ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Lavallee, 2023 ABASC 41 **Date: 20230421**

Lambert (Bert) Joseph Lavallee

Panel:	Maryse Saint-Laurent, KC Steven Cohen Karen Kim
Representation:	Carson Pillar Peter Verschoote for Commission Staff Thomas O'Leary, KC Brenden Roberts (Student-at-Law) for Lambert (Bert) Joseph Lavallee
Submissions Completed:	March 7, 2023
Decision:	April 21, 2023

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I. INTRODUCTION

[1] Lambert (Bert) Joseph Lavallee (**Lavallee**) contravened s. 93.1 of the *Securities Act* (Alberta) (the **Act**) by trading in securities of North America Frac Sand, Inc. (**NAFS**) while those securities were subject to a cease-trade order. Lavallee also contravened s. 93.4(1) by withholding from staff (**Staff**) of the Alberta Securities Commission (the **ASC**) information reasonably required for an investigation. Those findings were made by this ASC panel following a hearing (the **Merits Hearing**) and are set out in a decision dated August 18, 2022 and cited as *Re North America Frac Sand, Inc.*, 2022 ABASC 110 (the **Merits Decision**).

[2] Other allegations against Lavallee were dismissed in the Merits Decision, as were all allegations against three other respondents: NAFS; Brian Maurice Gibbs (**Gibbs**); and David Malcolm Alexander (**Alexander**). Allegations against Seton Securities International Ltd. (**Seton**) were resolved due to a settlement reached with Seton before the Merits Hearing began (the **Seton Settlement**, cited as *Re Seton Securities International Ltd.*, 2018 ABASC 148; also see *Re Seton Securities International Ltd.*, 2018 ABASC 150).

[3] Upon issuance of the Merits Decision, the proceeding moved into this sanction phase for the purpose of determining what, if any, orders for sanction and cost recovery should be made against Lavallee. Staff and former counsel for Lavallee (Mr. Hladun) declined the opportunity to tender any additional evidence for this phase of the hearing. Staff and Mr. Hladun each provided written submissions, with oral submissions scheduled for November 25, 2022. For medical reasons, the oral submissions date was changed to January 27, 2023. Following a request by Lavallee, including a change of counsel to Mr. O'Leary, the oral submissions date was adjourned to March 7, 2023. Mr. O'Leary made supplementary written submissions to which Staff provided a written reply. Oral submissions were made on March 7, 2023 by Staff and Mr. O'Leary.

[4] For the reasons below, we are ordering that Lavallee: pay a $75,000 administrative penalty; cease trading in or purchasing any security or derivative for the later of six years and the date by which he pays that administrative penalty; and pay a cost-recovery order of $11,000. Although requested by Staff, we did not make a disgorgement order.

II. BRIEF SUMMARY OF MERITS DECISION

A. Overview

[5] We summarize here some of the pertinent facts, as well as our findings against Lavallee. Full details of those facts and findings are in the Merits Decision, which is to be read in conjunction with this decision.

[6] NAFS, a Florida company, wanted to acquire certain leases (the **Leases**) from Canadian Sandtech Inc. (**CSI**). CSI transferred the Leases to North America Frac Sand (CA) Ltd. (**NAFSCA**), an Alberta company wholly owned by CSI. NAFS and CSI were then to complete a transaction (the **Transaction**) by which CSI (or its shareholders) would have received common shares of NAFS (**NAFS Common Shares**) in exchange for all shares of NAFSCA. NAFS was then to own the Leases through NAFSCA, and CSI or its shareholders would own a majority of the NAFS Common Shares then outstanding. The complications, disputes, complaints and ultimate resolution relating to the Transaction are not relevant for this sanction decision.

[7] During the course of the Transaction and in its aftermath, some Staff members became aware of certain alleged deficiencies in NAFS' financial statements. NAFS was subject to a cease-trade order issued on May 16, 2016 (the **CTO**), which remained in effect at the time of the Merits Hearing.

[8] Staff conducted several interviews during the course of its investigation (the **Investigation**) into NAFS and certain people connected to one or more of the entities involved in the Transaction. Lavallee was interviewed by Staff investigators on October 3, 2017, under oath and with counsel present (the **Interview**). The transcripts and exhibits from the Interview were in evidence. Lavallee did not testify at the Merits Hearing.

B. Lavallee's Trading Contrary to the CTO

[9] Staff alleged that Lavallee failed to comply with the May 16, 2016 CTO by trading in NAFS Common Shares between May 16, 2016 and September 29, 2017. However, Staff's written submissions limited their argument on this point to trades by Lavallee in December 2016 and later.

[10] We found that Lavallee, through his account in the Bahamas with Seton (the **Seton Account**), sold over 4.5 million NAFS Common Shares for proceeds of approximately US$137,090 between December 7, 2016 and September 29, 2017, thus contravening s. 93.1 of the Act. We also concluded that Lavallee knew of the CTO, likely in May 2016 but by August 24, 2016 at the latest.

C. Lavallee's Withholding of Information During the Interview

[11] Staff alleged that Lavallee withheld information during the Interview regarding: Lavallee's use of a second email address (the **Second Email Address**); Lavallee's use of a nominee named Robert Harris (**Harris**) to hold and trade NAFS Common Shares owned or controlled by Lavallee (and Gibbs); the existence of a trading account held in Harris's name (the **Harris Trading Account**), over which Lavallee had authority or provided direction; and Lavallee's involvement in Advanced Environmental Petroleum Producers, Inc. (**AEPP**). Although the allegation used an incorrect version of AEPP's name, we considered that immaterial in the circumstances.

