

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Lum, 2015 BCSECCOM 189

Date: 20150713

Hon Seng Lum (also known as Victor Lum) and May Lee Chan Lum

Panel	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
	Suzanne K. Wiltshire	Commissioner

Hearing dates December 8, 9 and 10, 2014 and February 12, 2015

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Findings date July 13, 2015

Appearing

Veda Kenda For the Executive Director

Nigel Campbell For Hon Seng Lum and May Lee Chan Lum
Sean K. Boyle

Findings

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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] In an amended notice of hearing issued December 4, 2014 (2014 BCSECCOM 491), the executive director alleges that Hon Seng Lum (also known as Victor Lum):
- a) while in a special relationship with Baja Mining Corp. and with knowledge of material information with respect to Baja that was not generally disclosed, entered into a transaction involving a security of Baja, contrary to subsection 57.2(2) of the Act; and
 - b) while in a special relationship with Baja and with knowledge of material information with respect to Baja that was not generally disclosed, recommended or encouraged May Lum to enter into a transaction involving a security of Baja, contrary to subsection 57.2(5) of the Act.
- [3] The executive director also alleges that Victor Lum and May Lum engaged in conduct described in the amended notice of hearing that harmed the credibility, reputation and integrity of British Columbia's securities markets and regulatory environment contrary to the public interest.
- [4] During the hearing, the executive director called two witnesses, a Commission investigator and Mr. M., an executive of Mount Kellett Capital Management LP (MK Capital), a global institutional investment and advisory firm. MK Capital was the ultimate controller of a plethora of companies and funds, including Mount Kellett Capital (Hong Kong) Limited (MK Hong Kong), the employer of Victor Lum at the time of the alleged misconduct.¹
- [5] The respondents were represented by counsel at the hearing but did not call any witnesses.

II Background

- [6] Victor Lum was at all relevant times a citizen of Singapore and a resident of Hong Kong. He was employed by MK in June 2008 as a director of MK's Multi-Asset Research Group and later rose to the position of managing director. His direct employer during the relevant period was MK Hong Kong. He advised MK on making and monitoring mining investments on a global basis.
- [7] Within MK, Victor Lum was for some time well regarded for his expertise and ability but he was not a member of senior management. However, after the time period in which his alleged misconduct took place, Victor Lum was terminated by MK for poor performance.
- [8] After an internal investigation by MK that included a review of text messages sent and received by Victor Lum on his MK issued mobile telephone, MK changed its position on Victor Lum's termination to "for cause". This change arose from MK's allegations that, among other things, he had breached various MK policies and procedures and transacted, or assisted May Lum to transact, trades in securities of companies held in MK portfolios for his benefit while in possession of material non-public information about those companies.

¹ For ease of reference, when the specific entity within the MK Capital group is not material, we simply refer to MK.

- [9] There was an ongoing dispute between Victor Lum and MK over Victor Lum's entitlement to a \$1 million bonus which MK agreed to pay him when he joined MK Hong Kong.
- [10] MK, through various law firms, made complaints to various regulatory authorities including this Commission concerning its allegations of misconduct against Victor Lum.
- [11] Victor Lum has never been registered under the Act and, except for a childhood family visit, has never been in Canada.
- [12] May Lum is Victor Lum's sister and resides in Singapore. She trained as a lawyer and was qualified as a lawyer in the United Kingdom and Singapore. May Lum has never been registered under the Act and, except for a childhood family visit, has never been in Canada.
- [13] Baja was at all material times a reporting issuer in British Columbia with its head office and management in Vancouver. Baja shares were listed on the Toronto Stock Exchange and quoted on the OCTQX.
- [14] Baja's principal asset was a 70% joint venture interest in a mineral development project in Baja California Sur, Mexico known as the Boleo Project. The other 30% joint venturer in the Boleo Project was a group known as the Korean Consortium.
- [15] May Lum was the sole director and shareholder of a British Virgin Islands company which in turn was the sole director and shareholder of Apulum Investments Limited, another British Virgin Islands company. Apulum opened a number of securities trading accounts (based on currencies) with CitiGroup in Singapore. May Lum had sole trading authority over these Apulum accounts. Her residence address in Singapore was the address to which account statements and confirmations were sent. The contact number for Apulum was May Lum's mobile phone.
- [16] The Apulum accounts purchased 365,000 shares of Baja for \$363,000 between September 2010 and August 2011.
- [17] MK began its purchases of Baja shares on behalf of many of its fund accounts in March 2011, approximately five months after the first purchases of Baja shares in the Apulum accounts. By April 2011, MK accounts held 11.9% of the Baja shares. By November 2011, MK and one of its senior executives collectively held 19.9% of the Baja shares. MK made filings disclosing these holdings to United States and Canadian regulators, including Alternative Monthly Reports under National Instrument 62-103.
- [18] Beginning about December 2011, MK was in an adversarial position with management and the Board of Baja. MK sought positions on the Baja board, raised concerns regarding Baja's governance practices and requisitioned a special general meeting. In February 2012, Baja called a special general meeting and recommended to its shareholders to reject MK's "creeping takeover strategy". MK issued a dissenting proxy circular. MK also complained to various regulatory authorities, including this Commission, about Baja's disclosures and governance practices. At Baja's April 3, 2012 special meeting, the Baja shareholders voted to retain Baja's

board. In his evidence, Mr. M. acknowledged that MK had lost its proxy battle with Baja management.

