

BRITISH COLUMBIA SECURITIES COMMISSION  
*Securities Act*, RSBC 1996, c. 418

Citation: Re Lim, 2017 BCSECCOM 196

Date: 20170605

**David Tuan Seng Lim, Michael Mugford and  
EuroHelvetia TrustCo S.A. now known as EHT Corporate Services S.A.**

<b>Panel</b>	Nigel P. Cave Audrey T. Ho Don Rowlatt	Vice Chair Commissioner Commissioner
<b>Hearing Dates</b>	November 7 - 9, 2016	
<b>Submissions Completed</b>	February 27, 2017	
<b>Date of Findings</b>	June 5, 2017	
<b>Appearing</b>		
Derek Chapman Joyce M. Johner	For the Executive Director	
Carey D. Veinotte Andrew Crabtree	For EHT Corporate Services S.A.	
Owais Ahmed	For David Tuan Seng Lim	
Stephen Jackson	For Michael Mugford	

**Findings**

**I. Introduction**

- [1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- [2] On November 20, 2015, the executive director issued a notice of hearing against the respondents (2015 BCSECCOM 418).
- [3] On October 31, 2016, the executive director amended the original notice of hearing (2016 BCSECCOM 366) such that the executive director alleged that the respondents:
- a) engaged or participated in conduct relating to the shares of Urban Barns Foods Inc. that they knew, or reasonably should have known, resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, the shares of Urban Barns, contrary to section 57(a) of the Act; and

- b) were control persons of Urban Barns at a time when they sold shares of Urban Barns without filing a prospectus or had an exemption from so doing, contrary to section 61 of the Act.

[4] At the commencement of the hearing, the executive director withdrew the allegation that the respondents contravened section 61 of the Act. Therefore, the only remaining allegation is that the respondents contravened section 57(a) of the Act.

[5] During the hearing, the executive director called one witness, a Commission investigator, tendered documentary evidence and provided written and oral submissions. Counsel for David Tuan Seng Lim and EHT Corporate Services S.A. attended the hearing, tendered documentary evidence on behalf of their clients and provided written and oral submissions.

[6] Although he had notice of the hearing, Michael Mugford did not attend the hearing, tender any evidence or make oral submissions. Mugford did provide written submissions.

## **II. Background**

### ***The Respondents***

[7] Lim is a resident of Vancouver, British Columbia. He was an investment advisor registered under the Act during the period relevant to the notice of hearing.

[8] Mugford is a resident of Lions Bay, British Columbia. Mugford (through Mugford's company) was Lim's client and a business associate. Mugford and Lim had a history of assessing various business opportunities together.

[9] EHT is a Swiss wealth management firm. One of the principals of EHT is an individual that we will refer to as DC. DC has a son that we will refer to as AC. AC was not employed by EHT.

[10] Lim and DC had a business relationship dating back to the 1990s, which included Lim opening several brokerage accounts for which DC was a trustee, at the firm where Lim worked.

[11] In 2002, Lim opened a brokerage account at the firm where he worked, for a company that we will refer to as PT. DC was a director of PT (along with another principal of EHT) and signed the account opening documents for the company.

[12] Lim was also a business associate of AC.

[13] Mugford had a business relationship of some kind with EHT dating back to at least 2007. An e-mail from March of 2007 to a principal of EHT shows that, as at that time, Mugford (or Mugford's company) maintained a bank account administered in some capacity by EHT.

***Other relevant parties***

JF

- [14] JF is the former president of a private Alberta company. JF died in 2011. JF and Mugford were business associates.
- [15] JF, along with several business associates, in July of 2009 formed a new Alberta private company called Urban Barns Foods Inc. (Urban Barns Alberta).
- [16] On June 15, 2009, JF contacted Mugford and told him that he was looking for a public shell company in order that he might complete a reverse take-over transaction with Urban Barns Alberta.

HL Ventures Inc.

- [17] HL Ventures Inc. (HL Ventures) is a Nevada company. HL Ventures was originally incorporated in 2007 to engage in the exploration and development of natural resource properties. By 2009, HL Ventures had halted its exploration activities and was essentially a shell company (i.e. it had no revenues and negligible total assets).
- [18] HL Ventures' shares were quoted on the Over the Counter Bulletin Board markets in the United States. Its shares had never traded before November 4, 2009.
- [19] On October 9, 2009, HL Ventures entered into a share exchange agreement whereby Urban Barns Alberta would be acquired (in a reverse take-over transaction) by HL Ventures. HL Ventures also changed its name to Urban Barns Foods Inc. on an earlier date.
- [20] On November 18, 2009, when a British Columbia resident, JB, became the CEO and a director of Urban Barns (the former HL Ventures), it became a reporting issuer in British Columbia.

BS/CFM

- [21] BS was the principal of a US entity that we will refer to as CFM. BS and Mugford were friends and business associates.
- [22] CFM is a direct marketer and tout sheet publisher for small public companies.

SV/ EV

- [23] SV was a business associate of Lim and Mugford.
- [24] SV was the contact person for a UK company that we will refer to as EV. The evidence was not clear as to the exact nature of SV's relationship with EV, although the evidence is that SV was able to control a bank account of EV (as will be discussed later).

Concerto

- [25] Concerto Limited is a Marshall Islands company incorporated on November 18, 2009. Two representatives of EHT, including DC, signed the account opening documents for

Concerto to open a bank account at Banque SCS Alliance, a Swiss bank. Bank SCS Alliance changed its name to CBH Compagnie Bancaire Helvetique SA (CBH) on December 1, 2009.

- [26] The account opening documents for the Concerto account at CBH indicate that:
- Lim was the beneficial owner of the account;
  - Concerto was owned or controlled by the Concerto Trust;
  - the settlor of the Concerto Trust was AC;
  - Lim was the beneficiary of the Concerto Trust; and
  - EHT was authorized to provide control and direction over this Concerto account.

BC

- [27] DC and his son AC have some connection to a company that we will refer to as BC. BC sent and received a total of US\$640,000 to or from one of DC or AC between June of 2007 and February of 2010.

- [28] The evidence did not make clear the exact nature of the relationship between DC, AC and BC.

- [29] Urban Barns also wired a total of approximately US\$41,000 to BC between July of 2009 and December of 2009. The reason for these payments was not clear from the evidence.

***The Escrow Agreement***

- [30] On May 19, 2009, DC sent an email to Lim that had attached to it a form of Escrow Agreement. On the same day, Lim forwarded a copy of DC's email to Mugford. The Escrow Agreement did not include the names of any principals to the Escrow Agreement.

- [31] The key terms of the Escrow Agreement were as follows:

- the parties were to be EHT and four unnamed entities that were thereafter described in the agreement as the "principals";
- EHT was to act as the escrow agent under the Escrow Agreement;
- EHT (as escrow agent) was to act on behalf of the beneficial owners of shares of an unnamed corporation;
- the beneficial owners of shares were to deliver shares of the unnamed corporation to EHT;
- upon receiving instructions to do so, EHT was to sell the shares in its possession and place the proceeds in an escrow account;
- instructions and expense invoices were to be provided via a private messaging system called "Safe Message" – which was a confidential messaging system utilized by EHT;
- sale proceeds from the escrow account, after paying approved expenses, were to be distributed to the four principals equally;
- approved expenses were to include:
  - a) costs of promotion

- b) any funds advanced by one of the principals to the unnamed corporation via a private placement, plus a 12.5% premium
  - c) the costs of US\$100,000 for acquiring a shell
- in the event that distributions to each of the four principals reached US\$500,000, then the allocation of proceeds among the principals would be adjusted such that one principal would receive 28% of the proceeds thereafter and the remaining three principals would each receive 24% of the proceeds.

[32] On May 22, 2009, Lim e-mailed a revised version of the Escrow Agreement to Mugford and AC. The e-mail that was sent with the revised agreement indicates that the revised agreement was as Lim and AC have discussed and that it contained Mugford's suggestion that there be a 12.5% premium attached to certain funds to be raised via private placement.

