided. While a significant number of BCM Shares were deposited into the LP Account in May 2016, we were not provided reliable evidence indicating when those shares were actually purchased.

Acquisitions in the Freedom Account stopped after the purchase of BCM Shares in April 2016. Although Malachi did not obtain the targeted number of BCM Shares identified in the Malachi Resolution, Budzinski continued to acquire more BCM Shares on behalf of Malachi until the Accounts were closed in June. Once that occurred, Budzinski began trading on his own behalf in the BMO Account.

[234] While Bauer testified that Budzinski's trading activity – consisting of small, single board lot trades – was inconsistent with an accumulation strategy, it appeared that her characterization of his trading activity was based more on his subsequent trading in the online accounts. Even so, the majority in *Re Anderson*, 2007 ABASC 97 (at paras. 243-245) (rev'd on other grounds: *sub nom. Anderson v. Alberta Securities Commission*, 2008 ABCA 184) accepted that an economically rational approach to acquiring illiquid securities may include purchasing in small portions to avoid driving up prices and paying the posted offer price to ensure that the orders were filled.

[235] Ali testified that a genuine accumulation strategy and an intent to manipulate the market are not mutually exclusive, and that ". . . it can be both in that if someone is accumulating the shares, manipulative activity could occur". We agree that this statement might prove accurate, depending on the context. As an example, a person seeking to accumulate shares of an issuer might engage in smaller volume transactions in a manner designed to reduce the share price before acquiring larger volumes at the reduced prices. But in this case, the accumulation strategy appeared inconsistent with the proposition that the impugned high-close trades and high-close bids reflected an intent to manipulate BCM's Share price by providing price support to the market. That is particularly the case given that the impugned trading activity occurred over a six-month period in which sizable quantities of BCM Shares were acquired while the only sale took place weeks before the first impugned trade.

(g) Budzinski's Price Support Motive

[236] Staff's position was that Budzinski's trading activities reflected a motive to increase the closing price and provide price support to BCM Shares. Specifically, Staff argued that Budzinski's late-day trading, the trades he made at high prices, and certain small volume purchases all reflected this manipulative intent. Staff also asserted that some of the high-close trades were uneconomic and that the high-close bids made no sense other than an attempt to support the bid for BCM Shares. We address each of these claims below.

(i) Late-Day Trading

[237] Staff focused on Budzinski's late-day trading that resulted in numerous high-close trades and high-close bids. While acknowledging that isolated high-close trades may occur as part of a genuine accumulation strategy, Staff submitted that his "persistent pattern of high-close trades" was indicative of an intent to support the price for BCM Shares.

[238] Budzinski's tendency to place orders late in the day was ostensibly based on his personal schedule, in which he apparently devoted most of his daytime hours to providing counselling services. Staff pointed out that Budzinski's limited availability during the day was similar to "just about every person with a job", and that he could have relied on the full services offered by Raymond James to achieve his trading objectives rather than provide unsolicited trading

instructions. Staff also submitted that he was capable of, and frequently did, provide trading instructions outside of the last few minutes of the trading day.

[239] That Budzinski might have arranged his trading activity differently – by restructuring his daily schedule or relying on Raymond James's services to conduct his trading activities – provided little insight into our assessment of whether the timing of his trading activity reflected an intent to provide artificial price support for BCM Shares. Despite the asserted limitations of his schedule, Budzinski regularly placed calls to Raymond James at various times throughout the day to obtain information on the trading of BCM Shares. While he often provided trading instructions prior to the last hour of the trading day, it was clear that Budzinski did frequently engage in trading activities near the end of the trading day. However, that alone is not inherently wrong or improper. Further, according to the evidence, Budzinski's first notice that Raymond James might be viewing it as such did not occur until his discussion with Garth on May 31, 2016.

[240] In oral submissions, Staff linked Budzinski's late-day trading to the decision by Raymond James to close the Accounts. However, the evidence did not wholly support that contention. Rather, Raymond James responded to Budzinski's late-day trading by imposing account restrictions on Budzinski in an effort to curtail that activity. Although Budzinski seemed to respond on June 8 by providing his trading instructions before the last hour of trading, Raymond James nonetheless decided that the Accounts should be closed due to concerns that Budzinski had accumulated a potentially undisclosed control position in BCM in the Accounts. That seemed consistent with our assessment of the conclusions in the IROC Report and the associated referral to the ASC. Despite conclusions that Budzinski's trading pattern was consistent with an accumulation strategy and that the high-close bidding was "minimal", the file was referred to the ASC because it was "currently looking into" the potential undisclosed control position and whether Budzinski "may have breached take[-]over bid provisions". In the circumstances, the decision by Raymond James to close the Accounts did not persuade us that Budzinski's late-day trading reflected an intent to artificially increase the price for BCM Shares.

[241] We also considered whether the structure of Budzinski's trading orders would support an inference that the late-day trading reflected an intent to provide price support to BCM Shares. If the intent was to provide price support for BCM Shares, we would have expected that the high-close trades derived from smaller trading orders that were largely filled at the high-close price. However, Budzinski's high-close trades were part of trading orders that sought larger share amounts (ranging from 3,500 to 35,000 shares) and were frequently filled in part from trades at prices equal to, and often below, the high-close trade. In our view, that corroborated Budzinski's asserted accumulation strategy as it reflected an intent to acquire BCM Shares, even if that meant that Budzinski had to meet the then current offer price for BCM Shares.

(ii) Higher Prices and Smaller Volume

[242] Regarding the Malachi and Freedom Accounts, Staff submitted that Budzinski consistently paid more for BCM Shares than the rest of the market and that BCM Shares were frequently available at lower prices earlier in the day.

[243] Staff did not identify evidence supporting these propositions. The IROC Report determined that the Accounts were involved in 44 uptick buy trades for BCM Shares in the first

six months of 2016, 25 of which were high-close trades (approximately 60% relative to all high-close trades for BCM Shares in this period of time). Other evidence indicated that during the same timeframe, 25 downtick trades for BCM Shares occurred in the Accounts, including on at least 10 of the days involving a high-close trade from one of the Accounts. The IROC Report also determined that on 18 of the 25 days involving a high-close trade, the BCM Shares were either not offered at a lower price earlier in the day or they were purchased by one of the Accounts at a lower price. Overall, the evidence failed to demonstrate that Budzinski routinely purchased BCM Shares at the top of the market, or that he avoided purchasing earlier in the day, or at lower share prices.

