

**ALBERTA SECURITIES COMMISSION**

**RULING**

**Citation: Re Cohodes, 2018 ABASC 161**

**Date: 20181010**

**Marc Culver Cohodes**

<b>Panel:</b>	Tom Cotter Kari Horn
<b>Representation:</b>	Don Young for Commission Staff  Andrew Wilson Hansen Wong for the Respondent
<b>Submissions Completed:</b>	August 15, 2018
<b>Decision:</b>	October 10, 2018

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>EVIDENCE .....</b>	<b>2</b>
	A. Vanderberg Affidavit .....	2
	B. Cohodes Affidavit.....	4
	C. Staff Affidavit .....	5
<b>III.</b>	<b>LAW.....</b>	<b>5</b>
	A. Interim Orders .....	5
	B. Misrepresentations .....	6
	C. Market Manipulation .....	8
<b>IV.</b>	<b>POSITIONS OF THE PARTIES .....</b>	<b>9</b>
	A. Staff.....	9
	B. Cohodes.....	10
<b>V.</b>	<b>ANALYSIS .....</b>	<b>10</b>
	A. <i>Prima Facie</i> Determination .....	10
	B. Alleged Contraventions .....	11
	1. Section 92(4.1) – Misrepresentation .....	11
	(a) The Short Thesis .....	11
	(i) Untrue or Misleading? .....	11
	(ii) Conclusion .....	12
	(b) Illegal Toxic Dumping Statements Preceding the June 27 Tweet ..	12
	(i) Untrue or Misleading? .....	12
	(ii) Conclusion .....	13
	(c) The June 27 Tweet .....	13
	(i) Untrue or Misleading? .....	13
	(ii) Materiality?.....	15
	(iii) Conclusion .....	18
	2. Section 93(a)(ii) – Market Manipulation .....	18
	(a) Act, Practice or Course of Conduct Relating to a Security?.....	18
	(b) Artificial Price?.....	19
	(c) Conclusion .....	20
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>20</b>

## I. INTRODUCTION

[1] On August 3, 2018, staff (**Staff**) of the Alberta Securities Commission (the **ASC**) issued a notice of application (the **NOA**) under s. 33 of the *Securities Act* (Alberta) (the **Act**), further to which they sought certain orders under s. 198 against Marc Culver Cohodes (**Cohodes**). The orders sought would have barred Cohodes from trading in securities of Badger Daylighting Ltd. (**Badger**) and prohibited him from "disseminating to the public, or authorizing the dissemination to the public, any statements relating to the business or operations of Badger that he knows or reasonably ought to know are misleading or untrue, or which fail to state a necessary fact for the statements not to be misleading".

[2] Staff's NOA stated that the grounds for the application were that Cohodes:

- (a) held a short position in securities of Badger;
- (b) "misrepresented on social media a picture of a Badger truck as support for his allegation of illegal toxic dumping" and "[h]as made numerous public claims of a similar nature over a period of more than a year, coinciding with the acquisition of his short position";
- (c) contravened s. 92(4.1)(a) of the Act "by making statements that he knew or reasonably ought to have known w[ere] misleading or untrue, or which failed to state a necessary fact for the statements not to be misleading";
- (d) contravened s. 93(a)(ii) of the Act "by engaging or participating in an act, practice or course of conduct relating to the securities of Badger that he knew or reasonably ought to have known would result in or contribute to an artificial price for those securities";
- (e) "is a threat to the integrity of the capital market in Alberta and its investing public, warranting protective action in the public interest"; and
- (f) posed an extant threat to the market, "making the length of time required to conduct a hearing prejudicial to the public interest".

[3] At the hearing of Staff's application, Staff and counsel for Cohodes made oral submissions and filed affidavit evidence. Staff submitted two affidavits in support of the application: one sworn on August 2, 2018 by the president and chief executive officer of Badger, Paul Vanderberg (**Vanderberg**; we refer to his affidavit as the **Vanderberg Affidavit**), and one sworn on August 13, 2018 by a Staff investigator (the **Staff Affidavit**). Cohodes swore an affidavit on August 13, 2018 in opposition to the application (the **Cohodes Affidavit**).

[4] Following the hearing, we delivered a short ruling dismissing the application on the basis that Staff had not established *prima facie* contraventions of the Act by Cohodes as alleged. We indicated that written reasons for our ruling would follow. These are our reasons.

## II. EVIDENCE

[5] The following is a summary of some of the evidence pertinent to the application. Certain evidence is discussed in more detail later in these reasons.

### A. Vanderberg Affidavit

[6] According to Vanderberg, Badger is a Calgary-based company founded in 1992 and incorporated in Alberta. Its shares are publicly traded on the Toronto Stock Exchange under the symbol "BAD". It is in the business of providing excavation services in Canada and the United States (the **U.S.**) using a hydrovac excavation system. After excavating materials for customers, Badger transports and disposes of those materials as the customers direct.

[7] While Badger sometimes deals with hazardous or toxic materials, Vanderberg stated that it only does so "as allowed by applicable laws and regulations". He also stated that its customers are the owners of the materials Badger excavates and are responsible for characterizing them as hazardous or toxic and for designating an appropriate site for disposal.

[8] Vanderberg indicated that he understood Cohodes to be a "self-described 'short seller' based in California". Appended as an exhibit to the Vanderberg Affidavit was a copy of an article about Cohodes posted online by [www.bloomberg.com](http://www.bloomberg.com) in October 2016 (the **Bloomberg Article**). The author described him as a "rambunctious" short-seller who "famously sparred" with a number of high-profile companies. According to the article, Cohodes was betting against stocks of various Canadian issuers.

[9] On Friday, May 12, 2017, Badger released its financial results for the first quarter of 2017 (the **Q1 2017 Results**). On the same day, Cohodes publicly announced that he had begun "shorting" Badger's shares four months previously, and that he was about to launch a website called [www.turnoutthebadgerdaylight.com](http://www.turnoutthebadgerdaylight.com) (the **Website**).

[10] Also on May 12, 2017, Veritas Investment Research Corporation (**Veritas**), a Canadian equity research firm, issued a report placing Badger on "accounting alert". Vanderberg observed that while Veritas had been making inquiries of Badger for over two years, it did not release its report until the same day Cohodes announced his short position and the launch of the Website.

[11] The Website went live a few days after May 12, 2017, and included a slide presentation outlining Cohodes' "short thesis on Badger" (the **Short Thesis**). Vanderberg claimed that this document "contained numerous statements that were misleading or false", but did not indicate which statements or provide any information to indicate how they were misleading or false. Vanderberg went on to state that since May 12, 2017, Cohodes had "escalated his rhetoric and allegations" and continued to make "false representations to the public regarding Badger" online, in the media, and at analyst conferences.