[33] On May 26, 2009, Lim e-mailed a further revised version of the Escrow Agreement to DC. In that e-mail, Lim asked DC if the changes to the Escrow Agreement were acceptable to DC.

[34] Later on May 26, 2009, Lim e-mailed the revised Escrow Agreement to Mugford and AC along with the following message:

Here is the latest draft of the pooling agreement incorporating all the points of agreement in the discussions that we have had. Please feel free to correct and improve it where you see fit.

Michael, I don't have Brian's e-mail so am unable to send it to him for his review. I would be grateful if you could send it.

[35] On June 26, 2009, Lim sent an e-mail to AC discussing certain terms related to the transactions surrounding the acquisition of Urban Barns Alberta. The e-mail discussed a number of items and included the following:

Restricted shares

The restricted shares will in all probability be cancelled and new restricted shares issued for the acquisition of UB. This cannot happen until the shell is paid for. Therefore, the logical process would be to sign a letter of intent and embark on a first stage of marketing to raise the necessary capital and announce the completion when the net price (\$100,000) of the shell is accounted for.

...

Free trading shares

The free-trading shares are essentially held in trust.

...

### Forward Split

We are uncertain of the ratio but the target is to have somewhere in the region of 40 million shares issued upon completion of the amalgamation. That being the case, a split of 7-10 new for 1 old seems to make sense. We will have to study this part a bit closer before the final negotiation and before we disclose to them the structure of the shell.

...

### Escrow Agreement

The company has unpaid bills but essentially there will be approximately \$5000 left in the treasury. It will have no debt.

All issued shares to be accounted for.

All proceeds prior to disbursement will take care of costs (shell, promo, escrow agents fees etc.)

Disbursement ratios as discussed until \$500,000 net (\$2mil collective) whereby bonus to finder in terms of 28% to him and 24% for the remaining 3 for future disbursements.

...

- [36] No executed copy of the Escrow Agreement was entered as evidence; nor was an unexecuted copy of the Escrow Agreement that contained the names of the four principals to the agreement.

### ***Urban Barns (HL Ventures) reverse take-over transaction***

- [37] On July 22, 2009, Urban Barns entered into a letter of intent with Urban Barns Alberta to complete a share exchange which would result in Urban Barns Alberta becoming a wholly owned subsidiary of Urban Barns through a reverse take-over transaction.
- [38] On October 9, 2009, the above described transaction was confirmed in a binding agreement. The agreement also contemplated that Urban Barns was to complete a seven for one forward split as part of the transaction and cancel 20.5 million shares held by a third party.
- [39] Closing of the transactions described above occurred on December 4, 2009. At closing, Urban Barns had approximately 43 million shares outstanding.

### ***Delivery of Urban Barns shares to EHT/CBH/Brown Brothers***

- [40] Between July of 2009 and February of 2010, 7.7 million shares of Urban Barns (on a post forward split basis) were delivered to a custodial account at Brown Brothers Harriman & Co.

[41] There is no direct evidence as to the beneficial owners of these 7.7 million shares of Urban Barns.

[42] In each case, the share certificates delivered to Brown Brothers:

- were sent to Brown Brothers by CBH; and
- the stock powers of attorney authorizing the transfer of the Urban Barns shares into the name of Brown Brothers were signature guaranteed by representatives of both CBH and EHT.

***Marketing of Urban Barns and payment therefor***

[43] In the period of July of 2009 through September of 2009, Lim, Mugford and employees of Mugford's company worked on establishing (in some cases through third parties) a website for Urban Barns and a business plan for the company.

[44] On September 29, 2009, a third party sent draft promotional materials regarding Urban Barns to Mugford for his review.

[45] Just the two headlines and the first paragraph make clear that these were grossly promotional tout sheet materials:

***Investors: this little company just solved the global food crisis!***

***Buy URBF now at \$1 ... Sell at \$100!***

“They’ve got patented technology that grows crops 4 to 5 times faster in 1/400<sup>th</sup> space, with 99% less water – *INDOORS*

...

[46] During the hearing, the earliest copy of published materials of this ilk that was entered as evidence was taken on a screen shot from the internet dated November 20, 2009. The published materials were toned down somewhat from the September draft but remained grossly promotional:

***Investors: this little company just solved the global food crisis!***

“They’ve got unique technology that grows crops in as little as 1/4<sup>th</sup> the time, and amazingly, in as little as 1/100<sup>th</sup> of the space required by conventional farming methods!

Crops are grown indoors in a controlled environment, 100% free from outside contaminants such as pesticides, bird and animal feces and even bugs.

All this while using 99% less water!

...

Dear Fellow Investor:

This is a game changer, a stunning technological breakthrough that in one fell swoop.

- Solves the global food crisis.
- Puts an end to unripe, poor-tasting fruits and vegetables.
- Brings “picked fresh daily” organic produce to city dwellers year-round at highly competitive prices!

**I’m convinced these \$1 *URBF* shares are fast headed for \$14!**

...

[47] To put the statements in these tout sheet materials in context:

- the Form 10-Q that Urban Barns filed with securities regulatory authorities in the US for the quarter ended October 31, 2009 disclosed that Urban Barns had spent approximately US\$12,000 to acquire a growing machine and that this was its only material asset;
- there is nothing on the balance sheet (or elsewhere in the disclosures) to suggest that Urban Barns had any proprietary rights in the technology associated with the growing machine;
- the Form 10-Q that Urban Barns filed for the period ended January 31, 2010 indicated that the company (on a consolidated basis, which would include Urban Barns Alberta) did not conduct any operations nor generate any revenue during the period. Further, the financial statements contained a going concern note (i.e. that the company’s working capital would be insufficient to meet its anticipated liabilities in the next twelve months).

[48] The tout sheet materials of November 20, 2009 contained a disclaimer at the bottom in tiny font that they were part of a paid advertising campaign paid for by EV and prepared and published by CFM.

- [49] CFM, and its principal BS, were introduced to Urban Barns by Mugford.
- [50] On November 16, 2009, Lim sent an e-mail to SV asking him to send the following text in an e-mail to BS (in this case there is no question that the “Brian” in this e-mail was BS as Lim sent BS’ email address along with the note):

Brian:

*I would like to continue the marketing of URBF beyond this week.* (emphasis added) In fact, I would like to continue it through the rest of the year. I am going to send you a wire for \$300,000 this week. However, the total budget I was thinking of is \$600,000 for the rest of this year. Could you please make a schedule and budget for that amount to be utilized until December 31<sup>st</sup>.

Thank you.

Sami

- [51] What is of note about the above e-mail (aside from the discussion about the marketing campaign and the timing of that campaign) is that Lim was not asking SV to simply forward his e-mail to BS, but rather to copy the exact text of his e-mail and send it to BS so that the e-mail would appear, in future records, to have come from SV (although Lim clearly provided the content).
- [52] Also on November 16, 2009, Lim sent an e-mail to DC. Most of that e-mail discussed the opening of a Concerto account but ended with a note that “Invoices from Brian also on SM”. The “SM” reference is to EHT’s Safe Message confidential messaging system. This matches the manner in which expense invoices were to be provided to EHT under the terms of the Escrow Agreement.
- [53] On November 23, EV wired US \$474,965 to CFM. The wire transfer documentation said that the payment was in respect of:
- INVOICE URBF2 DATED 16/11/2006 AND,  
INVOICE URBF1 DATED 05.11.2009 LESS  
CHARGES
- [54] On December 4, 2009, Lim sent an email to Mugford attaching two versions of the promotional materials (similar to those referred to in paras. 45 and 46) for Urban Barns. Mugford then forwarded those materials (through a third party) to a direct mailing company that was being used by CFM as part of the promotional campaign.
- [55] On December 8, 2009, Lim emailed SV telling him to “initiate the wire of US\$125,000 as per the last invoice”.
- [56] On December 9, 2009, EV wired US\$124,965 to CFM. The wire transfer documentation said that the payment was in respect of:

INVOICE URBF3 DATED 12/7/09 LESS  
CHARGES

[57] On December 23, 2009, Lim emailed SV the following:

I believe that the amounts transferred to EV (name redacted) have been corrected so there should be sufficient monies there now. I would be grateful if you could try resending the wire.