[244] In any event, Budzinski's willingness to pay a higher price for BCM Shares is consistent with his accumulation strategy and his personal view that BCM's inherent value warranted paying a higher price. This concept was discussed by an ASC panel in *De Gouveia* (at para. 117):

If a buyer considers the higher price to be justified – if he imagines that he can profit from the purchase, even though he has paid more than the last buyer – then (assuming no misconduct on the part of the seller, or any other impropriety) the market price move is *prima facie* a fair reflection of a genuine pricing assessment and investment decision. The signal to the market is legitimate, and the price is not artificial.

However, it is less common, and therefore naturally more puzzling, to see a trader make a habit of upticking a particular stock – repeatedly buying it, and repeatedly buying it at a higher price than the same trader paid in the last trade.

[245] As noted in the IROC Report, the trading of BCM Shares in the Accounts did not appear timed to coincide with or reverse share price movements, and a pattern of small volume uptick trades was not observed. Rather, as discussed, the high-close trades were part of trading orders that typically sought considerable amounts of BCM Shares and were often filled at prices lower than or equivalent to the high-close share price.

[246] In the circumstances, we did not consider the prices that Budzinski paid for BCM Shares in the first six months of 2016 to be inconsistent with an accumulation strategy, nor did they suggest that Budzinski's high-close trades reflected an intent to provide price support for BCM Shares.

(iii) Uneconomic Trading

[247] Staff also submitted that some of Budzinski's high-close orders, and resulting trades, were uneconomic. This concept was discussed in *Workum* (at para. 1175):

The capital market generally, and an exchange particularly, is a venue in which rationally-minded economic actors endeavour to bring together their respective investment objectives and assessments to execute investment decisions at the best price (the highest, for the seller; the lowest, for the buyer) then attainable. Factors other than price may, of course, influence investors. However, apparently uneconomic buying can indicate not just inefficiency, but also impropriety.

[248] Staff suggested that the most "glaring example" (and the only one they cited) was Budzinski's high-close trade on May 6, 2016, when he placed a market order for 3,500 BCM Shares within the final two minutes of trading, resulting in the purchase of 1,500 BCM Shares at \$0.30 and an additional 2,000 BCM Shares at \$0.31 in the Malachi Account. Staff submitted that this activity was uneconomic, primarily because it represented the highest price paid for BCM Shares in any

of the Accounts during the Relevant Period. Pointing to the commission on this trade (roughly 10% of the cost of the order) and the relatively small number of BCM Shares acquired (roughly 0.3% of Malachi's BCM holdings), Staff submitted that the trade did not reflect any bona fide investment objective and that it must have been carried out to increase the closing price of BCM Shares.

[249] In the circumstances, we did not consider this particular trade order to be indicative of uneconomic trading, or that it was somehow inconsistent with Budzinski's objective of acquiring BCM Shares. The price paid by Budzinski for the BCM Shares fell within a reasonable range at the time, taking into account that the BCM Shares traded at \$0.30 earlier that day and occurred within days of the BCM Share price peaking in the first half of 2016. These transactions were also consistent with the Malachi Resolution, which contemplated the acquisition of BCM Shares ". . . in small lots of 25,000 or less so as not to push the market above .31 cents [sic] per share". That Budzinski did not acquire more BCM Shares may be due to the relatively small balance of funds in the Malachi Account at the time (this trade order resulted in having a negative account balance of nearly \$1,200).

[250] As we have determined that Budzinski's view was that BCM Shares were significantly undervalued and that they had significant potential which warranted acquiring at higher prices, it would be difficult to conclude that his trading orders were uneconomic. Having said that, even if we were to accept that certain of Budzinski's trades were uneconomic, the circumstances would not persuade us to infer that Budzinski sought to provide price support or that he lacked a bona fide objective of accumulating BCM Shares.

(iv) High-Close Bids

[251] Staff submitted that there was no realistic possibility in the circumstances for the high-close bids to have resulted in trades and that the trading activity made no sense other than an attempt to support the bid for BCM Shares. Staff pointed out that the timing of the high-close bids offered no legitimate opportunity for other market participants to act on them, that the bids were for small amounts (mostly single board lots of 500 BCM Shares) relative to the number of BCM Shares held in the Malachi Account, and that some of the bids occurred in close proximity to trades that Budzinski made at higher prices (including the two high-close bids that were entered at month's end).

[252] We earlier commented that Budzinski's high-close bid orders differed from the orders that produced high-close trades. Specifically, all of the high-close bids were day orders placed shortly before the end of the trading day and involved substantially smaller volumes. While Budzinski's high-close bids were typically available only for a minute or two before their expiry at the close of trading for the particular day, the process of entering the trade order on the system following receipt of Budzinski's instructions would have resulted in some inherent time delay. Indeed, Garth's notes reflected her difficulty in entering Budzinski's trade orders, which would have resulted in delayed processing of those orders. Even with some administrative delay in placing the high-close bids, Staff's point remains that the placement of trade orders near the end of the day can indicate something other than an intent to accumulate BCM Shares, particularly where there is no real opportunity for other market participants to react to those orders.

[253] While we shared Staff's skepticism about Budzinski's motivations for making the high-close bids, we did not consider the evidence to be sufficiently clear and convincing to find that this trading activity reflected an intent to support the bid price of BCM Shares. In reaching this determination, we considered the following:

- the high-close bids were entered through a registrant that apparently gave Budzinski no indication of any concern regarding his trading activity until he placed the final high-close bid on May 31 (perhaps because Thor did not consider Budzinski to be motivated by "nefarious" intent);
- the volumes for the trade orders may have been limited by the insufficient funds in the Malachi Account at the time of the high-close bids;
- Budzinski said in his Interview that he observed some erratic late-day trading activity in BCM Shares in late-April or early May and he wanted to monitor this activity and continue to acquire BCM Shares, which suggested that his late-day, small volume bids may have been an attempt to gauge the market for BCM Shares;
- trading data for the Relevant Period revealed some instances of last-minute trading activity in connection with BCM Shares, which suggested that Budzinski's high-close bids might have resulted in a trade;
- the impugned bid orders, had they been filled, would have resulted in a downtick to the existing BCM Share price; and
- Budzinski's overall trading activity reflected an investment strategy focussed on the accumulation of BCM Shares.