[12] We found that Lavallee withheld information from Staff during the Interview relating to the Second Email Address, and Lavallee's connection to Harris and the Harris Trading Account. We also found that the information withheld by Lavallee was reasonably required for the Investigation, and Lavallee knew the Investigation was being conducted. Therefore, we found that Lavallee breached s. 93.4(1) of the Act on those three grounds. We held that Staff did not prove a breach of s. 93.4(1) in connection with AEPP.

III. SANCTIONS

A. The Law

1. Rationale and Principles

[13] The rationale, principles and factors relevant to sanction determinations have been addressed in many decisions of ASC panels, including a comprehensive discussion in *Re Homerun International Inc.*, 2016 ABASC 95 at paras. 12-46.

[14] Sections 198 and 199 of the Act set out the type and extent of sanction orders an ASC panel may make in the public interest. Such sanctions are to be protective and preventive, not punitive

or remedial. They also must be reasonable and proportionate in the circumstances (see *Homerun* at paras. 12-13; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45; *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 154 and 156; *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54; and *Re Fauth*, 2019 ABASC 102 at para. 22). Both specific deterrence (deterring future misconduct by the particular respondent before the panel) and general deterrence (deterring others from engaging in similar misconduct) are "legitimate considerations" when determining appropriate sanctions (*Walton* at para. 154; and see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62).

[15] Orders available under s. 198 of the Act generally operate to curtail specified types of participation in the capital market, with remedies such as disgorgement also available (a s. 198(1)(i) order for paying amounts to the ASC obtained due to non-compliance with Alberta securities laws is commonly referred to as "disgorgement", and we use that term in this decision). Section 199 allows a panel to order an administrative penalty of up to $1 million for each contravention of Alberta securities laws. Administrative penalties must not over-emphasize "general deterrence of an unidentified and amorphous sector of the public" (*Walton* at para. 156), nor can general deterrence be used to justify "a crushing or unfit sanction" (*Walton* at para. 154).

[16] The submissions by both parties reflected their understanding of these principles.

2. Factors

[17] The panel in *Homerun* set out the relevant factors for sanctioning, to be analyzed within the context of the rationale and principles already discussed. Staff pointed to those factors from *Homerun*. Lavallee's counsel set out the same factors, with former counsel for Lavallee also noting the Alberta Court of Appeal's approval of those in *Spategens v. Alberta (Securities Commission)*, 2018 ABCA 410 at para. 31 (referring to an ASC panel's sanction decision in *Re Spaetgens*, 2017 ABASC 38, which cited *Homerun* and was varied on other grounds). Those factors are (*Homerun* at para. 20):

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[18] These four factors are discussed extensively in *Homerun* (at paras. 22-46), on which we rely. Details of the factors and their relevance in the present case are discussed below.

B. Parties' Positions on Sanctions

1. Staff

[19] Staff sought against Lavallee:

- disgorgement of $183,264.69;

- an administrative penalty of $75,000; and

- a ban on trading or purchasing securities or derivatives until the later of six years and the time when both the disgorgement and administrative penalty amounts have been paid.

[20] Staff submitted that all of Lavallee's misconduct was serious. Staff characterized Lavallee's breach of the CTO as planned and deliberate because it involved repeated instances of trading over several months while knowing of the CTO. Staff also attributed a financial motive to Lavallee. Staff stated that Lavallee's failure to disclose the Second Email Address during the Interview was intentional, but Staff did not make submissions specifically about his intention in failing to disclose information about Harris and the Harris Trading Account. Staff asserted that breaching ASC orders undermines the securities regulatory system, capital market integrity and confidence in the capital market. Staff also stated that concealing information during an investigation can hinder that investigation and harm the public interest. Staff acknowledged there was no evidence that identifiable investors were exposed to, or caused, any harm by Lavallee's misconduct. Staff considered there to be no mitigating factors in the present case.

[21] Staff placed considerable emphasis on Lavallee's regulatory history, specifically that he was found in 2007 to have engaged in illegal trades and distributions (*Re Lavallee*, 2007 ABASC 794). As a result, Lavallee was given various market-access bans in 2008 (with an exception for certain personal trading) for five years, as well as a $20,000 administrative penalty (*Re Lavallee*, 2008 ABASC 78).

2. Lavallee

[22] Counsel for Lavallee initially submitted that the only sanction order should be an administrative penalty of no more than $25,000. However, he stated during oral submissions that $50,000 might be more appropriate if no disgorgement order were made.

[23] Counsel for Lavallee acknowledged that the breaches were inherently serious, but said they were "not . . . breaches that had or even threatened serious impact on investors, the public, the market or the proper functioning of the [ASC]".

[24] He contended that the evidence indicated Lavallee's trading of NAFS Common Shares in the Seton Account was not a deliberate contravention of the CTO, but was due to his mistaken belief that the CTO did not apply to trades made through a Bahamian account. Lavallee's counsel also argued that the breach of the CTO did not undermine public confidence in the Alberta capital market because Lavallee did not sell NAFS Common Shares in Alberta. Counsel and former counsel for Lavallee both implied that there was no evidence any of the purchasers were from Alberta or otherwise subject to any disadvantages from purchasing the NAFS Common Shares, such as themselves being subject to restrictions on re-selling.