Also for the reference portion, you cud indicate “Marketing- Dec 21<sup>st</sup> to Dec 31<sup>st</sup>”. I’m afraid I don’t have an invoice number for you. the banking co-ordinates are the same though.

[58] On December 24, 2009, EV wired US\$174,965 to CFM where the wire transfer documentation was as described in Lim’s e-mail of December 23, 2009 to EV.

[59] On January 28, 2010, Lim again sent an e-mail to SV asking him to send the following text in an e-mail to BS:

Brian:

Thank you for your continued marketing of Urban Barns. It is providing great exposure for the company and I think it will really help in the long run. We would like to continue to move forward on a week to week basis as I requested at the beginning of the month. For the upcoming month, we would like to budget \$70,000. We will initiate a transfer in the next day or 2. In the meantime, could you send an invoice that covers our expenses to date from the last invoice. It will be helpful for our records. Thank you.

Sami

[60] On February 26, 2010, Lim emailed Mugford and asked him to send an email to EV:

Hi, Moening. Cud u do me a favour? Need you to get Sami to wire 32k to Brian for this week ...

[61] On February 27, 2010, SV sent an e-mail to Lim and Mugford indicating that a payment to Brian had already been made on February 22, 2010. Lim then sent SV another email clarifying:

Yes, thanks, This payment of \$32,000 is for the week of Feb. 22<sup>nd</sup>.

[62] On March 3, 2010, EV wired US\$31,975 to CFM for “Marketing – Feb 22-28<sup>th</sup>, less charges”.

[63] In total, CFM received approximately US \$1.2 million for its promotion of Urban Brands.

***Concerto funding of EV and Urban Barns***

[64] Almost all of the payments from EV to CFM (described above) were immediately preceded by a wire transfer payment from Concerto to EV. The payments from Concerto came from its bank account at CBH over which the principals at EHT were authorized to provide instructions. The following is a chart of the dates and amounts of the wire transfers that were in evidence (amounts in US\$):

<b>Concerto wire to EV</b>	<b>Date of Concerto wire</b>	<b>EV wire to CFM, less charges</b>	<b>Date of EV wire</b>
\$116,725	January 5, 2010	\$114,965	January 6, 2010
\$38,100	January 11, 2010	\$37,475	January 14, 2010
\$55,825	January 18, 2010	\$54,970	January 19, 2010
\$55,825	January 21, 2010	\$54,970	January 25, 2010
\$175,000	January 28, 2010	\$69,970	February 5, 2010
		\$69,970	February 11, 2010
\$45,000	February 16, 2010	\$32,475	February 22, 2010
		\$31,975	March 3, 2010
<b>\$486,475</b>	<b>Total</b>	<b>\$466,770</b>	<b>Total</b>

[65] The Concerto wire transfers to EV were sent with a reference description as “URBF Investment”.

[66] Concerto also subscribed twice for private placements of shares of Urban Barns. The first subscription occurred on December 17, 2009 when Concerto purchased 50,000 shares of Urban Barns for US\$42,500. The second subscription occurred on February 10, 2010 when Concerto purchased 250,000 shares of Urban Barns for US\$250,000.

[67] The minutes of a meeting of the board of directors of Urban Barns held February 5, 2010 indicate that the proceeds of this second private placement were to be used for administration of the company and not for operational purposes.

***Lim and his clients’ acquisition of Urban Barns shares***

[68] On November 4, 2009, the first day that the shares of Urban Barns had ever traded, Lim, through an offshore account, purchased 20,000 shares of Urban Barns at US\$0.85 per share.

[69] A number of Lim’s clients commenced purchasing Urban Barns shares on November 5, 2009 and continued to do so in the days that followed. Those clients included a corporation owned and controlled by Mugford, the operations manager of Mugford’s company and a company that we will refer to as PMT, two of the directors of which were principals of EHT (including DC). Lim marked all of these trades as unsolicited.

[70] Mugford’s company purchased 40,000 Urban Barns shares on November 6, 2009.

[71] PMT purchased a total of 73,519 Urban Barns shares between November 19, 2009 and December 8, 2009.

### ***Payments to BC***

- [72] On January 20, 2010, EHT provided instructions to CBH to wire US\$60,000 from Concerto's account to an account in the name of BC, the reference on the wire was that these were "URBF Proceeds".
- [73] On January 26, 2010, EHT provided instructions to CBH to wire a further US\$30,000 from Concerto's account to the BC account, again with a reference that these were "URBF proceeds".
- [74] On February 2, 2010, EHT provided instructions to CBH to wire a further US\$30,000 from Concerto's account to the BC account, again with a reference that these were "URBF proceeds".
- [75] Finally, on February 8, 2010, EHT provided instructions to CBH to transfer US\$3,268.46 from Concerto's account to the BC account, this time the reference was only to "URBF".

### ***Sales of Urban Barns shares by CBH***

- [76] CBH had brokerage accounts at three firms in the US (Merrill Lynch, Apex Clearing and Legent Clearing) and one in Canada (National Bank).
- [77] During the relevant period, which the executive director says is November 4, 2009 through to February 28, 2010, a total of 3,798,566 Urban Barns shares were sold from CBH's three US accounts for total proceeds of US\$3,906,247. All of the Urban Barns shares that were sold in this manner came from the Brown Brothers custodial account.
- [78] During the relevant period, a total of 1,004,655 Urban Barns shares were sold from CBH's Canadian account for total proceeds of US\$850,416. All of the Urban Barns shares that were sold in this manner came from the Brown Brothers custodial account.
- [79] One hundred percent of the Urban Barns shares sold in the market on November 4 and November 5, 2009 came from CBH's Merrill Lynch account.
- [80] During the first five days of the relevant period, 95% of the Urban Barns shares sold in the market came from CBH's Merrill Lynch account.
- [81] During the relevant period, forty-one percent of the entire volume of sales in the market of Urban Barns shares came from CBH's four North American brokerage accounts.
- [82] There is no clear evidence as to where the proceeds from these sales of Urban Barns shares went.

### **III. Circumstantial evidence and key inferences**

- [83] The executive director conceded that their case was dependent, in large part, upon circumstantial evidence. The executive director also submitted that, based upon the totality of the evidence adduced during the hearing, the panel should make some or all of the following key inferences:

- that BC was a company controlled by one or both of AC and DC;
- that EV was owned or controlled by SV;
- that the “Brian” referred to in multiple e-mails from Lim is BS;
- with respect to the Escrow Agreement:
  - o the unnamed shell corporation in the Escrow Agreement was to be Urban Barns (HL Ventures);
  - o the four principals to the Escrow Agreement were Lim, Mugford, BS and BC (which was really DC and AC); and
  - o the Escrow Agreement sets out the “road map” for the market manipulation of the Urban Barns shares;
- that the publication of the tout sheet materials and direct mailing campaign relating to Urban Barns and carried out by CFM commenced earlier than November 20, 2009 and most likely on November 5, 2009;
- that Concerto (Lim) was providing the funding to CFM for the Urban Barns tout sheet and direct mail marketing campaign and not EV as is stated in the tout sheet materials;
- that Lim’s purchase of 20,000 shares of Urban Barns on November 4, 2009 was a “wash trade”;
- that the purchases of shares of Urban Barns by Lim’s clients, through accounts at Lim’s employer, commencing on November 5, 2009 and thereafter were directed by Lim and were not unsolicited;
- that EHT instructed CBH to sell the approximately 4.8 million Urban Barns shares that were sold through CBH’s four North American brokerage accounts and that EHT did so in accordance with the terms of the Escrow Agreement; and
- that the 7.7 million Urban Barns shares that were placed into custody with Brown Brothers (via EHT and CBH) were beneficially owned by the four principals under the Escrow Agreement.