[12] The Vanderberg Affidavit then addressed Cohodes' social media "Twitter" account postings. Vanderberg indicated that as of the beginning of August 2018, Cohodes had about 25,600 Twitter followers and had posted approximately 160 "Tweets" concerning Badger between May 12, 2017 and July 10, 2018. Copies of those Tweets were attached to the Vanderberg Affidavit. As Vanderberg pointed out, many of them claimed that Badger was guilty of illegally

dumping toxic waste. Others said that Badger is a fraud and a "criminal operation". Some claimed that Cohodes had evidence – including tapes – to prove such criminal conduct, and that a Badger executive would be criminally charged.

[13] Vanderberg denied that any of these claims were true, and stated that he had no knowledge of any illegal activities.

[14] One Cohodes Tweet in particular was highlighted in the Vanderberg Affidavit, and by Staff in oral submissions. On June 27, 2018, Cohodes Tweeted a photograph of a Badger truck in the darkness, in dump position, with the following text: "Just a Sign of Things to come with **Badger** Daylight and their ILLEGAL TOXIC DUMPING.. **\$BAD** this is not a Dumpsite but a field . . . Your Day is coming. . ." (original emphasis) (the **June 27 Tweet**). In reply, another Twitter user stated in part, "[f]amily is in this industry. I will tell you this could be 100% legal depending on what they had in the tank. [Our] business has used the same trucks for cleaning out. . .". Cohodes replied, "I get that. . . except it was tested. . . Rules in Canada are different than the states [sic].. Time will tell". There was no further evidence with respect to who "tested" what and what was found as a result of that testing, nor which "Rules in Canada are different" than those in the U.S.

[15] According to Vanderberg, the photograph was not a picture of illegal toxic dumping; it was actually a picture taken by one of Badger's operating partners and posted online to show lighting that had been installed on the truck for nighttime operations. Vanderberg pointed out that the location was not a "field" as Cohodes claimed in the June 27 Tweet, but rather was a client's oil and gas lease facility – on which material had been excavated by Badger and deposited in accordance with the client's directions.

[16] Vanderberg described similar "false representations" Cohodes made about Badger both in the media and during his appearance at an investor conference held by Veritas in Toronto on June 26, 2018. Vanderberg again denied that any of Cohodes' allegations were true, and repeated that he was unaware of any such illegal activities.

[17] On April 30, 2018, ASC investigative Staff sent Vanderberg a letter stating that the ASC was closing an investigation into "allegations by short sellers of accounting and disclosure related breaches of Alberta securities laws" by Badger, and no further enforcement action would be taken. The letter gave Badger permission to disclose this information, and Badger issued a news release in that regard on May 2, 2018.

[18] Finally, the Vanderberg Affidavit addressed the "Market Impacts of Cohodes' Statements". Vanderberg said he had observed a correlation between "Cohode[s] false allegations" and "notable drops in Badger's stock price and spikes in trading volumes". He also said that "shareholders" told Badger they were selling their shares in the weeks following May 12, 2017 "because of short seller allegations". He gave an example that he claimed supported this assertion, which is discussed later in these reasons.

[19] The Vanderberg Affidavit concluded with Vanderberg's stated belief that if Cohodes were "permitted to continue making false statements about Badger, there will be substantial harm to

Badger's investors, Badger's business and reputation, and the Canadian and Alberta capital markets".

## **B. Cohodes Affidavit**

[20] According to the Cohodes Affidavit, Cohodes was once the general partner of an investment management firm, but he is now the owner of a farm in California. He has experience analyzing corporate accounting and management, which included, as he described it, identification of "a number of 'high-flying' companies, whose stock price was inflated through accounting manipulations and misrepresentations to the public". He mentioned some of the companies he has reported to the U.S. Securities and Exchange Commission (the **SEC**) over the years, which in some cases saw legal action taken by regulators and law enforcement agencies or had other consequences for the companies in question.

[21] Cohodes indicated that more recently, he had identified a number of Canadian companies he suspected had "improper accounting and management practices". He described two in particular which he said subsequently faced consequences from those practices. Typically, he said, when he identifies a publicly-traded company whose records suggest such improper practices, he takes a short position and sometimes reports the matter to the appropriate regulators and posts his findings online. He denied publishing false information about such companies, and pointed out that doing so would only harm his reputation and the success of his own trading practices.

[22] Cohodes confirmed that he holds a short position in Badger, and has held it for over a year. He acquired the position based on a number of factors, including his identification of what he felt were "items of concern on Badger's financial statements". He summarized his views in the Short Thesis he posted on the Website in mid-May 2017. A copy of the Short Thesis was attached to the Cohodes Affidavit. It is lengthy, and explains in some detail the reasons for his views on Badger.

[23] Like Vanderberg, Cohodes noted that Badger released its Q1 2017 Results on May 12, 2017, the same day Veritas released its negative report about the company. Cohodes denied any connection with Veritas or its report, and focused on the fact that the Q1 2017 Results were largely negative, reporting much lower earnings per share than had been expected by the market (\$0.10 per share versus the expected \$0.32 per share). It was his view that any drop in Badger's share price on May 12, 2017 was attributable to the Q1 2017 Results – not to his Short Thesis or Veritas' report. Moreover, he noted that Badger had "failed to make any real attempt to refute [his] accounting and financial analysis".

[24] With respect to his allegations of illegal dumping by Badger, Cohodes said he received that information from "a number of whistleblowers" who contacted him after he posted his Short Thesis. On June 27, 2017, he posted a request that anyone with additional information in this regard contact him.

[25] Cohodes said that since the June 27, 2017 post, he has collected "extensive information" regarding illegal dumping by Badger, both from whistleblowers connected or formerly connected with Badger, and from his own "investigations". He briefly outlined some of this evidence in the Cohodes Affidavit, and attached as an exhibit a copy of an undated statement he said he obtained from a former Badger employee in California – whom he did not identify by name. The statement

described some instances of "questionable" and possibly "illegal" dumping, and indicated that the author had heard similar stories from co-workers working in other states.

[26] Based on this evidence, Cohodes stated he believes that his allegations of illegal dumping are true. However, since the evidence he provided to authorities in the U.S. led to investigations, Cohodes said he has been asked not to disclose any further details and has "not made any public statements regarding illegal dumping by Badger since June 27, 2018". He indicated a willingness to share his information with the ASC, but only if "appropriate confidentiality protections are put in place".