[25] Counsel for Lavallee argued that, although withholding information during an investigative interview is serious, the specific instances of Lavallee's failure to disclose information were less so. Counsel for Lavallee pointed out that Lavallee admitted during his Interview that he had traded NAFS Common Shares in the Seton Account, so that Lavallee's earlier denial of the Second Email Address would not have actually compromised that aspect of the Investigation. Lavallee's counsel

also noted that even if Lavallee deliberately failed to mention the Second Email Address, that was a "fleeting" intention because of his admissions later during the same Interview about the Seton Account. Counsel for Lavallee stated that the impact of Lavallee's withholding of information about Harris and the Harris Trading Account was minor because there was no evidence that Lavallee ever received any NAFS Common Shares held by Harris in that account, and because we concluded in the Merits Decision (at para. 598) that Lavallee had only "some direction or authority" over the Harris Trading Account. Lavallee's former counsel had stated that there was no evidence of harm to investors or the capital market in Alberta due to Lavallee withholding information from Staff.

[26] Overall, Lavallee's counsel suggested that moderation in sanction would be appropriate because the evidence indicated that Lavallee thought trading outside Alberta was not banned by the CTO, disclosed the existence of the Seton Account during his Interview, and had financed NAFS' operations over several years. Further, he argued that there was no harm to investors or the capital market.

C. Analysis

1. Sanctioning Factors

(a) Seriousness of Misconduct

(i) Elements

[27] As stated in *Homerun* (at para. 22), the three aspects to examine when considering the seriousness of misconduct in which a respondent engaged are: its nature; the respondent's intention (deliberate, reckless or inadvertent); and the actual or potential harm. Fraud and misrepresentations are generally considered to be the most serious types of misconduct.

(ii) Nature of Misconduct

[28] We found that Lavallee breached s. 93.1 of the Act by selling NAFS Common Shares while NAFS Common Shares were subject to the CTO, an order of the ASC. During the period challenged by Staff, Lavallee sold more than 4.5 million NAFS Common Shares for proceeds of approximately US$137,090. There was little helpful evidence regarding the cost to Lavallee of those NAFS Common Shares. We also found that Lavallee breached s. 93.4(1) by withholding during his Interview information about the Second Email Address, Harris and the Harris Trading Account.

[29] The May 16, 2016 CTO ordered all sales and purchases of NAFS' securities to cease, stating that NAFS' financial statements for the periods ending September 30, 2015 and December 31, 2015 "were not completed in accordance with Alberta securities laws". As stated in *Re Felgate*, 2021 ABASC 68, it is self-evident that contravening ASC orders is serious misconduct (at para. 28). In *Re Loughery*, 2019 BCSECCOM 78, a British Columbia Securities Commission (**BCSC**) panel noted that contravention of a cease-trade order is more serious when that cease-trade order had been made against the particular individual following an enforcement hearing (at para. 29). For example, Lavallee was ordered in 2008 to cease trading in securities for five years after an enforcement hearing; here, however, it was the securities of NAFS which were subject to the CTO after a corporate finance review (we discuss below the significance of those previous sanctions).

[30] Withholding information from Staff during an investigation is also serious misconduct because it can undermine the effectiveness of that investigation. As stated in *Re Hagerty*, 2014 ABASC 348 (at para. 27): "The investigative function is an important element of the ASC's administration of Alberta securities laws, protection of the investing public, and fostering of confidence in our capital market. Hindering or frustrating that function by making untrue statements to Staff investigators does not merely generate inefficiency – it imperils those fundamental public-interest objectives."

[31] Email addresses have become increasingly important in recent years, and it is essential that Staff investigators are given all relevant email addresses. Regarding Harris and the Harris Trading Account, such information was relevant to several of Staff's allegations, including that Lavallee was a *de facto* officer of NAFS and had failed to meet insider reporting requirements when trading or purchasing NAFS Common Shares. Although Staff did not prove those allegations, Lavallee's untruthfulness about his connection to Harris and the Harris Trading Account impeded Staff's ability to conduct the Investigation.

(iii) Degree of Intention

[32] The second aspect of the seriousness of misconduct is the respondent's intention in engaging in that misconduct – whether it was: planned and deliberate; not deliberate but attributable to recklessness; or inadvertent (*Homerun* at para. 22).

[33] Staff characterized Lavallee's sale of NAFS Common Shares as planned and deliberate; counsel for Lavallee argued that Lavallee seemed to have thought the sales did not contravene the CTO because the Seton Account was based outside of Alberta.

[34] At no point during the proceeding did Lavallee's counsel tender evidence as to Lavallee's intention or motivation. However, Lavallee admitted during his Interview that he held the Seton Account and that he traded NAFS Common Shares in it (although he minimized the extent of those sales). Staff acknowledged that those admissions meant that Lavallee's trading in contravention of the CTO "was perhaps not as surreptitious or extensive as some of the chicanery employed by respondents referenced in prior [ASC] decisions involving market manipulation schemes". Staff also conceded that Lavallee opened the Seton Account before the CTO was issued, meaning that the Seton Account was not opened for the purpose of evading the CTO. There was no evidence as to the identity of the purchasers on the other side of Lavallee's sales and whether any of those purchasers were or were not connected to Alberta and were or were not restricted by the CTO.

[35] We do not consider Lavallee's sales in contravention of the CTO to be inadvertent, but we are not satisfied that Lavallee's intention was the dedicated flouting of the CTO suggested by Staff's submissions. Lavallee's misconduct was certainly reckless – he knew of the CTO and should have ensured that he was at no risk of breaching it. This misconduct was at worst deliberate, although, as conceded by Staff, not the most egregious level of intention.