[254] In the end, we considered it equally plausible that Budzinski's impugned high-close bids arose from some non-manipulative motive.

(h) Conclusion on Artificial Price

[255] To summarize, we find that Budzinski's high-close trades were the result of his pursuit of a bona fide accumulation strategy in respect of BCM Shares and that the evidence did not establish an intent to provide price support for those shares. Accordingly, Budzinski's high-close trades were based on legitimate market activity and the resultant closing prices for BCM Shares reflected genuine market supply and demand. We therefore find that Budzinski's high-close trades did not result in, or contribute to, an artificial price for BCM Shares.

[256] We have also determined that Staff have not demonstrated with sufficiently clear and convincing evidence that it is more likely than not that Budzinski's high-close bids were made with the intention of artificially supporting the bid price for BCM Shares or any other improper intent. We are therefore unable to find that Budzinski's high-close bids may have resulted in, or contributed to, an artificial price for BCM Shares.

[257] Because Staff have not proved the second element necessary for us to find a contravention of s. 93(a)(ii), we need not address the third element, that is, whether Budzinski knew or reasonably ought to have known that his trading activity may have resulted in or contributed to an artificial price for a security.

[258] Accordingly, we dismiss the allegation that Budzinski contravened s. 93(a)(ii) of the Act.

[259] We note that market manipulation allegations are notoriously difficult to prove, in large part because such allegations often require Staff to establish that a respondent was motivated to engage in non-genuine trading activity. We also observe that the allegations in the NOH were limited to the high-close trades and high-close bids from the Accounts in the period from January 1, 2016 through to June 7, 2016. We therefore did not consider whether Budzinski's trading activity outside of this timeframe, particularly his subsequent online trading in his BMO and QTrade accounts, was contrary to s. 93(a)(ii) of the Act.

B. Insider, Early Warning and Take-Over Bid Requirements

1. Preliminary Issue – "Control or Direction"

[260] We turn now to Staff's allegations that Budzinski failed to comply with certain insider reporting, early warning disclosure and take-over bid requirements. To prove allegations that a person failed to meet these requirements, it must be established that the person either beneficially owned or had control or direction over the relevant securities.

[261] Budzinski's position appeared to be that he was not subject to any reporting obligations because he did not have beneficial ownership of any BCM Shares in the Accounts. However, the relevant allegations in the NOH were premised on whether Budzinski either had a beneficial ownership interest in the BCM Shares in the Accounts or had control or direction over them. Moreover, the NOH indicated that Malachi, Freedom Investors, LP and HP were the beneficial owners of the BCM Shares in these Accounts and, despite some evidence suggesting that Budzinski might have a beneficial interest in at least some of the BCM Shares in the Accounts, Staff's written submissions instead focussed on Budzinski's control or direction over those shares. We therefore limit our analysis to determining whether Budzinski had control or direction over the BCM Shares in the Accounts.

[262] The phrase "control or direction" in respect of securities is not defined in the Act. A panel of the Ontario Securities Commission in *Re Rowan*, 2008 ONSEC 12 (at paras. 82-84) (aff'd (*sub nom. Rowan v. Ontario Securities Commission*), 2010 ONSC 7029, and by Court of Appeal at 2012 ONCA 208) discussed the law relating to the interpretation of this phrase:

In *Re Robinson*, the Commission also addressed the interpretation of the phrase "control or direction" contained in section 107 of the Act, endorsing the following statement from the same Notice and Request for Comments:

[a] person with "control or direction" over securities includes any person . . . who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has *or shares*:

- (i) voting power which includes the power to vote, or to direct the voting of, such securities and/or

- (ii) investment power, which includes the power to acquire or dispose, or to direct the acquisition of such securities.

(Notice and Request for Comments on Proposed Refinement of the Early Warning Regime and the Rules Regarding Insider Reporting, Takeover Bids and Control Block distributions as they Apply to Investors in General, Including Portfolio Managers and Portfolio Clients (1994), 17 O.S.C.B. 4438, at p. 4444, quoted in Re Robinson (1996), 19 O.S.C.B. 2643, at para. 253.)

This legal interpretation of the words "control or direction" is now incorporated in a national notice published by Canadian Securities Administrators ("CSA") Staff. Under the heading, "When do I need to add registered holders and in what circumstances?", the notice states:

You can hold your securities in the following three ways:

- (1) You can hold them directly. For example, you can hold the securities in an account with your broker, but the account is in your name.
- (2) You can hold them indirectly. For example, you beneficially own common shares in X Co. but the registered owner is another entity such as a holding company, an RRSP, or a family trust.
- (3) You can have control or direction over them. You have control or direction over the securities if you, directly or indirectly, through any contract, arrangement, understanding or relationship or otherwise have or share
 - voting power, or
 - investment power.

This would include having control or direction over the securities through a power of attorney, a grant of limited trading authority, or management agreement. For example, you set up a trust for your children in which Co. X securities are held. Because of your relationship with your children, you need to report your children's holdings, because you could direct your children to purchase or sell those securities. This may also be the case if your spouse owns the securities, but you have control or direction over those securities.

If you choose either "Indirect" or "Control or Direction", SEDI will prompt you to add the name of a registered holder. The registered holder is the entity through which you beneficially own the securities, such as an RRSP, holding company, family trust, or the person or company that owns the securities you have control or direction over. (CSA Staff Notice 55-310, section 4.2.9 (April 2003). See also CSA Staff Notice 55-308, "Questions on Insider Reporting", section 3.5 (November 2002).)