[27] Finally, Cohodes opined that the statements in the Vanderberg Affidavit correlating Cohodes' public commentary with drops in Badger's share price appeared to be "deliberately misleading". He highlighted the fact that the timing of the release of the Q1 2017 Results coincided with the negative trading in May 2017, and reiterated that he had not made any allegations of illegal dumping at that time. Cohodes also contended that Badger's share price remained almost the same following his June 27 Tweet as it was before, and pointed out several occasions when he made negative public comments about Badger, after which its share price was either virtually unchanged or actually increased.

### **C. Staff Affidavit**

[28] The body of the Staff Affidavit was short, and simply appended copies of recent Tweets by Cohodes.

[29] This included a number of Tweets dated August 9 through August 11, 2018, posted both by Cohodes and by third parties communicating with or about Cohodes. Most merely addressed (and criticized) the fact that this application was brought by Staff, and thus had no relevance to the merits of the application. A few of Cohodes' Tweets repeated his allegations of illegal dumping by Badger, and were presumably included by Staff to rebut Cohodes' assertion that he has "not made any public statements regarding illegal dumping by Badger since June 27, 2018".

## **III. LAW**

### **A. Interim Orders**

[30] Section 33 of the Act gives the ASC the authority to respond promptly to threats to the integrity of the Alberta capital market, including by making temporary orders that implement the preventative and protective measures available under s. 198. We must be satisfied that such orders are in the public interest, and that the length of time necessary to conduct a full enforcement proceeding and render a decision could be prejudicial to that interest (*Re York-Rio Resources Inc.*, 2009 ABASC 112 at para. 11; see also *Re Omega Securities Inc.*, 2017 LNONOSC 677 at paras. 18-19). The latter element presupposes that Staff are in the process of investigating the respondent.

[31] The panel in *York-Rio* also said the following with respect to the ASC's authority under s. 33 of the Act (at para. 11):

This authority enables the [ASC] to move swiftly to protect Alberta investors and the Alberta capital market where circumstances warrant. It is an important – indeed, vital – tool in the [ASC's] public-interest arsenal. Orders so made, however, are merely interim protective measures; they are not sanctions for misconduct in the same sense as orders that might be made after an investigation is

completed, a hearing held, and actual misconduct found on the basis of the evidence and argument presented at the hearing.

[32] Section 198(1) of the Act provides for a variety of measures to address capital market misconduct, including those intended to halt certain types of capital market activity. This includes orders which would prohibit a party from trading in or purchasing certain securities (s. 198(1)(b)), and orders which would prohibit a party from disseminating to the public specified information or materials (s. 198(1)(f)).

[33] The threshold Staff must meet on an application under s. 33 is relatively low: they need only establish on a *prima facie* basis that Alberta securities laws have been contravened as alleged (see *Omega* at para. 22).

[34] We agree with the following statements of the Ontario Securities Commission (the **OSC**) panel in *Omega* (at paras. 23 and 25):

It is clear . . . that the issuance of a temporary cease trade order is an extraordinary remedy and one that should not be exercised lightly. . . . [T]he evidence required may fall short of that which Staff would be required to produce at a hearing on the merits, but must amount to more than mere suspicion or speculation.

...

[A *prima facie* case is established where]:

- a. the available evidence supports the material parts of the allegation(s) made by Staff; and
- b. in the opinion of the [OSC], the evidence appears to be credible and reliable, having regard to all of the circumstances, including its source, detail, and the presence or absence, at this preliminary stage, of any explanations or evidence that may contradict it.

[35] As noted, the contraventions alleged in the NOA against Cohodes are that he made statements with respect to Badger that he knew or reasonably ought to have known were misrepresentations (contrary to s. 92(4.1)(a) of the Act), and that he engaged in conduct that he knew or reasonably ought to have known would create an artificial price for Badger's securities (i.e., market manipulation, contrary to s. 93(a)(ii)).

## **B. Misrepresentations**

[36] Section 92(4.1) of the Act provides:

- (4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know
  - (a) in any material respect and at the time and in the light of the circumstances in which it is made,
    - (i) is misleading or untrue, or
    - (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,

and

- (b) would reasonably be expected to have a significant effect on the market price or value of a security . . .

[37] In *Re Arbour Energy Inc.*, 2012 ABASC 131 (at para. 753), an ASC panel enunciated a three-part test for determining whether or not a contravention of s. 92(4.1) of the Act has been established. Staff must prove that:

- (i) a statement was made by a respondent; (ii) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; [and] (iii) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security . . . .

[38] As explained in *Arbour*, the "determination as to whether untrue or omitted facts would reasonably be expected to have a significant effect on the market price or value placed on securities by reasonable investors" is essentially a determination as to "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (at para. 765).

[39] While investor and expert evidence on the issue of materiality and market impact may be of assistance to ASC hearing panels in some circumstances, neither is required – "[c]ommon-sense inferences about materiality may suffice" (*Arbour* at para. 764). An ASC panel is "an expert tribunal with specialized knowledge of the Alberta capital market and securities regulation". We are thus "well[-]positioned and able to draw inferences as to the objective view of a reasonable investor", including "as to whether untrue or omitted facts would reasonably be expected to have a significant effect on the market price or value placed on securities" (*Arbour* at para. 765).

[40] Prior ASC decisions suggest that we must be "cautious not to use hindsight in our assessments of materiality" (*Arbour* at para. 767). In *Re Kapusta*, 2011 ABASC 322 (at paras. 255-256), the panel explained:

Materiality, for present purposes, is (as noted) an objective concept, the assessment to be made in light of the effect "that would reasonably be expected" from a fact or change. The test for materiality, therefore, is not what eventually did happen, but rather what, beforehand, would reasonably have been expected to transpire. When that assessment is made after the fact . . . the assessor must not confuse outcome with expectation. In this important sense, hindsight is to be avoided . . . . **That said, it does not follow that one must disregard any occurrence after the time as at which a materiality assessment is to be made. In particular, an after-occurring fact or circumstance might have corroborative value – for example, as to the reasonableness (or otherwise) of a posited earlier expectation.**

**We treat after-occurring events with caution. . . . That evidence would not determine the issue of materiality, but could corroborate a finding made on other grounds.** [emphasis added]

### C. Market Manipulation

[41] Section 93(a)(ii) of the Act provides:

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

[42] According to *Re De Gouveia*, 2013 ABASC 106 (at para. 99), to prove a contravention of s. 93(a)(ii) of the Act, Staff must show that: (i) the respondent's impugned activity constituted or involved an "act, practice or course of conduct relating to a security"; (ii) the activity may have resulted in or contributed to an artificial price for the security; and (iii) the respondent knew or reasonably ought to have known that the activity may have resulted in or contributed to an artificial price for the security (see also *Re Coastal Pacific Mining Corp.*, 2016 ABASC 301 at paras. 34-39).