[36] Regarding Lavallee's withholding of information during his Interview, we found in the Merits Decision that Lavallee deliberately withheld the Second Email Address. We are also satisfied that he deliberately withheld information about Harris and the Harris Trading Account. Therefore, this misconduct was deliberate, rather than reckless or inadvertent.

(iv) Exposure to Harm

[37] We agree with Staff that there was no evidence that any of Lavallee's misconduct caused harm to identifiable investors or even exposed them to harm. However, his misconduct undermined the effectiveness of the CTO and of Staff's investigative function and thus may lead to decreased efficiency of, and confidence in, the Alberta capital market. As stated by an ASC panel in *Re Dobler*, 2004 ABASC 1178 (at para. 32): "To the extent that [an ASC] order imposed with a view to protecting the investing public and market integrity is seen to be disregarded, we think market confidence likely to be impaired, and with it the willingness of investors to invest and the ability of issuers to obtain capital."

(v) Conclusion on Seriousness of Misconduct

[38] We conclude that Lavallee's misconduct was serious.

(b) Respondent's Characteristics and History

[39] The panel in *Homerun* stated (at para. 27) that a respondent's characteristics and history may be relevant in assessing the degree of risk posed and, consequently, the extent of required specific and general deterrence. This factor may also be relevant to the proportionality of the sanctions being considered.

[40] Although an older respondent may, in some circumstances, attract lesser sanctions, we do not consider Lavallee's age to be relevant here. There was no evidence or argument that Lavallee was impecunious. Had there been, we would have considered that as part of Lavallee's personal circumstances.

[41] As mentioned, various sanctions were ordered against Lavallee in 2008, following findings by an ASC panel that Lavallee had engaged in illegal trades and distributions and that such conduct was contrary to the public interest. Lavallee was prohibited for five years from acting as a director or officer, and from trading in or purchasing securities and using exemptions (with an exception or "carve-out" for certain personal or registered accounts). He was also ordered to pay an administrative penalty of $20,000.

[42] Those past sanctions are relevant in three ways. First, they confirm the evidence we heard during the Merits Hearing that Lavallee had prior capital market involvement and was aware that the securities industry is highly regulated. Second, they indicate that Lavallee was aware of the nature of ASC investigations and proceedings, yet still engaged in the misconduct found here. Third, there was no allegation or indication that Lavallee acted in violation of the sanctions in place against him between 2008 and 2013.

[43] On balance, we conclude that Lavallee's background, experience and regulatory history mean more significant sanctions are required here than if he had no such history. This is not as punishment for Lavallee's current or past misconduct, but because of the heightened risk that he will again deliberately or recklessly contravene Alberta securities laws. This is also relevant for general deterrence, to ensure others are reminded that recidivism is not acceptable.

(c) Benefit Sought or Obtained by Respondent

[44] As set out in *Homerun*, a benefit sought or obtained through misconduct may be an indicator of future risk. A financial benefit is the most obvious, but other benefits may exist, such

as a reputational benefit. A greater actual or potential benefit typically increases the incentive for a respondent or another person to engage in future misconduct, but greater sanctions may decrease future risk by countering the temptation to seek such a benefit.

[45] Here, it was obvious that Lavallee obtained a financial benefit, receiving approximately US$137,090 from his sales of NAFS Common Shares in contravention of the CTO. Counsel for Lavallee argued that the profit Lavallee made was a more relevant figure than the proceeds, and that the amount of profit was unclear. Counsel for Lavallee also submitted that Lavallee's extensive financial contributions to NAFS were of benefit to NAFS and its shareholders, with the value of such contributions outweighing any gain he received from his sales of NAFS Common Shares.

[46] There was little evidence as to how much Lavallee paid for those NAFS Common Shares he sold, and no evidence that it was a significant amount. We accept that the benefit to Lavallee was somewhat less than US$137,090, but consider that the onus was on Lavallee and his counsel to prove the cost of those NAFS Common Shares, and they did not do so.

[47] Shortly after Lavallee denied the existence of the Second Email Address, he admitted to having traded NAFS Common Shares in the Seton Account, thus giving him no actual benefit from withholding the email information. Staff eventually learned about Lavallee's connection to Harris and the Harris Trading Account, but did not prove any other allegations related to that connection. However, the overriding concern here is that Lavallee was untruthful during his Interview in an attempt to benefit himself. There must be significant sanctions for such untruthfulness, to protect the integrity of Staff's investigations and the ASC's public interest mandate as a whole.

(d) Mitigating or Aggravating Considerations

[48] Staff submitted that there were no mitigating factors, and considered the use of an offshore trading account to be aggravating. In our view, the existence and location of Lavallee's Seton Account are already accounted for in the above analysis, and we decline to consider those to be aggravating factors.

[49] Lavallee's counsel argued for moderation in sanction because Lavallee may have thought that trading through the Seton Account was outside the scope of the CTO, he disclosed the existence of the Seton Account, and he financed NAFS' operations over several years. We addressed these points earlier in our analysis, although the last warrants additional discussion here.

[50] It is clear that Lavallee invested a considerable amount of money in NAFS. Had NAFS succeeded, that would have led to a potential financial benefit for NAFS' shareholders (including Lavallee, of course). However, that did not give Lavallee any sort of licence to regain part of his investment by breaching the CTO. Nor is his significant investment a mitigating factor. Providing funding to a company with the hope of generating future returns is a business decision, not a sanctioning consideration.

[51] We find no aggravating or mitigating considerations here.

