

**Mark Aaron McLeary, Timothy John McLeary,
Robert Hainey, Jerry Williams, and Erik John Benson**

Securities Act, RSBC 1996, c. 418

Panel¹	Don Rowlatt Suzanne K. Wiltshire	Commissioner Commissioner
Hearing Dates	June 4, 5, 6, 8, 2012 November 22, 2012 December 10, 12, 17, 18, 2012 March 8, 2013	
Submissions Completed	March 8, 2013	
Date of Decision	December 16, 2014	
Appearing		
Derek J. Chapman	For the Executive Director	
H. Roderick Anderson	For Mark Aaron McLeary	
Joseph Saulnier	For Timothy John McLeary	
Dwight Stewart	For Erik John Benson	

Findings

I INTRODUCTION

History of the proceedings

- ¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 concerning the alleged market manipulation of Sungro Minerals Inc. (Sungro) shares between June 15, 2009 and July 6, 2009 (the trading period).
- ¶ 2 Sungro shares were quoted on the OTC Bulletin Board (OTCBB) during the trading period.
- ¶ 3 On July 7, 2009, the Commission's Director of Corporate Finance issued a halt trade order under section 89 of the Act with respect to Sungro's securities and issued a second order on July 10. These orders were issued on the basis that there were unexplained and unusual fluctuations in the volume of trading in, or market price of, Sungro's securities.

¹ Bradley Doney was a member of the panel until he retired. He then ceased to participate in any further deliberations of the panel.

- ¶ 4 On July 29, 2009, the executive director issued a notice of hearing under sections 161(1)(b) and 161(2) of the Act against Sungro and a temporary order that all persons cease trading in the securities of Sungro (2009 BCSECCOM 413).
- ¶ 5 The temporary order was extended with the consent of the parties to September 25, 2009.
- ¶ 6 On September 25, 2009, the executive director's application to extend the temporary order was heard and the cease trade order was extended until a hearing is held and a decision rendered.
- ¶ 7 In November 2010, the executive director entered into settlement agreements with five Sungro seed shareholders (2010 BCSECCOM 621).
- ¶ 8 In May 2011, the executive director entered into a settlement agreement with Karnjit Singh Bahd (Bahd) and discontinued proceedings against him (2011 BCSECCOM 243).
- ¶ 9 In August 2011, the executive director issued an amended notice of hearing which named the current respondents and Malkeet Singh Bains (Bains) and Narvinder Singh Patric Virk (Virk), but no longer named Sungro as a respondent (2011 BCSECCOM 379).
- ¶ 10 In April 2012, applications made by Erik John Benson (Benson) to sever the allegations against him and by Timothy McLeary to adjourn the hearing of the allegations against him were dismissed.
- ¶ 11 In May 2012, the executive director entered into a settlement agreement with Virk and discontinued proceedings against him (2012 BCSECCOM 189).
- ¶ 12 In May 2012, the executive director entered into a settlement agreement with Bains and discontinued proceedings against him (2012 BCSECCOM 202).
- ¶ 13 On May 24, 2012, the executive director issued a further amended notice of hearing (2012 BCSECCOM 199) which named the current respondents but did not name Bains and Virk.
- ¶ 14 In the further amended notice of hearing, the executive director alleges that:
- the respondents, directly or indirectly, engaged in or participated in conduct relating to Sungro's shares 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, Sungro shares, contrary to section 57(a) of the Act;
 - Mark McLeary (McLeary) and Timothy McLeary made false or misleading statements at their interviews with Commission investigators, by denying their involvement in, and knowledge of, particulars of the alleged market manipulation and powers of attorney, contrary to section 168.1(1)(a) of the Act.

¶ 15 On June 4, 2012, McLeary applied for disclosure from the executive director of materials relating to the executive director's settlement with Bains. On June 4 the panel granted that application on conditions. The hearing of the evidence then started on June 5.

Sungro, Bains, Bahd and Virk

¶ 16 Sungro was incorporated in Nevada and was registered as an extra-provincial company in British Columbia in August 2007. Its head office was in Surrey, British Columbia. Sungro shares were quoted on the OTCBB in the United States, initially under the symbol SUGO and then the symbol SUGM.

¶ 17 Bains was Sungro's president, CEO and sole officer and director. He is an insurance agent and resides in Delta, British Columbia. He has known McLeary since 1991, when Bains joined an insurance company where McLeary was already working.

¶ 18 In the settlement agreement with the executive director, Bains admitted that he participated in a market manipulation involving Sungro shares, contrary to section 57(a) of the Act. As part of his settlement he undertook to testify at the hearing. His testimony often was vague, he claimed poor recollection and, on some significant points, his testimony was inconsistent with his prior sworn statements to Commission investigators. For these reasons, we put little weight on his evidence.

¶ 19 Virk and Bahd were Sungro seed shareholders and close friends of Bains. They also helped Bains find other seed shareholders. Virk resides in Abbotsford, British Columbia and is married to Bains' cousin. Bahd resides in Richmond, British Columbia.

¶ 20 In his settlement agreement with the executive director, Virk admitted that he participated in market manipulation involving Sungro shares, contrary to section 57(a) of the Act.

¶ 21 In his settlement agreement with the executive director, Bahd admitted that he made false statements to Commission investigators regarding his Sungro shares and those of other seed shareholders.

The respondents

¶ 22 McLeary resides in North Vancouver, British Columbia and is the director and president of Kramcorp Ventures, Inc. (Kramcorp), his private company. McLeary had remained a good friend of Bains since they met in 1991 and by 2009, McLeary had also known Virk and Bahd for some time.

¶ 23 Timothy McLeary is McLeary's brother and resides in North Vancouver, British Columbia. He was employed with the TD Canada Trust bank (TD Bank) from July 12, 2004 to September 2, 2007. He was the branch manager of the East Hastings branch until August 20, 2006 and of the Broadway Willow branch until September 2, 2007.

¶ 24 Benson was an investment advisor with Canaccord Genuity Corporation (Canaccord) in Vancouver, British Columbia. Benson took over a number of accounts, including Virk's, Bahd's

and McLeary's accounts, when another advisor left Canaccord in March or April of 2009. Before the start of the trading period, McLeary's Canaccord account was empty.

- ¶ 25 Benson carried out sell orders for Virk and Bahd during the trading period. He testified that prior to dealing with the respondents, he had virtually no experience with the OTCBB.
- ¶ 26 Robert Hainey (Hainey) is a promoter in the United States. Hainey and McLeary were introduced by a mutual acquaintance. Hainey's private company is Internet Marketing Solutions Inc. (Internet Marketing). Hainey brought to McLeary a mining deal, called the Conglomerate Mesa project, for Sungro's consideration.
- ¶ 27 Jerry Williams (Williams) is a stock picker and a resident of the United States. He was the moderator of a message board called "Monk's Den" on an investor website called Investorshub.com. Williams is known on the internet as the "Monk". In June 2011, there were 1291 followers of the Monk's Den message board.
- ¶ 28 Williams had a core group of Monk's Den members who received advance notice of Williams' stock picks so they could buy the stock before Williams promoted it. During the trading period there were around ten members of the core group. After members of the core group bought shares, Williams would set up message boards relating to his specific stock picks and he and members of the core group would post messages about the picked stock. Core group members also took turns either supporting the bid or hitting the ask to support the price or drive up a stock's price.
- ¶ 29 McLeary, Timothy McLeary and Benson attended the hearing, in person or through counsel. Hainey and Williams did not attend. Williams filed an affidavit and provided brief written submissions.
- ¶ 30 At the hearing, a staff investigator and Bains testified for the executive director.
- ¶ 31 Benson and a former compliance employee at Canaccord testified for Benson.

II BACKGROUND

- ¶ 32 On August 15, 2007, Sungro issued Bains five million shares for \$5000 (\$0.001 per share).
- ¶ 33 On September 18, 2007, Sungro issued 118,750 Sungro shares to each of 40 seed shareholders for \$0.02 per share. All of the seed shareholders were close friends or family of Bains, Virk or Bahd, including Bains' brother and sister-in-law; Virk's wife, brother and sister-in-law; and Bahd's parents.
- ¶ 34 One of the seed shareholders gave evidence in his interview with staff that he simply trusted Bahd who had asked him to put Sungro shares in his name, which he did. He said that Bahd reimbursed him for the shares he purchased and he never considered them to be his shares.

- ¶ 35 In February 2008, Sungro registered the seed shareholders' 4.75 million shares for resale by filing a registration statement with the United States Securities and Exchange Commission (SEC).
- ¶ 36 In June 2008, Sungro's original market maker, Mark Dillon (Dillon) of Pennaluna & Co., applied to the Financial Industry Regulatory Authority, Inc. (FINRA) to have Sungro quoted on the OTCBB and the Pink Sheets. On September 22, 2008, FINRA cleared Sungro's shares to be quoted on the OTCBB and the Pink Sheets.
- ¶ 37 In January and February 2009, the seed shareholders' shares were re-issued in tradable form. By February 10, 2009, all 4.75 million seed shares were eligible to trade.