[43] With respect to the meaning of "artificial price", the ASC panel in *Re Podorieszach*, [2004] ASCD No. 360, explained (at paras. 85-86):

. . . an artificial price can be described as a price that differs from the price that would result from the market operating freely and fairly on the basis of information concerning true market supply and demand.

. . . Normal-course transactions between buyers and sellers, operating at arm's length, reflect real demand and supply; whatever the effect on price, it can be said to be a genuine market effect. If, however, demand or supply is distorted, then price will likely also be distorted – no longer reflective of real market demand and supply, it will be artificial.

[44] The impugned conduct in a market manipulation case may involve trading in or purchasing securities, but s. 93(a)(ii) of the Act is broad enough to capture other types of conduct as well. This may include the dissemination of information (or misinformation) which is alleged to have distorted genuine supply or demand by making a security appear more or less desirable than it might otherwise. As the panel stated in *Re Hennig*, 2008 ABASC 363 (at para. 1143), "[a]rtificiality is . . . essentially the product of intentional misrepresentation of genuine demand or supply".

[45] The ASC has also noted that in market manipulation cases, it might be necessary to draw inferences based on circumstantial evidence (*Podorieszach* at para. 76). Such inferences must be reasonable and grounded on facts that have been proved, not on speculation (*De Gouveia* at para. 95). We must also "consider the alternative possible inferences"; a conclusion that two alternative inferences – one consistent with guilt and one consistent with innocence – are equally plausible is an insufficient basis on which to find a respondent liable for market manipulation (*Podorieszach* at para. 78).

#### IV. POSITIONS OF THE PARTIES

##### A. Staff

[46] At the outset of their oral submissions on the application, Staff confirmed both that an investigation into Cohodes' conduct is currently underway and that there was an error in the NOA: while only s. 92(4.1)(a) of the Act was referenced, subsection (b) of s. 92(4.1) must also be proved to establish a contravention of the section. Later, Staff emphasized that in accordance with the NOA, the prohibitions sought against Cohodes were specific and narrow: an order barring him from trading – not from purchasing – Badger shares, and an order barring him from making misrepresentations about Badger – not barring him from commenting about Badger at all.

[47] While Staff indicated that the evidence regarding the range of Cohodes' public statements about Badger over the past year or so provided context, they focused their argument on the June 27 Tweet and Vanderberg's denial that the photograph in that Tweet depicted illegal toxic dumping by Badger. They pointed out that Cohodes did not contest Vanderberg's explanation, and argued that lack of opposition suggested the statements in the June 27 Tweet were indeed misleading or untrue, and Cohodes knew it.

[48] With respect to materiality, Staff argued that the evidence concerning the variations in Badger's share price over time (or the absence thereof) was a "red herring", as we can draw a "common-sense inference" that the share price of a company in the excavation and dumping business would be significantly affected by representations that it is guilty of doing its dumping illegally. They acknowledged that the impact of such representations on the market would depend on who made them and his or her stature or following, but argued that Cohodes has a significant social media following – including over 25,000 followers on Twitter. They further pointed to statements in the Cohodes Affidavit that he has a reputation for providing accurate information to the public and other regulatory authorities, and to the fact that Cohodes was significant enough to have been the subject of the Bloomberg Article, which referred to him as a "Famed Short Seller".

[49] As to Cohodes' alleged contravention of s. 93(a)(ii) of the Act, Staff argued that the dissemination of false information about an issuer may lead to an artificial price for that issuer's securities. Cohodes' "protracted campaign" of negative commentary about Badger since May 2017 culminated in the June 27 Tweet and constituted a "course of conduct" relating to Badger's shares which may have resulted in or contributed to an artificial price. Staff emphasized that the section does not require proof of an artificial price – only that the conduct *may* have had that effect. Given Cohodes' background and experience in the capital markets, they argued, he knew or ought to have known of that possibility.

[50] Lastly, Staff addressed the public interest and the prospect of imminent harm to the Alberta capital market. They highlighted how recently the June 27 Tweet had been posted, and also highlighted the Tweets attached to the Staff Affidavit, some of which repeated the same allegation of illegal dumping just a few days prior to the hearing of this application. They noted that Cohodes had done nothing to correct the misrepresentation in the June 27 Tweet, and that some of Cohodes' other Tweets showed his disdain for Canadian regulators – which in turn, Staff argued, suggested that Cohodes would not "forestall from this type of activity in the future".

## **B. Cohodes**

[51] Through his counsel, Cohodes argued that on the evidence before us, Staff had not met the test and evidentiary burden for an order of this kind, and, specifically, for the order sought on this application, which he characterized in part as a "gag order". In particular, he emphasized that his allegations of illegal dumping have not been proved to be false. He denied there was any urgency to the matter, given that the June 27 Tweet was posted approximately six weeks prior to the hearing, and that he began commenting on Badger well over a year ago.

[52] Cohodes observed that Badger has civil remedies available to it but has pursued none of them to date, submitting that that is relevant to whether an order from the ASC granting such "broad relief" is necessary or appropriate in the public interest. In a similar vein, he referenced several case authorities emphasizing the importance of freedom of expression. They were cited in support of his argument that because there is a public interest in uninhibited market commentary, freedom of expression should also factor into the analysis as to whether the order sought is in the public interest.

[53] Cohodes took the position that he does not have great influence in the capital markets, as demonstrated by the lack of impact his public statements about Badger have actually had on Badger's share price – which, he pointed out, has actually risen by 20% since he began commenting on the company in May 2017. He emphasized the lack of evidence of any correlation between his public comments and Badger's share price, and minimized the extent and impact of his Twitter following, especially since there was no evidence before us as to whether any of those followers have any interest in Badger.

[54] Cohodes acknowledged that it was not correct for him to have stated in his affidavit that he has "not made any public statements regarding illegal dumping by Badger since June 27, 2018", but argued that he only did so in the days leading up to the hearing of this application in response to the allegations in the NOA and the ASC's related news release.

## **V. ANALYSIS**

### **A. *Prima Facie* Determination**

[55] Staff argued that the panel was not "to determine the issue of toxic dumping, illegal dumping, or criminal dumping, at least not generally . . .", but was instead to determine whether Cohodes "made a statement that he knew or ought to have known was false or misleading . . .". Consistent with *York-Rio*, Staff submitted that the panel should not "make ultimate determinations of credibility or liability in this application", but should instead "determine whether the evidence supports the allegations of breach; in other words, is it credible and reliable having regard to all the circumstances". Cohodes countered by submitting that there was an incomplete record before the panel, with conflicting affidavits untested by cross-examination leading to "key gaps in information".

