

Re Nguyen-Qui

In the matter of:

**The Rules of the Investment Industry Regulatory Organization of
Canada (IIROC)**

and

The Universal Market Integrity Rules

and

Vinh Phat Nguyen-Qui

2012 IIROC 53

Hearing Panel
of the Investment Industry Regulatory Organization of Canada
(Québec District Council)

Hearing held in Montréal, March 26, and June 6 and 7, 2012
Decision rendered on September 17, 2012

Hearing Panel

M^e Michèle Rivet, Chair, Mr. Daniel Houle, Mr. Yves Julien

Appearances

M^e Sébastien Tisserand, Enforcement Counsel
Mr. Vinh Phat Nguyen-Qui, representing himself

DECISION

¶ 1 Pursuant to Market Integrity Rule-UMIR (UMIR) Policy 10.8 (Practice and Procedure), Part 9 (Conduct of Hearing) of the Investment Industry Regulatory Organization of Canada (IIROC), and pursuant to UMIR 2.2(2)(b) and Policy 2.2, and UMIR 3.1(1) and Policy 3.1, and UMIR 6.2, and to Schedule A.1 to IIROC Transition Rule No.1.1, a hearing panel of IIROC was constituted to hear the allegations of misconduct in the matter of Mr. Vinh-Phat Nguyen-Qui.

¶ 2 Between October 2, 2009 and December 23, 2009, IIROC alleges more specifically that Mr. Vinh-Phat Nguyen-Qui (hereinafter, the Respondent):

1. entered orders that he knew or ought reasonably to have known would create or could reasonably be expected to create a false or misleading appearance of trading activity or interest in the purchase or sale of the security, contrary to UMIR 2.2(2)(a);
2. entered short-sale orders in the pre-opening market without an acceptable designation, contrary to UMIR 6.2(1)(b)(viii);
3. entered short-sale orders in the pre-opening market below the last sale price, contrary to UMIR 3.1(1).

¶ 3 The hearing was initially set for March 26 and 27, 2012. On March 26, at the start of the hearing, Mr. Vinh-Phat Nguyen-Qui, who had failed to appoint legal counsel for himself although duly informed of the hearing, having been served notice by hand on January 21, 2012, requested a postponement. The hearing was postponed and a peremptory date set for June 6 and 7, 2012.

¶ 4 Counsel for Enforcement introduced a certain number documents in evidence and called as a witness Ms. Cynthia Mercer, a senior investigator at IIROC. The Respondent also introduced a few documents into evidence and he testified as a witness.

¶ 5 Before disposing of the evidence, it is appropriate to review an objection formulated by counsel for Enforcement relative to two documents: one document that appears to be the transcription of a phone conversation dated January 18, 2012 between two individuals who did not give evidence at the hearing, namely Mr. Sesto Deluca and Ms. Jacky Laurin of IIROC; and a document entitled “Trading Conduct Compliance Review Report”, dated July 28, 2009, which came from IIROC and concerned W.D. Latimer Co Ltd.

¶ 6 Since IIROC undertakes to uphold the applicable laws of Québec, the Enforcement Counsel cited articles 2832, 2843, 2869, 2870, 2871, 2872, 2873, 2874 of the Civil Code of Québec¹, relative to the evidence, as well as the attendant court decisions².

¶ 7 The Hearing Panel, after deliberation, concluded that these documents may be deposited in accordance with the rules of evidence that generally apply in matters of hearsay³ concerning the phone conversation which is inadmissible as evidence by its content. As for the report respecting W.D. Latimer, which is a report prepared by IIROC for the period of March 2009, Article 274.1 of the Civil Code provides a different system of admissibility for a report, one which does not require the court to apply the criteria of necessity and reliability required for other statements. The Hearing Panel allows it to be introduced into evidence, however without ruling on its relevance or probative effect.

¶ 8 It was agreed that the documents thus introduced into evidence shall not be available to the public but shall remain under seal. The documents in question are those filed as exhibits:

D-5: Telephone interview, January 18, 2010.

D-6: W.D. Latimer co Ltd, 2009 Trading Conduct Compliance Review Report.

1. The decision on penalties to impose on Mr. Vinh-Phat Nguyen-Qui

¶ 9 From the evidence presented by IIROC, which evidence has not been challenged, what emerges is that during the material time, Respondent was employed as an investment advisor at W.D. Latimer Co. Limited (WDLCo), a Participant under UMIR, at its Montréal branch, and that he was an Approved Person with the IDA and subsequently IIROC from September 1998 to August 2011. As part of his job during the material time, Respondent was notably responsible for trading BBD.B shares on the stock market on behalf of his employer; he shared the gains and losses with his employer on a 50/50 basis. He left this job on August 2, 2011.