Virk's and Bahd's trading of Sungro shares

- ¶ 38 The first public trade of Sungro's shares was arranged by Bains in early February 2009 when Dillon contacted Bains seeking Sungro shares. Bains arranged for Virk to sell 30,000 shares to Dillon for \$0.35 per share.
- ¶ 39 Virk's Sungro share certificate for 118,750 shares was deposited into his Canaccord brokerage account on February 3, 2009. On February 19, Virk placed an order to sell 30,000 Sungro shares at \$0.35 per share. (Benson was not Virk's broker at this time).
- ¶ 40 The order was filled less than eight minutes later, leaving 88,750 Sungro shares in Virk's account. McLeary was aware of this trade.
- ¶ 41 Virk made \$10,000 on this trade and three days after the trade settled, a cheque for \$10,000 was issued to Virk from his account.
- ¶ 42 Virk did not place his next order until June 12.
- ¶ 43 Between 8:03 and 8:34 am on June 12 (all times Pacific time unless otherwise noted), the following phone calls occurred in the following order:
- McLeary called Bains
 - Bains called Virk
 - Virk called Benson
 - Virk called Bains and
 - Bains called McLeary.
- ¶ 44 At 8:36 am, Benson entered an order to sell 50,000 of Virk's Sungro shares at \$0.45, good for the day.
- ¶ 45 Upon entering the order, Benson received a "Price outside normal limits" prompt from the trade entry system. (Information provided by Canaccord to Commission staff during the investigation indicates that such alerts are created automatically by the trade system and do not generate any compliance actions. To Benson, the purpose of such a prompt was to avoid a "fat finger" (typographical) error on order entry; whenever the prompt appeared he would check to see the order had been entered correctly.)

- ¶ 46 Between 9:24 and 9:54 am, another series of phone calls occurred in the same order as earlier that morning among McLeary, Bains, Virk and Benson.
- ¶ 47 Between 11:34 and 11:51 am, the following phone calls occurred in the following order:
- Bains called Virk
 - Virk called Bains
 - Virk called Benson
 - Virk called Bains
- ¶ 48 Benson testified that Virk had called him and asked him to show the June 12 order through Pennaluna.
- ¶ 49 At 11:52 am, Benson added operational notes to the order for Canaccord's traders to show Virk's order through Pennaluna.
- ¶ 50 Benson testified that a Canaccord trader then called him and told him that he could not request that the order be shown through Pennaluna as the U.S. trading desk determines which market maker to use. Benson cancelled the instructions to show the order through Pennaluna.
- ¶ 51 The June 12 order expired unfilled.
- ¶ 52 On June 15, the next trading day, between 9:12 and 9:34 am, the following phone calls occurred in the following order:
- McLeary called Bains
 - Bains called Virk
 - McLeary called Bains
 - Virk called Benson
- ¶ 53 At 9:37 am, Benson entered an order to sell 25,000 of Virk's Sungro shares at \$0.45 per share, good until September 3, 2009. The trading instructions stated "Please show through Pennaluna". Benson testified that he had no explanation as to why he included these instructions when on June 12 he removed the same instructions as being contrary to trading rules.
- ¶ 54 Benson received a prompt from the trade entry system that the price on this order was outside normal limits.
- ¶ 55 Between 11:29 am and 12:03 pm, the following phone calls occurred in the following order:
- Bains called McLeary
 - Bains called Virk
 - Virk called Benson
 - Benson called Virk
 - Virk called Bains
 - Bains called McLeary
 - Bains called Virk

- Virk called Benson
- Virk called Bains
- Bains called McLeary

- ¶ 56 At 12:21 pm, a partial fill for 5000 shares was received. The remainder of the order (20,000 shares) was filled through four trades on June 17, the last one at 9:19 am.
- ¶ 57 At some point on June 15, Benson made a note in Canaccord's client management software that Virk had asked him if Bains could have trading authority over Virk's account. Benson advised against it.
- ¶ 58 He told Virk that he thought it was inappropriate for Bains, a president of a publicly traded company, to have trading authorization on Virk's account when that company's security was the only security in the account.
- ¶ 59 The trading authority was not granted.
- ¶ 60 On June 17, between 9:01 and 9:35 am, the following phone calls occurred in the following order:
- Bains called Virk
 - Virk called Bains
 - Virk called Benson
 - Virk called Bains
 - Bains called Virk
 - Virk called Benson
- ¶ 61 At 9:36 am, Benson entered an order to sell 25,000 of Virk's Sungro shares at \$0.45, good until September 8, 2009. The order was filled by 11:48 am through five trades at \$0.45, and one each at \$0.46 and \$0.47.
- ¶ 62 Between 12:17 and 12:23 pm, the following phone calls occurred in the following order:
- McLeary called Bains (three times in a row)
 - Virk called Bains
 - Virk called Benson
- ¶ 63 At 12:24 pm, Benson entered an order to sell 20,000 of Virk's Sungro shares at \$0.90, good until September 8, 2009. Benson received a prompt from the trade entry system that the price was outside normal limits.
- ¶ 64 The order was filled by 12:43 pm through three trades at \$1.01 and six trades at \$0.90.
- ¶ 65 Also on June 17, McLeary spoke to Hainey when he, Hainey and the person who introduced them held three telephone conference calls between 7:00 and 8:40 am. These are the first calls in evidence involving McLeary and Hainey. McLeary also spoke to Hainey alone that afternoon. (In total, during the trading period there were 63 phone calls between McLeary and Hainey).

- ¶ 66 The executive director argued that around this time, McLeary told Hainey about Sungro’s float (the number of its shares available to the public marketplace) and that Hainey then told Williams. We agree.
- ¶ 67 At his sworn interview with the SEC, Hainey stated that “McLeary and Bains” told him there was “100-and-something thousand [Sungro] shares” on deposit and the rest were held in certificate form. On further questioning, Hainey agreed that the discussions relating to Sungro's share structure “started” with McLeary.
- ¶ 68 In his affidavit that he filed with the Commission and during an earlier sworn interview conducted by the SEC, Williams stated that in June 2009, Hainey told him that Sungro was a “potential float lock-down” company, by which he meant a company with a small float and heavy insider trading. On June 17, Williams told a Monk’s Den core group member that the float was 118,000.
- ¶ 69 McLeary said in his sworn interview with Commission staff that he did not introduce Hainey to Bains until July. Since Williams knew about Sungro’s float (from Hainey) in June and Bains did not know of Hainey until July, Bains could not have told Hainey. McLeary must have told Hainey who then told Williams.
- ¶ 70 There were no records in evidence of phone calls between Bains and Hainey. Bains testified that he spoke to Hainey only once, from a lawyer’s office, and that he and Hainey never met.
- ¶ 71 After Hainey told Williams about Sungro’s float, Williams shared that information with the Monk’s Den core group.
- ¶ 72 Williams admitted during his SEC interview and in his affidavit that he gave core group members the information Hainey provided him and told them that if they decided to buy shares, they should buy no more than 5000 shares. He also admitted that he started a message board on Investorshub.com relating to Sungro.
- ¶ 73 This was corroborated by the evidence of a Monk’s Den core group member when Commission staff interviewed him.
- ¶ 74 The core group member explained that Williams first recommended Sungro to the core group on a conference call, where he stated that the initial price target was \$5.00.
- ¶ 75 Starting at 12:57 pm Eastern time (9:57 am Pacific time) on June 17 (which was about 90 minutes after Hainey's third conference call with McLeary), Williams sent private messages to the core group member, through the Investorshub.com website. The messages were sent between 12:57 and 1:11 pm Eastern time.
- ¶ 76 Williams first message to the core group member was to buy 5000 shares of Sungro:

[Williams to core group member]: buy 5,000 shares of SUGM...only 5K and keep it to yourself for now...theis [sic] is our core group getting in....

¶ 77 The core group member gave evidence that buying 5000 shares was important because Williams wanted everyone in the core group to be able to purchase shares before the promotion began.

¶ 78 The core group member replied to Williams a few minutes after the last message, asking him about his target on Sungro. Williams replied with a reference to Sungro's 118,000 float:

[Core group member to Williams]: What's your target on SUGM? 5k in case it doesn't go?

[Williams to core group member]: 118K float...it's gonna go...will be at least a 10 bagger...

¶ 79 The core group member then asked whether to buy at the ask price. Williams replied less than two minutes later that everything has been at the ask so far:

[Core group member to Williams]: Sweet! Should I hit the ask, or wait for around .35 to .40?

[Williams to core group member]: Everything has been at the ask so far...although some are leaving bids in ...for more...just in case...

[Core group member to Williams]: Okay, I will hit it here shortly!

[Williams to core group member]: Alrighty...

¶ 80 The core group member bought 5000 shares of Sungro on June 17 and, according to the SEC's trading data for Sungro stock, members of the Monk's Den did 81% of the buying of Sungro's shares on June 17. They also dominated the buying volume during the rest of the trading period.