[56] As mentioned, we adopt the approach taken by the OSC panel in *Omega* in determining *prima facie* whether a respondent has contravened Alberta securities laws. Because Cohodes has provided some evidence in response to Staff's allegations and evidence, no conclusions can be drawn from considering Staff's evidence alone – we must also weigh Cohodes' evidence in

assessing whether Staff have satisfied their evidentiary burden (albeit a lesser burden than would be required at a hearing on the merits).

[57] Contradictory evidence by itself does not relieve a panel of its responsibility to make an assessment as to whether Staff have established contraventions of Alberta securities laws on a *prima facie* basis. However, we must be careful when weighing untested evidence that we do not make unwarranted findings with respect to the conflicting affiants' respective credibility when the evidence provided by both is conceivably plausible on its face. Unless a respondent's evidence lacks an air of reality, it should be given some weight in an application of this nature. In this case, we have no reasonable basis for preferring the evidence of Vanderberg over that of Cohodes on certain key factual disputes, as a careful analysis of their seemingly disparate assertions of fact suggests that both of them could be truthful.

## **B. Alleged Contraventions**

[58] We now consider the evidence touching on the grounds relied upon by Staff as establishing *prima facie* contraventions of ss. 92(4.1) and 93(a)(ii) of the Act.

### **1. Section 92(4.1) – Misrepresentation**

[59] The preliminary issue before us was identifying precisely which statements made by Cohodes were said to be untrue or misleading, thus forming the basis for the alleged contravention of s. 92(4.1) of the Act. At the outset of the hearing, as a result of certain ambiguities in the NOA, the panel asked Staff whether they were relying on Cohodes' statements concerning Badger's accounting and management issues as grounds for the alleged contraventions. As mentioned, Staff responded by telling us that "[t]here is context associated with those allegations", but that they were relying in "large part" on the June 27 Tweet. Staff's submissions centred on the alleged falsity of the June 27 Tweet, although other Tweets that Cohodes posted about Badger's disposal practices were mentioned. Nothing was said about earlier statements Cohodes had made in the Short Thesis questioning the integrity of Badger's financial disclosures and identifying certain competitive and management turnover issues.

[60] Since Staff did not expressly concede that their case for seeking orders under ss. 33 and 198 of the Act was grounded solely on the June 27 Tweet, we consider it necessary to discuss all of the evidence adduced in determining *prima facie* whether Cohodes contravened s. 92(4.1). We discuss in turn the evidence touching on three categories of statements referred to in the Vanderberg Affidavit and the Cohodes Affidavit: (i) the Short Thesis statements in relation to Badger's financial and management affairs; (ii) Twitter statements accusing Badger of illegal toxic dumping in Canada and the U.S. preceding the June 27 Tweet; and (iii) the June 27 Tweet.

#### **(a) The Short Thesis**

##### **(i) Untrue or Misleading?**

[61] The Short Thesis, posted to the Website in mid-May 2017, consisted of 31 slides containing various assertions with respect to Badger's financial condition and disclosures, change of auditors, growth prospects, senior management qualifications and turnover, and relations with franchisees. As mentioned, Vanderberg deposed that the Short Thesis "contained numerous statements that were misleading or false" – although he did not identify which statements he believed were misleading or false. Moreover, he offered no evidence to refute any part of the Short Thesis.

[62] Following publication of the Short Thesis, Cohodes posted several Tweets with similar themes in May through August 2017. The Vanderberg Affidavit did not specifically address these Tweets, although it included a sweeping statement that "[Cohodes] has continually made false representations to the public regarding Badger in various venues, including on Twitter, on the Website, in the press, and at analyst conferences". It also included some general denials of Cohodes' accusations of fraud and criminality, including accusations Cohodes apparently made at a Veritas investor conference in Toronto on June 26, 2018.

[63] In short, neither the evidence nor Staff's submissions pointed to any specific statements made by Cohodes in relation to his Short Thesis which were untrue or misleading. Vague contentions about "numerous statements" with "false representations" fall well short of establishing grounds on which a panel may find a contravention of s. 92(4.1) of the Act, even on a *prima facie* basis.

**(ii) Conclusion**

[64] Accordingly, we find that Staff have not established, *prima facie*, that any statements in this category were untrue or misleading. It is therefore unnecessary to consider the other elements which make up a contravention of s. 92(4.1) of the Act in respect of those statements.

**(b) Illegal Toxic Dumping Statements Preceding the June 27 Tweet**

**(i) Untrue or Misleading?**

[65] After August 2017, Cohodes' Tweets were largely confined to his accusations that Badger engaged in what is generally described as "illegal toxic dumping". The Vanderberg Affidavit made several references to such statements. In many instances, Cohodes used inflammatory and profane language in making his accusations, some of which were mentioned by Vanderberg – for example, describing Badger as a "criminal operation", which was "illegally dumping Toxic waste all over The [U.S.]", and contending that "dumping toxic shit in the country where I live is bad news, and when these Badger guys get caught . . . they're gonna be in a lot of trouble . . .".

[66] In almost all instances where Vanderberg deposed that a statement of this nature was untrue, he qualified his evidence with phrases such as "I have no knowledge", "[t]o the best of my knowledge" or "I am not aware". This observation is not a criticism of Vanderberg's evidence. Indeed, his qualified statements are unsurprising in light of his position as president and chief executive officer of Badger, which he said employs approximately 1,800 people in over 150 locations in Canada and the U.S. We would not expect Vanderberg to be intimately familiar with all of Badger's field operations, and we presume that he must have had to rely on the reports of others for much of his information. Vanderberg acknowledged one instance of Badger having been issued a notice of violation in 2012 relating to a fluid spill in Wyoming, which was remediated.

[67] As mentioned, Cohodes deposed to having received numerous reports from various sources related to Badger's "illegal dumping in at least California, Texas and Colorado". Cohodes then listed the evidence he had as including:

- a) Statements from multiple individuals formerly connected to Badger, who have advised me about their own personal knowledge of illegal dumping by Badger. An example of a statement that I have received from a former employee is attached as **Exhibit "C"**. I have

not disclosed the identity of the former employee in the attached document, subject to appropriate confidentiality provisions being put in place in this proceeding.