- [19] On April 23, 2012, Baja issued a news release and material change report regarding capital cost overruns at the Boleo Project and the funding issues resulting from the overruns (the April 23 Disclosures).
- [20] By May 3, Baja had agreed to add two nominees of MK to its board. MK continued to call for the resignation of Baja's CEO who resigned on May 14.
- [21] On May 4, MK filed a petition in the BC Supreme Court seeking, among other relief, appointment of an independent inspector for Baja prior to Baja's annual general meeting.
- [22] On May 16, Baja issued a news release and first quarter report which contained further details of the capital cost overruns and funding issues.
- [23] Following Baja's April 23 Disclosures, MK arranged to have an MK team visit the Boleo Project site, in the testimony of Mr. M., "to begin to develop an assessment of what things looked like from a physical perspective". Along with a consultant and other MK representatives, Mr. M. and Victor Lum were present at the site visit which took place between May 15 and 17.
- [24] During the site visit, Victor Lum prepared daily notes of his consultations with employees and consultants at the Boleo Project site and Victor Lum's own observations and conclusions, which he emailed to a number of MK personnel.
- [25] On May 18, 2012, following the MK site visit, Victor Lum and May Lum exchanged a number of text messages regarding the sale of Baja shares held in the Apulum accounts. 50% of these Baja shares (182,500 shares) were sold that day at an average price of approximately \$0.26 per share.
- [26] The relevant text message exchange regarding the May 18, 2012 sale of Baja shares in the Apulum accounts is as follows [V= Victor Lum; M= May Lum]:
 - 10:24 V to M: I nd u to sell the baja shares tonite. Let's start w 1/3 of the shares tonite. Let me know when done. Do it at close to mkt
 - 10:51 M to V: Ok. Will txt when done. But want me to txt u mkt price first?
 - 10:52 M to V: Sry was driving just now when I missed your call.
 - 10:53 V to M: Ok. Will txt u price. Thx
 - 12:27 V to M: Actually- when market opens-can u pls call them to give u price quote. If more than 25c. Tell them to start sellin slowly into mkt so that half of our position is sold. I won't hv much cell recp later so counting on u. Don't worry. Just sell slowly over course of the day until we get to half sold

12:38 M to V: Got it.

14:22 M to V: Done. Average price 26. A small no. at 27, the rest just above 26. Left w half of original position.

14:23 M to V: We sold 182500 shares, wh is half of our original position.

14:35 V to M: Thx

- [27] Following the site visit to the Boleo Project, various MK personnel and consultants continued due diligence on Baja at a data room which was set up in Baja's head office in Vancouver. Victor Lum was not present in Vancouver but exchanged emails and documents with the MK personnel at the Vancouver data room and elsewhere regarding that further due diligence.
- [28] On June 5, 2012, the remaining 50% of the Baja shares (182,500 shares) held in the Apulum accounts were sold at \$0.195 per share.
- [29] There was only one relevant text message between Victor Lum and May Lum regarding the sale of the remaining Baja shares in the Apulum accounts on June 5, 2012. This was a text from May Lum to Victor Lum at 1:25 on June 6, 2012: "All sold at 0.195."
- [30] On June 21, 2012, Baja issued a further news release and material change report providing additional information on the previously announced cost overruns regarding the Boleo Project, funding concerns and cost-cutting measures (the June 21 Disclosures).
- [31] The public interest allegation in the amended notice of hearing is based on text messages exchanged between Victor Lum and May Lum regarding trades in the Apulum accounts and in another account (the Lim & Tan account) of securities of certain issuers, some of which, including Baja, were held by MK in its portfolio of investments.
- [32] Victor Lum had been involved in assessing the investment potential of some of these issuers on behalf of MK.
- [33] The relevant circumstances surrounding the trades alleged to have been contrary to the public interest are set out later in our analysis of those allegations.

III Positions of the Parties

a) Executive Director

- [34] The executive director says that Victor Lum breached subsection 57.2(2) when he entered into a transaction involving Baja securities while he was a person in a special relationship with Baja and with knowledge of material information with respect to Baja which was not generally disclosed.
- [35] The executive director also says that Victor Lum breached subsection 57.2(5) when he recommended or encouraged May Lum to enter into a transaction involving Baja securities while

he was a person in a special relationship with Baja and with knowledge of material information with respect to Baja which was not generally disclosed.

- [36] The executive director also says that the conduct of Victor Lum and May Lum in entering into transactions involving securities of Baja and a number of other issuers, some of which were in MK's portfolio of investments, harmed the credibility, reputation and integrity of British Columbia's securities markets and regulatory environment and was contrary to the public interest.
- [37] Regarding this public interest allegation, the executive director says that:
- a) Victor Lum had been involved in assessing the investment potential of some of these issuers, that Victor Lum instructed May Lum to buy or sell securities of these issuers at specified prices and that May Lum traded such securities as directed by Victor Lum;
 - b) by having May Lum execute these trades, the respondents concealed Victor Lum's involvement in the trades;
 - c) Victor Lum falsely certified and confirmed to MK that he did not hold any positions or trade in securities that required disclosure or approval by MK; and
 - d) May Lum would have known the nature of Victor Lum's employment and that his trading instructions were based on inside information and that, given the nature of Victor Lum's employment and the specific nature of his trading directions, she should have made inquiries of Victor Lum and should not have executed the trades on his behalf.

b) Respondents

- [38] The respondents say that all allegations must be dismissed.
- [39] As to the insider trading allegations against Victor Lum under both subsection 57.2(2) and (5), the respondent, Victor Lum, says the following:
- At the times of the impugned sales of Baja shares from the Apulum accounts:
- Victor Lum did not have knowledge of any material fact or material change² regarding Baja that had not been generally disclosed; and
 - There is no evidence that Victor Lum had any interest, actual or beneficial, in the Apulum accounts and the executive director is estopped from arguing that Victor Lum had any such interest by the wording of paragraph 15 of the amended notice of hearing.