¶ 81 Between June 17 and July 6, 2009, 1785 messages were posted on the message board Williams started. Williams, Hainey and members of the core group regularly posted messages. There were some recurring themes in the messages:

- The float was very low.
- You must buy at the ask price if you want your order filled.
- The stock is going to reach \$5.00.
- The stock price is moving up quickly on little volume.

¶ 82 Similar messages were also posted on the Monk Den's general message board (which was not related to any particular stock).

¶ 83 On June 18 between 6:56 and 7:17 am, the following phone calls occurred in the following order:

- Benson called Virk
- Virk called Bains

- McLeary called Bains
- Bains called Virk
- Bains called Benson
- McLeary called Bains

- ¶ 84 According to Benson’s note on June 18, Virk called Benson to sell 5000 Sungro shares at \$2.00.
- ¶ 85 At 7:17 am, Benson entered an order to sell 5000 of Virk’s Sungro shares at \$2.00, good for the day. Benson received a prompt from the trade entry system that the price on this order was outside normal limits.
- ¶ 86 The order was filled within two minutes, by a sale of 3500 shares at \$2.01 per share and 1500 shares at \$2.00.
- ¶ 87 Between 7:20 and 7:27 am, the following phone calls occurred in the following order:
- Bains called McLeary
 - Virk called Bains
 - Bains called Virk
 - Virk called Benson
- ¶ 88 According to Benson’s note on June 18, Virk called Benson again, this time to sell 3750 Sungro shares at \$2.00 to “even out the number of shares he owned”.
- ¶ 89 At 7:32 am, Benson mistakenly entered an order to buy 3750 Sungro shares at \$2.00, good for the day.
- ¶ 90 He then cancelled that order and at 8:10 am entered an order to sell 3750 of Virk’s Sungro shares at \$2.00, good for the day. This order produced a prompt that the price was outside normal limits.
- ¶ 91 By 8:28 am, 2000 shares from this order were sold through 3 transactions. The order then expired with 1750 shares unsold.
- ¶ 92 On June 19 at 9:40, Benson spoke to Virk who wanted to sell his remaining Sungro shares, through open orders at \$2.15, \$2.25 and \$2.50 per share.
- ¶ 93 At 12:22 pm, McLeary called Benson. The phone call lasted 2 minutes and 8 seconds. In cross-examination, Benson testified that McLeary’s phone call was “completely unrelated” to Virk’s orders.
- ¶ 94 Benson entered three orders at 12:25 pm. One of these orders was for the remainder of the June 18 order for 1750 shares at \$2.00 which had gone unfilled. It was filled in two trades on June 19.
- ¶ 95 Two of these orders were from Virk’s instructions on June 19. They were both filled on June 22, the next trading day, through trades at \$2.25 and \$2.50. Benson testified that he forgot to enter

the third order Virk gave him on June 19, which was to sell Sungro's shares at \$2.15. He entered that order on June 22 and it was also filled that day.

- ¶ 96 On June 19 Benson also met with Virk and Bains. At that meeting, Bains gave Benson, for deposit, Sungro share certificates for Bahd and Bains' brother.
- ¶ 97 Also on June 19, Hainey acquired 118,750 shares from each of four Sungro seed shareholders for a total of 475,000 shares. This came about after Hainey brought the Conglomerate Mesa project to McLeary for Sungro's consideration and Hainey and McLeary decided they wanted Sungro shares before they brought the project to Sungro. McLeary then tried to get shares for both he and Hainey from Sungro shareholders, some of whom he knew.
- ¶ 98 The Sungro shareholders McLeary contacted were not willing to give up their shares. Eventually Virk and Bahd found shareholders who were willing to give shares to McLeary and Hainey.
- ¶ 99 McLeary stated during his interview with Commission staff that he and Hainey did not want more than four certificates (118,750 shares per certificate) each, in order to hold less than 5% of Sungro's shares and avoid triggering a regulatory filing requirement. McLeary's later acquisition of a total of 475,000 shares from four seed shareholders is discussed below at paragraph 139.
- ¶ 100 Hainey's company Internet Marketing entered into stock purchase agreements with the shareholders, that Hainey had prepared. The agreements state the sale price of the shares is \$0.40 per share but that the payment would not be made until Internet Marketing negotiates a "successful acquisition". According to Hainey, this is meant to refer to a successful acquisition by Sungro of rights to the Conglomerate Mesa project.
- ¶ 101 The shares were transferred to Internet Marketing through powers of attorney signed by the seed shareholders, which Bains sent to Sungro's share transfer agent on June 19. (Bains also sent powers of attorney for the transfer of shares to Bahd, who acquired shares from seed shareholders at the same time). The powers of attorney are discussed below.
- ¶ 102 Bains asked the transfer agent to send Internet Marketing's new share certificates to its address in Rhode Island and asked that it rush the request.
- ¶ 103 The share certificates from the four seed shareholders were cancelled and new certificates were issued to Internet Marketing on June 19. (They were subsequently split and re-issued on July 8 and 17, 2009).
- ¶ 104 Internet Marketing did not pay for the shares. After they were transferred to Internet Marketing, Hainey claimed that the four shareholders asked him to pay for the shares, but instead he offered to return them. This was after the temporary order was issued and, according to Hainey, the shareholders declined to receive the shares back.
- ¶ 105 After the trading period, Hainey sold 297,500 of the shares to 16 members of the Williams' core group at \$2.00 per share. The shares were then trading at \$4.20 per share. Williams arranged

these trades by finding buyers, receiving their payment and remitting payment to Hainey. He received a commission for this work, in some cases as much as one half of the purchase price. At least one member believed he was buying shares from the company, not from an individual.

- ¶ 106 On June 22 at 7:10 am, Bains called Benson and at 7:13 am, Bains called McLeary.
- ¶ 107 At 7:13 am, Benson entered an order to sell 5000 of Virk's Sungro shares at \$2.15, good until September 11, 2009. This was the order that Benson forgot to enter on June 19. The order was filled by 9:22 am, through four transactions.
- ¶ 108 Following this, Virk's account had no more securities in it. The full cash balance was paid out to Bains and McLeary, as described below.
- ¶ 109 On June 23 between 9:21 and 10:24 am, the following phone calls occurred in the following order:
- Bahd called McLeary
 - McLeary called Bains
 - Bains called Benson
 - Bains called McLeary (twice)
 - Bains called Benson
 - Bains called McLeary
 - Bahd called Bains
 - Benson called McLeary
 - Bains called Bahd
 - Bahd called Benson
- ¶ 110 At 10:30 am, Benson entered an order to sell 5000 of Bahd's Sungro shares at \$3.20 per share, good until September 14, 2009. The order was then cancelled at 10:39 am.
- ¶ 111 At 10:40 am, Benson entered another order to sell 5000 of Bahd's Sungro shares at \$3.20 per share, this time good for the day.
- ¶ 112 Between 12:01 and 12:04 pm, the following phone calls occurred in the following order:
- Bahd called Bains (twice)
 - McLeary called Bains
 - Bains called Bahd
 - Bahd called Benson
- ¶ 113 Benson then cancelled the second order at 12:04 pm.
- ¶ 114 Between 12:46 and 12:48 pm, Bains called Bahd and Bahd then called Benson.
- ¶ 115 Just before 12:49 pm, Benson entered another order to sell 2500 of Bahd's Sungro shares, this time at \$3.75 per share and good until September 14, 2009. The trade entry system prompted that the price on this order was outside normal limits.

- ¶ 116 This order was partially filled with a sale of 500 shares on June 24 at 8:19 am. Benson then cancelled the order at 8:57 am.
- ¶ 117 At 12:59 pm on June 23, Benson entered three orders to sell 2500 of Bahd's Sungro shares at \$3.90, 2500 shares at \$4.15 and 2500 shares at \$4.35 per share, good until September 14, 2009. The trade entry system prompt that the price on this order was outside normal limits appeared. (Benson cancelled all three orders at 8:57 am on June 24).
- ¶ 118 Also on June 23, Bahd attempted to deposit into his Canaccord account three Sungro share certificates (which were in addition to the certificate Bains gave Benson on June 19 for deposit to Bahd's account). Along with the share certificates, Bahd gave Benson the subscription agreements for the original holders of the shares he was trying to deposit.
- ¶ 119 The evidence at the hearing was that because the names on the subscription agreements and the share certificates did not match, Canaccord compliance was unable to determine how Bahd had acquired the shares certificates. They rejected the certificates and required that they be returned to Bahd, which Benson did.
- ¶ 120 On or before June 23, Williams told the Monk's Den core group in a conference call that Sungro was going to split its stock five-for-one and that that would create more buying pressure. Members of the core group then bought shares. (Sungro did not publicly announce the stock split until June 26).
- ¶ 121 During his SEC interview, Williams said that Hainey had told him about Sungro's pending stock split. Based on the same reasoning as for the source of the information about Sungro's float, McLeary, not Bains, must have told Hainey about Sungro's pending stock split: McLeary stated during his interview with Commission staff that he knew about the upcoming split; Williams knew about it (from Hainey) in June; McLeary did not introduce Bains to Hainey until July.
- ¶ 122 On June 24, 2009, between 10:52 and 11:49 am, the following phone calls occurred in the following order:
- Virk called Benson
 - Virk called McLeary
 - McLeary called Benson
- ¶ 123 Virk sent a fax to Benson in which he authorized Canaccord to issue a cheque from his account payable to Custom House, a foreign currency exchange and international payments company.
- ¶ 124 This is reflected in Benson's notes. He noted that on June 24, he had spoken to Virk who had authorized Canaccord to issue a cheque for the full balance in the account, payable to Custom House.
- ¶ 125 On June 25, between 8:38 and 8:45 am, the following phone calls occurred in the following order:
- McLeary called Bains
 - Bains called Bahd