- b) Statements from land owners who have experienced Badger illegally dumping on their property.
- c) Test results showing the improper dumping of materials including hydrocarbons.
- d) Reviews of dumping records and dumping permits, which shows dumping without permits and/or without reporting the dumping with the appropriate [U.S.] authorities.
- e) I have videos and photographs of dumping and dump sites in Colorado and California, which show . . . what appears to be illegal dumping, based on their locations and a review of the relevant permits/dump records. [original emphasis]

[68] Cohodes also deposed to having provided an ASC investigator with names and contact information of former Badger employees who would give evidence of illegal dumping, but stated that those individuals were never contacted by Staff. We described earlier Cohodes' further evidence that he has provided the foregoing information to "authorities in the [U.S.]" which are investigating Badger's dumping practices, including undertaking soil tests. He said he has been asked not to disclose the details of his information so as not to interfere with the investigations.

[69] In the end, we are left with Cohodes' hearsay accusations of illegal toxic dumping which are said to be supported by several witnesses, countered by Vanderberg's qualified general denials. In light of the quality of the evidence on this point, we do not discern a reasonable basis for preferring Vanderberg's evidence over that of Cohodes. Neither witness was cross-examined on his affidavit, nor did we hear from any other witnesses who might corroborate any of the evidence tendered. Without more, we are not prepared to make a finding that Cohodes' evidence has no air of reality.

## (ii) Conclusion

[70] Accordingly, we find that Staff have not established, *prima facie*, that any statements in this category were untrue or misleading. It is therefore unnecessary to consider the other elements which make up a contravention of s. 92(4.1) of the Act in respect of these statements.

## (c) The June 27 Tweet

### (i) Untrue or Misleading?

[71] As we have observed, the focal point of Staff's submissions was the June 27 Tweet. Its content was also the subject of extensive commentary in the Vanderberg Affidavit, wherein Vanderberg deposed:

There was no illegal toxic dumping.

- (a) I am advised by Marcel Beloin, Badger's operating partner in Fox Creek, AB, and do believe, that he took the Photo on December 19, 2017. Mr. Beloin took the Photo to show the lighting he had installed on the truck to assist with safe operations at night. Mr. Beloin is proud of his innovation, which is why he posted it on a social media website called Hydrovac Nation.

- (b) The Photo was taken at a client's oil and gas lease facility, not a "field" as represented by Cohodes on his Twitter Account. The materials being deposited in the Photo were excavated on the client's lease and deposited as directed by the client according to the client's operating procedures.
- (c) In summary, Cohodes found a photo Mr. Beloin posted on the internet to illustrate his pride in safe operations at Badger, and used it without Mr. Beloin's consent to falsely claim that it depicted illegal activity.

[72] While Vanderberg stated that there was no toxic dumping, the conclusion was a *non sequitur* from his assertions of fact. Vanderberg did not say that the "materials being deposited" in the photograph were free from toxins or contaminants, nor did he say that the deposit "as directed by the client according to the client's operating procedures" was done in accordance with applicable law. Although Vanderberg took issue with Cohodes' description of the dump site as a "field" and pointed out that it was actually an "oil and gas lease facility", the two descriptions are not mutually exclusive. Hundreds, if not thousands, of oil and gas lease facilities in Alberta are situated in fields.

[73] For his part, Cohodes seemed to minimize the significance of the June 27 Tweet, but did not suggest there were any facts to corroborate his description of what the photograph depicted. Instead, Cohodes deposed to the considerable volume of Tweets he has posted (over 60,000 since December 2010), the fact that Twitter has never asked him to remove any of his posts, and the fact that neither Badger nor the ASC has ever asked him to explain or remove the June 27 Tweet. He also pointed out that the June 27 Tweet "received relatively little attention at the time", drawing only two "re-Tweets" and ten "likes".

[74] With respect to the content of the June 27 Tweet, Cohodes stated that he obtained the photograph from a public page on another social media platform, Facebook, and that the explanation for the photograph given by Vanderberg – to show a lighting innovation – did not accompany the photograph.

[75] In short, Cohodes' comments did not address the veracity or falsity of the text in his June 27 Tweet. At best, it appeared that Cohodes was careless in writing the June 27 Tweet. By itself, the photograph provided no reasonable basis for Cohodes to suggest that the subject materials were toxic and were being dumped illegally. Moreover, he provided no explanation for, or evidence asserting the truth of, his response to the above-mentioned third-party reply comment on the June 27 Tweet – although his assertion that "it was tested" clearly insinuated that there had been some verification of his allegation that the deposited materials shown in the photograph were toxic.

[76] Given the circumstances in which Cohodes obtained the photograph featured in the June 27 Tweet, we believe it implausible that it depicted illegal toxic dumping. Further, we do not believe that the deposited materials were tested as Cohodes suggested. We do find credible Vanderberg's evidence as to the reason the photograph was posted and we find it very unlikely that Badger's operating partner would want to publish photographic evidence of illegal toxic dumping on social media if that were the case. Accordingly, we find that Staff have established, *prima facie*, that the June 27 Tweet was untrue. We now consider the next element of s. 92(4.1) of the Act:

whether this would reasonably have been expected to have had a significant effect on the market price or value of Badger's shares.

**(ii) Materiality?**

[77] In the ordinary course of most enforcement proceedings involving allegations of misrepresentation, there is no issue as to whether the person making the statement ought to be considered a credible source of information, and thus someone whose impugned statements might be considered useful by a reasonable investor in making an investment decision. The actual or apparent authority of that person to make statements on behalf of an issuer is usually obvious – either the statement is made by the issuer itself, by a senior officer of the issuer, or by someone posing as the issuer or as a senior officer of the issuer. However, that was not the case here. Other than having taken a short position, Cohodes appears to have had no connection whatever with Badger, and he was not a registrant. Instead, he is a short-seller, who at one time was the general partner of an investment manager, but who has owned and lived on a farm in California raising chickens and training horses for more than five years.

[78] As mentioned, in oral submissions Staff acknowledged that the expected market effect of a given statement depends in part on who is making the representation. Staff relied on certain evidence as establishing Cohodes' "notoriety" and thus showing him to be someone to whom a reasonable investor would listen when making an investment decision. That evidence can be conveniently grouped into three categories.

[79] First was the size of Cohodes' Twitter audience, said to consist of 25,600 followers at the time the Vanderberg Affidavit was prepared. In his submissions, Cohodes' counsel pointed out that Twitter is a global social media platform and that Cohodes had a "limited number of followers in a huge universe of people". Moreover, there was no evidence to suggest that many of these followers were even remotely interested in Cohodes' views on Badger. The Tweets that were in evidence suggested there was scant attention being paid to what he was posting about Badger, seldom garnering more than a few comments, "likes" or "re-Tweets".