(e) Conclusion on Sanctioning Factors

[52] Lavallee engaged in serious misconduct, with the breach of the CTO being the most serious, and he gained a financial benefit from some of his misconduct. Lavallee has experience

in the capital market and with ASC proceedings. Overall, he engaged in reckless and deliberate misconduct despite his experience and background. There is, therefore, a strong need for specific and general deterrence to prevent further recidivism by Lavallee and to discourage others who may be tempted to engage in similar capital market misconduct.

2. Outcomes of Other Proceedings

(a) Relevance

[53] A review of relevant previous decisions is important in ensuring that sanctions ordered in a particular case are proportional (see *Homerun* at para. 16). While recognizing such previous outcomes are not determinative because of factual differences, the parties pointed to several previous securities commission decisions as providing a range of the type, duration and quantum of sanctions which would be appropriate here.

(b) Breaches of a Cease-Trade Order

[54] Several of the cases presented included a contravention of a cease-trade order. In most of those, the respondent breached a cease-trade order by issuing securities to raise money from investors, rather than selling securities in the secondary market.

[55] Two of those cases were *Re Caspian Energy Ltd*., 2013 ABASC 367 (a settlement agreement) and *Re Malone*, 2016 BCSECCOM 334 (a BCSC panel's sanction decision for contraventions of a ban on acting as a director and officer and in an investor relations capacity). Both were too far removed from the circumstances in the present case to be useful.

[56] *Felgate* is somewhat closer to the facts of the present case. Felgate was subject to an interim cease-trade order imposed by a panel after a *prima facie* assessment of evidence tendered in support of that order as a protective measure before a full enforcement hearing could be conducted. Felgate raised $300,000 by issuing securities to two investors in contravention of that interim cease-trade order, claiming that he believed the promissory notes he issued were not securities. Felgate also engaged in behaviour towards Staff which showed an aggressive disdain for Alberta securities laws. The panel ordered an administrative penalty of $50,000 and various market-access bans for the later of five years and the time at which his administrative penalty was paid in full. The panel declined to order disgorgement as it would not be in the public interest in those particular circumstances (at para. 94): the promissory notes were not yet due; there was no evidence that the two investors were dissatisfied or that their invested money had been used contrary to their expectations; and the allegation of fraud underlying the interim cease-trade order had not yet been adjudicated. An appeal on different grounds was dismissed: *sub nom. Alberta Securities Commission v. Felgate*, 2022 ABASC 107.

[57] In *Loughery*, a BCSC panel imposed various sanctions for the breach of a cease-trade order issued against the corporate respondent (Military International Limited (**Military**)) for a failure to file required financial statements. Both Military and the individual respondent (Loughery) were found liable for an intentional breach of that cease-trade order by raising $170,000 from investors, all of which was lost. Loughery had previously been sanctioned by a former self-regulatory organization for misconduct while a registrant. Neither respondent made submissions on the appropriate sanction. The panel ordered a $20,000 administrative penalty and $170,000 disgorgement against Military, along with a cease-trade order of Military's securities for the later of five years and the date by which the monetary orders were paid. Against Loughery, the panel

ordered a $50,000 administrative penalty and various market-access bans for the later of six years and the date by which his administrative penalty was paid. Although BCSC staff sought a disgorgement order against Loughery, the panel did not make such an order because there was insufficient evidence that Loughery benefited from the proceeds raised by Military, as the portion of the $170,000 ultimately received by Loughery was used for salary and the reimbursement of legitimate business expenses (at paras. 46 and 48).

(c) Withholding Information During an Investigation

[58] We were referred to three cases in which a respondent withheld information or made misleading statements to Staff during an investigative interview: *Re Shimoon*, 2015 ABASC 702; *Hagerty*; and *Re Singh*, 2012 ABASC 344. Shimoon was ordered to pay a $25,000 administrative penalty, while Hagerty and Singh were each assessed a $20,000 administrative penalty. No other sanction orders were made against any of those three. In *Shimoon* and *Hagerty*, Staff proved a contravention of s. 221.1(2) of the Act – providing a response during an investigative interview which was untrue in a material respect. That is different from the s. 93.4(1) breaches found in the *Singh* case and against Lavallee, which did not have an explicit materiality component. We did not find that Lavallee withheld "material" information during his Interview, but that the information he withheld was reasonably required for Staff's investigation. In our view, however, the ultimate effect of, and underlying considerations for, both of these sections are generally comparable. The panel in *Singh* emphasized the importance of general deterrence so others would recognize the necessity of being frank and honest in interviews, rather than lying, withholding or concealing information (at para. 12). That is also a significant consideration for the present case.

3. Consideration of Appropriate Sanctions

(a) Market-Access Bans

[59] Focusing on the need for specific and general deterrence in light of Lavallee's breach of the CTO, Staff sought a ban preventing Lavallee from trading in or purchasing securities or derivatives for the later of six years and the date by which any monetary sanctions are paid.

[60] Lavallee's former counsel argued that a trading ban was not warranted here because there was no evidence of harm to investors or the capital market, nor evidence of complaints by investors. Lavallee's present counsel also suggested that a ban was not warranted here because there was no fraudulent motive, no personal gain, no harm or potential harm to any investors, and no threat to public confidence in the market. If the panel were to impose a trading ban, counsel for Lavallee argued that a carve-out would be appropriate, in the same form as in the 2008 orders against Lavallee. Staff submitted that specific deterrence in the circumstances (including because Lavallee is a recidivist) make a carve-out inappropriate here.