- Bahd called Benson
- Bahd called Bains

- ¶ 126 At 9:08 am, Benson entered three day orders to sell 2500 of Bahd's Sungro shares at \$4.25, 2500 at \$4.50 and 2500 at \$4.75 per share.
- ¶ 127 The order to sell at \$4.25 was partially filled by a sale of 500 shares at 9:53 am. The three orders then expired at the end of the day.
- ¶ 128 Between 8:47 and 9:03, the following phone calls occurred in the following order:
- Benson called Virk
 - Virk called McLeary
 - McLeary called Bains.
- ¶ 129 In his evidence at the hearing, Benson confirmed he called Virk to inform him that the cheque from Virk's account to Custom House was ready to be picked up. The cheque, for USD\$79,885.16, was deposited in Kramcorp's Custom House account on June 25. Kramcorp was McLeary's company.
- ¶ 130 When asked during his interview, McLeary stated that Kramcorp had had its Custom House account for four or five years. This plainly was not true.
- ¶ 131 McLeary signed an account application form for Kramcorp's account on June 23, 2009 and he and the account executive signed the account agreement the same day. The new account checklist, completed by Custom House and dated June 25, states that Kramcorp had no existing relationship with Custom House. The checklist was signed by the Custom House account executive on June 24 and by the branch manager on June 26.
- ¶ 132 The account application form contains the handwritten notation "*Beneficiary: Kramcorp Ventures Inc. SUGM*". (SUGM was Sungro's ticker symbol). It then says "*Payout*" and lists three names: Bains; the person who introduced McLeary to Hainey; and a promoter who brought a deal to McLeary for Sungro's consideration, which did not complete.
- ¶ 133 The full USD\$79,885.16 deposited to Kramcorp's Custom House account was paid out on June 25 to Kramcorp and Bains, after being converted to Canadian currency: CAD\$68,580 was transferred to Kramcorp's Bank of Montreal bank account and a cheque for CAD\$22,728.56 was issued to Bains.
- ¶ 134 In his interview with Commission staff in September 2009, McLeary stated that the CAD\$68,580 he received was for Virk's investment in a private mining deal McLeary was looking to do. McLeary testified that he had not raised money from any other investors at that time, the deal had not progressed, and that he was not proceeding with it until the Commission proceeding was concluded.

- ¶ 135 However, he said that he had not told Virk that he was not proceeding with the project and was not planning to tell Virk unless asked. He said he was simply holding Virk's money until he asked for it back, which Virk had not done.
- ¶ 136 McLeary's explanation for the purpose in receiving Virk's money forms part of the executive director's allegation that McLeary made false or misleading statements to investigators during his interview, which we discuss below.
- ¶ 137 Benson called Bahd at 10:01 am on June 25 about returning the certificates he had attempted to deposit on June 23. Benson testified that when he informed Bahd that Canaccord was returning the certificates, Bahd told him that the certificates were a "gift" and that the owners of the three share certificates were just "giving them to him". (On June 22, Sungro shares closed at \$2.50, making each certificate worth at that point almost \$300,000).
- ¶ 138 After Benson spoke to Bahd, the following phone calls occurred between 10:03 am and 12:37 pm on June 25 in the following order:
- Bahd called Bains
 - Bains called McLeary
 - Bains called Bahd
 - Bahd called Bains
 - Bains called McLeary
 - Bahd called Benson
 - McLeary called Benson
 - Benson called McLeary
- ¶ 139 Also on June 25, McLeary acquired shares from four Sungro seed shareholders. The circumstances were similar to Internet Marketing's acquisition of shares on June 19 - McLeary entered into share purchase agreements with each shareholder and powers of attorney were used to effect the transfers.
- ¶ 140 Like Internet Marketing, McLeary did not pay for these shares. He gave Bahd share purchase agreements he had drafted. Bahd then gave them to the four shareholders who signed them. The agreements provided that the price of the shares was to be determined. McLeary gave evidence that his lawyer told him that there should be a sale price in the purchase agreements. We discuss below McLeary's explanation as to why the agreements did not include a price.
- ¶ 141 Bains provided the powers of attorney to Sungro's transfer agent and asked that they issue new share certificates to McLeary and forward them to Sungro's office on a "rush basis". (Bains also provided nearly identical powers of attorney transferring four share certificates to Virk and three to Bains' brother).
- ¶ 142 On June 26, between 6:59 and 7:04 am, the following phone calls occurred in the following order:
- Bains called Bahd
 - Bahd called Benson
 - Bahd called Bains

- Bains called McLeary

- ¶ 143 At 7:05 am, Benson entered two orders. One order was to sell 5000 of Bahd's Sungro shares at \$4.50 per share, good until September 17, 2009. The order was partially filled on June 26 and June 30, and completely filled on July 1.
- ¶ 144 The other order was to sell 10,000 of Bahd's Sungro shares at \$4.75, good until September 17, 2009. This order was partially filled on July 1 for 700 shares at \$4.95, and the balance of the order was cancelled on July 6, 2009.
- ¶ 145 On July 6 at 7:02 am, Benson entered an order to sell 9300 of Bahd's Sungro shares at \$4.75 per share, good until September 24, 2009. The trade entry system prompt indicated that the price on this order was outside normal limits.
- ¶ 146 This order was partially filled on July 6 by a sale of 100 shares at 9:19 am. The order was then cancelled on July 8, 2009. By that time, Bahd had 111,950 Sungro shares left in his account.
- ¶ 147 Benson testified that this order was cancelled because of the Commission's halt trade order issued July 7 and that he informed Bahd of this on July 8.
- ¶ 148 About one and half hours after he told Bahd about the halt trade order, Bahd told Benson he was going to send Benson a fax authorization to have a cheque made payable to Custom House for the full cash balance in his account of USD\$29,543.12.
- ¶ 149 Between 9:34 and 9:49 am on July 9, the following phone calls occurred in the following order:
- Benson called Bahd
 - Bahd called Bains (three times)
 - Bahd called McLeary
 - Bahd called Benson
 - McLeary called Bahd
 - Bahd called Benson
- ¶ 150 Benson made a note on July 9 at 10:24 am. It states that Bahd had faxed the authorization to the wrong number, that Canaccord compliance would allow a cheque to be issued only to Bahd, not Custom House, given the Commission's scrutiny of trading in Sungro shares, and that Bahd was going to pick up the cheque, payable to himself.
- ¶ 151 Canaccord issued the cheque to Bahd for USD\$29,543.12 and Bahd deposited it in his bank account on July 14. On July 15, he issued a cheque to Bains for CAD\$10,000 and transferred CAD\$15,000 to a bank account held by a company of which he was the sole director. That company then issued a cheque to Bains for CAD\$15,147 on July 15 and Bains deposited both cheques into his bank account on July 15.

Timothy McLeary's role and the powers of attorney

- ¶ 152 In total, 18 nearly identical powers of attorney to transfer stock were used to transfer shares to McLeary, Internet Marketing, Virk, Bahd and Bains' brother. None of the powers of attorney

were dated. Each power of attorney bears what appears to be the signature of a seed shareholder. Below each shareholder signature is the “signature guaranteed stamp” of the East Hastings street TD Bank branch, followed by Timothy McLeary’s signature as an officer of the bank guaranteeing the shareholder’s signature as genuine.

- ¶ 153 The top portion describes the transferee and transferor, the shares and the certificate number. The handwriting in the top portion of each power of attorney appears to be that of the same individual. Timothy McLeary confirmed that it was not his handwriting in the top portion.
- ¶ 154 Timothy McLeary last worked at the East Hastings street TD branch on August 20, 2006 and last worked at the TD Bank on September 2, 2007.
- ¶ 155 It was only after Timothy McLeary had ceased to work for the TD Bank that the directors of Sungro approved the form of share subscription and the issue of Sungro shares to the seed shareholders on September 18, 2007. Share certificates dated the same date were then issued to the seed shareholders but it was not until January 2009 (and in one case February 2009) that share certificates in tradable form were issued to the seed shareholders.
- ¶ 156 Timothy McLeary was interviewed under oath by Commission staff and some of his answers gave rise to the executive director’s allegation that he made false or misleading statements to Commission investigators. We deal with that allegation later in these findings.
- ¶ 157 At his interview, Timothy McLeary stated that:
- he could not have signed the powers of attorney outside of the dates he worked at the East Hastings street branch, in other words, after August 20, 2006;
 - he had not guaranteed any signature after September 2, 2007;
 - he did not take the signature guarantee stamp with him when he left the TD Bank and it was locked away every night.
- ¶ 158 He also denied guaranteeing any power of attorney that had not been signed by someone, saying he could not do that. He stated that he could not recall if he ever guaranteed a power of attorney that had been signed but which did not have the top portion filled in and that he did know if he had done so.
- ¶ 159 He had no explanation for why his signature guarantee appeared on powers of attorney relating to shares represented by share certificates issued to the seed shareholders in early 2009 that were subsequently transferred in June 2009 to McLeary, Internet Marketing, Virk, Bahd and Bains’ brother.
- ¶ 160 The executive director argued that there were only two likely scenarios.
- ¶ 161 The first scenario was that Timothy McLeary signed the powers of attorney in blank while he was still at the bank, sometime between January 5, 2005 when he started at the Hastings branch and September 2, 2007 when he left the bank. The executive director did not distinguish as to what he meant by “in blank”.