[80] Second was the Bloomberg Article featuring Cohodes and describing the "profanity-ridden presentation" he gave at an investing conference in New York, during which he spoke about his "bearish theses" on several Canadian public issuers (Badger was not mentioned). The article's headline referred to Cohodes as a "Famed Short Seller", and the article indicated that in 2001 he was praised as "'the highest-profile short-seller on Wall Street'" by the *New York Times*. However, the overall tone of the article implied that his fame could at least in part be ascribed to his "unusually blunt speech and theatrical antics", coupled with personal attacks on individuals associated with his target issuers. The Bloomberg Article by itself did not establish that Cohodes had an enduring reputation for predictive acuity such that a reasonable investor might find his views of any real utility in making a decision to buy, sell or hold Badger shares.

[81] Third was the Cohodes Affidavit, wherein he deposed to his history of identifying, and providing information to the SEC about, "notorious companies engaged in fraudulent accounting and business practices". In one case, he deposed to his involvement with a sub-prime lender which became the subject of two publications in 2012 and 2013. Cohodes also stated that more recently he had identified certain Canadian companies whose financial records had "red flags". As

mentioned, he stated that he typically takes a short position in such companies and, if he "believe[s] it appropriate", reports the companies to securities regulators and publishes his findings online.

[82] While it was clear from the Cohodes Affidavit that he has an elevated opinion of his ability to accurately detect improper accounting and management practices engaged in by public issuers, it was far less clear that the investing public holds the same opinion. We were not persuaded that Cohodes' publicly-expressed opinions on Badger (or any other issuer) commanded sufficient respect among market participants to justify an inference that a reasonable investor would find his statements credible and useful in making an investment decision.

[83] We are also of the view that in assessing the likely market impact of a given statement, we must consider the nature of the issuer about which the statement is made in addition to the nature of the person making the statement. Even though we were not convinced that Cohodes could conceivably influence a large public issuer's share price by what he says or does, we acknowledge that someone in Cohodes' position might be able to affect the market of a small, thinly-traded issuer in certain circumstances. However, in this case, the evidence before us was that Badger has a market capitalization in excess of \$1 billion with reasonable liquidity.

[84] We have noted that prior ASC decisions such as *Kapusta* have emphasized that after-occurring events, including market movements, are to be treated with caution and are not determinative of materiality. Nevertheless, such evidence can be corroborative of findings made on other grounds. We accept what was said in *Kapusta* (at para. 255) that "[t]he test for materiality . . . is not what eventually did happen, but rather what, beforehand, would reasonably have been expected to transpire". What is different about this case, though, is that we have evidence of a reasonably long period of market reactions to many very similar statements (including photographs purportedly showing Badger vehicles engaged in illegal toxic dumping) made by Cohodes preceding the impugned June 27 Tweet. We have the benefit of having this history of statements and corresponding market responses to assist us in prospectively assessing the likely effect another such statement might have. In these somewhat unusual circumstances, we are of the view that giving this evidence some weight in determining a reasonable expectation of market impact is not strictly a hindsight analysis. We therefore consider that evidence in some detail.

[85] However, before analyzing the evidence concerning market reactions to earlier statements on the subject of illegal dumping, we first address the reliability of the evidence adduced with respect to the effect Cohodes' statements had on the market for Badger shares.

[86] First, the Vanderberg Affidavit suggested some causal connection between: (a) Cohodes' announcement of his short position on May 12, 2017 and publication of his Short Thesis a few days later; and (b) a 14% decline in Badger's share price on record trading volumes on May 12, 2017, followed by a further 14% decline in the week following. In support of his contention that these price decreases were attributable to Cohodes, Vanderberg referenced a May 18, 2017 email from a representative of a hedge fund located in London. The writer referred to "[t]he short seller stabbing . . . at you" and stated the fund was "exiting the position entirely", had lost trust in Badger, and would never invest in Badger again.

[87] However, we noted that this email was preceded by one sent the previous day by a different representative of the same hedge fund. That individual expressed concerns about Badger's failure to communicate with the market regarding the claims that had been made about its accounting, and urged it to refute those claims publicly or at least advise why it could not do so. He indicated that, while the fund liked Badger, "we cannot justify holding a position where management is able to, but chooses not to, clarify these kinds of things to the market", as the ongoing silence suggested there was truth to those claims: "[t]he absence of a refutation is suggesting to the market that there is some genuine issue with the cash balances that makes such a refutation difficult – or worse – that they might be true". As a result, he continued, "we are being forced to seriously consider cutting the position completely". There was no further evidence with respect to whether Badger responded to this email or the issue it raised, but we considered it suggestive of another explanation for market reaction in the May 2017 time frame.

[88] Moreover, as Cohodes pointed out, Badger released its Q1 2017 Results on May 12, 2017, which reported earnings per share of \$0.10 when market expectations were for earnings per share of \$0.32. Staff did not suggest that this assertion was incorrect, and we find the "earnings miss" a far more likely explanation for the drop in Badger's share price than Cohodes' announcement of his short position and release of his Short Thesis. Even the above-mentioned email from the hedge fund representative referred to the fact that Badger's "shares reacted so badly to results" on May 12, 2017.

[89] Second, the Vanderberg Affidavit referred to two other market movements said to be coincident with Cohodes' activities. The first was a 30% increase in the Badger share price from \$24.80 on May 1, 2018 – the day before Badger's announcement that the ASC was closing its investigation into allegations by short-sellers of accounting- and disclosure-related contraventions of Alberta securities laws by Badger – to \$32.30 on June 25, 2018. The second was a 7.4% decline from \$32.30 on June 25, 2018 – the day before Cohodes spoke at the Veritas investor conference in Toronto and two days before the June 27 Tweet – to \$29.90 on July 6, 2018.

[90] As mentioned, Cohodes answered the foregoing with his own evidence on the market's reaction to his public statements, claiming that Vanderberg's allegations "appear to be deliberately misleading". With respect to the first instance Vanderberg cited, Cohodes deposed that after a full day of trading following Badger's announcement about the ASC investigation, the share price closed at \$25.05, an increase of approximately 1% with no significant change in trading volumes. He also pointed out (correctly) that neither the ASC investigation nor the announcement was related to allegations of illegal dumping. As to the second instance, Cohodes said that the share price moved up slightly following his presentation at the conference on June 26, 2018 (\$32.30 to \$32.31) and the next day closed down only 0.6% following the June 27 Tweet, to \$32.10.

[91] Cohodes also deposed:

These are also not the only days [on] which I commented publicly on Badger. Many of the days when I have commented on Badger, the stock price of Badger has, in fact, gone up:

- (a) My first public comment regarding illegal dumping was made on June 27, 2017. The stock price for June 27, 2017 was largely unchanged from the prior day (down from \$25.74 to \$25.61), before it proceeded to rise over each of the following 3 trading days by a total of approximately 3.5%.