[84] We received submissions from all the parties on the law relating to the circumstances in which a panel may properly infer a fact. There was no real disagreement about the applicable law. There was considerable divergence in the submissions from all of the parties as to the manner in which that law should be applied to the circumstances of this case.

[85] This commission most recently considered the issue of inferences in *Re Weicker*, 2015 BCSECCOM 19 (at para.80):

Insider trading cases often require panels to consider inferences. We may make inferences, we cannot speculate. In drawing inferences, we must ensure that we do not assume a fact that has not been proven and that any inference that we make is reasonable based on the facts that have been proven.

- [86] Without listing each of the parties' positions on each of the above inferences, it is sufficient for these purposes to note that, in most cases, one or more of the respondents submitted that it would be mere speculation for the panel to make the inference in question.
- [87] Similarly, the Ontario Securities Commission in *Re Suman*, 2012 LNONOSC 176, citing the Ontario Court of Appeal decision in *R. v. Morrissey*, [1995] O.J. NO. 639, held that inferences must be ones that can be reasonably and logically drawn for a fact or group of facts established by the evidence.
- [88] On this legal foundation, we assessed each of the inferences that the executive director has asked us to make:

*1) BC was controlled by one or both of AC and DC*

It is clear that there was some connection between BC and one or both of AC and DC. However, payments to and from a corporation does not necessarily equate to ownership or control of that corporation. More importantly, we do not think that this inference is necessary or relevant to the hearing. None of BC, AC or DC are respondents in this hearing. We also do not find that determining the ownership or control of BC affects our disposition of any issue in the hearing.

*2) EV was owned or controlled by SV*

We find that SV was able to direct the actions of EV. That is sufficient for the purposes of this hearing. We make this finding for two reasons. First, there is clearly a relationship of some significance between SV and EV. The corporate records of another private company in which SV is the sole director indicate that EV is the largest (by a significant percentage) shareholder of that other company. Second, there are several emails in which Lim clearly directs SV to make payments to CFM for the marketing program associated with Urban Barns and then those payments are subsequently made by EV. This is most clear from the December 23, 2009 email from Lim to SV in which Lim tells SV that he has put money into EV's account in order to allow SV to resend a wire transfer. It is clear that SV carried out Lim's requests with respect to payments to CFM via the actions of EV. It is also clear that SV had sufficient control over the funds in EV's account in order for SV to direct that EV make payments to CFM.

*3) The "Brian" referred to in multiple e-mails from Lim is BS*

There are a number of references to "Brian" in various emails among the parties. The only e-mail in which it is explicit that the Brian referred to in the e-mail is BS is the e-mail of November 16, 2009 from Lim to SV where Lim included BS' email address following his reference to Brian. There are three other emails in which the context clearly suggests that the Brian referred to is BS:

- A second e-mail of November 16, 2009 from Lim to DC that made reference to "Brian's invoices" on SafeMessage was made immediately following Lim's e-mail to SV (which was to be forwarded to BS) in which Lim indicated that

they would pay BS \$300,000 “this week”. The Escrow Agreement sets out explicitly that invoices for expenses are to be sent to EHT via SafeMessage and BS was clearly the party providing marketing services at the direction of Lim.

- A January 28, 2010 e-mail and a February 26, 2010 email both dealt with the payment by EV of marketing expenses and those clearly were referring to BS.

We find that each of these three references to “Brian” was to BS.

The only e-mail that refers to Brian without any context is the e-mail of May 26, 2009 which attaches the draft Escrow Agreement. Although BS is the only Brian that is part of the evidence in the hearing, there is nothing in the context of the e-mail itself or its timing that connects this to BS. We do not have sufficient evidence to find that the Brian referred to in this e-mail is BS.

*4) The unnamed shell company in the Escrow Agreement was to be Urban Barns (HL Ventures)*

We find that the unnamed shell company in the Escrow Agreement was to be HL Ventures (renamed Urban Barns). The e-mail of June 26, 2009 between Lim and AC makes specific reference to certain deal issues related to the acquisition of Urban Barns Alberta. It then goes on, under a heading “Escrow Agreement”, to describe several key terms that are found in the draft Escrow Agreement (including which costs are to be deducted prior to distribution and, more importantly, the very unique disbursement arrangements (i.e. \$2 million of equal disbursements and then 28% to one principal and 24% to each of the other three principals thereafter)). This is a clear description of the draft Escrow Agreement and we find that the terms of the Escrow Agreement were to be put in place for the acquisition of Urban Barns Alberta.

*5) The four principals to the Escrow Agreement were Lim, Mugford, BS and BC (which was really DC and AC)*

Firstly, none of BS, BC, DC or AC are respondents in this matter. We do not find it relevant to any of the issues in this hearing to make a determination that any or all of them were principals under the Escrow Agreement and we therefor decline to do so. However, we do note that there is no evidence that BC was a principal under the Escrow Agreement.

We do find that Lim and Mugford were principals under the Escrow Agreement. The evidence is clear that the Escrow Agreement was circulated to and from Lim and Mugford on each of May 19, May 22 and May 26, 2009. The May 26, 2009 e-mail was sent with a cover note that the Escrow Agreement reflected the points of agreement in the discussions that “we have had”. The May 22, 2009 e-mail that was sent with the circulation of the Escrow Agreement included a note that the agreement had been amended to reflect Mugford’s suggestion of a deal point relating to the private placement proceeds. These e-mails paint a picture of an agreement that is being negotiated between Mugford, Lim and AC. There is no suggestion in their communications that the agreement is being negotiated by them on behalf of others

(i.e. there is no suggestion of needing input or consent from third parties etc.). The subsequent conduct of both Lim and Mugford support a finding that they were principals under the agreement. Lim, through Concerto, provided private placement proceeds (as was envisaged under the terms of the Escrow Agreement). As will be discussed below, Lim, through Concerto, provided the funding for the Urban Barns promotional campaign. Mugford was asked to review and comment upon the tout sheet materials. Lim called upon Mugford to arrange payment to CFM for the Urban Barns promotional campaign when Lim was unable to do so himself. All of these actions are supportive of a finding that Mugford was a principal under the Escrow Agreement.

6) *The Escrow Agreement sets out the “road map” for the market manipulation of the Urban Barns shares*

A determination that the Escrow Agreement set out the road map for the manipulation of the Urban Barns shares is a question of mixed law and fact. There is the factual question of whether the Escrow Agreement’s terms were followed and then there is the legal question of whether that conduct is contrary to section 57(a) of the Act).

The Escrow Agreement terms are clear:

- the principals were to deliver their shares in an unnamed shell company to EHT as escrow agent,
- the shell company was to be the recipient of one or more private placements to allow it to continue to meet its administrative obligations,
- the shell company shares were to be promoted,
- the escrow agent (upon being given instructions to do so) would sell the shares of the shell company, and
- the proceeds would be distributed to the principals after paying certain expenses.

There is clear evidence that most of the key terms of the Escrow Agreement were carried out with respect to Urban Barns. EHT did receive 7.7 million Urban Barns shares. Urban Barns did carry out two private placements. The Urban Barns shares were heavily and expensively promoted. 4.8 million of the Urban Barns shares that flowed through EHT were sold into the market. This is beyond the realm of coincidence. Regardless of whether there was ever a signed Escrow Agreement, we find that its terms were generally carried out with respect to Urban Barns.