- [40] As to the public interest allegations against Victor Lum and May Lum, the respondents say the following:
- British Columbia lacks any real or substantial connection to the respondents or to the alleged public interest breaches.

² For ease of reference in these Findings, we use the term "material information" to refer to "material fact" or "material change" as defined in the Act.

- The alleged breaches by Victor Lum of MK policies and procedures are a matter of private law since they involve the employment relationship between Victor Lum and MK and have no territorial connection to British Columbia, involve persons with no connection to British Columbia and involve interpretation of policies and procedures subject to change over time and subject to inconsistent practices and application.
- Victor Lum did not breach any of MK's policies and procedures in respect of Baja.
- May Lum was the sole beneficial owner of all of the relevant Apulum accounts and the Lim & Tan account.
- While May Lum received certain trading suggestions from Victor Lum, there is no evidence that May Lum knew that any trading advice was based on inside information.
- There was no evidence that May Lum had detailed knowledge of MK Hong Kong's business, MK's investment portfolio, MK's employment policies, the specifics of Victor Lum's employment or that she had reason to believe that Victor Lum's conduct was improper or that he was not abiding by his employer's rules.
- May Lum's receipt and acceptance of Victor Lum's suggestions is equally or more consistent with one family member recognizing and relying in good faith on the particular expertise of another in a particular area.

[41] The respondents also suggested that this panel be wary of the documentary and summary evidence provided to the executive director by MK and its Canadian and US lawyers and through the testimony of Mr. M. The respondents pointed out that MK was in an adversarial position with Baja management and its board throughout the relevant period in 2012 and was also in a dispute with Victor Lum over payment of a \$1 million bonus to Victor Lum. MK had made complaints and submissions to several regulators regarding Victor Lum's conduct. The respondents also pointed out that Commission staff did not interview or call as witnesses any Baja personnel or either of the respondents.

IV Applicable Law

a) *Insider trading*

[42] Section 57.2(2) provides:

A person must not enter into a transaction involving a security of an issuer... if the person

- (a) is in a special relationship with the issuer, and
- (b) knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

[43] Subsection 57.2(5) says:

If a material fact or material change with respect to an issuer has not been generally disclosed, the issuer, or a person in a special relationship with the issuer with knowledge of the material fact or material change, must not recommend or encourage another person to enter into a transaction involving a security of the issuer or a related financial instrument of a security of the issuer.

[44] Section 3 provides:

For the purposes of sections 57.2 and 136, a person is in a special relationship with an issuer if the person

- (a) is an insider, affiliate or associate of
 - (i) the issuer,
 - (ii) a person that is proposing to make a take-over bid, as defined in section 92, for the securities of the issuer, or
 - (iii) a person that is proposing
 - (A) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with the issuer, or
 - (B) to acquire a substantial portion of the property of the issuer,
- (b) is engaging in or is proposing to engage in any business or professional activity with or on behalf of the issuer or with or on behalf of a person described in paragraph (a) (ii) or (iii),
- (c) is a director, officer or employee of the issuer or of a person described in paragraph (a) (ii) or (iii) or (b),
- (d) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge while in a relationship described in paragraph (a), (b) or (c) with the issuer, or
- (e) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge from another person at a time when
 - (i) that other person was in a special relationship with the issuer, whether under this paragraph or any of paragraphs (a) to (d), and
 - (ii) the person that acquired knowledge of the material fact or material change from that other person knew or reasonably ought to have known of the special relationship referred to in subparagraph (i).

[45] Section 1(1) provides:

"material fact" means... a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;

[46] Section 1(1) further provides:

“material change” ...[is]

- (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer; or
- (ii) a decision to implement a change referred to in subparagraph (i) made by
 - (A) the directors of the issuer, or
 - (B) senior management of the issuer who believe that confirmation of the decision by the directors is probable...

b) Materiality

[47] In this Commission's decision in *Canaco Resources Inc. (Re)*, 2013 BCSECCOM 310, some of the principles for determining a "material fact" were set out at paragraph 84 as follows:

1. The test for materiality is objective – would the fact or event reasonably be expected to significantly affect the market price or value of the securities?
2. The test for materiality is a market impact test. As stated in *YBM*, [*YBM Magnex International Inc. (Re)* (2000), 23 OSCB 1171.] "The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities."
3. The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event?
4. It is noteworthy that in some jurisdictions, the test for materiality is whether the fact or event is something that a reasonable investor would want to know. This is not the test under the Act. Information can be important to a reasonable investor without being "material". As stated in *Biovail*: "If a statement would be reasonably expected to have a significant effect on the market price or value of a security, then that statement would clearly be important to an investor in making an investment decision. However, it does not necessarily follow that a statement that is important to an investor in making an investment decision would reasonably be expected to have a significant effect on the market price or value of a security."
5. Materiality is assessed in the context of the issuer's industry and the market.

[48] The decision of the Ontario Securities Commission in *Re Donnini*, (2002), 25 OSCB 6225 at para. 110, emphasized the importance of determining what was "fact". The British Columbia Supreme Court in *Inmet Mining Corp. v. Homestake Canada Inc.*, 2002 BCSC 61, para. 108 (varied on other grounds 2003 BCCA 610), discussed what constitutes a "fact" as follows: "More importantly, by definition a fact is something that is true or that is precise information. The Oxford Dictionary defines a fact as a "thing that is known to have occurred or to be true, to exist, or be true...an item of verified information."