- (b) On October 10, 2017, I spoke at the Grant's Interest Rate Observer conference, and presented my views on Badger. On October 6, 2017 (the last trading day before the Grant's Conference), Badger's stock closed at \$26.22. On October 10, 2017 and October 11, 2017 (the day of my presentation and the day after my presentation), Badger's stock closed at \$28.29 and \$28.25 respectively, an increase of over 7%.

[92] Cohodes' evidence thus indicated a consistent pattern of him disseminating disparaging comments about Badger – in particular, allegations of illegal toxic dumping – followed by negligible market movement in either direction. Moreover, Cohodes' counsel submitted that Badger's share price had increased by 20% since Cohodes started Tweeting about the company, an assertion that Staff did not dispute. As Cohodes' counsel put it, "the market . . . ignores his information".

[93] In their submissions, Staff speculated that perhaps the index or Badger's peer group had appreciated more than Badger's share price over the 15-month period in question, but noted that the panel did not have that information and that was what a full hearing on the merits would be for. Having tendered (through the Vanderberg Affidavit) selective evidence about the purported effect on the market of Cohodes' statements – under the heading "Market Impacts of Cohodes' Statements" – we were surprised to hear Staff describe this evidence as a "red herring", and suggest that we should instead draw common sense inferences concerning materiality. It would have been simple for Staff to have led evidence on an appropriate index and Badger's peer group share prices over the relevant period, but they did not do so. We decline to speculate on what such evidence might have been, particularly in light of the evidence before us suggesting minimal or no correlation (much less causation) between Cohodes' statements and Badger's share price.

### (iii) Conclusion

[94] We were not persuaded that the June 27 Tweet could reasonably have been expected to have had a significant effect on Badger's share price. The market evidence corroborated our view that there was an insufficient basis on which to make a finding that Cohodes' statements were regarded by market participants as authoritative in any respect or would influence a reasonable person's investment decision about an issuer of Badger's size. It is therefore unnecessary to consider the final element which makes up a contravention of s. 92(4.1) of the Act in respect of the June 27 Tweet.

[95] We find that Staff have not established, *prima facie*, that Cohodes contravened s. 92(4.1) of the Act.

## 2. Section 93(a)(ii) – Market Manipulation

### (a) Act, Practice or Course of Conduct Relating to a Security?

[96] With respect to Staff's allegation that Cohodes contravened s. 93(a)(ii) of the Act, we start by considering the first element of a contravention: whether the impugned activity constituted or involved an act, practice or course of conduct relating to a security. Staff contended that Cohodes' many Tweets alleging illegal toxic dumping amounted to a course of conduct relating to Badger which culminated in the June 27 Tweet. Cohodes did not address this element of s. 93(a)(ii), arguing only that the market impact evidence failed to prove, *prima facie*, an artificial price.

[97] Notwithstanding our finding that Staff have not established, *prima facie*, the falsity of the many Tweets preceding the June 27 Tweet, we are satisfied that the cumulative effect of these statements constituted a course of conduct relating to Badger's shares. At the very least, the June 27 Tweet was an "act" relating to Badger's shares. Cohodes made the connection between his activity and share pricing very clear in the disclaimer that accompanied certain of his internet publications about Badger. This disclaimer read in part:

We take investment positions consistent with our own opinions in the companies we cover. If the report contains an overall negative assessment, then that means we stand to profit if the company's stock declines.

**(b) Artificial Price?**

[98] The second element of s. 93(a)(ii) of the Act was primarily in dispute: whether Cohodes' activity may have resulted in or contributed to an artificial price. Here, Staff submitted that misinformation and misleading investors about the merits of an issuer creates artificiality. They argued that if it is established that the June 27 Tweet was false or misleading, the consequent Badger share price had to be artificial, especially where the misrepresentation went to the "heart of the business".

[99] Staff referred us to an earlier ASC decision for the proposition that artificiality can result not only from activities which distort the appearance of supply and demand for a security – such as wash trading – but also from untruthful information about the merits of an issuer's business enterprise. In *Coastal*, the panel found a contravention of s. 93(a)(ii) of the Act as a result of a market manipulation scheme commonly described as a "pump and dump". In discussing the element of artificiality in s. 93(a)(ii), the panel said (at paras. 48-49):

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

The evidence here persuades us that the capital market generally, and specific investors who bought Coastal shares in the period of the promotional campaign, were misinformed and misled about the merits of Coastal as a business enterprise, and therefore about the inherent value of a Coastal share.

[100] In *Coastal*, the facts were consistent with a typical pump and dump scheme, including: an issuer whose shares were quoted on an over-the-counter market at pennies per share with minimal trading volumes; a substantial number of shares issued to and controlled by the issuer's principals and associates; a coordinated promotional campaign involving several news releases from the issuer and concurrent emails from an associate using a pseudonym; and a dramatic run-up in the share price on significant trading volumes, followed by the inevitable collapse in share price once the promotional campaign ended. On those facts, the artificiality of the subject share price was self-evident.

[101] However, in this case we were asked to infer artificiality from the mere fact of *prima facie* misinformation contained in the June 27 Tweet. Again, we are of the view that the overall context in which the impugned misinformation is conveyed must be considered before an inference can be drawn. As the Alberta Court of Appeal cautioned in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (at para. 26): "[d]rawing inferences when there is an evidentiary gap, based on

an 'educated guess', is speculation". There is an impermissible logical leap from *prima facie* evidence of misinformation about an issuer, regardless of source and other relevant context, to a finding that the issuer's share price was, or may have been, artificially affected.

[102] Here, taking into consideration the evidence discussed earlier on the issue of materiality and the fact that Cohodes seemingly made no pretence of who he was, what he was doing and for what purpose, we decline to infer that an artificial price was, or may have been, created in consequence of the June 27 Tweet. Again, the market evidence before us corroborated that finding, and there was insufficient evidence adduced suggesting that the June 27 Tweet may have resulted in or contributed to an artificial price for Badger's shares.

**(c) Conclusion**

[103] We therefore find that Staff have not established, *prima facie*, that Cohodes contravened s. 93(a)(ii) of the Act. Accordingly, we need not address the third part of the test in *De Gouveia* with respect to Cohodes' knowledge.

**VI. CONCLUSION**

[104] We were not satisfied that the evidence before us was sufficient to establish, *prima facie*, that Cohodes contravened the Act as alleged in the NOA. As a result, Staff's application was dismissed as earlier indicated.

October 10, 2018

**For the Commission:**

\_\_\_\_\_  
"original signed by"  
Tom Cotter

\_\_\_\_\_  
"original signed by"  
Kari Horn