¶ 10 The evidence has showed that the Respondent entered deceptive or misleading orders by coding them “anonymous”. The rules of the stock market allow the input of lawful anonymous orders. The anonymity behind which Mr. Nguyen-Qui concealed himself made it impossible for Desjardins Securities, which brought the complaint, to attribute the illicit entries to him by name. However, IIROC had no trouble tracing him down. The Respondent, as the investigation conducted by IIROC shows, used the identifier WD099IR⁴.

¶ 11 Ms. Cynthia Mercer, witness for IIROC, explained before us how and as of when the audits of the

¹ Civil code of Quebec, RSQ, c. C-1991.

² As indexed and deposited before us: BAUDOIN and RENAUD (under the management of) Wilson et Lafleur, Azimut, SOQUIJ.

³ More specifically *Maurice v. André Construction Ltée*, (1975) CA 756.

⁴ Introduced into evidence as exhibits P-1, P-3 and P-4.

Respondent's work⁵ began and when he received this information, namely on May 31, 2010⁶.

¶ 12 Thus, the investigation shows that between October 2, 2009 and December 23, 2009, the Respondent repeatedly entered in the preopening market on the Toronto Stock Exchange, an IIROC-regulated marketplace, deceptive and misleading buy and sell orders for BBD.B stock (Class B shares in Bombardier Inc.). During the material time, the Respondent would cancel his illicit orders before the market opened. The orders thus entered and cancelled by the Respondent during the material time were illicit because they were opened simultaneously on either side of the preopening market on behalf of the same person and the buy order showed higher prices than the sale order prices.

¶ 13 The evidence showed that the Respondent was attempting to trade in the BBD.B stock to obtain member discounts from the Stock Exchange by trading around a neutral position. Thus, on October 2, 2009, the Respondent was short 55,000 shares of BBD.B in the preopening market; sooner or later he had to start buying in order to return to a neutral position; it was therefore to his advantage to have the COP (Calculated Opening Price) as low as possible to advantageously cover his short transaction, in whole or in part, as soon as the market opened. In the preopening market on October 2, 2009, Respondent notably entered: (i) four sell orders on 91,000 shares of BBD.B, at prices ranging between \$4.19 and \$4.33 and (ii) one buy order on 5000 shares at \$4.73. All of these orders remained open simultaneously for several minutes before the market opening, but at 9:30 a.m., the Respondent had cancelled them all. 24. The 4 sell orders were therefore triply reprehensible: (i) they were not marked as short-sale orders; (ii) the prices were below the previous day's closing price and (iii) they were entered in the preopening market at below the \$4.76 price of a buy order opened simultaneously.

¶ 14 Respondent's illicit orders gave the illusion in the preopening that 5000 shares could be about to be traded at a price ranging between \$4.33 and \$4.73 when the market opened. The fictitious trade never took place because of the last-minute cancellation of the illicit orders, but by inputting and then cancelling his orders before 9:30 a.m., the Respondent nevertheless sought to deceive and to create in the preopening market the illusion of lower-priced trades to come.

¶ 15 All of this evidence stems from the interview conducted at the IIROC office between counsel representing the IIROC investigator and Mr. Vinh-Phat Nguyen-Qui on August 4, 2011⁷ or from conclusions reached by Ms. Mercer based on all of the documentation relative to the transactions executed by the Respondent between October 2 and December 23, 2009⁸, which documentation is part of the record.

¶ 16 A table deposited into evidence by Ms. Mercer shows 17 days of stock market trading between October 2, 2009 and December 23, 2009 inclusively, during which the Respondent entered orders in the preopening market.

¶ 17 The Respondent thus entered 29 sell orders without the prescribed "short" designation. Among these orders, 27 were entered at a price below the last sale price indicated on the consolidated market display, which at 9:30 a.m. is the closing price for the previous day. If these orders had borne the acceptable designation, the Respondent's entries would all have been rejected by the TSX.

¶ 18 As Ms. Mercer explained during her testimony, when discussing the short-sale orders entered by the Respondent during the material time:

"Twenty seven of them were at a price that was below the previous day's close, so they would have been rejected by the TSX because they fell outside the 3.1 rule. Two of them were not marked short, but they

⁵ Introduced as exhibits P-4 and P-8.

⁶ Exhibit P-9.

⁷ Copy of the transcript of the interview with Vinh-hPat Nguyen-Qui, introduced into evidence as Exhibit P-21.