These principles have also been applied in a number of decisions. For instance, in *Re Borealis Explorations Ltd. ("Borealis")*, the Alberta Securities Commission (the "ASC") considered the issue of control or direction over securities. In that matter, the respondent Goldenberg was an insider of a public company, Borealis Explorations Ltd. (Borealis) and a partner in a law firm. Goldenberg maintained accounts over which he had trading authority, including an account held in his name in trust. Goldenberg had signing authority over this account but never exercised it, as all the trading in the account was done by Mr. Cox, Borealis' President. The ASC held that it was clear that Mr. Goldenberg and Mr. Cox had joint direction and control over the shares in the account even though the shares notionally belonged to Borealis's creditors:

With respect to the insider trades outlined in paras. 4 and 5 of the agreed statement of facts, it was suggested that no reporting was required. The Board notes however that s. 147 requires a report when an insider has "direct or indirect beneficial ownership of or control or direction over securities of the reporting issuer". Notwithstanding that the shares in question might have been pledged to certain creditors, or might have notionally belonged to some creditors, it is clear that the respondents Cox and Goldenberg had direction and control over them. Mr. Goldenberg specifically testified that the reason for having them in the Trust Account was to control their release into the market.

With respect to the shares owned by Mr. Goldenberg's law firm, the Board is satisfied that Mr. Goldenberg had direction and control over them. It would seem obvious that when a decision had to be taken as to whether to sell some shares, the partnership would look to Mr. Goldenberg's recommendation. Mr. Goldenberg as an insider had an indirect beneficial ownership as a member of the partnership, and also had direction and control of the shares. Mr. Goldenberg admitted at the hearing that he had a beneficial interest in these shares. The Board is of the view that an insider who has a partial beneficial interest in shares must still report trades under s. 147, even if others with a majority interest in the shares theoretically could overrule the insider's wishes as to whether a trade should take place. (*Re Borealis Exploration Ltd.* (1993), 2 C.C.L.S. 72, (A.S.C.) paras. 17 and 18.)

[263] We note that s. 3.3(1) of the Companion Policy to NI 55-104 specifically comments on the meaning of "control or direction" for the purposes of NI 55-104, and adopts virtually the same phraseology as was endorsed in *Re Robinson* (1996), 19 O.S.C.B. 2643.

[264] Accordingly, the generally accepted interpretation is that a person has control or direction over securities if the person (directly or indirectly) has or shares either voting power or investment power (or both) over those securities, and investment power includes the power to acquire or dispose of, or to direct the acquisition or disposition of such securities.

[265] Staff submitted that Budzinski retained and exercised trading authority over the BCM Shares in the Accounts during the Relevant Period and he therefore had control or direction over those shares.

(a) Malachi Account

[266] We earlier found that Malachi authorized Budzinski to trade in the Malachi Account throughout the Relevant Period and that he was the only person to provide trading instructions to Raymond James for every one of the transactions in the Malachi Account during that time.

[267] Budzinski submitted that he was merely acting on the authority of Malachi's board of directors through board resolutions, respecting which he had no authority to vote. The Malachi Letter identified Budzinski as Malachi's Managing Director and the person responsible for trading in the Malachi Account at the direction of the board of directors or the executive committee. Budzinski confirmed in his Interview that he was managing the Malachi Account in accordance with "the resolutions that had been passed", but he also indicated that there were no board resolutions authorizing the purchase of BCM Shares in the account prior to the Malachi Resolution and that the decision to purchase BCM Shares was made by the executive committee.

[268] While we had little evidence as to the functioning or governance of Malachi, the available evidence clearly demonstrated that Budzinski effectively dictated the outcome of any Malachi decision in respect of the BCM Shares in the Malachi Account.

[269] Accordingly, we find that Budzinski had investment power in relation to BCM Shares in the Malachi Account throughout the Relevant Period and he therefore had control or direction over those shares.

(b) Freedom Account

[270] In respect of the Freedom Account, we earlier found that Budzinski had trading authority for that account throughout the Relevant Period and that he exercised that authority for every one of the transactions in the Freedom Account during that time.

[271] We have no hesitation in finding that Budzinski had investment power in relation to BCM Shares in the Freedom Account and that he therefore had control or direction over the BCM Shares in that account throughout the Relevant Period.

(c) LP Account

[272] Staff submitted that Budzinski had control or direction over the BCM Shares held in the LP Account during the Relevant Period, based on the combination of his full trading authority on the account, his exercise of that authority, and the influence he exerted over LP, his daughter-in-law.

[273] We earlier determined that Budzinski had trading authority over the LP Account from the time that account was opened until the end of the Relevant Period, based on account documents in evidence. We also determined that he executed trades in the LP Account until at least December 2015, based in part on Budzinski's admission in his Interview and corroborated by Thor's comments on account documentation indicating that Budzinski was primarily managing the portfolio. As earlier discussed, LP's evidence lacked credibility and we gave no weight to her denial of Budzinski's exercise of trading authority within the LP Account.

[274] While statements made in his Interview suggested that Budzinski may not have exercised his trading authority in the LP Account after December 2015, he retained trading authority for the LP Account until the end of the Relevant Period, and it was only after that time that LP wrote to Thor and requested that Budzinski be removed ". . . from further activation . . ." on the LP Account. Accordingly, we find that, from the opening of the LP Account to the end of the Relevant Period, Budzinski had investment power in relation to the BCM Shares in the LP Account and he therefore had control or direction over those shares.

(d) HP Account

[275] Staff submitted that Budzinski had control or direction over BCM Shares held in the HP Account during the Relevant Period, based on the combination of his full trading authority over the HP Account and the level of influence he had over HP.

[276] We earlier determined that Budzinski had trading authority for the HP Account from the time that account was opened until the end of the Relevant Period. We also determined that

Budzinski exercised trading authority for all trades in the HP Account prior to January 2016. Although HP testified that the BCM Shares in the HP Account belonged to him, he also admitted to providing trading authority to Budzinski so that he could buy BCM Shares for HP. HP also testified to having sent multiple letters to Thor relating to Budzinski's trading authority over the HP Account, although the only letter in evidence came after the Relevant Period and "removed" Budzinski from the HP Account at that time.