- ¶ 162 We consider this first scenario the most likely. Our conclusion as to the meaning to be given to the expression “in blank” in relation to this scenario is set out below.
- ¶ 163 This scenario is consistent with Bains controlling Sungro’s seed shareholders and those shareholders being directed to pay for and hold Sungro shares, for which they were subsequently repaid.
- ¶ 164 Given the amount of control Bains, Virk and Bahd had over the seed shareholders, it would have been a simple matter to have them attend Timothy McLeary’s office before he left the bank and sign an uncompleted power of attorney which Timothy McLeary then stamped and signed to guarantee the signature.
- ¶ 165 The top portion of each power of attorney was then completed later, likely by one individual, when they were used in 2009 to transfer shares to McLeary, Internet Marketing, Virk, Bahd and Bains’ brother.
- ¶ 166 The executive director suggested as an alternative scenario that Timothy McLeary kept the signature guarantee stamp and used it in 2009 when guaranteeing the powers of attorney, around the time the shares were transferred.
- ¶ 167 We find this unlikely. It does not accord with Timothy McLeary’s sworn statements as noted above. It would make no sense for Timothy McLeary to risk taking the stamp when he left the bank, for use 16 months later. More importantly, it would have left Bains without control over the shares even though he had repaid the seed shareholders for their purchase.
- ¶ 168 For execution of the scheme, it makes the most sense for Bains to have obtained control over the Sungro shares issued to the seed shareholders prior to the issue of the shares in mid September 2007 and prior to the reimbursement of the seed shareholders for their payment for the shares, and not in 2009, some two years later.

III ANALYSIS

A Market Manipulation

Law

- ¶ 169 Section 57(a) of the Act states:
- 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
- (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract, or...
- ¶ 170 In *Siddiqi* 2005 BCSECCOM 416, at paragraph 118, the Commission stated:
- [...] 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 is clearly so when considered along with all of the manipulator's other conduct.

Did the respondents participate in conduct relating to securities?

- ¶ 171 We find that each respondent participated in conduct relating to securities.
- ¶ 172 Benson accepted for deposit share certificates, entered and cancelled Virk and Bahd's trade instructions, and had phone calls with Bains, Virk and Bahd relating to Sungro shares.
- ¶ 173 Hainey informed Williams of Sungro's float, and its impending stock split, bought and sold Sungro shares and posted messages relating to Sungro shares on the Monk's Den message board.
- ¶ 174 Williams bought Sungro shares, disseminated information about Sungro to the core group, encouraged members to buy and promoted Sungro shares on the Monk's Den message boards.
- ¶ 175 Timothy McLeary guaranteed signatures on powers of attorney which were used to transfer Sungro shares to various parties.
- ¶ 176 McLeary had phone calls with Bains, Virk and Bahd and told Hainey about Sungro's float and its impending stock split.
- ¶ 177 The executive director also argued that the evidence gives rise to the inference that McLeary gave trade instructions to Bains who passed them on to Virk and Bahd. We agree.
- ¶ 178 Of all the respondents, McLeary had the most experience with the OTCBB. He had numerous brokerage accounts and had founded and was the president and CEO of several companies whose shares were quoted on the OTCBB or traded on the TSX-V.
- ¶ 179 Before starting Sungro in August 2007, Bains had no experience with public companies or with exploration companies. He was inspired to start a new company by McLeary who had successfully started businesses in the past. Bains' initial goal was to build a company and then sell it.
- ¶ 180 McLeary told Bains that he would need about \$150,000 and 40 or 50 seed shareholders to start a public company and that he could get around \$500,000 for a shell public company. He referred Bains to persons who would become Sungro's accountants, lawyers, transfer agent, geologist and to market maker Mark Dillon of Pennaluna & Company. McLeary had used all of these professionals in the past. He also introduced Bains to Hainey.
- ¶ 181 The instructions on June 12 to show the trade through Pennaluna is a specific example that points to McLeary's involvement in Virk and Bahd's trading. Benson had no OTCBB experience before the trading period and testified that he did not understand the significance of showing a trade through Pennaluna. Benson also testified that Virk appeared to be an unsophisticated trader. Bains testified that he did not know what a market maker does.

- ¶ 182 In contrast, McLeary was the president and CEO of a company whose shares were quoted on the OTCBB. Its market maker was Pennaluna and McLeary had referred Bains to Pennaluna who became Sungro's market maker. McLeary would have known what a market maker was and that Pennaluna was Sungro's market maker.
- ¶ 183 McLeary's control over Virk and Bahd's trading is also evident from the clear pattern of telephone calls among McLeary, Bains, Virk, Bahd and Benson before Benson entered sell orders or acted on other instructions. Before nearly every sell order or order cancellation by Virk and Bahd during the trading period, there were telephone calls between McLeary, Bains and Virk or Bahd.
- ¶ 184 McLeary's control over the seed shares is also clear. McLeary claimed four seed shareholders willingly gave him their shares for free because
- the stock was "basically worthless"
 - the shareholders were from an East Indian community, were unsophisticated with respect to trading, and probably did not have brokerage accounts
 - he had known them for a long time and they "believe Mark McLeary and who I am and what I'm about".
- ¶ 185 McLeary's explanation makes no sense. First, three of the four shareholders he purchased shares from said they did not know McLeary and had never met him.
- ¶ 186 Second, the shares were not worthless - in February 2009, Virk had sold Sungro shares to Dillon at \$0.35, meaning the shares each seed shareholder gave to McLeary could have been worth more than \$41,000. McLeary knew about the February trade.
- ¶ 187 In addition, two of the transfer agreements are dated June 3 and two are dated June 8, 2009. A short time later, on June 12, Benson entered an order to sell Virk's shares at \$0.45 per share. As discussed above, we find that McLeary gave instruction to Bains for this trade, which shows he knew what the shares could be sold for.
- ¶ 188 We find that the more likely explanation is that the shareholders did not care about giving their shares to McLeary for free because they did not consider that they owned them and had been reimbursed for what they had paid to acquire the shares. This is consistent with Bains controlling Sungro's public float by controlling the Sungro seed shareholders.
- ¶ 189 It is also consistent with the fact that the seed shareholders, other than Virk and Bahd, did not trade during the trading period. If they did control the shares, it is likely they would have traded when the stock rose during the trading period from a close of \$0.45 cents at the beginning of the trading period to a close of \$4.75 at the end of the trading period.
- ¶ 190 One of the shareholders from whom McLeary acquired shares when interviewed by Commission staff stated that Bahd had asked him to put Sungro shares in his name, which he did. Bahd subsequently reimbursed him for the shares he purchased and he never considered them to be his shares. This shareholder also said that Bahd gave him the share purchase agreement with

McLeary, which he signed. He did not question the statement in the agreement that the share price was to be determined.

¶ 191 Another shareholder from whom McLeary acquired shares stated she did not know she had purchased Sungro shares until she received from staff a summons for an interview. She asked her husband and he told her they had purchased Sungro shares but that they no longer had them.

¶ 192 Based on the frequency and timing of phone calls in relation to the trades and instructions about the trades, McLeary's market experience, his knowledge of the circumstances relating to Sungro and the fact that he received partial profits from Virk's trading, we find that McLeary directed the sales of Virk's and Bahd's Sungro shares by passing instructions through Bains.

Did the respondents' conduct result in or contribute to an artificial price for Sungro shares during the trading period?

¶ 193 The first issue is whether there was an artificial price for Sungro shares during the trading period. We find there was.

¶ 194 At the start of the trading period Sungro had only \$299 in assets and had no business. Despite there being no real change in its prospects, its share price increased to a high of \$4.95 on relatively heavy volume during the trading period. Virk and Bahd's selling was a part of the trading volume during the trading period. The share price closed at \$4.75 on July 6, giving Sungro a market capitalization of over \$46 million.

¶ 195 On no news, Sungro's share price rose to \$4.00 by June 23, seven trading days into the price run up. Sungro issued news releases on June 23 and 26. Neither would justify the significant share price increase in Sungro shares over the trading period.