⁸ Audit tracking orders for BBD.B on the TSE for the period of October 2th 2009 to January 13th 2010; Sell orders for user ID WD099IR entered in the pre-open on BBD.B during the period of October 2th to December 23th 2009; Pre-open orders for WD99IR that should have been short markers for the period of October 2th 2009 to December 23th 2009, Pre-open orders for WD099IR that were marked as short sales for the period of October 2th 2009 to December 23th 2009. These documents were introduced into evidence as a bundle under Exhibit P-19.

were at a price that was above the previous day's close...They were not rejected because they were not marked as short sell orders, so the TSX would not know that they were short sell orders, but have they known, they would have rejected them"⁹.

¶ 19 The table looks like this:

	Order Date	Order Time	Sell	Disp. Vol.	Price	Prev. Day Close
1	2-Oct-09	09:20:15.71.000005	25000	25000	4.310	4.98
2	2-Oct-09	09:20:26.60.000005	22000	22000	4.400	4.88
3	2-Oct-09	09:21:34.00.000006	19000	19000	4.190	4.88
4	2-Oct-09	09:23:39.11.000006	25000	25000	4.330	4.88
5	5-Oct-09	08:17:15.08.000004	22000	22000	4.310	4.76
6	5-Oct-09	08:24:53.61.000006	19000	19000	4.250	4.76
7	5-Oct-09	09:03:17.17.000004	19000	19000	4.440	4.76
8	5-Oct-09	09:27:14.63.000004	25000	25000	4.410	4.76
9	5-Oct-09	09:29:15.37.000005	22000	22000	4.550	4.76
10	26-Oct-09	09:26:54.31.000004	22000	22000	4.410	4.69
11	27-Oct-09	09:24:43.21.000004	22000	22000	4.410	4.6
12	2-Nov-09	09:06:29.06.000004	22000	22000	3.810	4.39
13	2-Nov-09	09:10:07.14.000001	9900	9900	3.78	4.39
14	11-Nov-09	08:57:57.11.000003	22000	22000	4.2	4.59
15	11-Nov-09	08:58:31.97.000002	25000	25000	4.2	4.59
16	11-Nov-09	09:15:22.16.000003	9900	9900	4.11	4.59
17	11-Nov-09	09:18:26.13.000002	20000	20000	4.11	4.59
18	16-Nov-09	09:20:38.52.000004	22000	22000	4.400	4.66
19	16-Nov-09	09:22:33.33.000001	9900	9900	4.380	4.66
20	24-Nov-09	08:42:06.58.000004	22000	22000	4.650	4.96
21	24-Nov-09	09:23:06.83.000004	22000	22000	4.650	4.96
22	27-Nov-09	09:21:32.71.000000	5000	5000	4.590	4.6
23	27-Nov-09	09:27:18.50.000000	4000	4000	4.560	4.6
24	27-Nov-09	09:30:10.75.000000	13800	13800	4.500	4.6
25	1-Dec-09	09:28:29.85.000000	3000	3000	4.57	4.48
26	1-Dec-09	09:28:36.60.000000	2000	2000	4.58	4.48
27	2-Dec-09	09:26:36.95.000004	22000	22000	4.110	4.6
28	2-Dec-09	09:28:31.00.000004	25000	25000	4.200	4.6
29	23-Dec-09	09:26:48.06.000005	22000	22000	4.400	4.78

¶ 20 And Ms. Mercer adds:

“So, what he was doing was putting in orders on both sides of the market for time priority, and then he would see what information came to him throughout that time period, and then decide before the market

⁹ Testimony of Ms. Cynthia Mercer, Stenographer's Notes, June 6, 2012, pages 129 and 130.

opened, he would decide what he would like to take. ”¹⁰

¶ 21 On many days, the sell orders entered by the Respondent in the preopening market were at prices below his buy orders which were entered at the same time.¹¹

¶ 22 According to Ms. Mercer :

“What he was doing was trying to manipulate the price. Although on an individual basis he was increasing and decreasing, ultimately it had no effect on the opening price at the beginning of the day. ”¹²

¶ 23 In his testimony, the Respondent did not in any way contradict the evidence presented by IIROC. He reiterated the answers given during the interview of August 4, 2011.¹³ The Respondent testified that his purpose in entering his orders only to cancel them before market opening was to position himself at the top of the time priority list at 9:30 a.m. on both sides of the market or on whichever side he chose at the last minute and, once positioned in this manner, to effect so-called “passive” trades which allowed him to benefit from the member discounts granted by the Toronto Stock Exchange on passive trades. He was not attempting to speculate up or down on BBD.B, but since he could perforce not always be in neutral, his position necessarily fluctuated between inventory and short.