7) *The publication of the tout sheet materials and direct mailing campaign relating to Urban Barns and carried out by CFM commenced earlier than November 20, 2009 and most likely on November 5, 2009*

We find that the tout sheet materials and direct marketing campaign carried out by CFM in relation to Urban Barns did commence earlier than November 20, 2009 and did commence on or about November 5, 2009. This finding is based on the following. First, EV’s wire transfer to CFM on November 23, 2009 for US\$474,965 references an “INVOICE URBF1 DATED 05.11.2009” which clearly indicates that marketing work was being performed prior to November 20, 2009. Second, Lim’s

email to SV of November 16, 2009 (that was to be forwarded to BS) states that “I would like to *continue* the marketing of URBF beyond this week” (emphasis added). The respondents argued that several different interpretations of that sentence are possible. While it is true that that sentence is open to other possible interpretations, the best and most logical interpretation of that wording is that on November 16, 2009 Lim was asking BS (via SV) to *continue* a marketing campaign that was already ongoing. Finally, the shares of Urban Barns had never traded prior to November 4, 2009. There is simply no other possible, let alone reasonable, explanation for the explosion of trading activity that commenced in the shares of Urban Barns on or about November 4, 2009 other than CFM’s marketing campaign having commenced. Approximately 2.5 million Urban Barns shares were traded in the 12 trading days between November 4, 2009 and November 19, 2009. Urban Barns’ press releases of its reverse take-over transaction were already long since issued without having triggered a single trade in the market.

8) *Concerto (Lim) was providing the funding to CFM for the Urban Barns tout sheet and direct mail marketing campaign and not EV as is stated in the tout sheet materials*

This fact is incontrovertible. The e-mail exchanges between Lim, SV and Mugford, make clear that Lim is providing the direction and the funding for CFM’s marketing campaign of Urban Barns. The e-mail exchanges are also clear that Lim was attempting to hide this fact by using SV/EV as an intermediary in the e-mail communications to BS/ CFM. Further, the evidence of the back-to-back wire transfers of funds from Concerto to EV and then EV to CFM, makes clear that it was Lim who was providing the funding for this campaign. Finally, there is an email from Lim to SV in which Lim specifically references putting additional funds into an EV bank account in order for EV to send those funds to BS/CFM.

9) *Lim’s purchase (through a corporate vehicle) of 20,000 shares of Urban Barns on November 4, 2009 was a “wash trade”*

We are unable to make this inference. A “wash trade”, in common parlance, is a market transaction in which the buyer and the seller are one and the same. The trading records confirm that 100% of the shares that were sold on November 4, 2009 came from CBH’s four North American brokerage accounts. As will be discussed below, it is not possible for us to determine the specific beneficial ownership of the shares in those four accounts. As a consequence, we are not able to infer that Lim was also the seller of the 20,000 Urban Barns shares that he purchased on November 4, 2009.

10) *The purchases of shares of Urban Barns by Lim’s clients, through accounts at Lim’s employer, commencing on November 5, 2009 and thereafter were directed by Lim and were not unsolicited*

We do make this inference. It is simply not credible that several different individuals who had the same investment advisor, all decided on November 5, 2009 (or very shortly thereafter), as their own investment idea, to commence purchasing the shares of a company (listed on the OTCBB) that had never traded a single share prior to that

date. We find that the idea to purchase shares of Urban Barns by Lim's clients originated with Lim.

*11) EHT instructed CBH to sell the approximately 4.8 million Urban Barns shares that were sold through CBH's four North American brokerage accounts and that EHT did so in accordance with the terms of the Escrow Agreement*

We are not able to make this inference. While this would have been consistent with the express terms of the Escrow Agreement, we have no evidence of who provided trading instructions for any of the Urban Barns shares in any of the four North American accounts of CBH. Even if we were able to make this inference, we are not certain of the relevance of this inference as there is no evidence that, if EHT was providing instructions to CBH, it was doing so as principal.

*12) The 7.7 million Urban Barns shares that were placed into custody with Brown Brothers (via EHT and CBH) were beneficially owned by the four principals under the Escrow Agreement*

We are not able to make this inference in the exact manner suggested by the executive director. It is clear that the 7.7 million Urban Barns shares that were ultimately deposited with Brown Brothers came via CBH and EHT. It was also an express term of the Escrow Agreement that the four principals were to deliver Urban Barns shares into escrow with EHT. However, we do not have any evidence of who specifically delivered how many of the Urban Barns shares to EHT. In our view, it is clear that the Escrow Agreement was acted upon. We are therefore able to infer that the 7.7 million Urban Barns shares that were routed through EHT to Brown Brothers were beneficially owned by one or more of the four principals.

#### **IV. Positions of the Parties**

[89] The executive director's position is that:

- a) the respondents developed a plan to acquire and promote the shares of a shell company, Urban Barns;
- b) that plan was set out in the Escrow Agreement; and
- c) the conduct of each of the respondents that collectively can be said to contravene section 57(a) of the Act, is as follows:

##### Lim

- was one of the four principals under the Escrow Agreement
- instructed CFM to carry out its tout sheet promotion of Urban Barns
- arranged for payment of CFM for that promotional campaign
- funded payment of the promotional campaign through Concerto
- provided content for the promotional campaign
- made private placements into Urban Barns in order to allow it to fund its administrative (and not operational) expenses

- acquired Urban Barns shares at the commencement of the promotional campaign
- made solicited trades of Urban Barns shares to help create the initial demand for the Urban Barns shares at the beginning of the promotion

Mugford

- was one of the four principals under the Escrow Agreement
- referred CFM to Urban Barns for the promotional campaign
- provided a review of the tout sheet materials
- assisted in the payment of CFM
- reviewed the Urban Barns business plan and assisted in the development of a website for Urban Barns
- forwarded promotional materials to one of the direct mailing firms utilized by CFM;
- acquired Urban Barns shares at the commencement of the promotional campaign

EHT

- was the escrow agent under the Escrow Agreement and generally carried out its duties thereunder
- facilitated the deposit of the 7.7 million Urban Barns shares that were ultimately deposited with Brown Brothers
- provided instructions for the sale of 4.8 million Urban Barns shares through four North American brokerage accounts of CBH
- provided instructions on the payment of funds from Concerto to EV (which were then forwarded to CFM)
- provided instructions on the payment of sale proceeds of the Urban Barns shares from Concerto to BC

[90] Lim’s position is that the executive director did not prove there was either a misleading appearance of trading activity or an artificial price for the securities of Urban Barns.

[91] In particular, Lim suggests that there were no “hallmarks” that would relate to a misleading appearance of trading activity (i.e. wash trades, pre-arranged trades, uneconomic trades, market domination, uptick trades, high closing, etc.).

[92] Lim also submits that this case would be unique if the panel were to find that there was a manipulation in the securities of Urban Barns as there was limited, if any, evidence of misconduct relating to the demand for Urban Barns shares.

[93] Mugford’s position is that:

- a) the executive director did not prove that there was either a misleading appearance of trading activity or an artificial price for the securities of Urban Barns; and

- b) even if there is a finding of a manipulation with respect to the shares of Urban Barns, the executive director has failed to prove that Mugford participated in conduct that resulted in or contributed to that manipulation and, importantly, ever profited from that conduct.

[94] EHT's position is that:

- a) the executive director did not prove that there was either a misleading appearance of trading activity or an artificial price for the securities of Urban Barns;
- b) the executive director did not prove that EHT ever participated in conduct that resulted in or contributed to the manipulation; and
- c) the executive director did not prove that EHT had the requisite mental state in order to prove that it contravened section 57(a) of the Act.

## **V. Analysis and Findings**

### **A. Applicable Law**

#### ***Standard of Proof***

[95] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held:

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[96] The Court also held (at paragraph 46) that the evidence must be “sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test.

[97] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

#### ***Definition of a security***

[98] Section 1(1) of the Act defines “security” to include “(a) a document, instrument or writing commonly known as a security”, “(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person”, “(d) a bond, debenture, note or other evidence of indebtedness, share, stock...” and “(i) an investment contract.”

#### ***Section 57(a)***

[99] Section 57(a) of the Act states that a person “must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct results in or contributes to a misleading

appearance of trading activity in, or an artificial price for, a security or exchange contract.”