[49] As stated in *Canaco*, and in *Siddiqi (Re)*, 2005 BCSECCOM 416, at para. 87, the test of materiality of information is the market impact test:

...the expected impact the information would have on the market price or value of the issuer's securities.

[50] In *Canaco* the Commission panel said, at para. 100:

The analysis of the impact of a fact or event on market price requires the issuer to consider whether the information will change existing investor perception to an extent

sufficient to significantly affect market price. The questions the issuer needs to consider are: What is current investor perception of our business and prospects now? Would this information reasonably be expected to change that perception? If so, would the information reasonably be expected to change the perception to an extent sufficient to significantly affect market price?

[51] We have applied those principles to the alleged undisclosed material facts, in turn, below.

c) *Conduct contrary to the public interest*

[52] The executive director says that the conduct by the respondents alleged in the amended notice of hearing, while not contravening a specific provision of the Act, is conduct contrary to the public interest that warrants our making orders under section 161 against the respondents.

[53] We refer later in these Findings to the law regarding the jurisdiction of this Commission to make an order in respect of conduct contrary to the public interest in the absence of a breach of a specific provision of the Act.

d) *Standard of proof*

[54] 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 (at paragraph 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.

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

[56] We have applied these standards in making our Findings in this matter.

V *Analysis*

a) *Insider trading - Victor Lum*

[57] In order for the Executive Director to prove an allegation of insider trading against Victor Lum, he must provide clear, convincing and cogent evidence of all the required elements in subsection 57.2(2), including:

- a person
- in a special relationship with an issuer
- entered into a transaction involving a security of the issuer
- with knowledge of a material fact (or a material change)
- that has not been generally disclosed.

[58] It is not disputed that Victor Lum was a “person” and each impugned sale of Baja shares in the Apulum accounts was a “transaction involving a security of an issuer”. We find that those elements of subsection 57.2(2) have been established.

- [59] The respondents contested the executive director's proof of each of the other required elements of subsection 57.2(2), including whether it was Victor Lum, as opposed to May Lum, who entered into the impugned transactions involving Baja shares.

The May 18 sales of Baja shares in the Apulum accounts

- [60] The executive director conceded that his allegations that Victor Lum entered into transactions involving Baja securities with knowledge of material information regarding Baja that had not been generally disclosed depend upon Victor Lum's knowledge of the "details of the cost overrun," rather than the amount of the overrun itself. The executive director acknowledged that the amount of the cost overrun had been generally disclosed prior to the May 18 sales of the Baja shares in the Apulum accounts.
- [61] The executive director alleges two undisclosed material facts about the "details of the cost overrun" known by Victor Lum. The first relates to the percentage of project completion (Project Completion) and the second relates to the shortfall in funding required to complete the project (Funding Shortfall). Victor Lum's observations on these matters are set out in his notes on day 3 of his visit to the Boleo Project site, as follows:
- Flour (sic) reporting project completion at 50% which the company is representing to us as well. Clearly not the case from just a cursory drive thru the site. When pushed hard during our session w[ith] Flour (sic), it became clear that the reporting completion target (denominator) that the % project completion is reported is wrong and based off either superseded completion targets or not meaningful benchmarks.
 - Based on number of man hours estimated to completion, the Project is 30-35% completed. Based on project cash spent to date - ~50% - ~750MM spent against a completion budget of ~\$1.5BN (including revised escalation).

1. Project completion

- [62] The executive director alleges that Victor Lum had knowledge of the undisclosed material fact that the "project completion at 50%" was reported wrong, "based off either superseded completion dates or not meaningful benchmarks."
- [63] After examining all of the evidence regarding the percentage completion of the Boleo Project at or about May 18, 2012, we find that the material information about delays in construction along with numerous other significant factors affecting completion of the Boleo Project had been generally disclosed by that date.
- [64] The last reported percentage completion of the Boleo Project by Baja was as at the end of February which stated that construction was 37.2% complete. Baja confirmed that number as at that date and stated that construction was on schedule in its March 28, 2012 news release. Included in the documentary evidence was a construction schedule graph prepared by Baja which indicated that construction should be 50% completed by the end of April.

- [65] Victor Lum's notes do not state that Baja or Fluor, Baja's consultant, admitted that the reported percentage completion was wrong, the notes merely state that "it became clear" that the 50% number being reported by Baja and Fluor was wrong.
- [66] Victor Lum's notes indicate his opinion that the methodology used by Baja and Fluor to calculate percentage completion of construction was the problem. It was his impression that the percentage completion represented by Baja and Fluor was "Clearly not the case from just a cursory drive thru the site." Based on that impression and an estimate of man-hours required to complete, he advised the MK group that "the Project is 30-35% completed". This was not a "fact" but a statement of Victor Lum's opinion as to the percentage completion in mid-May.
- [67] Baja's own disclosures and those of the analysts whose reports are in evidence make it clear that numerous factors had led to the cost overruns announced in the April 23 Disclosures and also reflected that it was generally known that construction was behind schedule.
- [68] However, it was also clear from these disclosures that the delay in the construction completion schedule was not in and of itself the most important issue. Baja had disclosed that it had a liquidity crisis. The focus of concern was not construction delay itself but rather the necessity of making numerous adjustments to achieve completion in a timely manner so as to enable production to commence in the first half of 2013 and, even more importantly, the necessity of finding financing to keep the Boleo Project alive even through June 2012.
- [69] During the relevant period in the first half of 2012, the situation at the Boleo Project site and the implications for Baja were very volatile and perilous. The following matters were among the serious issues known to be facing the Boleo Project and Baja during this period, many of which signal the reality that the Boleo Project was delayed:
- inflationary cost pressures, difficult ground conditions at the mine site, delays and mining challenges due to managing around old mine workings, an inexperienced workforce and need for additional training of workers
 - delay in bringing on stream a second continuous mining machine and a high tech simulator
 - a preliminary capital cost analysis that indicated a total cost overrun of US\$400 million (consisting of a cost overrun of US\$246 million plus depletion of the existing contingency and cost overrun reserves) and lack of adequate funding to complete the project
 - defaults under debt covenants
 - need to meet with the Korean Consortium and other potential funding sources
 - managing site visits by investment analysts and investors
 - setting up a data room in Vancouver
 - complaints to regulators by MK and a complex petition by MK to the BC Supreme Court
 - a proxy battle over disclosure and governance issues
 - the challenge to cut costs
 - the need to change the mining plan and
 - changes in management and in the Baja Board of Directors.