[61] As stated, Lavallee's breach of the CTO was serious misconduct. As an experienced market participant who had already been subject to sanctions after an enforcement hearing, we are satisfied that Lavallee was aware – or should have made himself aware – that his trading through the Seton Account was or could have been contrary to the CTO. He should have ensured such trading was allowed before engaging in it. Contrary to his counsel's submissions, this is exactly the type of misconduct for which a trading and purchasing ban is appropriate. Although we have no knowledge of any harm to specific investors, Lavallee did gain from his trades and his conduct did threaten public confidence in the capital market.

[62] In our view, a ban of six years is appropriate, as suggested by Staff, given the need for specific and general deterrence.

[63] Regarding a carve-out from the trading ban, Lavallee's counsel referred us to the wording in the 2008 order against Lavallee. That carve-out allowed Lavallee to continue "trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in: (i) Lavallee's own personal accounts; or (ii) registered retirement savings plans or registered education savings plans (as defined in the *Income Tax Act* (Canada)) for the benefit of one or more of Lavallee, his spouse and his dependent children" (*Re Lavallee*, 2008 ABASC 78 at para. 45).

[64] Lavallee's trading misconduct here was through the Seton Account, a personal trading account. It would be counter-intuitive to give Lavallee a carve-out allowing him to engage in precisely the same activity for which we are sanctioning him, without evidence addressing matters such as why he may want to engage in such activity, how many personal trading accounts he has, and where such accounts are located. There is also no evidence as to whether Lavallee even has a registered retirement savings plan, a registered education savings plan, a spouse or dependent children. Should Lavallee wish to pursue a carve-out, he could apply under s. 214 of the Act for a variation order.

(b) Monetary Sanctions

(i) Disgorgement Order

(A) The Law

[65] Under s. 198(1)(i) of the Act, where a person has not complied with Alberta securities laws, a panel may order that the person "pay to the [ASC] any amounts obtained or payments or losses avoided as a result of the non-compliance", if the panel finds such a payment to be in the public interest. *Fauth* sets out a comprehensive summary of the principles and application of that disgorgement power. We adopt the two-step process described in *Fauth* (at para. 78): (1) determine if the respondent obtained amounts from a contravention of the Act; and (2) determine if it is in the public interest to order disgorgement.

(B) Amounts Obtained from Contravention

[66] We concluded in the Merits Decision that Lavallee obtained approximately US$137,090 through his breach of the CTO, a contravention of s. 93.1 of the Act. Staff sought a disgorgement order of $183,264.69, which is Staff's calculation of the Canadian dollar equivalent for the US$137,090. Counsel for Lavallee suggested that a disgorgement order would not be in the public interest, but that any disgorgement ordered should be based on Lavallee's profit (proceeds from the sale of the NAFS Common Shares, less the amount Lavallee paid for those NAFS Common Shares).

[67] Although neither Lavallee nor his counsel tendered evidence on the cost to Lavallee for the NAFS Common Shares at issue, we need not decide the amount for disgorgement, given our conclusion below on the public interest.

(C) Determination in the Public Interest

[68] We now turn to the second step. Staff argued that disgorgement is in the public interest because Lavallee breached the CTO deliberately and to enrich himself. Counsel for Lavallee submitted that a disgorgement order should not be the default for the breach of a cease-trade order,

and that more is needed than the fact a contravention occurred. Counsel for Lavallee also pointed to several factors here which, he contended, showed that a disgorgement order would not be in the public interest, including that: Lavallee funded NAFS' operations over the years; there was no evidence of harm to investors, particularly Alberta investors; all of the trades at issue "were made with willing and presumably informed third parties"; and NAFS Common Shares were apparently traded on an "active market" outside of Alberta. Counsel for Lavallee also likened the circumstances here to those in *Felgate*, in which a panel did not order disgorgement.

[69] Disgorgement orders by ASC panels have primarily been made in cases of fraud or misrepresentation – situations in which a respondent has raised money from investors by being fundamentally dishonest. We were not pointed to any ASC decisions in which disgorgement was ordered for the issuance of securities in contravention of a cease-trade order, although Staff did cite *Loughery* in which such an order was made against an issuer by a BCSC panel (discussed above).

[70] Staff argued that *Felgate*, in which no disgorgement order was made, should be distinguished because the panel in *Felgate* found "peculiar" circumstances. Counsel for Lavallee pointed to certain similarities between *Felgate* and the present case – there was no evidence in *Felgate* that the two investors were dissatisfied with Felgate's use of the money they invested or that such use was contrary to their expectations, and the fraud allegations underlying the interim cease-trade order had not been adjudicated.

[71] Here, we had no evidence as to the parties on the other side of Lavallee's trades. NAFS was a Florida company at the relevant times and filed disclosure with the Securities and Exchange Commission in the United States (as well as in Canada). It is possible that the purchasers had no connection to Alberta and were either unaware of an Alberta CTO affecting NAFS Common Shares or were not dissuaded by its existence. The situation here is different than a company raising money from investors through fraud or misrepresentations.

[72] In these circumstances, we do not consider it to be in the public interest to order Lavallee to disgorge amounts he made when he sold NAFS Common Shares in contravention of the CTO. An administrative penalty and a ban on trading and purchasing will provide the appropriate level of specific and general deterrence.

(ii) Administrative Penalty

[73] As a sanction for all of Lavallee's misconduct, Staff sought an administrative penalty of $75,000, with counsel for Lavallee arguing for a maximum of $25,000 (or $50,000 if we did not order disgorgement).