[277] In light of our finding that Budzinski retained trading authority for the HP Account from the opening of that account to the end of the Relevant Period, we find that he maintained investment power in relation to the BCM Shares in the HP Account and therefore had control or direction over those shares throughout that period.

2. Insider Reporting

[278] Staff alleged that Budzinski breached s. 182 of the Act by failing to file reports and make disclosure as an insider of BCM in accordance with insider reporting requirements in Parts 3 and 4 of NI 55-104. In the circumstances, the reporting obligation under Part 4 did not seem applicable and Staff's submissions were limited to the filing obligations under Part 3. We therefore limit our analysis to the obligations under Part 3 of NI 55-104.

(a) Overview of Insider Reporting Requirements

[279] Section 182 of the Act requires an insider of a reporting issuer to file reports and make disclosure in accordance with the regulations. The definition of "insider" in the Act includes, among other things, a person who has control or direction over, directly or indirectly, "securities of an issuer carrying more than 10% of the voting rights attached to all the issuer's outstanding voting securities" (s. 1(aa)(iii)).

[280] An insider who is a "reporting insider" of a reporting issuer is required by s. 3.1 of NI 55-104 to file insider reports in accordance with Part 3 of NI 55-104. A reporting insider includes an insider who is a "significant shareholder" of the reporting issuer. A "significant shareholder" is defined to mean "a person . . . that has beneficial ownership of, or control or direction over, whether direct or indirect, securities of an issuer carrying more than 10[%] of the voting rights attached to all the issuer's outstanding voting securities . . .".

[281] Within 10 days of becoming a reporting insider, s. 3.2 of NI 55-104 requires the reporting insider to file an "initial report" that discloses their direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer. A reporting insider is also required by s. 3.3 of NI 55-104 to file a subsequent report within five days of any changes to the reporting insider's beneficial ownership of, or control or direction over, securities of the reporting issuer.

(b) Analysis

[282] As mentioned, it was not disputed that BCM was a reporting issuer throughout the Relevant Period.

[283] According to Staff's s. 218 certificate, between August 31, 2015 and June 30, 2016, Budzinski did not file any insider reports in respect of BCM Shares pursuant to the insider reporting requirements set out in ss. 3.1, 3.2 or 3.3 of NI 55-104.

[284] We earlier determined that Budzinski had control or direction over the BCM Shares in each of the Accounts during the Relevant Period. In the case of the Malachi and Freedom Accounts, he had control or direction throughout the Relevant Period, whereas his control or direction over the BCM Shares in the LP and HP Accounts spanned from the time those accounts were opened through to the end of Relevant Period.

[285] The definitions of "insider" under the Act and "significant shareholder" under NI 55-104 relate to control or direction over securities that carry the right to vote. As discussed earlier, the BCM Shares that were subject to Budzinski's control or direction were common shares, which by their nature include voting rights. While Budzinski suggested that he did not have the ability to vote any BCM Shares held in the Accounts, that is not by itself determinative of whether a person or company has control or direction over a security. Budzinski also claimed in his written submissions that he was not an insider of BCM and had no desire to become one. However, the determination of whether someone is an insider is not affected the person's intention or desire to be an insider.

[286] Accordingly, the fundamental question was whether Budzinski attained control or direction over 10% of the issued and outstanding BCM Shares during the Relevant Period, thus making him a BCM "insider" under s. 182 of the Act, and a "significant shareholder" (and thus a "reporting insider") of BCM for the purposes of NI 55-104.

[287] According to the BCM MD&A, there were 20,137,011 issued and outstanding BCM Shares as of August 31, 2015, and the number of issued and outstanding BCM Shares increased to 25,661,011 as of May 31, 2016. The BCM MD&A also indicated that from August 31, 2015 to May 31, 2016, BCM Shares were issued from treasury pursuant to four private placements and a debt settlement arrangement. While the BCM MD&A identified the dates and the number of BCM Shares issued pursuant to the private placements, there was no reference to the number of BCM Shares issued in connection with the settlement of debt or the date those shares were issued. Given the difference between the issued and outstanding BCM Shares as of August 31, 2015 and May 31, 2016, and based on the number of shares issued through private placements between those two dates, we have assumed that 300,000 BCM Shares were issued in connection with the debt settlement arrangement. For the purpose of our analysis, and because it was most beneficial to Budzinski's position, we further assumed that the date of issuance for the shares issued in connection with the debt settlement arrangement was the earliest possible date, namely September 1, 2015. Accordingly, our calculation of the number of issued and outstanding BCM Shares in the Relevant Period was as follows:

Date	BCM Shares Issued from Treasury	BCM Shares Issued and Outstanding
August 31, 2015		20,137,011
September 1, 2015	300,000 shares issued via debt settlement	20,437,011
October 6, 2015	1,395,000 shares issued via private placement	21,832,011
November 27, 2015	1,610,000 shares issued via private placement	23,442,011
December 18, 2015	1,394,000 shares issued via private placement:	24,836,011
February 15, 2016	825,000 shares issued via private placement	25,661,011
May 31, 2016		25,661,011

[288] On or about September 21, 2015, 1,001,000 BCM Shares were acquired through the Freedom Account, increasing the cumulative number of BCM Shares held in the Malachi and Freedom Accounts to 2,349,000. Because the BCM Shares held in these two accounts then exceeded 10% of BCM's issued and outstanding Shares at the time, and because he had control or direction over the BCM Shares in these two Accounts, Budzinski became an "insider" for the purposes of s. 182 of the Act and a "significant shareholder" and a "reporting insider" of BCM for the purposes of NI 55-104. That triggered Budzinski's obligation to file an initial report pursuant to s. 3.2 of NI 55-104. Budzinski did not file an initial insider report. That omission constituted a contravention of s. 182 of the Act.

[289] The Accounts continued to accumulate BCM Shares through to the end of the Relevant Period. According to trading data in evidence, from September 21, 2015 up to and including June 7, 2016 (the final day of the Relevant Period), there were 73 days in which one or more transactions involving BCM Shares occurred in one or more of the Accounts. For each day, the number of BCM Shares that were subject to Budzinski's control and direction changed and triggered an additional and independent requirement to file a supplemental insider report pursuant to s. 3.3 of NI 55-104. Budzinski did not file any such reports.