- [70] We have thoroughly analysed Baja's disclosure, including its news releases, material change reports, its first quarter financial results and MD&A. We also closely reviewed five different reports published by analysts between March 29, 2012 and May 16, 2012. While the details may vary, there is no question in our minds that all of the issues set out above had been generally disclosed either by Baja in its public disclosure or by the investment firms' analysts who issued reports both before and after Baja's April 23 Disclosures.
- [71] All of the investment analysts' reports referred to above contained the opinions and predictions of the authors of those reports about the impacts of the facts known to them on the future of the Boleo Project and on Baja shares as an investment.
- [72] Both Baja and several of the investment analysts who reported on Baja indicated that Baja was looking at ways to speed up construction, change the mining plan and other measures to meet the announced goal to commence production in the first half of 2013. For example, Baja's April 25 news release stated: "Our objective is to continue to advance our Boleo Project so that copper production begins on schedule in the first half of 2013."
- [73] A reasonable investor would conclude from Baja's public disclosures in April and early May and from the analysts' published reports that the projected completion schedule was behind. Indeed, the descriptions of proposed steps to get back on schedule made it evident that construction was delayed.
- [74] We conclude that the factors affecting completion had been disclosed as well as the steps taken or to be taken to accelerate the rate of construction. Baja's stated position that production would start in the second half of 2013 was not only not wrong but was acknowledged by Victor Lum himself in his day 3 notes when he concluded that first production could commence by May 2013 (i.e. first half of 2013) provided that the funding shortfalls could be overcome by June 2012.
- [75] Thus, the delay in the schedule of completion in mid-May had been disclosed in the context of the overall circumstances of the Boleo Project. As such, whether the "project completion at 50%" was reported wrong, "based off either superseded completion dates or not meaningful benchmarks" was not at the relevant time in mid-May material undisclosed information.

2. Funding shortfall

- [76] This takes us to the second specific statement in Victor Lum's day 3 site visit notes relied upon by the executive director- that the completion budget was "~\$1.5BN".
- [77] The investment analysts who reported on Baja also made their own calculations of the additional funding required to complete the Boleo Project and suggested possible sources of the required capital and commented on the risks and consequences of such capital not being available in a timely way. Several of such estimates also exceeded the funding shortfall contained in the April 23 Disclosures by Baja. For example:

- The fourth report, published by Raymond James on April 25, 2012, estimated the capital cost of the project, including the spending of the contingency and cost overrun reserves, to be between \$1.4 and \$1.5 billion
- The fifth report, published by Canaccord Genuity on May 16, 2012, estimated the capital cost to be approximately \$1.447 billion.

[78] We find that the various estimates of the cost to complete and, implicit in that, the owners' funds needed to be raised, whether set out by Baja, the other analysts or by Victor Lum, had been extensively generally disclosed by Baja in its public disclosures and by the analysts who made visits to the Boleo Project site. All of these disclosures took place before the first sale of Baja shares from the Apulum accounts on May 18.

The June 5, 2012 sales of Baja shares in the Apulum accounts

- [79] As noted above, Victor Lum was not present at Baja's head office in Vancouver for MK's further due diligence on Baja and the Boleo Project following the site visit. We have examined the evidence of what information Victor Lum learned regarding "the details of the cost overruns" at the Boleo Project between the May 18 and June 5 sales of the Baja shares in the Apulum accounts.
- [80] Having already found that Victor Lum was not aware of any material information that had not been generally disclosed at the time of the May 18 sales, we find that there is insufficient evidence to conclude that he became aware of any new material information that had not been generally disclosed at the time of the June 5 sale of Baja shares in the Apulum accounts.
- [81] In addition, regarding the June 5, 2012 sale of Baja shares in the Apulum accounts, there is no evidence of any direction or instruction by Victor Lum to May Lum to carry out the sale of the remaining Baja shares in the Apulum accounts on June 5 or any other date or at any price or in any quantity.
- [82] The only evidence offered by the executive director that could support Victor Lum's involvement in the June 5 sales are his directions to May Lum on May 18 to sell "half of our position" and "Just sell slowly over course of the day until we get to half sold". May Lum carried out those instructions on May 18. The only other communication in evidence between Victor Lum and May Lum regarding the June 5 sales is May Lum's text message to Victor Lum on June 6: "All sold at 0.195."

Indicators of Materiality and Previous Disclosure- Market Impact

- [83] Although market reaction to publicly disclosed information is not determinative of the issue of the materiality of that information, our conclusion that any information known to Victor Lum by the time of the May 18 and June 5 trades had already been generally disclosed is supported by the manner in which the market reacted after the June 21 Disclosures. The executive director takes the position that this disclosure by Baja set "out the details of the cost overrun for the first time." These are said to be the details of which Victor Lum was aware when the impugned transactions took place on May 18 and June 5.