**B. Analysis**

[100] Section 57(a) of the Act requires the executive director to establish four elements in order to prove a contravention of that section:

- did the conduct of the respondent relate to securities or exchange contracts?
- was there either (or both) a misleading appearance of trading activity in, or an artificial price for, that security or exchange contract (what we will refer to as the form of the manipulation)?
- was there the requisite causal connection between the respondent’s conduct and the form of the manipulation (i.e. did the respondent, directly or indirectly, engage in conduct that results in or contributes to the form of the manipulation?) and
- did the respondent have the requisite mental state for the contravention (i.e. did the respondent know, or should they have reasonably known, that their conduct had the requisite causal connection to the form of manipulation?)

[101] In this case, the first two elements can be considered collectively (with respect to all of the respondents). The last two elements require a separate analysis with respect to the specific conduct of each respondent and their mental state.

*Conduct relating to securities*

[102] There was no dispute during the hearing that the conduct of all of the respondents in question related to the shares of Urban Barns. Shares of a corporation are a security under the Act.

*Misleading appearance of trading activity or artificial price*

[103] The notice of hearing contains an allegation that the respondents’ conduct resulted in or contributed to a misleading appearance of trading activity or an artificial price for the shares of Urban Barns.

[104] However, the submissions of the executive director make clear that he is alleging both (i.e. that the respondents’ conduct resulted in or contributed to a misleading appearance of trading activity and an artificial price for the shares of Urban Barns).

[105] It is important to understand the difference between these two concepts as the case law has, to some extent, considered different factors when looking at a “misleading appearance of trading activity” versus “an artificial price” for a security.

[106] This distinction was clearly described by the Alberta Securities Commission in *Re Coastal Pacific Mining Corp.*, 2016 ABASC 301 (CanLII):

1. False or Misleading Appearance of Trading Activity?

[41] Staff directed us to the decision of the ASC in *Re De Gouveia*, 2013 ABASC 106 (CanLII), for guidance on the application of section 93(a) and key concepts therein. However, the factual background in *De Gouveia* differed so markedly from that in the present case that we found the earlier decision of limited assistance. *De Gouveia* involved "flurries" of trading orders, many soon changed or cancelled entirely; "wash trades" involving one party on both sides of the transaction (as buyer and seller); and multiple small purchases followed by unprofitable resales. This activity was found to have given a distorted impression of the market (supply and demand) for the securities in question. Such activity was not observed in the present case, although the same outcome was alleged.

[42] The trades in the relevant period here were real trades. The trading volumes summarized in the table above were apparently genuine. There was no suggestion that the same person or company was on both sides of the trades. To the contrary, the evidence was that the Chang-linked offshore entities made actual sales to real investors – 12,000 of them. There was no suggestion that any of those investors intended anything other than to acquire the shares sold to them, in the genuine belief that doing so was consistent with their own investment objectives. Indeed, the harm allegedly done in this case was most obviously done to those investors who actually did buy shares but later saw their value dwindle to little or nothing.

...

[45] In short, we conclude that the trading activity revealed by the evidence – however motivated and with whatever consequences – was actual trading activity. We do not discern a false or misleading appearance of trading activity here.

...

## 2. Artificial Price?

[47] We turn now to the allegation concerning "artificial price" and section 93(a)(ii) of the Act.

[48] This provision targets artificiality of price, however derived. Such artificiality may originate in, or be coupled with, a distorted appearance of trading activity (as in *De Gouveia*), but such a combination is neither inevitable nor required to establish a breach of section 93(a)(ii).

[49] The evidence here persuades us that the capital market generally, and specific investors who bought Coastal shares in the period of the promotional campaign, were misinformed and misled about the merits of Coastal as a business enterprise, and therefore about the inherent value of a Coastal share. The news release campaign described above communicated supposed good news – extremely good news – about Coastal's supposed mining business when that business was not, in reality, being pursued in a serious way. The sudden burst of near-daily (or more-than-daily) news releases from Coastal in the relevant period, and the highly optimistic (at best) content of at least the 1 November 2010 news release (the only one in evidence), conveyed a sense that good things were happening to Coastal, and happening quickly. A similar impression was communicated even more frenetically by the concurrent email campaign, which (as evident from the quoted email of 1 November 2010) also touted an anticipated, vastly higher, share price.

[50] It is clear that this vigorous (but misleading) promotional campaign artificially stimulated investor interest in, and demand for, Coastal shares. Investors bought Coastal shares at higher prices and in higher volumes. That actual trading activity, reported to the market, undoubtedly reinforced the impressions communicated by the promotional campaign. As seen from the table above, trading prices and volumes reached remarkable levels.

...

[52] We find that the prices at which Coastal shares traded from 20 October into November 2010 were artificial, and that this artificiality was directly attributable to the promotional campaign undertaken during that period. As we concluded above, Coastal itself was among the participants in that campaign.

[107] We agree with this analysis from the Alberta Securities Commission and it is instructive for our interpretation of section 57(a) of our Act (which is the equivalent of section 93(a)(ii) in Alberta). In addition, much of what the panel said in *Coastal Pacific* about what was done to create an artificial price for the Coastal shares could be said about what happened with respect to the shares of Urban Barns.

Misleading appearance of trading activity

[108] The executive director submitted that we could find that there was a misleading appearance of trading activity in the shares of Urban Barns commencing on November 4, and lasting throughout the relevant period. However, we do not view this case as principally being about a misleading appearance of trading activity.

- [109] The executive director pointed to the 20,000 shares that were acquired by Lim (indirectly, through a company owned by Lim) on November 4, 2009 and said that this was a “wash trade”. As set out above, we were not able to reach that specific conclusion with respect to the trade.
- [110] There is very little evidence that the trading in the Urban Barns shares that commenced on November 4, 2009 was not “real” trading activity.
- [111] The executive director also says that the purchases made by Lim’s clients commencing on November 5, 2009 and in the days thereafter were solicited and should, in effect, be viewed as “artificial demand” for the Urban Barns shares. As set out above, we have concluded that these trades were solicited, notwithstanding that Lim marked these transactions as unsolicited. However, the total volume of these transactions were relatively modest when considered in the context of the total volume of Urban Barns shares traded in the relevant period. These purchases were less than 2% of the total purchases of Urban Barns shares during the relevant period. Just as in *Coastal Pacific*, there is nothing in the evidence to suggest that the vast majority of the trading in the shares of Urban Barns during the relevant period involved anything other than real purchasers engaged in real trading activity. While this demand, created by Lim purchasing shares on behalf of his clients, likely reinforced the marketing campaign (discussed below), we do not view this to be the main element of the manipulation in this case.
- [112] We do not find that there was a misleading appearance of trading activity in the shares of Urban Barns.

#### Artificial Price

- [113] In our view, the central issue under this portion of the section 57(a) analysis is whether there was an artificial price created with respect to the Urban Barns shares.
- [114] The executive director points to the tout sheet promotional campaign and the market dominance of the four North American accounts of CBH on the sell side of the transactions volumes as the basis upon which we should find that there was an artificial price created for the Urban Barns shares.
- [115] However, the respondents urged us to consider the tout sheet promotional material through the lens of this Commission’s decision in *Re Carnes*, 2015 BCSECCOM 187.
- [116] The respondents also argued that previous decisions of this Commission, where there was a finding of a contravention of section 57(a), have all involved significant activity by the respondent(s) on both the supply and the demand side of the trading in the securities in question. The respondents say that, in this case, there was limited or no evidence of any activity by the respondents on the purchasing side of the transactions ledger in Urban Barns shares during the relevant period.