¶ 24 Entering orders on both sides at the same time as the Respondent did for his own benefit in the pre-opening market constitutes a manipulative or deceptive practice, as these constitute fictitious trades creating a false or misleading appearance of interest to trade. This practice creates a false or misleading appearance of trading activity or interest in the purchase or sale of the security.

¶ 25 It was the Respondent’s duty to make sure that the orders he was entering were correctly marked as short sales, as applicable. No short-sale order shall be entered prior to the opening of a marketplace at a price below the last sale price as indicated in the consolidated market display.

¶ 26 In 2009, the Respondent, at the material time, had been in the industry for eleven years. He ought to have known that these orders did not comply with the rules. The fact of not knowing the rules or making mistakes cannot in any way constitute a sustainable defense.

¶ 27 The evidence therefore leads us to conclude that the Respondent did commit the alleged violations, contrary to UMIR 2.2(2)(a), to UMIR 6.2(1)(b)(viii), and to UMIR 3.1(1). These rules read as follows:

2.2 Manipulative and Deceptive Activities

(2) A Participant or Access Person shall not, directly or indirectly, enter an order or execute a trade on a marketplace if the Participant or Access Person knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create:

a) a false or misleading appearance of trading activity in or interest in the purchase or sale of the security;

6.2 Designations and Identifiers

(b) a designation acceptable to the Market Regulator for the marketplace on which the order is entered, if the order is:

(viii) a short sale which is subject to the price restriction under subsection (1) of Rule 3.1.

3.1 Restrictions on Short Selling

(1) Except as otherwise provided, a Participant or Access Person shall not make a short sale of a

¹⁰ Stenographer’s Notes, pages 134 and 135.

¹¹ Marketable Orders in the Pre-Opening from October 1st 2009 through February 28th 2010; Pre-Opening Orders and COP- BBD.B from January 13th 2010 through February 12th 2010; Pre-Opening Orders and COP-BBD.B from October 2th 2009 to December 23rd 2009. These documents were introduced into evidence as a bundle under Exhibit P-25.

¹² Stenographer’s Notes, page 155.

¹³ *Op.cit.*, note (7), pages 137 and following.

security on a marketplace unless the price is at or above the last sale price.

2. The decision on penalties to impose on Mr. Vinh-Phat Nguyen-Qui

¶ 28 The proof of misconduct being complete, it was agreed to proceed with the penalty hearing at the same hearing so that the Hearing Panel might deliberate on the whole.

¶ 29 As mentioned in the Notice of Hearing, the conclusions sought by virtue of UMIR Policy 10.5 and UMIR Policy 10.7 are as follows:

1. A reprimand;
2. A fine not to exceed the greater of
 - a) \$1,000,000 per contravention of a Requirement; and
 - b) an amount equal to triple the financial benefit which accrued to the Respondents as a result of committing each contravention;
3. A restriction, suspension or revocation of access to the marketplace for such period and upon such terms and conditions, if any, considered appropriate;
4. Any other remedy determined to be appropriate under the circumstances; and
5. Payment of the expenses incurred by Staff as a result of the investigation and proceedings.

¶ 30 At the hearing, counsel for Enforcement, taking into account the evidence, more specifically recommended the following penalties:

1. Prohibition from accessing the marketplace as a registered representative for a period of two (2) months;
2. A fine for the different counts, apportioned as follows:
 - a) \$10,000 for the first count; and
 - b) \$5,000 for each of counts 2 and 3.
3. Costs in the amount of \$10,000.
4. That Mr. Nguyen-Qui be required to take the “Trader Trading Course” again.

¶ 31 Regarding the first violation, the decision in *Re Mashregi*¹⁴ may be enlightening. It concerns a settlement agreement regarding a market positioning in the preopening, for the sole purpose of positioning oneself without any intention of executing the orders. In that particular case, the Hearing Panel accepted the suggestion proposed in the agreement, namely a \$50,000 fine with \$10,000 in costs, the violations having occurred over a 15-month period.

¶ 32 Regarding counts 2 and 3, which are related violations, the Policy¹⁵ is very clear. Part 1 on the Entry of Short Sales Prior to the Opening states:

“Prior to the opening of a marketplace on a trading day, a short sale may not be entered on that marketplace as a market order and must be entered as a limit order and have a limit price at or above the last sale price of that security as indicated in a consolidated market display (or at or above the previous day’s close reduced by the amount of a dividend or distribution if the security will commence ex-trading on the opening).”