[74] The panel in *Fauth* discussed the appropriate size of an administrative penalty (at paras. 98-99):

> The decision as to the size of administrative penalty which is appropriate in a given situation is not simply "a mathematical exercise": *Fiorillo v. Ontario (Securities Commission)*, 2016 ONSC 6559 (at para. 296). An administrative penalty must be large enough to act as a deterrent, but, like other sanction orders, it must also be proportionate to the circumstances. This includes . . . the "magnitude of the illegality" (*Brost* at para. 54). In *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 (at para. 21), the ABCA stated: "If sanctions under this legislation are so low as to

> communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence, the opposite to deterrence may result" (see also *Walton* at para. 165).
>
> In addition, . . . consideration of what may be proportionate in the circumstances involves consideration of the range of administrative penalties imposed in comparable cases, and consideration of a respondent's finances. . . .

[75] Lavallee's financial circumstances were not a factor here, as neither former nor current counsel for Lavallee submitted arguments or tendered evidence on Lavallee's personal financial situation.

[76] We concluded above that: Lavallee's misconduct was serious; his trading in contravention of the CTO was reckless, possibly deliberate; his withholding of information from Staff during his Interview was deliberate; Lavallee had previously been sanctioned by the ASC; his trading in contravention of the CTO resulted in a financial benefit to him; his misconduct put at risk the integrity and efficiency of our capital market; and there were no aggravating or mitigating considerations. An administrative penalty here – as part of a package of sanctions – must convey to Lavallee and anyone tempted to engage in similar misconduct that such actions are unacceptable.

[77] Staff argued that Lavallee's breach of the CTO should attract an administrative penalty at the high end of the $10,000 to $60,000 range seen in other decisions, while his withholding of information during his Interview was comparable to misconduct which attracted administrative penalties of $20,000 to $25,000.

[78] We agree that the ranges set out by Staff are reasonable here.

D. Determination of Appropriate Sanctions

[79] Having considered the factors noted above, we conclude that specific and general deterrence require a ban on trading and purchasing securities and derivatives, as well as an administrative penalty. We have determined that disgorgement is not necessary here in light of the other sanctions we are imposing.

[80] In our view, a six-year ban on Lavallee trading in or purchasing securities or derivatives and an administrative penalty of $75,000 are proportionate, reasonable and in the public interest as sending the requisite message of specific and general deterrence. It is also appropriate to order that the expiry of the ban be linked to Lavallee's payment of the administrative penalty. We decline to order a carve-out from the trading and purchasing ban, given the dearth of information underlying that request. Should Lavallee wish to pursue a carve-out, he could apply under s. 214 of the Act for a variation order.

IV. COST-RECOVERY

A. Allegations and Findings in the Context of Cost Recovery

[81] The Investigation in this matter was broad. It led to a notice of hearing against Lavallee, NAFS, Gibbs, Alexander and Seton. The Merits Hearing proceeded against the first four, with the allegations against Seton withdrawn after the Seton Settlement was reached. In the Seton Settlement, Seton agreed to pay $5,000 in costs to the ASC. As noted, we dismissed all of the allegations made by Staff against NAFS, Gibbs and Alexander. We also dismissed most of the

allegations against Lavallee, including the allegations that he breached ss. 182, 147(3) and 221.1(2) of the Act. We found in the Merits Decision that Lavallee breached s. 93.1 and that he breached s. 93.4(1) on three of the four grounds alleged by Staff.

B. The Law

[82] *Homerun* (at paras. 47-52) set out the law relating to cost recovery:

> Section 202 of the Act authorizes a hearing panel, if satisfied after conducting a hearing that a respondent has contravened Alberta securities laws or acted contrary to the public interest, to order the respondent to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". Section 20 of the *Alberta Securities Commission Rules (General)* sets out categories of costs that may be subject to an order if the hearing panel "is satisfied that such costs are reasonable in all the circumstances":
>
> > (a) costs of [Staff] involved in the investigation or the hearing, or both, based on the time expended for purposes of or related to the investigation or the hearing, or both, and the applicable hourly rates;
> >
> > (b) costs paid or payable to a person or company, other than [Staff], appointed or engaged by the [ASC] or the Executive Director for purposes of or related to the investigation or the hearing, or both;
> >
> > (c) costs paid or payable in respect of witnesses, other than costs referred to in clause (a) and (b), for purposes of or related to the investigation or the hearing, or both; and
> >
> > (d) any other costs paid or payable for purposes of or related to the investigation or the hearing, or both.
>
> An order under section 202 of the Act is distinct from a sanction. The purpose of a cost-recovery order was described in *Re Marcotte*, 2011 ABASC 287 (at para. 20):
>
> > A costs order is . . . a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.
>
> Accordingly, the relevant costs will be those related to the investigation into the misconduct found, and the hearing in which that misconduct was proved. It would be inappropriate to assess costs attributable to allegations ultimately withdrawn or dismissed. A panel will therefore be mindful of which allegations were proved and which were withdrawn by Staff or dismissed by the panel. Where a cost item can be readily ascribed to a particular respondent and particular allegation, the task is straightforward. More often, however, it would be impractical for Staff's supporting documentation and submissions to make such plain distinctions, given the complexity and evolving nature of the investigation process or the scope of a particular hearing. In those cases the panel faces the task of estimating the proportion of claimed costs fairly attributable to specific respondents and specific allegations.
>
> In assessing the reasonableness of claimed costs, the panel also considers aspects such as time spent by Staff on a matter; indications of duplicated effort for which some reduction might be warranted; the nature and scale of claimed disbursements; and any prior recovery of costs arising from the same

> matter (for example, through settlement with another respondent). Through that process the panel determines the amount of costs prima facie recoverable.
>
> The panel must also make an allocation of recoverable costs based on its assessment of which respondents should bear responsibility, and in what respective proportions. In this task the panel will focus on the extent to which investigation and hearing resources (as reflected in the recoverable costs) were applied to proving the respective respondents' misconduct. Other considerations may lead the panel to conclude that cost responsibility is properly allocated wholly among one of multiple classes of respondents (for example, wholly among individual respondents for whom corporate respondents were mere vehicles for the misconduct found).
>
> Having made that allocation, the panel then considers the efficiency (or inefficiency) that each party brought to the proceeding as a whole, and the associated contribution to the broader public interest objectives of our regulatory system. This factor may argue for moderation – sometimes substantial – in the extent of cost recovery to be ordered against a particular respondent (and therefore may result in less than full recovery of the prima facie aggregate amount).