¶ 196 On June 23, Sungro announced that it was negotiating acquisition of an oil and gas prospect in Wyoming. The news release stated that the negotiations were in preliminary stages, that any agreement would be subject to a "definitive agreement" following due diligence, and that there was no assurance that the parties would reach an agreement as planned or at all.

¶ 197 On June 26, Sungro announced the five for one stock split, to be effective July 6, 2009. By the time of the June 26 news release, Sungro's stock price closed at \$4.50, the second highest price it closed at during the trading period.

¶ 198 On the buy side, an active promotion of Sungro shares took place through the Monk's Den orchestrated by Williams with assistance from Hainey. This promotion did not involve any fundamental information about the business prospects of the company. The sole basis of the promotion was that, consistent with previous examples, the Monk's Den participants undertook to take advantage of their buying power and their belief that Sungro had a low public float to increase the price of the stock.

¶ 199 The next issue is whether the respondents' conduct resulted in or contributed to an artificial price for Sungro shares during the trading period. We find that it did.

- ¶ 200 Effectively, Sungro had a very small trading float consisting of the shares sold by Virk and Bahd. Of the seed shareholders, only Virk, Bahd and Bains' brother deposited their certificates with a broker; only Virk and Bahd's shares traded during the trading period and Bains and McLeary controlled that trading.
- ¶ 201 Aside from the initial sale by Virk of 30,000 shares in February 2009, to Sungro's market maker, all of Virk's shares were sold between June 15 and June 22, 2009 at escalating prices from \$0.45 to \$2.50. Following that, Bahd sold 6800 of his shares between June 23 and July 6, 2009 at escalating prices between \$3.75 and \$4.95.
- ¶ 202 The remaining seed capital shares were effectively controlled by McLeary, Bains, Hainey, Virk and Bahd.
- ¶ 203 In effect, the public float of Sungro was artificially constrained. Had the original seed capital shareholders been legitimate shareholders it is logical to conclude that at least some of them would have been sellers during the trading period as the price of Sungro rapidly escalated. Had additional shares been sold into the market it is less likely that the share price would have risen so dramatically.
- ¶ 204 The executive director argued that Timothy McLeary's conduct in guaranteeing the signatures on the powers of attorney that were used to transfer shares to McLeary, Hainey and others, was a critical step in the market manipulation. We agree. Possession of powers of attorney to transfer stock signed by the seed shareholders, with those signatures guaranteed, was essential to ensure those directing the scheme had control of the seed shareholders' shares and could artificially constrain the public float.
- ¶ 205 Consistent with *Siddiqi*, in determining whether or not there has been stock manipulation it is essential to review the collective, rather than the individual, actions of the parties. The manipulation of Sungro's share price involved actors in both Canada and the U.S.
- ¶ 206 Viewed collectively, we find that the respondents' conduct resulted in or contributed to an artificial price for Sungro's shares during the trading period. Having found this, there is no need for us to determine whether their conduct contributed to a misleading appearance of trading activity in Sungro shares.

Did the respondents know or reasonably should have known, that their conduct resulted in or contributed to an artificial price for Sungro shares?

i) McLeary, Hainey and Williams

- ¶ 207 We find that McLeary, Hainey and Williams knew or ought to have known that their conduct resulted in or contributed to an artificial price for Sungro shares.
- ¶ 208 McLeary knew about Sungro's tightly controlled float. He knew that the shares were held in certificate form and that the shareholders were unsophisticated, did not have brokerage accounts and therefore were unlikely to deposit and trade their shares. He told Hainey who then told Williams about Sungro's tightly controlled float.

¶ 209 McLeary directed Virk and Bahd's selling, which was done on specific days, at specific amounts and prices. McLeary knew that in the circumstances of a tightly controlled float, this trading would result in Virk and Bahd receiving an artificially higher price for Sungro shares and benefitted from it through the CAD\$68,580 payment from Virk's proceeds.

¶ 210 Hainey knew about Sungro's controlled float and gave that information to Williams, telling him it was a "potential float lock-down". Hainey posted messages on the Monk's Den bulletin boards and knew those postings would encourage others to buy Sungro shares. He would have known that creating a demand for Sungro shares that were artificially constrained would create an artificial price for those shares.

¶ 211 Williams knew that his conduct would result in an artificial price for Sungro shares – in fact, driving up the price of a company's stock was the Monk's Den purpose, according to its "welcome page" on the website investorshub.com:

The purpose of this board is to make profits and help each other along the way by focusing on team work. We profit by buying and holding selected company stocks and locking down the float of chosen companies. Selections are announced on an unscheduled basis by email. Monk completes extensive research before calling any new stock.

¶ 212 Williams boasted in a message how he had been involved in two trading plays around May 2008 where "disciplined investors" locked up the float of two "worthless" or "useless" companies and dramatically increased their share price – in one case from \$0.44 to \$4.44 in 13 days, and another from pennies to \$8.00 in 14 days.

ii) Timothy McLeary

¶ 213 We concluded above that Timothy McLeary signed the powers of attorney sometime before he left the bank on September 2, 2007.

¶ 214 Given this finding, the executive director argues that if Timothy McLeary signed the powers of attorney in blank for his brother's future use that means he knew or reasonably should have known they would be used by his brother for a future manipulation.

¶ 215 We understand the executive director to be saying here that Timothy McLeary signed the powers of attorney when they were completely blank, without even shareholders' signatures. There is no such evidence before us.

¶ 216 The only evidence we have is that contained in the transcript of Timothy McLeary's sworn interview conducted by the Commission investigators where he clearly stated that he would not have signed as guaranteeing the signature unless the person had signed the document. He also clearly stated that he could not recall if the share information in the top portion had been filled out.

¶ 217 In our view this would be consistent with his limited role in guaranteeing the signature. His concern was whether the signature was genuine and not the contents of the document.

¶ 218 There is no evidence that Timothy McLeary knew that the powers of attorney would be used by his brother for a future manipulation. Indeed, given Bains' initial intention to sell Sungro as a shell company, there is no evidence that the manipulation in 2009 was even contemplated at the time Timothy McLeary guaranteed the seed shareholders' signatures on the powers of attorney.

¶ 219 The evidence before us is insufficient to conclude that Timothy McLeary reasonably should have known that his conduct in guaranteeing the signatures of the seed shareholders at some point prior to his departure from the bank in early September 2007 would result in or contribute to an artificial price for Sungro shares in mid 2009.

iii) Benson

¶ 220 The executive director does not allege that Benson was party to or knew of the alleged manipulation.

¶ 221 Rather, the executive director alleges that Benson reasonably should have known that the sell orders he was entering for Virk and Bahd during the trading period resulted in or contributed to an artificial price for Sungro.

¶ 222 The executive director argues that there were numerous "warning signs" that Benson "should have picked up on". In summary, the executive director points to the following as warning signs with respect to Virk's and Bahd's trading:

- (a) Benson first learned of Sungro when Bains called him "out of the blue" sometime prior to the trading period for a stock quote on Sungro.
- (b) Benson's impression was that Virk and Bahd were unsophisticated investors and yet both used limit orders even after there was a market and also multiple orders at increasing prices and Bahd cancelled numerous orders.
- (c) Despite Virk's unsophistication, he asked that his June 12 order be directed to a particular market maker, Pennaluna.
- (d) Virk asked on June 15 if Bains could have trading authority over his account.
- (e) A "Price outside normal limits" prompt was triggered on five of Virk's first six orders and three of Bahd's orders.
- (f) Telephone calls were made by Bains and McLeary to Benson at key points during Virk's trading, indicating they were very interested in Virk's trading.
- (g) Bains unexpectedly delivered share certificates for Bahd and Bains' brother to Benson on June 19 at Benson's prearranged meeting with Virk.
- (h) Virk's trading during the first three days of the trading period accounted for 68% of the volume; Virk's sale of 65,000 shares on June 17 was 70% of the trading volume.

- (i) Virk requested that his trading proceeds be paid out to Custom House, a third party.
- (j) Bahd delivered three additional Sungro stock certificates, each worth around \$300,000, to Benson on June 23. When Canaccord compliance subsequently rejected the certificates, Bahd stated that the owners had given the share certificates to him.

Benson's initial call

¶ 223 The executive director does not state why Bain's initial call to Benson is a warning sign. We do not consider a call for a stock quote on Sungro at some time prior to the trading period to be a warning sign.

Order instructions

¶ 224 As noted earlier, Benson took over Virk's and Bahd's accounts after their previous investment advisor left Canaccord in March or April 2009. Benson's understanding was that Virk and Bahd wanted to liquidate their shareholdings and close their accounts.

¶ 225 Limit orders, multiple orders and cancelled orders, while they may suggest some level of sophistication, are not by themselves indicative of a manipulation.

¶ 226 As Benson testified, while his first impressions were that Virk and Bahd were unsophisticated, the type of orders they communicated only caused him to conclude they might be more sophisticated than he had first thought.

¶ 227 As noted in Benson's submissions, Virk's and Bahd's trading did not disclose a pattern of trading practices of the type normally considered to be manipulative such as wash-trading or crosses, match trades, high-closing, up-ticking, spoofing or late trades.