(c) Reliance on Legal Advice

[290] Budzinski's submissions seemed to offer a defence in respect of the insider reporting allegations (and perhaps Staff's other reporting allegations) based on inquiries he claimed to have made starting in July 2015 about whether he needed to "file as an insider". He asserted that he spoke to "a lawyer, Student Legal Services and even several compliance officers in the summer of 2016" and that none of these individuals indicated any need to file "as an insider or anything else".

[291] Staff submitted that Budzinski presented no evidence in support of these assertions, and that whatever he might have been told in July 2015 would have no bearing on his reporting obligations during the Relevant Period. Staff also submitted that the facts relied on by Budzinski, if true, failed to meet the requisite criteria for a legal advice defence. To establish such a defence, a respondent must prove that the lawyer had sufficient knowledge of the facts on which to base the advice, the lawyer was qualified to give the advice, the advice was credible given the circumstances under which it was given, and the respondent made sufficient inquiries and reasonably relied on the advice (*Re Ward*, 2022 ABASC 139 at para. 331; *Re Mega-C Power Corp.* (2010), 22 O.S.C.B 8290).

[292] As is generally the case with any defence proffered by a respondent, evidence is required to establish a defence based on reliance on legal advice (*Ward* at para. 333). A panel of the BC Securities Commission recently observed in *Re Johnston*, 2021 BCSECCOM 79 at para. 82:

In the securities law context, it is very difficult to imagine a situation where a respondent can make out a defence of reliance on legal advice simply by asserting the fact that legal advice was received and relied upon. Any decision maker given the responsibility of considering the defence must be given the facts from which to assess the presence or absence of the factors enumerated in *Mega-C* and the other decisions that reference it.

[293] Budzinski failed to provide any evidence in connection with a defence based on reliance on legal (or professional advice). In particular, we have no evidence regarding the individuals who

Budzinski spoke with (nor do we know their credentials), whether Budzinski provided sufficient facts upon which they could provide credible advice that might reasonably be relied on in the circumstances, what advice Budzinski may have received, and whether he followed that advice. Absent a proper evidential foundation, we are unable to evaluate and determine Budzinski's claimed reliance on legal (or professional) advice.

(d) Conclusion on Insider Reporting Allegations

[294] Having concluded that Budzinski became a "reporting insider" of BCM on September 21, 2015 and that he made numerous trades in BCM Shares thereafter, we find that Budzinski failed to file an initial insider report or any subsequent reports as required by the regulations (ss. 3.2 and 3.3 of NI 55-104) and he therefore contravened s. 182 with each omission.

3. Early Warning Disclosure

[295] Staff alleged that Budzinski breached s. 182.1 of the Act by failing to make and file early warning disclosure in accordance with the requirements of Part 5 of 62-104, specifically that he acquired control or direction over more than 10% of the issued and outstanding BCM Shares but did not issue and file a news release or file a report as required by the regulations.

(a) Overview of Early Warning System

[296] As summarized in *Genesis Land Development Corp. v Smoothwater Corporation*, 2013 ABQB 509 (at paras. 9-11), several market objectives are served by the early warning disclosure regime in 62-104 in addition to alerting the market of the possible take-over of an issuer:

[9] The rationale for the early warning system was first described in 1998 in the Notice of National Instrument 62-103 (4 September 1998) that accompanied then-proposed NI 62-103 (the "1998 Notice"):

The early warning system contained in the securities legislation of most jurisdictions requires disclosure of holdings of securities that exceed certain prescribed thresholds in order to ensure that the market is advised of accumulations of significant blocks of securities that may influence control of a reporting issuer. Dissemination of this information is important because the securities acquired can be voted or sold, and the accumulation of the securities may signal that a take-over bid for the issuer is imminent. In addition, accumulations may be material information to the market even when not made to change or influence control of the issuer. Significant accumulations of securities may affect investment decisions as they may effectively reduce the public float, which limits liquidity and may increase price volatility of the stock. Market participants also may be concerned about who has the ability to vote significant blocks as these can affect the outcome of control transactions, the constitution of the issuer's board of directors and the approval of significant proposals or transactions. The mere identity and presence of an institutional shareholder may be material to some investors. [original emphasis]

[10] In *CSA Notice - Notice and Request for Comment on Proposed Amendments to Multilateral Instrument 62-104 and National Instrument 62-103 and Proposed Changes to National Policy 62-203*, ASC CSA Notice (13 March 2013) (the "2013 Notice"), the Canadian Securities Administrators confirmed that this rationale is still valid today, and noted that the objective of early warning disclosure is not only to predict possible take-over bids, but also to anticipate proxy-related matters. In requesting comments on their proposals to amend the early warning reporting requirements, the CSA noted:

The objective of early warning disclosure is not only to predict possible take-over bids but also to anticipate proxy-related matters

The purpose of early warning reporting is to compel the release of information with respect to changes in the ownership of, or control or direction over, a reporting issuer's voting or equity securities to allow the market to review and assess the potential market impact of the change. Investors must be given sufficient information to be able to effectively evaluate the impact. In our view, disclosure to investors of a change that may influence or affect control is essential for market transparency and investor confidence.

Persons subject to the early warning requirements disclose the purpose of the change as part of their early warning news release and report. . . .

[11] The comments in the 2013 Notice make it clear that the early warning regime was not put in place merely to warn of impending take-over bids, but to provide disclosure to the market of accumulations of significant blocks of securities for several reasons, including the possibility of a proxy fight over the constitution of a board of directors.

[297] Given the objectives of the regime, failure to abide by the early warning disclosure obligations is not justified by the suggestion that the person accumulating shares of an issuer has no interest in effecting a take-over of, or to otherwise control, the issuer. Moreover, disclosure of the person's intent not to effect a take-over may be equally important to the issuer and other market participants.

[298] Further, in the context of an issuer such as BCM, whose securities are thinly traded, the concerns regarding the effect of undisclosed share positions on liquidity would be exacerbated.