C. Parties' Positions on Cost Recovery

1. Staff

[83] Staff's costs for the investigation and hearing were $285,238.92. Staff acknowledged that Lavallee should be responsible for only "a small portion" – $25,000 – of those costs because:

- Staff proved only two of the ten allegations pursued during the Merits Hearing (an eleventh allegation was against Seton and was settled before the Merits Hearing began);
- the eight allegations not proved were the most complex and fact-intensive, thus accounted for a disproportionate amount of the total costs; and
- Lavallee was not responsible for inefficiencies during the hearing process.

[84] Staff deducted $156,855.05 from the total costs to reach a recoverable costs figure of $128,383.87, then calculated their suggested costs payable based on approximately 20% of that figure. We discuss Staff's specific deductions and submissions below.

2. Lavallee

[85] Lavallee's counsel argued that costs of $10,000 would be appropriate (Lavallee's former counsel had submitted that no costs should be ordered). Lavallee's counsel did not appear to contest Staff's basic approach of assessing a percentage of recoverable costs, but argued that approximately 10% of the recoverable costs would be more fair than 20%. He also pointed to the small amount of documentary evidence and the relatively few pages in the Merits Decision relating to the breaches found.

D. Analysis and Determination of Cost-Recovery Order

1. Appropriateness of Cost-Recovery Order

[86] As argued by Staff and accepted by Lavallee's current counsel, we conclude that it is appropriate in this case to make an order for cost recovery, but only a minimal amount.

2. Recoverable Costs

[87] Staff asserted that the recoverable costs were $128,383.87, after making various deductions. Staff deducted: all of the time and most of the expenses related to the Investigation; all of the time billed by the second Staff counsel on this file; and most of the disbursements during the Merits Hearing. Staff did not deduct: any time for Staff counsel Mr. Young after the start of the Merits Hearing; the research time in December 2019 relating to an unsuccessful application by Gibbs and Lavallee heard in January 2020 (referred to in the Merits Decision and cited as *Re North America Frac Sand, Inc.*, 2020 ABASC 40); certain witness expenses for Staff investigator Louise Panneton; a pre-hearing courier charge for a delivery to Lavallee's former counsel; or any court reporter expenses from the first set date hearing on August 13, 2018 through to the oral submissions on the merits on February 8, 2021.

[88] We agree with Staff's deductions, although we also deduct the following amounts:

- billed by Staff counsel Mr. Young during the course of the proceeding:
    - $15,150 – specifically naming, or clearly relating to, Gibbs or Alexander (regarding cross-examinations and written submissions); and
    - $1,050 – preparation for and participation in Gibbs' November 9, 2020 application for an extension of the time to file his written submissions; and
- court reporter charges:
    - $1,126.40 – for a September 24, 2018 application by Gibbs and a September 27, 2018 ruling on that application; and
    - $846.80 – for Gibbs' November 9, 2020 application for an extension of the time to file his written submissions;

[89] After making those additional deductions, the recoverable costs amount is $110,210.67, which we round to $110,000.

3. Percentage and Amount of Recoverable Costs Allocated to Lavallee

[90] As noted, we are satisfied that Lavallee should be responsible for only a small percentage of the recoverable costs. The two allegations proved against him were the only allegations sustained in a very long and complex matter. Although serious misconduct, the findings made against Lavallee took up relatively little time during the Merits Hearing and in the written and oral submissions.

[91] We now turn to efficiency considerations, as mentioned in the above quotation from *Homerun*. Lavallee did not make any admissions during the course of the Merits Hearing, when such admissions could have contributed to the Merits Hearing's efficiency. However, Staff acknowledged that inefficiencies during the proceeding were not caused by Lavallee. Moreover, we note that, during the course of this proceeding, Lavallee's former counsel often assisted the self-represented respondents, to the extent he was able, while still properly representing his client. There were no indications that Lavallee opposed such assistance, and we are prepared to accept

that Lavallee either agreed with this or did not oppose it. That assistance helped to keep this proceeding from being even more challenging and of an even longer duration.

[92] In all the circumstances, we determine that Lavallee should pay to the ASC $11,000 in costs, being 10% of the approximately $110,000 recoverable costs.

V. CONCLUSION

[93] For the reasons given, we make the following orders against Lavallee:

- under s. 198(1)(b) of the Act, he must cease trading in or purchasing any security or derivative for a period of six years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later;
- under s. 199, he must pay to the ASC an administrative penalty of $75,000; and
- under s. 202, he must pay costs to the ASC in the amount of $11,000.

[94] This proceeding is now concluded.

April 21, 2023

For the Commission:

"original signed by"
Maryse Saint-Laurent, KC

"original signed by"
Steven Cohen

"original signed by"
Karen Kim