¶ 228 As well, Virk's and Bahd's trading demonstrated a pattern of order entry at prices at the "best bid" or between the bid and ask. The sell orders that Benson was instructed to enter therefore do not, in and of themselves, account for the price increases in Sungro shares from June 17 to June 25, 2009 when the shares reached \$4.75.

¶ 229 We do not consider the nature of the orders given by Virk or Bahd to be warning signs of a manipulation.

Request to direct order through Pennaluna

¶ 230 With respect to Virk's request to direct the June 12 order through Pennaluna, Benson was quickly notified that it was not acceptable because Canaccord's U.S. trading desk determines which market maker to use. Rather than pointing to sophistication on Virk's part, this would appear to point to a lack of knowledge. When Benson (who acknowledged a lack of familiarity with OTCBB trading) was made aware the direction was not acceptable, he informed Virk and the direction was cancelled.

¶ 231 There is no evidence that Benson was aware that Pennaluna was the original market maker for Sungro. None of Virk's and Bahd's orders went through Pennaluna.

¶ 232 Given these circumstances, we can see no reason for Benson to consider Virk's early request to direct the trade to Pennaluna as a warning sign of a manipulation.

Request to grant trading authority

¶ 233 Benson consulted with Canaccord compliance personnel regarding Virk's request to grant trading authority over his account to Bains because he knew Bains was an insider of Sungro as a result of Bains' earlier request for a Sungro stock quote. After the compliance department advised it would be too difficult to manage this because Bains was an insider, Benson told Virk, and later Bains, that he had consulted the compliance department and gave the reasons the request was being declined. Virk and Bains accepted the decision and no trading authority was granted.

¶ 234 This event caused Benson concern as to possible insider trading issues, but in our view it does not mean that he reasonably should have known of the manipulation.

Price outside limits prompt

¶ 235 Benson said he always checked the order to see he had correctly entered it when a "price outside normal limits" prompt appeared but that he had no specific recollection of seeing this message while entering the noted Sungro trades. He observed that he had seen such prompts come up on every exchange he had ever entered orders on and had never had any compliance enquiries as a result.

¶ 236 No evidence was provided as to the parameters giving rise to a "price outside normal limits" alert for OTCBB trading. A review of the trading indicates that when the prompt appeared the order was in most instances either at the "best bid" or between the bid and ask and was frequently preceded by trades at or above the order price. In these circumstances, we fail to see how such alerts could be considered to be a warning sign of price manipulation.

Bains' delivery of share certificates

¶ 237 When Bains delivered two Sungro share certificates to Benson, one in the name of his brother and the other in Bahd's name, on June 19, 2009, Benson forwarded the share certificates on within Canaccord for acceptance. The shares were subsequently accepted by Canaccord for deposit to Bahd's and Bains' brother's already existing accounts with Canaccord.

¶ 238 The shares had recently become free trading and we accept Benson's submission that there was nothing unusual about the president of an issuer being in possession of share certificates issued in a private placement.

¶ 239 While this event might again have given rise to insider trading concerns, it does not mean that Benson reasonably should have known of the manipulation.

Trading volume

¶ 240 Virk's first order on June 12, 2009 expired unfilled. The executive director's reference to volume during the first three days of the trading period refers to Virk's second order on June 15

to sell 25,000 shares at \$0.45 and his subsequent orders on June 17 to sell 25,000 shares at \$0.45 and later 20,000 shares at \$0.90.

¶ 241 The June 15 order resulted in a partial fill of 5000 shares on the first day at \$0.45 (following two earlier trades at \$0.55) and then four trades again at \$0.45 by 9:20 am on June 17. We consider the June 15 order and subsequent trades to be consistent with Virk's stated intention to liquidate his remaining Sungro shareholdings. The sale pursuant to this order of a total of 25,000 shares all at \$0.45 over 3 days would not in our view mean that Benson reasonably should have known of the manipulation.

¶ 242 While Virk's total trading volume over the three day period represented 68% of Sungro sales volume, if trades pursuant to the June 15 order are excluded, Virk's trading volume for the remaining two orders made on June 17 drops to 44%.

¶ 243 Virk's first order in the morning on June 17 for an additional 25,000 shares again at \$0.45 and the subsequent trades at or near \$0.45 are also consistent with liquidation of his Sungro shareholdings. In our view there is nothing in this order and the trades (even though trades to this point over the three days totalled a volume of 50,000 shares) that would cause Benson reasonably to conclude Virk's trading involved a manipulation.

¶ 244 At the time Virk communicated his second order to Benson on June 17 Sungro was trading above the order price at \$1.01. Again, this order, which brought Virk's total volume sold to 70,000 shares over the three days of trading, was consistent with the intention to liquidate. Given that the most recent bid was above the ask on the order at the time it was placed, notwithstanding the growing volume, we do not find that Benson reasonably should have known of the manipulation.

¶ 245 It was on June 17, 2009, sometime after Williams began sending messages to the core group that Williams and the core group entered the market and became the dominant market participants. From the time of their entry on June 17, 2009 until the Sungro share price first reached \$4.75 on June 25, Williams and the core group bought 142,665 Sungro shares. During the same period, Virk only sold a further 38,750 shares and Bahd 1000 shares.

¶ 246 Based on this analysis, we do not consider Virk's trading volume over the first three days of the trading period to mean that Benson reasonably should have known of the manipulation.

McLeary's and Bains' phone calls to Benson

¶ 247 Benson explained that some of the calls Bains and McLeary made could have been answered by an assistant or another advisor in his group if he failed to answer. He testified that any telephone conversations he had with Bains or McLeary did not concern Virk's or Bahd's trading and that he was unaware until just prior to being interviewed by Commission investigators sometime after the trading period that McLeary had anything to do with Sungro.

¶ 248 Benson was credible and we accept his evidence. We do not consider phone calls from these individuals about matters other than Virk's and Bahd's trading to be relevant.

Virk's payment instructions

- ¶ 249 After all his Sungro shares had been sold, Virk requested the proceeds be paid out to Custom House. Benson followed Canaccord procedure for third party payment by obtaining Virk's request in writing and then submitting it to the compliance department. The request was approved by Canaccord as Custom House was considered to be an acceptable identification of a third party.
- ¶ 250 Benson submitted that the request for payment to a currency exchange made sense since Virk's account was a US dollar account. We note that while the cheque was later deposited to Kramcorp's account at Custom House, the cheque was made payable only to Custom House and not to any specific account.
- ¶ 251 Benson had no knowledge that the funds would eventually be directed to anyone other than Virk.
- ¶ 252 Virk's payment request does not mean that Benson reasonably should have known of the manipulation.

Bahd's delivery of share certificates

- ¶ 253 When Bahd brought in three share certificates for deposit on June 23, 2009, Benson consulted with the compliance department because the shares had originally been issued to third parties. The compliance department decided to reject the additional share certificates for deposit because they originated with third parties. Benson advised Bahd of the decision and the share certificates were returned to Bahd.
- ¶ 254 Obviously this request raised concerns for Benson, but the rejection of the shares resolved concerns related to the third party issue. As the shares Bahd had in his account for trading were those originally issued to him, there was no reason for Benson to have a similar concern in facilitating the sale of those shares.
- ¶ 255 We do not consider the delivery of the additional share certificates to mean that Benson reasonably should have known of the manipulation.

Conclusion

- ¶ 256 We find that the "warning signs" listed by the executive director do not prove that Benson reasonably should have known of the manipulation.
- ¶ 257 There was no evidence that Benson was aware that the demand for Sungro shares was being created by Williams and the core group. Nor is there evidence that Benson was aware of McLeary's role in directing Virk's and Bahd's trading. The evidence is to the contrary – Benson was not aware that McLeary had anything to do with Sungro until sometime after the trading period when he learned of it during the course of the Commission staff's investigation.
- ¶ 258 In several instances where requests caused Benson concern, such as potential insider trading and share ownership issues, he sought advice from the Canaccord compliance department and followed that advice. Virk's and Bahd's acceptance of that advice with little demur, gave Benson no cause for further concern.

¶ 259 In other respects Virk’s and Bahd’s trading was consistent with the liquidation and closure of their accounts following their previous advisor’s departure from Canaccord.

¶ 260 We conclude that the circumstances surrounding Virk’s and Bahd’s trading are not sufficient, either individually or collectively, to find that Benson reasonably should have known that his conduct in executing Virk and Bahd’s trade instructions contributed to an artificial price for Sungro shares.

B False or Misleading statements

Law

¶ 261 Section 168.1(1)(a) of the Act states:

A person must not

(a) make a statement in evidence or submit or give information under this Act to the commission, the executive director or any person appointed under this Act that, in a material respect and at the time and in light of the circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading, or...

¶ 262 The statements in issue in this case were made to investigators appointed under the Act.

¶ 263 In *Re Nuttall*, 2011 BCSECCOM 521, at paragraph 44, the Commission stated that:

The materiality threshold in section 168.1(1)(a) measures the degree to which the information given is false or misleading – how far it departs from the truth – not its relevance to the investigation.

Allegations against McLeary

¶ 264 The executive director alleges that at his interview on September 21, 2009, McLeary made the following false or misleading statements to Commission investigators:

- He obtained shares from seed shareholders using share transfer agreements; and
- He received Virk’s trading proceeds as Virk’s investment in a future project of McLeary’s.

i) Statements about acquiring shares through share transfer agreements

¶ 265 The executive director’s particular allegation is that McLeary’s statement in his interview, that he obtained Sungro shares from four seed shareholders using share purchase agreements, was false or misleading.

¶ 266 In argument, however, the executive director argued that McLeary made a false or misleading statement in response to the question of whether the powers of attorney were attached to the share certificates when they were sent to Sungro’s share transfer agent. In response to that question, McLeary answered that he did not know, that he did not believe so, and that they may have been.

¶ 267 Counsel for McLeary argued that these are two different allegations and the executive director should not be allowed to argue the second allegation when it was not made in the letter of particulars given to the parties, before the hearing.

- ¶ 268 We do not need to decide the point raised by counsel for McLeary since we find that, even if the second allegation was properly made, we would find it unproven, since McLeary’s answers were not false or misleading in a material respect - his answers were not an outright denial and were, at worst, vague or ambiguous.
- ¶ 269 Regarding the particularized allegation, it was not particularized as to whether that information was false or misleading. (The executive director did not allege that McLeary omitted facts that would make the information he gave not false or misleading).
- ¶ 270 In his interview McLeary did give information to investigators that he obtained seed shares through share purchase agreements that he entered into with seed shareholders.
- ¶ 271 Dealing with the issue of whether this information was false, there is no dispute that McLeary entered into share purchase agreements with seed shareholders. The only issue is whether it was false to say that he “obtained” shares through those agreements.
- ¶ 272 The allegation of falsity appears to be framed as two alternative situations: either he acquired the shares through share purchase agreements or he acquired the shares through powers of attorney, as the executive director appears to argue.
- ¶ 273 In fact, both documents work together. The share purchase agreements state that:

On the Closing Date, the Vendor will deliver to the Purchaser, the following documents:

- (a) share certificates representing Shares together with one or more stock transfer powers of attorney, duly endorsed by the Vendor for transfer in form acceptable to the Company’s registrar and transfer agent, for the purposes of effecting the registration of the Shares in the name of the Purchaser;

[emphasis added]

- ¶ 274 Similarly, the powers of attorney state that the shareholders “have bargained and sold” their shares.
- ¶ 275 In our view, McLeary’s information about obtaining shares through share purchase agreements was not false.
- ¶ 276 We also do not think McLeary’s information was misleading in the circumstances. As noted, it is clear from the share purchase agreement that powers of attorney would be used to effect the transfer and registration of shares. The Commission investigators clearly knew about using powers of attorney, since they specifically asked McLeary about them during his interview.
- ¶ 277 We therefore dismiss this allegation.

ii) Statements about purpose of receiving Virk's trading proceeds

¶ 278 Virk's trading proceeds of USD\$79,885.16 were paid into a Custom House account set up by McLeary on June 23, the day after Virk's last order was filled. As noted above, the handwritten note on the account application form states that the account was for "SUGM payouts".

¶ 279 Of the money transferred into the account, CAD\$68,580 was transferred to Kramcorp's bank account.

¶ 280 McLeary stated at his interview that he obtained a portion of Virk's trading proceeds "because [Virk] was investing in something that I'm going to be doing here".

¶ 281 McLeary said he was looking at doing one of five private mining deals and needed "about a half million bucks" to do a private work program or build it up and possibly "IPO it".

¶ 282 McLeary also testified at his interview that:

- Virk was the only person by the time of his interview on September 21, 2009 who had given him money for a potential deal;
- the deals were in limbo because of his issues with the Commission;
- Virk could have his money back if he wanted it, and he had not told Virk he was not going forward until the Commission matter was resolved;
- Virk had just lost \$500,000 around the same time and had been robbed of \$64,000.

¶ 283 Despite McLeary's assertions that his evidence on this point is straight forward and uncontroverted, it simply defies logic. There is no documentation to substantiate McLeary's testimony that the Virk proceeds were for some sort of future investment. There were no other investors and no identified transactions. McLeary suggested his parents would be investors but even they had not committed funds.

¶ 284 We conclude that the CAD \$68,580 was part of the proceeds of the manipulation of Sungro's share price and that it was paid to McLeary.

¶ 285 We therefore find that McLeary gave false or misleading statements to Commission investigators contrary to section 168.1 of the Act when he stated the CAD \$68,580 payment was Virk's investment in a project.

Allegations against Timothy McLeary

¶ 286 The executive director alleges that at his Commission interview on April 9, 2010, Timothy McLeary made false or misleading statements to Commissioner investigators when he said that:

- He did not signature guarantee any blank powers of attorney;
- He did not keep his signature guarantee stamp after he left the bank; and
- He could not explain how he signature guaranteed the seed shareholders' signatures on powers of attorney relating to share certificates issued in early 2009.

i) Statements about guaranteeing blank powers of attorney

¶ 287 The executive director argued that Timothy McLeary said in his interview that he did not signature guarantee any blank powers of attorney.

¶ 288 In fact, he stated that he could not recall if he had guaranteed signatures on powers of attorney that had been signed but which did not have the top portion filled in, adding that he did not know if he had.

¶ 289 More importantly, he denied that he guaranteed any powers of attorney which had not been signed by a transferor, in other words a power of attorney that was completely blank.

¶ 290 There is no evidence that Timothy McLeary signed powers of attorney that were completely blank. As we found above, the most likely explanation is that, while still at the bank, he signed the powers of attorney, which had been signed by the seed shareholders but had the top portions blank. Consequently, we do not find that his statements on this point were false or misleading.

ii) Statement about not keeping his signature guarantee stamp after he left the bank

¶ 291 The executive director alleges that Timothy McLeary made a false or misleading statement when he told investigators that he did not keep his signature guarantee stamp after he left the bank.

¶ 292 There is no evidence that Timothy McLeary kept his signature guarantee stamp after he left the bank.

¶ 293 Since we have concluded that he signed and stamped the powers of attorney before he left the bank, we do not infer that he kept the stamp after he left the bank.

¶ 294 We therefore dismiss the allegation that his statement about not keeping his signature guarantee stamp after he left the bank was false or misleading.

iii) Statement about being unable to explain how he signature guaranteed powers of attorney using his signature guarantee stamp relating to share certificates issued on January 9, 2009

¶ 295 In his interview, Timothy McLeary stated that he had no explanation as to how he could have guaranteed the signature on a power of attorney for transferring share certificates issued January 9, 2009.

¶ 296 He also said in his interview that he:

- did not witness powers of attorney that had not been signed;
- could not recall if he witnessed powers of attorney which had the top portion incomplete;
- did not witness signatures after he left the bank;
- did not take the bank stamp with him; and
- could not have signed the powers of attorney after he left the bank.

¶ 297 Consistent with his statements, we have already concluded that, before he left the bank in September 2007, Timothy McLeary signature guaranteed powers of attorney that had been signed by the seed shareholders but that did not have the share transfer information in the top portion filled in.

¶ 298 The fact that the share transfer information was incomplete on the already signed and guaranteed powers of attorney, permitted the powers of attorney to be used later in 2009 by anyone possessing both the share certificates and the powers of attorney, to transfer Sungro shares represented by certificates that were not issued to seed shareholders until January 2009.

¶ 299 There is no evidence that Timothy McLeary was aware of how the incomplete powers of attorney, which he signature guaranteed prior to his departure from the bank in September 2007, would eventually be used.

¶ 300 Therefore, we do not find his statement about being unable to explain how these powers of attorney were eventually used in 2009 to be either false or misleading.

¶ 301 We dismiss this allegation.

IV SUMMARY OF FINDINGS

¶ 302 We dismiss the allegations against Benson and Timothy McLeary.

¶ 303 We find that:

- McLeary, Hainey and Williams directly or indirectly, engaged in or participated in conduct relating to Sungro's shares that they knew, or reasonably ought to have known, resulted in or contributed to an artificial price for Sungro shares, contrary to section 57(a) of the Act; and
- McLeary made false or misleading statements to Commission investigators respecting the purpose of his receipt of Virk's trading proceeds, contrary to section 168.1(1)(a) of the Act.

¶ 304 We direct the executive director and McLeary, Hainey and Williams to provide their written submissions on sanctions as follows:

By January 16, 2015 The executive director delivers submission to the McLeary, Hainey and Williams and to the secretary to the Commission.

By January 30, 2015 McLeary, Hainey and Williams deliver response submissions to the executive director and secretary to the Commission.
Any party seeking an oral hearing on the issue of sanctions must advise the secretary to the Commission by this date.

By February 6, 2015 The executive director delivers reply submissions (if any) to the McLeary, Hainey and Williams and to the secretary to the Commission.

¶ 305 December 16, 2014

¶ 306 **For the Commission**

Don Rowlett
Commissioner

Suzanne K. Wiltshire
Commissioner