[299] In Alberta, a person's early warning disclosure obligations derive from s. 182.1 of the Act, which requires a person to make and file disclosure as set out in the regulations and to comply with any transactional prohibitions in those regulations where the person acquires direct or indirect beneficial ownership of, or control or direction over, securities of a prescribed type or class of a reporting issuer representing a prescribed percentage of the outstanding securities of that type and class.

[300] The applicable regulations are found in Part 5 of 62-104. In particular, the provisions in effect at the time applied to a person (an "acquiror") who acquired control or direction over "voting or equity securities of any class of a reporting issuer . . . that, together with the acquiror's securities of that class, would constitute 10% or more of the outstanding securities of that class". Where that condition was met, the person was then obligated to:

- promptly issue and file a news release containing the information required by s. 3.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103); and
- within two business days from the date of the acquisition, file a report containing the information required by s. 3.1 of NI 62-103.

[301] Section 5.2(2) of 62-104 also required that the person issue an additional news release and file a report each time the person acquired control or direction over an additional two percent or more of the outstanding securities of the class of securities that was the subject of the most recent report required to be filed under s. 5.2.

(b) Analysis

[302] Consistent with our earlier findings:

- throughout the Relevant Period, BCM was a reporting issuer;
- Budzinski had control or direction over the BCM Shares in the Malachi and Freedom Accounts throughout the Relevant Period;
- Budzinski had control or direction over the BCM Shares in the LP and HP Accounts from the dates the respective accounts were opened to the end of Relevant Period; and
- Budzinski attained control or direction over more than 10% of BCM Shares on or about September 21, 2015, when the cumulative total number of BCM Shares held in the Malachi and Freedom Accounts reached 2,349,000, or 11.49% of the issued and outstanding BCM Shares at that time.

[303] Given these facts, Budzinski became obligated on or about September 21, 2015 to promptly issue and file a news release and file a report required by s. 3.1 of NI 62-103 within two business days.

[304] Budzinski was also obligated to issue an additional news release and report whenever his control or direction over BCM Shares increased by two percent or more (through his acquisition of BCM Shares). According to the evidence, this occurred on each of the following occasions:

- on or about October 22, 2015, 520,000 BCM Shares were purchased in the HP Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 3,135,000, or approximately 14.36% of the issued and outstanding BCM Shares at that time;
- on or about November 9, 2015, 155,000 BCM Shares were purchased in the HP Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 3,585,000, or approximately 16.42% of the issued and outstanding BCM Shares at that time;
- on or about November 16, 2015, 600,000 BCM Shares were purchased in the LP Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 4,276,000, or approximately 19.59% of the issued and outstanding BCM Shares at that time;

- on or about November 20, 2015, 778,000 BCM Shares were purchased in the LP Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 5,054,000, or approximately 23.15% of the issued and outstanding BCM Shares at that time;
- on or about December 4, 2015, 416,000 BCM Shares were purchased in the HP Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 5,925,000, or approximately 25.28% of the issued and outstanding BCM Shares at that time;
- on March 28, 2016, 21,000 BCM Shares were purchased – 15,000 in the Malachi Account and 6,000 in the Freedom Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 7,001,000, or approximately 27.28% of the issued and outstanding BCM Shares at that time; and
- on May 3, 2016, 320,000 BCM Shares were deposited into the LP Account, increasing the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 7,573,000, or approximately 29.51% of the issued and outstanding BCM Shares at that time.

[305] According to Staff's s. 218 certificate, between August 31, 2015 and June 30, 2016, Budzinski did not file any early warning news releases or early warning reports for BCM in accordance with the early warning disclosure requirements stipulated in s. 5.2 of 62-104. We therefore accept that Budzinski failed to make and file any of the required early warning disclosure following any of the transactions described above.

[306] Although Budzinski did not provide any cogent arguments relating to the early warning disclosure obligations in his submissions, we inferred from his materials that he did not think those obligations applied to him because he purported not to have beneficial ownership of any of the BCM Shares. However, as mentioned, there is no need for proof that he had beneficial ownership of any of the BCM Shares in the Accounts; it is Budzinski's control or direction over BCM Shares in the Accounts during the Relevant Period that gave rise to his early warning disclosure obligations.

[307] Budzinski also took the position that he was not subject to any reporting obligations under Alberta securities laws because he had no intention of pursuing a take-over bid for BCM. As mentioned, his stated intentions (or lack thereof) do not absolve him of his early warning disclosure obligations.

(c) Conclusion on Early Warning Disclosure Allegations

[308] We find that Budzinski contravened s. 182.1 by failing to make and file early warning disclosure in accordance with the requirements of Part 5 of 62-104.

4. Take-Over Bid Requirements

[309] Staff alleged that Budzinski breached s. 159 of the Act by making a take-over bid that was not in accordance with take-over bid requirements in Part 2 of 62-104, specifically that he acquired control or direction over more than 20% of the issued and outstanding BCM Shares but did not issue and file a news release, file a report, distribute a circular to all holders of BCM Shares, or take any other steps required by 62-104.

(a) Overview of Take-Over Bid Requirements

[310] In Alberta, a person's take-over bid obligations derive from s. 159 of the Act, which requires that a person shall not make a take-over bid except in accordance with the regulations.

[311] The term "take-over bid" is defined in 62-104 to mean:

. . . an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20% or more of the outstanding securities of that class of securities at the date of the offer to acquire . . .

[312] The term "offeror's securities" is defined in 62-104 – it means the securities ". . . beneficially owned, or over which control or direction is exercised, on the date of an offer to acquire, by an offeror or any person acting jointly or in concert with the offeror" (s. 1.1).

[313] By virtue of s. 2.8 of 62-104, an offeror must make a take-over bid to all holders of the class of securities subject to the bid who are in the local jurisdiction by sending the bid to each holder of that class of securities. In other words, any purchase of shares that would result in the purchaser acquiring control or direction over 20% or more of the issuer's issued and outstanding share capital constitutes a take-over bid, and obligates the purchaser to make an offer to all holders of the class in accordance with the regulations, unless an exemption is available. The applicable regulations are set out in ss. 2.9 and 2.10 of 62-104.