¶ 33 Thus, in *Fabi*¹⁶, which concerns the acceptance of a settlement agreement, Mr. Fabi entered orders and executed trades on the TSX Venture Exchange that he ought reasonably to have known would create or could

¹⁴ *Mashregi (Re)*, 2005 R.S.D.D. no 8

¹⁵ UMIR Policy 3.1, Restrictions on Short Selling.

¹⁶ *Re Fabi*, 2008 IIROC 16.

reasonably be expected to create an artificial sale price for six securities. In that instance, Mr. Fabi made a mistake, but he nevertheless “ought reasonably to have known”. Given that it was an error and not deliberate manipulation, the penalty was consequently a fine of \$15,000 and \$5000 in costs.

¶ 34 Moreover, counsel for Enforcement submitted a sworn statement regarding the costs claimed by IROC.¹⁷

¶ 35 The Guidelines¹⁸ enumerate the considerations that must guide the Hearing Panel in the imposition of sanctions.

¶ 36 Disciplinary sanctions are a deterrence. As the second paragraph of section 2 of the Guidelines states:

“General deterrence will follow from an appropriate decision and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. This can be achieved if a sanction strikes an appropriate balance by addressing a registrant’s specific misconduct, but also being in line with industry expectations.”

¶ 37 Section 3 of the Guidelines further states:

“Since sanctions should be tailored to address the misconduct involved in a particular case, a penalty must be proportionate to the gravity of the misconduct and the relative degree of responsibility of a respondent.”

¶ 38 The Guidelines provide a non-exhaustive list of the factors that the Hearing Panel must consider: harm to clients, employer and/or the securities market; blameworthiness; degree of participation; extent to which the respondent was enriched by the misconduct; prior disciplinary record; acceptance of responsibility, acknowledgment of misconduct and remorse; credit for cooperation; voluntary rehabilitative efforts; reliance on the expertise of others; planning and organization; multiple incidents of misconduct over an extended period of time; vulnerability of victim; failure to cooperate with the investigation; significant economic loss to the client and/or dealer member firm.

¶ 39 More specifically, in regard to Policy 2.2, the Guidelines mention that: “In all cases, fines should include any financial benefit to the respondent.”

¶ 40 Regarding UMIR 3.1 and 6.2 relative to short selling, the Guidelines state:

“In a case involving a limited number of transactions and limited quantifiable harm to the marketplace, consider a suspension or restriction of access of up to 6 months.”

¶ 41 The violations committed by Mr. Vinh-Phat Nguyen-Qui extend over a period of some three months. There is no evidence proving that the Respondent derived any benefit whatsoever. There is no proof either that the security in which the Respondent was trading, namely BBD.B stock, experienced any fluctuations. Moreover, the violations ceased as soon as the Respondent was informed by his supervisor Mr. DeLuca in January 2010.

¶ 42 A fine of \$10,000 on the first count seems justified, notably when compared to *Mashregi*.

¶ 43 The fines requested on counts 2 and 3, as well as the prohibition from access to the marketplace are the minimum sanctions that may be imposed and are appropriate in the case at bar.

¶ 44 As for costs, these total \$57,557.50. The amount claimed here is therefore entirely reasonable.

¶ 45 **WHEREAS** the evidence presented on the counts against Mr. Vinh-Phat Nguyen-Qui;

¶ 46 **WHEREAS** the Dealer Member Rules, the Guidelines, the IROC Rules and Policies, notably UMIR 2.2, 6.2 and 3.3;

¹⁷ Document introduced into evidence as Exhibit P-29.

¹⁸ IROC, UMIR Disciplinary Sanction Guidelines, April 1, 2009.

¶ 47 **WHEREAS** the jurisprudence of rulings in matters that present certain analogies.

¶ 48 **FOR THESE REASONS**, the Hearing Panel:

PROHIBITS Mr. Vinh-Phat Nguyen-Qui from access to the marketplace for a period of two (2) months in the capacity of a registered representative.

ORDERS Mr. Vinh-Phat Nguyen-Qui to pay a fine for the various counts against him, apportioned as follows:

a) \$10,000 on the first count;

b) \$ 5,000 on each of counts 2 and 3.

ORDERS Mr. Vinh-Phat Nguyen-Qui to pay costs in the amount of \$10,000.

IMPOSES on Mr. Vinh-Phat Nguyen-Qui the obligation to take of the *Trader Trading Course* again, and to pass the exam as a condition to having access to the marketplace again as a registered representative.

Montréal, September 17, 2012

M^e Michèle Rivet, Chair

Mr. Daniel Houle

Mr. Yves Julien

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