- [117] In *Carnes*, the panel was asked to consider whether a short seller who published a report casting doubts on the accuracy of a public silver mining company's geological technical reports had committed fraud or should be subject to sanctions, even without a finding that the respondent had contravened a section of the Act, on public interest grounds. All allegations against the respondent in *Carnes* were dismissed. The respondents characterize that decision as providing broad support for the notion that those who publish opinions about public companies should be given broad latitude to do so.
- [118] There is a substantial difference between the material that was published by the respondent in *Carnes* and the tout sheet materials that were published by CFM. In *Carnes*, it was questionable whether the report published by the respondent could be considered a fair representation of all of the facts that the respondent knew about the issuer's technical reports, as it failed to contain certain information that the respondent learned in his due diligence investigations on the issuer. In this case, the tout sheet materials were so grossly promotional that they were completely devoid of reality. There was no basis for the tout sheet materials to claim that Urban Barns, a company which had spent approximately US\$12,000 on equipment and had no other material asset or unique proprietary technology, had "solved the global food crisis" or that its shares would soon be worth \$7 per share.
- [119] There will be a "grey area" where certain, reasonably held, opinions create the legitimate basis for parties other than the issuer to make promotional statements. This is not one of those cases. The tout sheets were fabrications designed to trick the reader into believing that the Urban Barns shares were worth far more than they really were. To use the words from the *Coastal Pacific* decision, it is clear that the readers of this material would be misinformed and misled about the merits of Urban Barns as a business enterprise, and therefore about the inherent value of an Urban Barns share.
- [120] On November 4, 2009 when the Urban Barns shares commenced trading they did so at US\$.85 per share. The shares then significantly increased in price. On November 12, 2009, when the shares of Urban Barns reached their high closing price of US\$1.27, the company had a market capitalization of US\$55 million. There was no rational basis for the shares of Urban Barns to be worth that much or to have increased in price in the manner that they did. Similar to this Commission's decision in *Re Poonian*, 2013 BCSECCOM 131, we note that this behavior in the price of the Urban Barns shares, without any corresponding news releases by the issuer that could account for such a price increase, is supportive of a finding of there being an artificial price for these securities.
- [121] Frankly, the above conclusions (i.e. the misleading nature of the tout sheet materials and the irrational nature of the price of the Urban Barns shares), in and of itself, would be sufficient for us to find that there was an artificial price for the Urban Barns shares commencing on November 4, 2009 and lasting throughout the relevant period.
- [122] We do not accept the submissions of the respondents that it is necessary to find substantial involvement by a respondent on the demand side in order to find that there was an artificial price created for a security. We agree with the following passage

adopted by the panel in *Poonian* when it cited *Re Podorieszch*, [2004] A.S.C.D. 360, where the ASC described an “artificial price” 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:

In our view, the meaning [of artificial price] can best be determined by considering it in the context of the [Alberta] Act and the framework of securities regulation established by the Act...that framework is designed to protect investors and to foster fair, efficient capital markets and confidence in those markets, all of which turn on the integrity with which the market and market participants operate. Key to that market integrity is that the market be able to operate on real information...in this context, an artificial price can be 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...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.

- [123] In this case, in addition to the misleading tout sheet promotional campaign, there was also a constraint on the supply side of the Urban Barns shares that, at the outset of the relevant period, assisted in creating an artificial price for those securities. The Urban Barns shares had never traded prior to November 4, 2009. This means that, at the start of the promotional activity, there were no shares held by the “public” (i.e. persons who might have previously purchased Urban Barns shares). During the first two trading days of the relevant period, 100% of the sales of Urban Barns shares came from the four North American brokerage accounts of CBH. During the first five trading days of the relevant period, 95% of the sales of Urban Barns shares came from the four North American brokerage accounts of CBH. During the entire relevant period, 41% of all of the Urban Barns shares sold came from these four brokerage accounts.
- [124] This market dominance on the supply of Urban Barns shares through the four North American CBH accounts, also contributed to there being an artificial price for the Urban Barns shares. These shares were the only Urban Barns shares that were available for sale.
- [125] We find that there was an artificial price for the shares of Urban Barns commencing on November 4, 2009 and ending on February 28, 2010. This artificial price was created by the tout sheet marketing campaign conducted by CFM which commenced on or about November 4, 2009 and was aided by the market dominance on supply of the Urban Barns shares in the CBH accounts at the outset of the promotional campaign and the initial demand caused by Lim’s clients’ purchasing shares at the outset of the relevant period.

#### *Causal Connection*

- [126] Having found that there was an artificial price for the Urban Barns shares commencing on November 4, 2009 and lasting throughout the relevant period, the question becomes did the respondents, directly or indirectly, engage in conduct that resulted in or contributed to that artificial price?

[127] The interpretation of this element (i.e. the causal connection that a respondent must have to the misleading appearance of trading activity or artificial price) of section 57(a) was recently considered by this commission in *Re Cerisse*, 2017 BCSECCOM 27.

[128] In that case, the respondents were alleged to have contravened section 57(a) of the Act by, in essence, aiding and abetting others in misconduct that was alleged to have manipulated the securities of a listed issuer. That decision had this to say about the issue of causal connection:

140. The executive director's allegations under section 57(a) of the Act against all three of the respondents require us to consider when a person might "... **indirectly**, engage in or participate in conduct relating to securities ..." where that conduct "... results in or **contributes to** a misleading appearance of trading activity in, or an artificial price for a security..." We have emphasized the concepts of indirect participation in and contributions to a market manipulation as, at most, that is what the respondents are alleged to have done with respect to the Solanex shares. It is clear from the wording of the section that someone could be found to have contravened the section without having been directly involved in improper trading or improper promotional activity. The question is how broadly to interpret the concepts of "indirectly" and "contributed to".

141. The concept of "indirect" participation clearly would cover circumstances where a respondent was conducting improper trading activity through the use of nominee accounts or some other indirect manner of executing trades. It is less clear that this concept of indirect participation should apply where the alleged misconduct is tangential to the improper trading activity and/or improper promotional efforts.

142. There is a spectrum of conduct that is tangential to the core trading and promotional efforts associated with a market manipulation. Where various conduct fits within this spectrum will be highly factual and context specific. Generally, where the conduct is further removed from the actual improper trading or specific improper promotional activities, it will be more difficult to establish that that conduct "results in" or "contributes to" a misleading appearance of trading activity or an artificial price for a security. Examples of conduct on this end of the spectrum would include efforts to establish a general business website for an issuer, maintenance of an issuer's securities regulatory filings, instructing escrow agents or transfer agents and the mere assisting in the opening of brokerage accounts on behalf of others.

[129] It is also important to look at the entirety of a respondent's conduct. Although the following comments from this Commission's decision in *Re Siddiqi*, 2005 BCSECCOM 416 were made in the context of an analysis of a case concerned primarily with a misleading appearance of trading activity, we think they also apply when considering the actions of a respondent to create an artificial price for a security

118 As is clear from these authorities, a person manipulating the market might use a variety of tools to do the job. Some of these tools are not inherently illegitimate trading practices – they only become so when employed with the intention of manipulating the market. It is also necessary to consider the conduct of the alleged manipulator as a whole. Some trading and order activity may not seem manipulative when viewed in isolation, but it is clearly so when considered along with all of the manipulator’s other conduct.

[130] We must analyze the actions of each of the respondents separately with respect to their conduct and their causal connection to the artificial price for the shares of Urban Barns created by the tout sheet marketing campaign and the constrained supply of Urban Barns shares.

Lim

[131] Lim’s conduct as it relates to the causal connection to the artificial price of Urban Barns shares during the relevant period is both direct and obvious.

[132] Notwithstanding the tout sheet disclaimer which suggested that EV paid for the market campaign, it is clear that Lim, through Concerto, paid for a significant portion, if not all of, the tout sheet marketing campaign carried out by CFM. It is also clear from the e-mails between Lim and SV that Lim was the mastermind of both the timing and length of that campaign. Lastly, the evidence is also clear that Lim went to great lengths to hide the fact that he was funding the marketing campaign. He funneled both the funding and the instructions for the campaign through SV/EV.