- [84] There is no dispute that Baja's April 23 Disclosures regarding the cost overruns and highlighting Baja's lack of funding and its liquidity crisis reported material information. Trading in Baja shares from April 17 to 20 was quite consistent, with prices between \$0.91 and \$0.98 per share and generally modest volumes, with higher volume on April 20. After Baja's April 23 Disclosures, prices fell to a low between \$0.34 and \$0.39 between April 24 and April 30 and volumes increased substantially between April 23 and 26. Clearly, the market treated the Baja April 23 Disclosures as material.
- [85] Baja's June 21 Disclosures update the capital cost analysis, but note that capital cost review work was yet to be completed. The June 21 Disclosures reiterate that the estimated cost overrun is US\$246 million plus the contingency and cost overrun reserves making a total of US\$400 million. They go on to state that this does not account for additional delay costs, additional working capital, financing costs and cobalt and zinc contingency. Management estimated these additional costs to be in the range of US \$50 million to US\$150 million bringing the estimated total capital costs to be in the range of US\$1.617 billion to US\$1.717 billion.
- [86] There was no significant market reaction following Baja's June 21 Disclosures, even though the executive director argues this is the first public disclosure of the details of the cost overruns known to Victor Lum. This is so even where Baja's revised estimated total capital costs exceeded Victor Lum's estimate of approximately US\$1.5 billion stated in his day 3 notes by between US\$117 million to US\$217 million. Between June 18 and 20, Baja shares traded at between \$0.17 and \$0.22. Following Baja's June 21 Disclosures, the Baja shares traded on June 22 to June 29 at between \$0.19 and \$0.22 with relatively small volume changes before and after the announcement.

Conclusion on Insider Trading Allegation

- [87] We find that the executive director has not established on the balance of probabilities that Victor Lum had knowledge of material information that had not generally been disclosed prior to the sale of Baja shares in the Apulum accounts on May 18 and June 5, 2012.
- [88] Based on this finding, it is unnecessary for us to consider whether Victor Lum was in a special relationship with Baja or whether he entered into a transaction involving Baja securities.
- [89] We dismiss the allegations that Victor Lum acted contrary to subsection 57.2(2) of the Act.

b) Insider trading- recommending or encouraging May Lum

- [90] The executive director alleges that Victor Lum breached subsection 57.2(5) by recommending or encouraging May Lum to enter into a transaction involving a security of Baja with knowledge of material information with respect to Baja that had not been generally disclosed.
- [91] The evidence of Victor Lum's communications with May Lum regarding the May 18, 2012 sales of Baja shares in the Apulum accounts consisted of directions or instructions that were carried out by May Lum. The language of subsection 57.2(5) should be read broadly to achieve the purpose of the section. Thus, we find that Victor Lum's directions and instructions constituted recommending or encouraging May Lum to sell Baja shares and she did so.

- [92] There is insufficient evidence with respect to the June 5 sales of Baja shares that Victor Lum recommended or encouraged May Lum to sell the shares.
- [93] It is fundamental to proving the allegations against Victor Lum of breach of subsection 57.2(5) that there is clear and convincing evidence that Victor Lum had knowledge of material, undisclosed information regarding Baja at the time or times that he recommended or encouraged May Lum to sell shares of Baja in the Apulum accounts.
- [94] We have determined that the executive director has not proven on the balance of probabilities that Victor Lum knew of material information with respect to Baja that had not been generally disclosed at the time he recommended or encouraged May Lum to sell the Baja shares in the Apulum accounts on May 18, 2012.
- [95] Accordingly, we find that the executive director has not proven on the balance of probabilities that Victor Lum breached subsection 57.2(5).

c) *Conduct contrary to the public interest*

- [96] We now turn to the allegations that both Victor Lum and May Lum acted contrary to the public interest regarding trades in the Apulum accounts and in the Lim & Tan account in securities of Baja and four other named issuers. The executive director alleges that the respondents' conduct described in the amended notice of hearing "harmed the credibility, reputation and integrity of the Province's securities market and regulatory environment".
- [97] In addition to the evidence regarding trading in the securities of Baja, the evidence introduced by the executive director included evidence regarding securities of several other issuers (both the four named in the amended notice of hearing as well as others) in which some MK investment accounts and the Apulum or Lim & Tan accounts had also traded.
- [98] In the recent decision of this Commission in *Wood (Re)*, 2015 BCSECCOM 28, the panel confirmed at para. 73 that the Commission has "...the authority under section 161 to make an order against the respondent without finding a specific contravention of the Act", confirming the authority recognized in *Lohrisch (Re)*, 2012 BCSECCOM 237 and *McCabe (Re)*, 2014 BCSECCOM 269.
- [99] The Commission panel in *Wood* also stated at para. 74 that "(t)his authority must be exercised cautiously but must be exercised where protection of the public interest requires it."
- [100] The conduct referred to in the amended notice of hearing is that:
- the exchange of text messages between Victor Lum and May Lum contained specific directions and instructions for buying and selling various securities and confirmations of the transactions carried out according to such directions and instructions
 - Victor Lum "had been involved in assessing the investment potential of some of the [issuers]"
 - Victor Lum failed to disclose to MK that he held positions in securities that required disclosure to or approval by MK
 - by "having May Lum execute the trades, the Respondents concealed [Victor Lum's]

involvement in the trades” and

- May Lum would have known the nature of Victor Lum’s employment and that his trading instructions were based on inside information and, given the nature of Victor Lum’s employment and the specific nature of his trading directions, May Lum should have made inquiries of Victor Lum and should not have executed the trades on his behalf.