2.9 (1) An offeror must commence a take-over bid by

- (a) publishing an advertisement containing a brief summary of the take-over bid in at least one major daily newspaper of general and regular paid circulation in the local jurisdiction in English, . . . or
- (b) sending the bid to security holders described in section 2.8.

. . .

2.10 (1) An offeror making a take-over bid . . . must prepare and send, either as part of the bid or together with the bid, a take-over bid circular . . . in the following form:

- (a) Form 62-104F1 Take-Over Bid Circular, for a take-over bid . . .
- (2) An offeror commencing a take-over bid under paragraph 2.9(1)(a) must,
- (a) on or before the date of first publication of the advertisement,
 - (i) deliver the bid and the bid circular to the offeree issuer's principal office,

- (ii) file the bid, the bid circular and the advertisement,
 - (iii) request from the offeree issuer a list of security holders described in section 2.8, and
- (b) not later than 2 business days after receipt of the list of security holders referred to in subparagraph (a)(iii), send the bid and the bid circular to those security holders.
- (3) An offeror commencing a take-over bid under paragraph 2.9(1)(b) must file the bid and the bid circular and deliver them to the offeree issuer's principal office on the day the bid is sent, or as soon as practicable after that.

(b) Analysis

[314] Consistent with our earlier discussion:

- throughout the Relevant Period, BCM was a reporting issuer;
- Budzinski had control or direction over the BCM Shares in the Malachi and Freedom Accounts throughout the Relevant Period; and
- Budzinski had control and direction over the BCM Shares in the LP and HP Accounts from the time those accounts were opened to the end of Relevant Period.

[315] The evidence also established that on or about November 20, 2015, the purchase of 778,000 BCM Shares in the LP Account increased the cumulative number of BCM Shares subject to Budzinski's control or direction in the Accounts to 5,054,000, or approximately 23.15% of the BCM Shares that were issued and outstanding at that time. This acquisition triggered the take-over bid requirements in ss. 2.9 and 2.10 of 62-104.

[316] Once the aggregate shareholdings in the Accounts exceeded the 20% threshold, Budzinski was required to commence a take-over bid in one of two ways:

- pursuant to ss. 2.9(1)(a) and 2.10(1) and (2) of 62-104, by publishing an advertisement containing a brief summary of the take-over bid and filing the take-over bid, a circular in Form 62-104F1 (the **Take-Over Bid Circular**) and the advertisement with the ASC, or
- pursuant to ss. 2.9(1)(b) and 2.10(1) and (3) of 62-104, by sending the take-over bid to the holders of BCM Shares and filing the take-over bid and the Take-Over Bid Circular with the ASC.

[317] According to the evidence, Budzinski took none of these steps. The s. 218 certificate indicated that between August 31, 2015 and June 30, 2016, Budzinski did not file:

- an advertisement containing a brief summary of the take-over bid for BCM Shares in accordance with the requirements in ss. 2.9 and 2.10 of 62-104, or

- a take-over bid or Take-Over Bid Circular relating to BCM Shares in accordance with the requirements in s. 2.10 of 62-104.

[318] There was no dispute that Budzinski did not file any take-over bid materials in respect of BCM Shares. His apparent position was that he did not file any take-over-bid-related materials because he did not have beneficial ownership of the BCM Shares in the Accounts and only exercised trading authority in relation to those BCM Shares. However, as with the insider reporting and early warning requirements, proof of beneficial ownership is not required – it was Budzinski's control or direction over BCM Shares in the Accounts representing 20% or more of the issued and outstanding BCM Shares that gave rise to the take-over bid obligations.

[319] Again, Budzinski's assertion that he had no intention of taking over BCM, has no bearing on our determination of whether he breached the applicable take-over bid requirements.

(c) Exemptions

[320] It is the respondent who bears the onus of demonstrating the applicability of, and strict compliance with, any potential exemptions that might be available under Alberta securities laws: *Re Homerun International Inc.*, 2015 ABASC 990 at para. 83; *Re Osum Oil Sands Corp.*, 2021 ABASC 81 at para. 34. While Budzinski would bear that onus in these circumstances, he did not purport to rely on any of the exemptions from the take-over bid requirements set out in Part 4 of 62-104. We nevertheless considered whether Budzinski might have been able to rely on any of those exemptions in the circumstances, and determined from the evidence that no exemptions were available.

(d) Conclusion on Take-Over Bid Allegations

[321] We find that Budzinski contravened s. 159 of the Act by making a take-over bid that was not in accordance with 62-104.

5. Staff's Alternative Calculations

[322] While we found that Budzinski had control or direction over all four of the Accounts, Staff submitted that in the Relevant Period, the combined shareholdings for BCM Shares in any two of the Accounts exceeded the 10% threshold set out in s. 3.1 of NI 55-104 and s. 5.2 of 62-104 and that the combined shareholdings for BCM Shares in any three of the Accounts exceeded the 20% threshold for a take-over bid as set out in 62-104.

[323] Given our findings above, we need not rely on Budzinski's control or direction over BCM Shares in some but not all of the Accounts. Nevertheless, it was clear from Staff's evidence that significant BCM Shares were accumulated in the Accounts in the Relevant Period, such that Budzinski's control or direction over any two of the Accounts would have triggered the insider reporting and early warning requirements in NI 55-104 and 62-104, respectively, and further, that his control or direction over any three of the Accounts would have triggered the take-over bid requirements in 62-104.

VII. CONCLUSION

[324] Having found that Budzinski breached Alberta securities laws, this proceeding will now move into a second phase for the determination of what, if any, orders for sanction or cost-recovery ought to be made in light of our findings.

[325] Staff and Budzinski are each directed to inform one another and the Registrar, in writing, not later than noon on **Friday, March 3, 2023**, of the following: (i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and (ii) their expected timing requirements and suggested dates. After the panel has received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of next steps in this proceeding.

February 3, 2023

For the Commission:

"original signed by"

Kari Horn

"original signed by"

Matthew Bootle

"original signed by"

Steven Cohen

Corrigendum of the Decision

In paragraph [315] of the Decision, the reference to "NI 55-104" has been corrected to read "62-104".