[133] In addition to his conduct relating to the marketing campaign, Lim also took steps to help create the initial demand for the Urban Barns shares. Lim purchased 20,000 Urban Barns shares himself and then in the next few trading days after November 4, 2009 purchased approximately 150,000 Urban Barns shares on behalf of his clients. This initial demand, the marketing campaign and the market dominance of the four North American CBH brokerage accounts on the supply of the Urban Barns shares, created an artificial price for these securities. Lim was either directly responsible for or involved in each aspect of that conduct.

[134] Lim also carried out two private placement transactions during the relevant period in which he provided US\$242,500 in order for Urban Barns to meet its administrative (not operational) expenses.

[135] Finally, we have found that Lim was one of the principals under the Escrow Agreement. The essential elements of that agreement were that the principals were to pool certain Urban Barns shares in escrow, fund a marketing campaign and then split the proceeds of sales of the Urban Barns shares after expenditures. That agreement was the underpinning for the CFM campaign.

[136] We find that Lim’s conduct resulted in or contributed to an artificial price for the shares of Urban Barns during the relevant period.

Mugford

[137] Mugford's conduct as it relates to the causal connection to the artificial price for the Urban Barns shares is also direct, although less obvious than that of Lim.

[138] We have found that Mugford

- was one of the four principals under the Escrow Agreement
- referred CFM to Urban Barns for the promotional campaign
- provided a review of the tout sheet materials
- assisted in the payment of CFM
- reviewed the Urban Barns business plan and assisted in the development of a website for Urban Barns
- forwarded promotional materials to one of the direct mailing firms utilized by CFM;
- acquired Urban Barns shares at the commencement of the promotional campaign.

[139] We consider his role as a principal under the Escrow Agreement as the most direct connection between Mugford and the artificial price for the Urban Barns shares. As we noted above, it is that agreement that provides the basis for the marketing campaign.

[140] Even without finding that Mugford was one of the principals under the Escrow Agreement, the totality of the evidence, on a balance of probabilities basis, supports a finding that Mugford's conduct was sufficiently causally connected to the artificial price of the Urban Barns shares for us to find that he contravened section 57(a) of the Act.

[141] While none of Mugford's actions in:

- finding CFM;
- reviewing tout sheet materials;
- assisting Lim in organizing the flow of certain funds on one occasion to CFM through EV;
- forwarding promotional materials to one of the direct mailing firms used by CFM;and
- purchasing 40,000 Urban Barns shares through Lim during the first days of the relevant period,

individually, has a strong causal connection to the manipulation of the Urban Barns shares, they do in the collective sense. Mugford's actions were key contributions to the tout sheet marketing campaign that was the central element of the market manipulation in this case.

[142] We find that Mugford's conduct resulted in or contributed to an artificial price for the shares of Urban Barns during the relevant period.

EHT

- [143] EHT's connection to the artificial price for the Urban Barns shares can only be considered in the indirect sense described in *Cerisse*.
- [144] The executive director does not allege that EHT was one of the four principals under the Escrow Agreement. Rather, the executive director alleges that EHT was the escrow agent under that agreement and that its conduct as such was sufficient to have resulted in or contributed to the artificial price for the Urban Barns shares.
- [145] EHT's conduct, that the executive director alleges resulted in or contributed to the artificial price for the Urban Barns shares, is conduct that relates to its services as an offshore trustee. EHT acted as a conduit for the Urban Barns shares on their route to the four North American brokerage accounts of CBH. EHT also assisted Concerto in opening a Swiss bank account and provided instructions on various payments out of that account to CFM, among others.
- [146] There is no doubt the hiding of the identity of the individuals behind the manipulation of the Urban Barns shares was aided substantially by the use of an offshore intermediary like EHT. However, that is not one and the same as a finding that the conduct of EHT resulted in or contributed to the manipulation. Hiding the identity of the individuals responsible for a manipulation can assist the manipulators, but in this case it was not essential to the manipulation itself.
- [147] The two key elements of the market manipulation in this case were the tout sheet promotional campaign and the constraint on the supply side of the Urban Barns shares at the commencement of that campaign.
- [148] There is no evidence that EHT had any role in the tout sheet campaign other than its role with respect to the Concerto account payments. EHT was not the beneficiary of that account. The executive director does not allege that EHT was the architect of that promotional campaign nor, in any other manner, contributed to its contents.
- [149] EHT's only role in the market dominance in the supply of Urban Barns shares was in acting as an intermediary and a conduit of those shares through to the four North American brokerage accounts of CBH. Frankly, EHT's role in that process was not very different from that of CBH. The executive director asked us to infer that EHT provided trading instructions on those CBH accounts. As noted above, we are not able to make that inference and, even if we were, the terms of the Escrow Agreement itself expressly set out that EHT would only be acting on the instructions of the principals. EHT would not have been providing trading instructions of its own accord.
- [150] In summary, EHT did have an administrative role in the transactions that led to the artificial price for the shares of Urban Barns. EHT's role did aid in hiding the individual's responsible for the manipulation. However, those administrative actions (without more evidence linking those administrative actions to the artificial price for a security), in the words of *Cerisse*, were too tangential to the key elements of the

manipulation for us to find that EHT's conduct resulted in or contributed to the artificial price for the Urban Barns shares during the relevant period.

[151] There is not sufficient evidence for us to find that EHT's conduct contributed to the market manipulation. Therefore, we dismiss the allegations of a contravention of section 57(a) of the Act against EHT.

*Mental State*

[152] The remaining element of establishing that a respondent has contravened section 57(a) of the Act is that of the respondent having the requisite mental state.

[153] In this case, the executive director must establish, on a balance of probabilities, that Lim and Mugford knew, or ought reasonably to have known, that their conduct would result in or contribute to an artificial price for the shares of Urban Barns.

[154] We find that the evidence does establish that both Lim and Mugford had the requisite mental state to find that they contravened section 57(a) of the Act.

[155] First, we have found that both Lim and Mugford were principals under the Escrow Agreement. The whole purpose of that arrangement was to conduct a marketing campaign with respect to the Urban Barns shares to increase their value and then sell Urban Barns shares.

[156] Even without a finding that both were principals under the Escrow Agreement, the evidence is sufficient for us to determine that both had the requisite mental state to contravene section 57(a).

[157] Both Lim and Mugford were aware of the tout sheet campaign. Lim was providing the funding for CFM. It is easy to infer Lim's state of mind with respect to that campaign. Lim went to great pains to hide his involvement in it. Why go through the subterfuge of providing to SV e-mails intended for CFM? Why did Lim structure his payments to CFM through EV? In both cases, we find Lim did so because he was aware that the tout sheet marketing campaign was improper.

[158] Mugford reviewed an early draft of the tout sheet materials. It would be impossible to review a draft of those materials and not see them for what they were – grossly promotional tout sheet materials. Yet, Mugford took steps to assist in that campaign. He reviewed a draft of the materials. He assisted Lim in making one payment for it and also provided one set of materials directly to one of the direct mailing firms used by CFM. Mugford would have known that a member of the public reading those materials would be misled by them as to the real value of the Urban Barns shares.

[159] Both Lim and Mugford knew or ought reasonably to have known that the promotional campaign would result in an artificial price for the Urban Barns shares during the relevant period.

**VI. Conclusions**

[160] We find that both Lim and Mugford contravened section 57(a) of the Act. We dismiss the allegation of a contravention of section 57(a) against EHT.

[161] We direct the parties to make their submissions on sanction as follows:

**By June 27, 2017** The executive director delivers submissions to Lim and Mugford and to the secretary to the Commission.

**By July 11, 2017** Lim and Mugford deliver their response submissions to the executive director and to the secretary to the Commission.

Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

**By July 18, 2017** The executive director delivers reply submissions (if any) to Lim and Mugford and to the secretary to the Commission.

June 5, 2017

**For the Commission**

Nigel P. Cave  
Vice Chair

Audrey T. Ho  
Commissioner

Don Rowlatt  
Commissioner