[101] Commission panels, such as in *Wood* and *Jin (Re)*, 2014 BCSECCOM 194, have stated reluctance to find conduct contrary to the public interest based on the same conduct on which a breach of a specific provision of the Act is alleged. As outlined in the recent decision *Re Carnes*, 2015 BCSECCOM 187 at para. 131:

In the Enforcement context, where the Act prohibits specific conduct, and an allegation involving that type of conduct is found not to contravene the Act, then only in very rare circumstances would it be in the public interest to issue an order based on that same conduct.

[102] We share that reluctance in this case based on our dismissal of the allegations against Victor Lum of breaches of the specific insider trading and recommending and encouraging provisions of the Act.

[103] Thus, for the purpose of examining whether Victor Lum’s conduct was contrary to the public interest, we will not consider his conduct as it relates to the specific insider trading, recommending and encouraging allegations. However, we will consider other conduct by Victor Lum relating to Baja that is not specific to the insider trading, recommending and encouraging allegations. This conduct is similar to the conduct alleged regarding trading in securities of the other four issuers named in the amended notice of hearing and the other issuers not named in the amended notice of hearing but about which evidence was entered and submissions made (collectively, the Issuers).

[104] The evidence shows a similar pattern of text messages from May to November, 2012 between Victor Lum and May Lum containing trading directions or instructions for purchases and sales of Baja and the other Issuers and confirmations and other details of the transactions. As in the case of Baja, these directions or instructions from Victor Lum do not contain any reference to the reasons or rationale for making these purchases and sales, do not refer to any role that Victor had at MK or any involvement he had in assessing the investment merits of any of these Issuers or any information about the Issuers. Again, similar to the Baja transactions, May Lum never questioned the directions or instructions received from Victor and she carried out each transaction exactly as directed or instructed by Victor Lum.

[105] The essence of the public interest allegation against Victor Lum is that he breached MK’s policies and procedures by not disclosing his interest in securities of issuers held in MK’s investment portfolios and did not seek approval to trade in securities in MK’s investment portfolios or named in MK’s Restricted List from time to time. In doing so, the executive director says that Victor Lum “abused his position at MK...used his position and his knowledge

as an employee of MK and as a registrant [in Hong Kong] to violate securities laws and to conceal his trading activities from both regulators and from his supervisors.”

- [106] The executive director also argued that Victor Lum “...deceived his employers. He filed reports, repeatedly confirming that he ...did not have any accounts and was not trading. He provided false information to his employer, who is tasked with monitoring and regulating its employees especially because they are registrants and have information which is not available to the average investor...[Victor Lum] failed to disclose his interest in May’s account and his trading through her account to MK Capital, which prevented MK Capital from performing its oversight duties.”
- [107] Similar to the reasoning in *McCabe*, the totality of the respondent’s conduct is relevant in determining if an allegation of conduct contrary to the public interest has been proven. We may look at the totality of the facts and circumstances to determine if a conduct contrary to the public interest order is warranted in this case.
- [108] MK is not a registrant in any capacity in British Columbia. MK has no office or other place of business in Canada or any representatives who are resident in Canada.
- [109] MK’s policies and procedures are set forth in a lengthy Manual with many appendices and purport to apply to all of the entities in the MK structure. They are stated to be created under US law but to apply in the various jurisdictions where MK has offices and employees. The MK policies and procedures set out in the Manual are stated to be for the purpose of assisting MK to comply with US federal and state laws and to avoid violation by MK of US law and laws and regulations of other governments but also to protect the interests of MK’s clients. Compliance with the Manual is primarily a private matter governed by foreign law. The governing law of Victor Lum’s employment contract is stated to be New York State law.
- [110] We conclude that it is not in the public interest to make an order under section 161 based solely on Victor Lum’s alleged non-compliance with the Manual.
- [111] Further, we cannot conclude, based on the evidence before us, that Victor Lum’s conduct violated the Manual. It is not clear that the Apulum accounts or the Lim & Tan account would be found to be “personal accounts” of Victor Lum as defined in the Manual. Nor is it clear on the evidence before us that he deceived his employer when he filed confirmations stating that he held no accounts and did no trading.
- [112] The executive director also submitted that Victor Lum’s failure to disclose to MK his interest and trades in Baja shares made it impossible for MK to report accurately its ownership position regarding Baja shares. However, the Alternative Monthly Report that MK filed under National Instrument 62-103 required MK to disclose the ownership or control of MK and its “joint actors” in Baja shares. Even if Victor Lum had an interest in Baja shares, he was not a joint actor, as defined in NI 62-103, with MK and any failure to advise MK of his interest did not affect the accuracy of MK’s Alternative Monthly Reports.
- [113] MK also maintained a Restricted List which prohibited investment by any MK employees in securities of issuers on the Restricted List without prior approval. There are evidentiary issues related to the Restricted List:

- In his testimony, Mr. M. admitted that not all employees were told of the issuers listed from time to time on the Restricted List. Indeed Baja was never on MK's Restricted List. Only one of the issuers involved in the conduct contrary to the public interest allegations was on the Restricted List but there was no evidence that Victor Lum was aware of that.
- There was also evidence that MK employees were sometimes given permission to trade in securities on the Restricted List.

[114] In the transactions involving securities of each of the Issuers regarding the public interest allegations, the Apulum or Lim & Tan accounts purchased and sold some securities somewhat in tandem with purchases and sales of the same securities in MK accounts. However, the timing was not always close. For example, the first purchase of Baja shares in the Apulum accounts took place in September 2010. The second purchase of Baja shares in the Apulum accounts took place in March 2011 at virtually the same time as MK made its first purchase of Baja shares. MK purchased securities of one of the Issuers during April to June in 2012 and again in late November 2012. The Apulum account made its purchase of securities of that Issuer on September 13, 2012.

[115] The level of involvement of Victor Lum as an employee of MK varied from issuer to issuer. As described above, Victor Lum had a significant role to play in MK's investment in Baja. In the case of three of the Issuers, Victor Lum was part of the MK team that recommended investment by MK in these Issuers. In the case of three other Issuers, there was no evidence of any involvement of Victor Lum in investment decisions made by MK. There was no evidence that MK had any investment at all in securities of two other Issuers.

[116] Even though Victor Lum, in his capacity as an employee of MK, had some knowledge about MK's decisions to buy or sell securities and the timing of such transactions and, in some cases, had a role in reviewing these Issuers and recommending investment by MK, there is no evidence that any of the trades in the Apulum accounts (other than the sale of Baja shares discussed above) or in the Lim & Tan account were made while Victor Lum was aware of any material information concerning any of these Issuers and there is no allegation or evidence that this was the case.

[117] While some of the Issuers have connections to British Columbia, not all do:

- Baja was a reporting issuer in British Columbia with its head office in Vancouver and its shares were listed on the TSX-V.
- One other was also a reporting issuer in British Columbia with its head office in Vancouver.
- Two were reporting issuers in British Columbia.
- Two were public companies but not reporting issuers in British Columbia.
- There is no evidence of any connection to British Columbia of two others.

[118] We do not condone the conduct of Victor Lum. His conduct was potentially adverse to the interests of MK and MK's clients. To have an employee of MK directing and instructing a third party to trade in securities known by the employee to be held in his employer's investment portfolios potentially puts the employee and that other party in competition with the employer

and its clients. The practice of Victor Lum to give directions or instructions to May Lum in some instances to mirror buy or sell transactions by MK was not in MK's interests or those of its clients, regardless of the application of any of MK's practices or policies.

- [119] As noted above, we are unable to conclude that Victor Lum's conduct affected MK's ability to make accurate regulatory filings. This argument, if clearly made out, would provide support for a public interest finding at least regarding issuers with a substantial connection to British Columbia, such as being a reporting issuer with a head office in Vancouver. However, it would be "incautious and imprudent" for this panel to exercise its public interest jurisdiction in this matter to make orders where the issuers and respondents have limited, if any, connection to British Columbia.
- [120] Even regarding those issuers with a substantial connection to British Columbia, we conclude that the executive director has not proven on a balance of probabilities that Victor Lum breached the MK Manual or that public interest orders are necessary as a consequence of the trading in these Issuers when these trades were in tandem with trades by Victor Lum's employer, MK.
- [121] In *Wood*, the Commission panel found that the fact that the respondent was a registrant in British Columbia was an important basis for exercising the Commission's public interest jurisdiction. In this case, Victor Lum was a registrant in Hong Kong but not in British Columbia or elsewhere in Canada. The *Wood* panel also found that the respondent set up an offshore trading structure to deceive his employer and that he lied to his employer. In this case, the executive director has not proven that Victor Lum had any role in setting up the structure of the Apulum accounts or that he lied to his employer. In *Wood*, the respondent repeatedly traded securities of issuers on his employer's restricted list. In this case, there was evidence of trading in securities of only one issuer on MK's Restricted List and no evidence that Victor Lum was aware that this issuer was on the Restricted List.
- [122] Accordingly, examining the totality of the evidence of Victor Lum's conduct we decline to issue a finding that Victor Lum's conduct was contrary to the public interest.
- [123] Turning to the allegations of conduct contrary to the public interest against May Lum, we find even less justification for an adverse order.
- [124] Although May Lum is a qualified lawyer, she is not a registrant in any area related to securities regulation. As far as the evidence shows, she is only an investor through the Apulum accounts and the Lim & Tan account. There is no direct evidence that May Lum ever received any inside or confidential information from Victor Lum. She simply received and executed trading directions or instructions. There is no evidence that May Lum even knew who Victor Lum's employer was, or what business he was in or what his duties were. The text messages from Victor Lum to May Lum contained the names of issuers and securities but there is no evidence that May Lum had any other information at all about these issuers, MK, its investment portfolio, that Victor Lum was giving directions to trade in tandem with MK or any role of Victor Lum in assessing the investment potential of any of these issuers.

- [125] The executive director leans heavily on two of the hundreds of text messages between Victor Lum and May Lum in evidence and invites the panel to infer from these two text messages that May Lum must have known a great deal about Victor Lum's employer, its business, Victor Lum's duties and responsibilities, his knowledge of issuers and the securities in MK's investment portfolio and that Victor Lum was giving her trading instructions and directions based on undisclosed material information.
- [126] These text messages were one in which May Lum queried why her call to Victor Lum's mobile phone was forwarded to his office phone. The other was May Lum's text to Victor Lum wishing him a safe trip sent the day before his trip to the Boleo Project site.
- [127] To infer from these two apparently innocuous text messages that May Lum possessed all of the detailed knowledge referred to above and more would be completely speculative.
- [128] Accordingly, examining the totality of the evidence of May Lum's conduct and the absence of any real and substantial connection to our jurisdiction, we decline to issue a finding that May Lum's conduct was contrary to the public interest.

VI Summary

- [129] In summary, we have found that the executive director has failed to prove on the balance of probabilities that Victor Lum breached subsection 57.2 (2) or subsection 57.2(5) of the Act and we dismiss those allegations. We also will not exercise our discretion to make an order in the public interest under section 161 against Victor Lum or May Lum and we dismiss the conduct contrary to the public interest allegations against them.

July 13, 2015

For the Commission

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner