ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Ogilvie, 2022 ABASC 106 **Date: 20220803**

Paul Anthony Ogilvie

Panel:	Tom Cotter Trudy Curran James Oosterbaan
Representation:	Tom McCartney Peter Verschoote for Commission Staff W.E. Brett Code, Q.C. Gillian Broadbent for the Respondent
Submissions Completed:	June 30, 2021
Decision:	August 3, 2022

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I. INTRODUCTION

[1] In a notice of hearing issued June 19, 2020 (the **NOH**), Alberta Securities Commission (the **ASC**) staff (**Staff**) alleged that Saint Jean Carbon Inc. (**SJCI**) and Paul Anthony Ogilvie (**Ogilvie**) made misrepresentations contrary to s. 92(4.1) of the *Securities Act* (Alberta) (the **Act**). The allegations against SJCI were resolved by settlement prior to the hearing, cited as *Re Saint Jean Carbon Inc.*, 2020 ABASC 184 (the **Settlement**).

[2] The allegations against Ogilvie – the Chief Executive Officer (**CEO**), Chairman, and a director of SJCI – were that he made, or authorized SJCI to make, certain misleading or untrue statements in two news releases issued by SJCI on February 28, 2017 (the **First Release**) and on March 3, 2017 (the **Second Release**).

[3] A hearing into the merits of the allegations was held over three and a half days, during which Staff tendered documentary evidence and called two investigative Staff witnesses, as well as Barry Pearson, SJCI's former Chief Financial Officer and Secretary (**Pearson**). Ogilvie was represented by counsel who cross-examined Staff's witnesses and called Ogilvie to testify. We also received written submissions on the merits of the allegations from Staff and from Ogilvie.

[4] After considering the evidence and the submissions, we find that Ogilvie contravened s. 92(4.1) of the Act. Our reasons for that finding follow.

II. BACKGROUND

[5] Staff's allegations related to a series of communications – principally emails, but evidently some telephone conversations – between Ogilvie and representatives from the Singapore office of Panasonic Procurement Asia Pacific, a subsidiary of Panasonic Corporation (**Panasonic**). Those communications spanned several years from 2010 through 2017 and largely consisted of Panasonic's enquiries and Ogilvie's responses concerning the ability of SJCI, and other companies with which Ogilvie was formerly associated, to supply graphite for battery manufacturing. They culminated in SJCI, a public company with common shares trading on the TSX Venture Exchange (**TSXV**), issuing the First Release announcing that it had received its first order from Panasonic to supply graphite anode material to its manufacturing facility, which order was part of an "offtake agreement to supply multiple tonnes of anode material monthly for a number of years".

[6] In the two trading sessions immediately following issuance of the First Release, SJCI's share price quadrupled from the preceding closing price and traded on much higher volumes than the period prior to the First Release. Late morning March 2, 2017, trading in SJCI's shares was halted pending news, following which SJCI issued the Second Release to "clarify[. . .] certain information" in the First Release. Among other things, the Second Release stated that the offtake agreement had not been signed, but that Panasonic and SJCI were "working to finalize the proposed offtake agreement as soon as possible".

[7] Following issuance of the Second Release, ASC investigative staff corresponded with Panasonic legal staff, who advised that Panasonic had no intention of entering the proposed offtake agreement and that it was considering cancelling the order with SJCI. Ogilvie also communicated with Panasonic around this time, resulting in another SJCI news release dated March 20, 2017 (the **Third Release**) wherein the company stated that Panasonic was proceeding with the order, but

that in the event Panasonic undertook a mass order of anode material from SJCI, it would do so under its own form of standard purchasing agreement. After the Third Release, SJCI's shares resumed trading at prices and volumes similar to those preceding the First Release.

[8] On March 21, 2017, the ASC issued an interim cease trade order, as extended by an order dated April 4, 2017 (respectively cited as *Re Saint Jean Carbon Inc.*, 2017 ABASC 49 and *Re Saint Jean Carbon Inc.*, 2017 ABASC 59), prohibiting the trading of SJCI securities by Ogilvie, other named individuals, and all other "reporting insiders". On December 10, 2020, the ASC issued a partial revocation order (cited as *Re Saint Jean Carbon Inc.*, 2020 ABASC 190) revoking the interim order against all respondents other than Ogilvie, and on April 20, 2021, the ASC issued a further revocation order (cited as *Re Saint Jean Carbon Inc.*, 2021 ABASC 49) revoking the interim cease trade order against Ogilvie.

III. ALLEGATIONS AND PARTIES' POSITIONS

A. Staff

[9] Staff alleged that the statement in the First Release that Panasonic's first order was "part of an offtake agreement to supply multiple tonnes of anode material monthly for a number of years" was untrue. They also alleged that the reference to "an order" was misleading, as it omitted necessary context about its nominal size and purpose for testing – i.e., it was a five-kilogram sample of graphite for Panasonic to test to determine if it met the company's requirements for battery manufacturing. Staff further alleged that the First Release's statement that the order was being shipped to a manufacturing facility was misleading, because in fact it was being shipped to a testing facility. The implication was that the graphite was going to be used in the manufacture of batteries, and thus had already met Panasonic's requirements. Finally, Staff alleged that the reference to Panasonic as a "customer" was misleading – Panasonic was not a customer as that term is commonly understood, since what was being delivered was in essence a free test sample.

[10] As to the Second Release, Staff withdrew a number of particulars of the alleged misrepresentations, but maintained that the statement "[b]oth companies are working to finalize the proposed offtake agreement as soon as possible" was untrue.

[11] The NOH alleged that Ogilvie knew or reasonably ought to have known that he made misleading or untrue statements that would reasonably be expected to have a significant effect on the market price or value of SJCI's securities. Staff argued that Ogilvie knew that the subject order described in the First Release was for five kilograms of graphite for testing, belying his assertion that he thought SJCI had a contract with Panasonic to supply it with multiple tonnes of graphite each month. Ogilvie knew he had issued a misleading news release when he sent Panasonic another draft offtake agreement after the Second Release – in particular he knew that it was not true that the parties were working to finalize the proposed offtake agreement as soon as possible.

[12] Staff asserted that materiality was not in issue. They cited the fact that SJCI filed a material change report coincident with the First Release, following which SJCI's common share price increased from $0.07 to $0.295. Staff also mentioned that the share price returned to $0.07 after the "correcting news releases" were issued. Staff's submissions did not explicitly address the materiality of the alleged misrepresentation in the Second Release, other than to reiterate the allegation in the NOH that Ogilvie authorized statements that he knew were misleading or untrue

and would reasonably be expected to have a significant effect on the market price or value of SJCI's securities.

B. Ogilvie

[13] Ogilvie argued that the NOH was deficient in not giving him notice that he faced potential jeopardy under s. 194(3) of the Act. The argument apparently stemmed from wording in the NOH that alleged SJCI and Ogilvie breached s. 92(4.1) of the Act by "making" a misleading or untrue statement. Ogilvie complained that Staff did not plead s. 194(3) of the Act, which provides that a person or company who authorizes, permits, or acquiesces in the commission of an offence under s. 194(1) is also guilty of an offence. He asserted that he did not make any of the impugned statements, but that SJCI made them. Alternatively, if Staff was seeking a finding that Ogilvie authorized the impugned statements, Ogilvie averred that he did not personally authorize the statements but that he "worked with management and had discussions with the Board".

[14] Ogilvie also argued in the further alternative that he reasonably believed that the statements were true and not misleading. As corroboration for that assertion, he maintained that he had no incentive or motive to mislead the market, but only acted with the intention of discharging the company's obligation to disclose material changes. In contrast, Ogilvie pointed to his colleagues William Pfaffenberger (SJCI's President and a director; **Pfaffenberger**) and Pearson as having a motivation to mislead the market, evidenced by their respective spouses' trading of SJCI shares and by certain emails from Pfaffenberger about the First Release.

[15] Ogilvie refuted Staff's contention that he was solely or principally responsible for the substantive content of the news releases, maintaining that all of management communicated with each other regularly and collaboratively made key decisions. The fact that Pfaffenberger and Pearson responded to Ogilvie's request to review a draft of the First Release for typos with minor comments and corrections should be construed as a collective management team authorization of that release, in light of the extensive internal communications that preceded that response.

[16] The principal focus of Ogilvie's submissions was to support his contention that Panasonic became his customer and thus a customer of the company for which he worked, and that his discussions with Panasonic made him believe that SJCI and Panasonic had agreed to the essential terms of a long-term supply contract. Ogilvie set out an extensive narrative of how his relationship with Panasonic developed over the years, including a chronology of the emails between the parties over the period 2010 through 2017. The email communications evolved from Panasonic's general expressions of interest in what SJCI could supply to very specific discussions about production capacity, material specifications, pricing, quantities, and shipping. Ogilvie argued that he was dealing with people in authority to contract for Panasonic, and that during the course of negotiations various terms were "put to bed", which he believed meant that an agreement appeared to have been reached.

[17] On the subject of the draft offtake agreements that he sent to Panasonic in March 2016 and March 2017, Ogilvie interpreted Panasonic's silence as favourable – i.e., until the ASC started communicating with Panasonic, the company never told him that it would not sign his form of offtake agreement.

[18] Ogilvie submitted that all of SJCI's public disclosures made in February 2017 provide necessary context in which the impugned statements should be considered, notably the audited financial statements and accompanying management discussion and analysis for the year ended October 31, 2016. He emphasized SJCI's public disclosure policy described therein, and argued that the company's extensive public disclosure complied with that policy and applicable regulatory requirements, and should inform whether the impugned statements could be expected to have had the market effect that resulted. Instead, Ogilvie asserted that insider trading influenced SJCI's share price, and that the magnitude of the market reaction came as a surprise to SJCI management. Ogilvie also emphasized the forward-looking information disclaimers in the First Release and the Second Release that warned the reader of the conditional and contingent nature of the agreement or proposed agreement with Panasonic.

[19] Specifically addressing the Second Release, Ogilvie asserted that he "handed the process over" to the TSXV and SJCI's legal counsel. He maintained that the Second Release was almost as accurate as the First Release. Ogilvie also addressed the email communication from Panasonic's legal personnel to an ASC investigator stating that Panasonic had no intention of entering into the proposed offtake agreement and that it was considering cancelling the "minimal sample order". He argued that there was no evidence that the author of that email was informed about the seven-year history of communications with Panasonic procurement personnel, and that Panasonic legal personnel's stated position was belied by Panasonic procurement personnel's subsequent confirmation of the order.

[20] Ogilvie made submissions on various aspects of the materiality issue. He repeatedly affirmed that the information contained in the two press releases was material, principally because the sample order was for a production trial and that marked a significant milestone in the relationship between Panasonic and SJCI. However, he denied that the identified words were materially untrue or misleading. He also denied that they could reasonably have been expected to have a significant effect on the market price or value of SJCI's securities. Further, he did not have "actual or implied guilty knowledge" that the impugned statements would have such an effect.

IV. PRELIMINARY MATTERS

A. Standard of Proof

[21] The standard of proof in ASC proceedings is proof on a balance of probabilities. We must "be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 38; *Re Aitkens*, 2018 ABASC 27 at para. 48; and *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49). In assessing the evidence, we may draw inferences, provided that inferences are supported by evidence and not founded on speculation (*Aitkens* at para. 49; *Arbour* at para. 39; and *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 26-28).

B. Evidentiary Issues

1. Relevance and Hearsay

[22] Sections 29(e) and (f) of the Act provide that an ASC hearing panel is to "receive that evidence that is relevant to the matter being heard", and that "the laws of evidence applicable to judicial proceedings do not apply". All relevant evidence, including hearsay evidence, is

admissible, subject to the rules of natural justice and procedural fairness (*Aitkens* at para. 50; and *Arbour* at para. 45). However, it remains within our discretion as to the relevant evidence we will admit in a hearing (*Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18).

[23] In one instance, Ogilvie's counsel raised an objection about documentary hearsay evidence. The objection related to the previously mentioned email from Panasonic legal personnel to an ASC investigator stating that Panasonic was considering cancelling the graphite sample order and that the company had no intention of entering into SJCI's form of offtake agreement. Admissibility *per se* was not contested, only that Ogilvie did not accept the truth of the contents of that document. As also mentioned, Ogilvie in argument gave reasons why we should not accept the assertions in that document.

[24] When weighing the evidence admitted, we considered indicators of its reliability, including whether it was corroborated (*Aitkens* at para. 51; and *Arbour* at paras. 46 and 53). As noted in *Aitkens* (*ibid.*), significant indicators of reliability for transcripts of witness interviews compelled by Staff may include whether the witness was sworn or was accompanied by counsel (also see *Arbour* at para. 54; *Re TransCap Corp.*, 2013 ABASC 201 at para. 65; and *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (affirming *Re Capital Alternatives Inc.*, 2007 ABASC 79) at para. 34).

2. Credibility

[25] As is often the case in enforcement proceedings, the panel is required to draw conclusions about the credibility of witnesses and assess conflicting evidence. In making that assessment, we considered the source of the evidence and whether or not the evidence was consistent with other reliable evidence, including documents and the testimony of witnesses with no motivation not to tell the truth. We also considered whether the evidence made logical sense in the circumstances (*Aitkens* at para. 52). We were guided by the statement of law from *Faryna v. Chorny*, [1951] B.C.J. No. 152 (BCCA) (at para. 11, also cited in *R. v. Boyle*, 2001 ABPC 152 at para. 107):

> The credibility of interested witness[es,] particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[26] We were also mindful of the Alberta Court of Appeal's statements in *Walton* about assessing credibility, including the proposition that unless there is positive evidence to the contrary, disbelief of a witness does not necessarily mean that the opposite of what that witness said is true (at para. 36).

[27] Overall, we found credible the evidence of the witnesses who testified, particularly when corroborated by documentary evidence and the testimony of other witnesses. However, there were aspects of the testimony given by both Pearson and Ogilvie that we treated with measured skepticism because of their obvious animus toward each other and their propensity to diminish the extent of their respective responsibility for certain corporate actions and decisions. In the end, the areas of conflicting testimony from Pearson and Ogilvie were not particularly pertinent to, much

less determinative of, our findings on the allegations in the NOH. Our conclusions on specific credibility issues and conflicting evidence are given later in this decision.

3. Settlement

[28] As will be discussed later in this decision, the parties had conflicting positions concerning the weight that ought to be given to the Settlement. Staff argued that the Settlement was highly probative, being an admission against interest made by SJCI. Ogilvie posited various motives as to why SJCI may have entered into the Settlement, and argued that the admissions made in the Settlement were inconsistent with other evidence. We gave very little weight to the Settlement, unless the admissions made were uncontroversial or supported by other reliable evidence. We did not treat the Settlement as determinative of any issue in dispute, for the reasons given in *Re Wenzel*, 2005 ABASC 91 (at para. 25).

C. Notice of Hearing

[29] As mentioned, Ogilvie argued that the NOH did not give him notice that he was facing potential jeopardy under s. 194(3) of the Act for "authorizing" the impugned statements made by SJCI. We consider that preliminary issue now, as it was argued that it goes to our jurisdiction to hear and determine the allegations against Ogilvie.

[30] Ogilvie gave examples of notices of hearing in other proceedings in which respondents were alleged to have either made statements, or to have authorized, permitted, or acquiesced in statements made by an entity with which they were associated. He put forward the familiar proposition that the rules of natural justice demand that respondents be given proper notice of the case they are required to meet, and argued as a corollary that without such notice neither the panel nor a respondent could be sure that disclosure was complete.

[31] Ogilvie complained that Staff's written submissions did not seek a finding of "guilt" under s. 194(3), but instead asked at the end of their submissions for a finding of "authorizing", implicitly based on s. 194(3). Section 92(4.1) only proscribes "making" misleading statements and does not sanction "authorizing" such statements. We were reminded that we have no inherent jurisdiction, and thus we have no ability to substitute an allegation for what was actually alleged by Staff. Ogilvie also disputed Staff's ability to rely on s. 198(1.2) of the Act, noting that Staff had not alleged that he acted contrary to the public interest.

[32] Staff's reply submissions on this issue were simple: paragraph 4 of the NOH alleged that "Ogilvie was responsible for, contributed content to or authorized, permitted or acquiesced in the making of news releases issued by [SJCI], and specifically those mentioned in this Notice". Paragraph 1 of the NOH alleged that SJCI and Ogilvie breached s. 92(4.1) by "making" the alleged misstatements. There was no need to plead s. 194 because that provision is not relevant for administrative proceedings – it only pertains to "quasi-criminal" proceedings prosecuted in the Provincial Court of Alberta. Staff ensured that Ogilvie was aware of the allegation that he authorized, permitted, or acquiesced in issuing the impugned news releases.

[33] In Staff's submission, the relevant statutory provisions are ss. 198(1.2) and 199(1)(a)(ii):

> **[198](1.2)** The Commission may, after providing an opportunity to be heard, make an order under subsection (1)(a) to (h) against a director or officer of a company or of a person other than an

> individual who authorizes, permits or acquiesces in the contravention of Alberta securities laws or conduct contrary to the public interest.
>
> . . .
>
> **199(1)** If the Commission, after a hearing,
>
> (a) determines that
>
> (i) a person or company has contravened or failed to comply with any provision of Alberta securities laws, or
>
> (ii) a person or company authorized, permitted or acquiesced in a contravention or failure to comply with any provision of Alberta securities laws by another person or company,
>
> and
>
> (b) considers it to be in the public interest to make the order,
>
> the Commission may order the person or company to pay an administrative penalty of not more than $1 000 000 for each contravention or failure to comply.

[34] The cumulative effect of the foregoing is to allow a panel to impose certain market-access bans and an administrative penalty against a director or officer of a company, who after being given an opportunity to be heard, was found to have authorized, permitted, or acquiesced in the contravention of Alberta securities laws.

[35] We agree with Staff. Ogilvie was given adequate notice of the allegation that he contravened s. 92(4.1) by making the impugned statements and that he authorized, permitted, and acquiesced in SJCI making those same statements. The fact that these allegations are found in two separate paragraphs of the NOH does not detract from the adequacy of the notice given to Ogilvie – there is nothing confusing or ambiguous about the pleadings.

[36] Section 194(3) has no application here; the operative provisions of the Act for administrative hearings of allegations that a respondent authorized, permitted, or acquiesced in a contravention of Alberta securities laws are found in ss. 198(1.2) and 199(1)(a)(ii). Staff were not required to cite those statutory references in the NOH (although they were referenced on the first page of the NOH), provided that Ogilvie was given adequate notice of the case he was required to meet, which he was.

[37] We reject Ogilvie's contention that SJCI's admission in the Settlement of making untrue and misleading statements precludes those same allegations being made against Ogilvie. As other panels have observed, it is an obvious truth that companies can only act through individuals. We repeat what was said by the panel in *Aitkens* (at para. 40):

> Corporate entities and trusts can act only through individuals – either directly or through other corporate entities (such as through a corporate trustee acting for a trust). Further, "[a]uthority over the acts of a corporation generally rests, ultimately, with its directors and officers" (*Re Aurora*, 2011 ABASC 501 at para. 199). Therefore, directors and officers of corporations may be held responsible

> for – or to have authorized, permitted and acquiesced in – the conduct of corporate respondents (see also *Re Maitland Capital Ltd.*, 2007 ABASC 357 at para. 138).

[38] Again, the NOH made it very clear to Ogilvie that he was being asked to answer for allegedly untrue and misleading statements made by him and by SJCI. We were therefore required to hear and determine the allegation that Ogilvie authorized, permitted, or acquiesced in the statements made by SJCI in the First Release and the Second Release.

D. Due Diligence Defence

[39] Staff submitted that Ogilvie may rely on the involvement of SJCI's counsel with drafting the Second Release as grounds for asserting a due diligence defence, specifically that he relied on the advice of counsel and the TSXV's vetting of the Second Release such that he did not have the requisite intent to mislead. Staff referred to a test for determining whether a legal advice reliance defence could be asserted, citing *Aitkens* (at para. 80). They argued that Ogilvie was the sole source of information about the status of negotiations with Panasonic on the draft offtake agreement, with the result that Ogilvie could not assert a defence of legal advice because he had misled SJCI's counsel on that point.

[40] Ogilvie submitted that he was entitled to the statutory defence provided for in s. 194(2) of the Act, because he exercised reasonable diligence and did not have the requisite *mens rea* for a finding of liability. Section 194(2) provides:

> No person or company is guilty of an offence under section 57.7, 92(4.1) or 221.1 if the person or company, as the case may be, did not know, and in the exercise of reasonable diligence would not have known, that the statement referred to in that subsection was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made.

[41] For the same reasons given in addressing Ogilvie's complaint about the sufficiency of the pleadings in the NOH, s. 194(2) is not relevant to an asserted due diligence defence in these proceedings. We would reiterate that this was an administrative hearing, not an alleged offence prosecuted in Provincial Court to which s. 194(2) may apply. As noted in *Aitkens*, s. 92(4.1) of the Act includes a knowledge element that "may involve an examination of some of the same considerations as for a due diligence defence to a strict liability offence, including consideration of the criteria for reasonable reliance set out in *Arbour*" (at para. 93). We will therefore address this issue in our analysis of whether Staff proved that Ogilvie knew or reasonably ought to have known the necessary elements of s. 92(4.1).

V. FACTS

A. Saint Jean Carbon Inc.

1. Operations

[42] At the relevant time, SJCI described itself as a junior resource company involved in the acquisition and exploration of properties that had potential economic mineralization for the production of graphite and graphene. Although the company was incorporated in 1997, its public disclosure described it as having been "officially formed" in 2004 by amalgamation, with the resulting name Torch River Resources Ltd. The company held some molybdenum and gold properties in British Columbia and Manitoba before transitioning to exploration and development

of graphite in 2013 when it changed its name to Saint Jean Carbon Inc. Between 2013 and 2016, SJCI acquired graphite and lithium properties in Québec.

[43] SJCI developed relationships with the University of Waterloo and the University of Western Ontario to pursue graphene research, and obtained federally-funded research grants in 2015 to undertake that work. At the time of the First Release and the Second Release, SJCI was not producing any graphite, nor did it have any processing facility of its own. SJCI had only started preliminary economic assessments of its graphite properties in 2017.

2. Financial Statements

[44] In evidence were SJCI's audited comparative financial statements as at and for the years ended October 31, 2016 and 2015, with the accompanying management discussion and analysis, and unaudited comparative financial statements as at and for the periods ended January 31, 2017 and 2016. Overall, the financial condition of SJCI was what would be expected for a typical Canadian microcap resources issuer at a pre-production stage of its development. It had neither sales revenues nor a bank debt facility to fund operations, but relied on equity financings and loans from insiders for its working capital.

[45] Specifically, SJCI had a working capital deficit of approximately $900,000 as at October 31, 2016, which improved to working capital of approximately $380,000 as at January 31, 2017 as a result of equity financings in November and December 2016. During the 2016 financial year SJCI raised approximately $1.5 million from equity financings, and in the three-month period ended January 31, 2017 it raised approximately $1.97 million. The book value of SJCI's mineral exploration and evaluation assets was approximately $3.6 million as at January 31, 2017. Some of the properties were acquired in exchange for SJCI shares. From the number of shares outstanding as of that date and the share trading data in evidence, SJCI had a market capitalization of approximately $12 million before the First Release was issued.

B. Communications with Panasonic

1. October 2010 – January 2011

[46] As mentioned, Staff's allegations were largely grounded on email communications between Ogilvie and Panasonic over several years from 2010 to 2017. They consisted of dozens of emails, and we summarize the substantive content of the most pertinent correspondence.

[47] The communications began with an unsolicited email dated October 21, 2010 from DK at Panasonic to a general email address for a company of which Ogilvie was then the CEO, asking whether the company had any products suitable for "vein/flake graphite" in alkaline batteries. Ogilvie replied the same day stating that the company owned a number of graphite properties in Canada and could supply graphite of varying specifications, including high grade for lithium batteries. He represented that the company manufactured for customers worldwide on an "off-take" basis, and would need to know "the specification(s), quantities, package requirements on a five year basis".

[48] Ogilvie and DK exchanged several more emails during the remainder of October, the content of which began a pattern of communication that would continue in the years that followed. Ogilvie promised that his company could supply any graphite grade and specification that

Panasonic might need, whether for alkaline or lithium batteries, but that he would only do so under a long-term offtake agreement. DK resisted that approach, insisting that any commercial relationship would have to develop slowly, and that any purchase commitment would be contingent upon a sample evaluation satisfactory to Panasonic.

[49] For example, on November 2, 2010, DK wrote that, "[a]s you probably know, the sample evaluation usually takes around one year." Undeterred, Ogilvie sent more emails seeking Panasonic's commitment to enter an offtake agreement, implying that there was a time-limited opportunity for supply, because "[w]e have been approached by all of the very large trading companies, battery manufactures [sic], etc[.] in your area". Ogilvie sent DK another email on November 12 suggesting that his company supply Panasonic's needs for alkaline and lithium batteries by shipping an entire year's worth of material to a central distribution warehouse from which Panasonic could order what it wanted.

[50] In a November 15, 2010 email, DK was more explicit in tempering Ogilvie's expectations, stating that:

- Panasonic "buy[s] directly from makers instead of going through another trading house".
- "Japanese companies are rather cautious when starting business with a new supplier."
- Panasonic would discuss an offtake agreement with a fixed quantity and price for no more than a three-year term "[o]nce the business is stable, and customer is satisfied in terms of cost, delivery, quality etc[.] . . ."
- Panasonic would proceed with a sample evaluation that would take up to year to complete, if it received an attractive quote that was valid for a year.

Ogilvie provided a quote and certain shipping details. DK then sent a list of questions to Ogilvie on November 16 about his company's mine reserves, production, refining capacity, customers, capital, revenues, and ISO certifications.

[51] Ogilvie replied the same day, and we reproduce his email verbatim in its entirety, as it is illustrative of Ogilvie's insistent and promotional tone, at times hyperbolic:

> Darren, I apologize for the last email. Please understand this is not how other companies approach us. Typically, we produce material under a very specific contract. Your competitors, sign off-take agreements with us to produce the materials needed for a five year period. As we have massive reserves and the best quality graphite. We can also fully certify our product. The need for one year to test the samples is unheard of.
> I believe this is the case, as you have been receiving your material from China.
> When dealing with a Canadian company, you do not have to even consider testing our material. We will ship you exactly what you order.
> It is important for you to understand, we would very much like to supply you your rare earth materials as well as graphite. However, we need to know what your entire organization needs and we need to have an agreement for five years minimum.
> If you come to me a year from now and request materials, I will tell you positively, some other company will have purchased the materials.
> The demand world wide, is very significant, and most companies, are entering into MOU's and off-takes, to assure you have supply without interruption.

[52] About a week later, DK received answers to his questions about Ogilvie's company, including a statement that sales revenue was "very low" because their operating mine had just started. Ogilvie projected sales revenue of $15 million in the next year, escalating to $100 million in 2013, with production capacity of $245 million annually. Ogilvie represented that the company had "the financial backing of the world[']s largest investment bank, thus allowing us to meet our production goals".

[53] DK took that information, put it in a PowerPoint slide, and sent it to Ogilvie the next day, requesting more information about the company. Ogilvie replied the same day, asking DK to remove the Goldman Sachs name from the slide, and stated, "[w]e also have two other banks as well that we use". Several emails followed about a planned video conference call between the parties, although it was not clear whether the call occurred. The parties also exchanged a series of emails wherein Ogilvie sought Panasonic's detailed specifications, but DK resisted providing information with the requested degree of specificity for reasons of confidentiality. Conversely, DK repeatedly asked Ogilvie for his company's standard specifications and the number of grades produced so Panasonic could assess Ogilvie's company's capability to meet Panasonic's needs.

[54] On December 21, 2010, Ogilvie emailed DK with more information about the company's customers, representing that they included many other battery manufacturers, but that he could not disclose their names. He also mentioned that the company had product in Japan and that he would be sending "raw base material for you with the other samples we are sending you". DK replied that day, stating, "I am still a bit bewildered when you mentioned that your product is (was?) used in Panasonic Lithium ion batteries". He asked Ogilvie to confirm this information, adding that if it were true, this would be a "huge breakthrough" and would make Panasonic more willing to proceed. Ogilvie confirmed that he had told DK this, and that:

> I was told that a number of years ago, when the Tesla was at the early development stage. Our graphite was supplied through a distributor. I do not have any fact[s] to back this up, just a conversation with our mill.

[55] The emails continued through January 2011, with each party insisting on receiving the other's specifications. On January 19, 2011, DK wrote: "We are at a deadlock here. If you wish to continue pursuing a business partnership with Panasonic, we need your cooperation." Ogilvie replied the same day that he would send the requested information and that the samples should arrive soon. After DK asked about the status of the sample shipment, Ogilvie replied about a week later:

> Hi Darren, did you receive the sample yet[?] Our shipping partner lost five sample[s] for Japan. I fear yours was one of them. This is very troubling, I apologize.
>
> Could you please send me the shipping address so I can search for the shipment[?] If it was lost we will send a sample direct over nigh[t] from our head office.

DK followed up a month later on March 3, 2011, again asking for technical data.

2. July 2011 – January 2012

[56] As would also become a pattern in the parties' communications, there was a four-month hiatus in the correspondence before DK again followed up with Ogilvie on July 15, 2011, complaining that, "I have been waiting for a very long time but I have yet to receive the technical data we requested nor the sample you promised...". The next series of emails in evidence started in early September 2011 when DK reminded Ogilvie to send him a presentation that had been promised earlier, but their correspondence then moved to a discussion about Panasonic representatives touring a recently opened mine in Australia operated by Ogilvie's company.

[57] In that context, Ogilvie again asserted a need for a long-term offtake agreement in order to "progress our business relationship along". This provoked a curt response from DK several minutes later:

> That is what I have been trying to do - to make progress. Last time we waited for a couple of months for the technical data and samples but in the end we got nothing. Then when I approached you again and requested an updated company overview as sanyo and panasonic do no[t] know anything about [Ogilvie's company] a month ago, you keep telling me that I'd get it at the end of the day...
> One month has passed since then.
> No offense I couldn[']t help but wonder whether I have been patronized. . . .

[58] There were a few sporadic emails for the remainder of 2011 and January 2012 in evidence, returning to the subject of organizing a visit to the Australian facility.

3. January 2015 – February 2017

[59] The next series of emails between Ogilvie and Panasonic representatives in evidence started in January 2015. Ogilvie testified that the company hired a president in Australia who took over the conversation about a site visit to the Australian facility. In April 2013, Ogilvie joined Torch River Resources Ltd., which changed its name on October 30, 2013 to SJCI. Until Ogilvie joined the company, SJCI had been exploring for molybdenum with two properties in British Columbia and a gold property in Manitoba, but decided to hire Ogilvie to transition the company into the graphite industry when the price of molybdenum dropped significantly in 2013.

[60] On January 15, 2015, KHW of Panasonic emailed Ogilvie referring to an earlier communication not in evidence and enquiring whether SJCI could supply Panasonic with "spheroidized" graphite for battery applications. KHW also asked for specifications of the graphite, company information, mining capacity, and a "RnD development roadmap". In the ensuing correspondence over January and February 2015, Ogilvie sent KHW information with specifications, price estimates, and supply locales and stipulated that SJCI's interest was in supplying long-term contracts. There was another pause in the correspondence until December 2, 2015, when Ogilvie emailed KHW to inform him that SJCI was able to supply graphite at a much lower price than he had quoted earlier that year. Further emails were exchanged in December 2015 about specifications, price, and quantities, followed by a February 1, 2016 email from KHW to Ogilvie with detailed graphite specifications asking for quotes for 500 metric tonnes per month delivered on different shipping terms to Japan and California.

[61] KHW followed up on February 29, 2016, asking for the same information, to which Ogilvie replied on March 9, 2016, "please fi[n]d o[u]r formal agreement for supply of battery grade

material" and attached a draft offtake agreement. The agreement – evidently based on a template document – was clumsily drafted and replete with typographical errors, contradictory terms, and vague, colloquial language. Ogilvie testified that a change made to a later version of the draft offtake agreement was "part of housekeeping, counsel would have gone through it and changed it", implying that counsel had drafted the agreement, or at least had drafted the revisions. When confronted with the suggestion that it did not look as though a lawyer had done that because of the poor English, Ogilvie said he could not say and did not know, though he denied making the change himself. Pearson testified that Ogilvie habitually "produced offtakes or agreements by himself or through his office". Having regard to the language used in the draft offtake agreements in evidence, the timing of the subject change to the agreement (discussed later in this decision), and Ogilvie's equivocation on this point in his testimony, we found more credible Pearson's evidence on the authorship of the offtake agreement.

[62] KHW did not reply to Ogilvie's email with the draft offtake agreement. Over a month later on April 26, 2016 Ogilvie sent a terse note: "Why did you not follow up on this? I thought you were interested in North American supply." KHW waited five months before sending another email to Ogilvie on September 28, 2016, asking if SJCI had grades that would be suitable for Panasonic's alkaline batteries, and if so, to provide a price quote. Ogilvie replied the same day asking for more detail on material specification and forecasted quantities, which KHW sent him on October 17, 2016.

[63] The next group of emails in evidence were between SLP and PNC of Panasonic and Ogilvie, starting on January 25, 2017, when Ogilvie sent SLP a certificate of analysis (COA) asking if "we can supply a one ton[n]e trial order". After PNC expressed concern about the COA's higher-than-expected iron content, Ogilvie sent another COA on February 3, 2017. This prompted more questions from PNC, asking for "**typical specification** with COA result again" (emphasis in original), and reminding Ogilvie of the required specifications. Ogilvie sent PNC a specification sheet on February 6, 2017, stating that "[w]e look forward to supplying you a test sample".

[64] On February 8, 2017, PNC thanked Ogilvie for the specifications and asked him to confirm a price of $1,400 for a "1ton trial order only" and also to provide a price quote for "mass production", expressed as "300MT/year" of two different grades. Ogilvie replied the same day, quoting "$1,328.00/mt for the one ton and for mass production". On February 22, 2017, PNC emailed Ogilvie asking for "samples for lab test" and stipulated a quantity of five kilograms of a previously identified graphite specification. PNC asked Ogilvie for a delivery time estimate and provided a shipping address for Panasonic in Osaka, Japan. Ogilvie replied the next day:

> [Y]es we can send out right away. Please send me a formal request for the material (a purchase order of no dollar value we need this for duties and customs). We will air freight to the deliver[y] address.

[65] PNC sent Ogilvie the requested purchase order on February 24, 2017. The purchase order identified five kilograms of graphite with a unit price of US$1.328 per kilogram for a total value of US$6.64, and a notation, "VALUE FOR CUSTOM CLEARANCE ONLY. NO COMMERCIAL VALUE".

C. Communications within Saint Jean Carbon Inc.

[66] Both Ogilvie and Pearson testified that they had weekly management meetings by telephone that included Pfaffenberger. Pearson kept notes of those meetings, though he was challenged on their reliability as not having been made contemporaneously. Pearson testified that his notes were made "on or about the time of the meeting" and that most were made during the meetings. On cross-examination Pearson was confronted with the transcript of his investigative interview in which he said he kept certain information "after the fact" that could not be verified as absolutely correct. Pearson testified that he was nervous in his investigative interview as an explanation for the apparent contradiction, but maintained that his notes were correct. Ogilvie testified that he did not take his own notes of management meetings, but he said that Pearson's notes accurately captured the highlights of the meetings. We were satisfied from all of the evidence that Pearson's notes were generally reliable, but they did not have much probative value in deciding any contested facts.

[67] Pearson's notes corroborated the uncontested evidence that Ogilvie was the sole point of contact at SJCI with Panasonic personnel, and therefore everything Pearson and Pfaffenberger knew or thought they knew about SJCI's relationship with Panasonic came from Ogilvie. For example, in their meeting on November 23, 2016, Ogilvie mentioned Panasonic to his colleagues, advising that "he would be supplying material to Japan". Similarly in the notes of the February 7, 2017 management meeting, Ogilvie reported that he had "some interaction with Panasonic, specification, samples and next step". The following week Ogilvie reported that he expected to get an order from Panasonic, and they discussed the logistics of mining, transporting raw material, processing, and shipping finished product.

[68] Most of the pertinent documentary evidence of SJCI internal communications consisted of emails among management. After the February 8, 2017 email exchange between Ogilvie and PNC, Ogilvie forwarded those emails – as well as a chain of immediately preceding emails – to Pfaffenberger, Pearson, and an employee of SJCI's investor relations firm the same day, with a note that read in part: "we are inches from getting the PO from Panasonic . . . believe it or not, this has been going back and forth for over two years . . . finally our spec and price approved". Also on that day, Pfaffenberger replied, "GREAT!! Should we announce this soon? Panasonic doesn't screw around. We have been recognized!!" Pearson's reaction was more measured, as he expressed concern that the price quote was too low and he was less certain that Panasonic would reply with an order. Ogilvie reassured his colleagues that the lower quote was for less processed material and reflected the same raw material price given earlier, then ended his note, "Now this will be big [n]ews!"

[69] On February 15, 2017, Pfaffenberger asked Ogilvie to draft a news release for the anticipated order, and later that day Ogilvie sent him a draft of what would eventually become the First Release. The first draft was substantively the same as the final version of the First Release, other than one important embellishment that Ogilvie added later. In the first draft Ogilvie was quoted as stating: "[the Panasonic] order is part of an offtake agreement to supply anode material monthly for a number years", whereas the First Release quoted him stating: "[the Panasonic] order is part of an offtake agreement to supply <u>multiple tonnes of</u> anode material monthly for a number of years" (emphasis added).

[70] The recipients of the draft First Release suggested only minor edits, mostly spelling and grammar. Pfaffenberger enthusiastically responded "I LIKE IT" when he received the first draft. Five days later on February 20, 2017, Pfaffenberger emailed his management colleagues telling them that he thought SJCI's shares were "poised to break out" and that they needed to disseminate three big news releases before pricing SJCI's shares for the next financing, including a news release about the Panasonic order. Pfaffenberger predicted that the news would double or triple SJCI's share price from where it was trading (around $0.07).

[71] In the days preceding the First Release there were further internal communications about the status of the Panasonic order. An offtake agreement was discussed at a February 21, 2017 management meeting, with reference to "25 tons per month". After receiving PNC's February 22 email requesting lab test samples, Ogilvie emailed Pfaffenberger and Pearson the next day stating: "FYI -DO NOT DISTR[I]BUTE, 12 pounds is small, but it is an order. They have requested, and will send me a PO. So this is the making of a big press release....talk at 11:00".

[72] On February 27, 2017, Ogilvie circulated what appeared to be the penultimate version of the First Release, which now included the reference to "multiple tonnes" of anode material under the offtake agreement. Ogilvie asked the recipients to check for "typos", and he laid out a plan of action that consisted of: (i) sending the draft to the Investment Industry Regulatory Organization of Canada (**IIROC**) later that day; (ii) halting trading of SJCI's shares at market open on February 28, 2017; (iii) disseminating the news release a half-hour later; and (iv) resuming trading one hour after that. Pfaffenberger and Pearson replied with minor typographical corrections and edits.

[73] Ogilvie asked Pearson to contact IIROC before market open on February 28 to request a trading halt pending news, with instructions to tell IIROC "just being cautious" if they asked the reason for the halt. After the First Release was disseminated and SJCI's shares resumed trading, management seemed surprised by the market reaction to the news. Ogilvie emailed Pearson on March 1, stating: "I don't know what to say, I was full expecting to sit back at 14 to 15 that would have made me very happy, we are actually running out of sellers, that means Glenn could walk the stock up to a buck!!!!!!!!!!!!!!" That sentiment was also reflected in Pearson's notes of a management call that day.

[74] Ogilvie and Pearson gave conflicting testimony on the respective roles of management concerning the preparation of news releases, especially the First Release. Ogilvie portrayed the drafting process as a collaborative effort in which all participated and provided substantive input. Pearson on the other hand testified that Ogilvie was responsible for the substantive content of news releases and that Pearson and Pfaffenberger only provided grammatical and spelling corrections. The documentary evidence suggested that Pearson's account of the drafting process was more accurate, but in the result nothing turns on this point for reasons discussed later in this decision.

[75] It was reasonably clear from the evidence that Ogilvie – on behalf of SJCI management – was principally responsible for the drafting of the Second Release, with advice from SJCI counsel. There was very little documentary evidence of internal SJCI communications touching on the Second Release, and overwhelmingly the evidence consisted of emails among Ogilvie, SJCI counsel, and TSXV personnel.

[76] There was also evidence that SJCI's investor relations consultant advised Ogilvie to get a comment from Panasonic on the First Release before it was disseminated, and that Ogilvie agreed at the time that that was a good idea. When asked why he ultimately did not do so, Ogilvie testified that, "I guess I didn't think about it. I just didn't do it".

D. February 28, 2017 News Release

[77] Because Staff alleged that various words and phrases used in the First Release were misleading or untrue, we reproduce here verbatim all of the pertinent text from the body of that release:

> OAKVILLE, Ontario, Feb. 28, 2017 (GLOBE NEWSWIRE) -- Saint Jean Carbon Inc. ("Saint Jean" or the "Company") (TSX-V:SJL) (OTCQB:TORVF), a carbon science company engaged in the design and build of green energy storage, green energy creation and green re-creation through the use of carbon materials. The Company is pleased to announce that it has received their first order from Panasonic Corporation to supply graphite anode material to their manufacturing facility. The order consists of two different material specifications. Panasonic is one of the largest battery manufacturers in the world and makes batteries for companies like; Tesla, Toyota, Volkswagen and many other large corporations.
>
> Paul Ogilvie, CEO, commented: "After more than two years of working on material specifications, sampling and re working, we could not be more pleased than to finally ship finished material to our customer. The order is part of an offtake agreement to supply multiple tonnes of anode material monthly for a number of years. We are hopeful that the electric car business continues to grow at this rate; as that will continue to push our demand and create more and more opportunities for us. We consider today as our greatest accomplishment; to be recognized and awarded with an order to supply one of the world's best technology companies, is a tremendous accomplishment for the team."
>
> Prof. Zhongwei Chen, CTO, commented: "Our research and constant striving to create the best in class anode material is starting to pay off. Our goal is to have the ability to create material for any customer's specification on the highest level of consistency and quality."
>
> The Company will ship the first order within 90 days. The Company will continue to work with all of our other interested battery companies, and continue to help create better turnkey solution for anode materials and work to create higher performance that may untimely mean higher performance batteries.
>
> . . .

[78] SJCI filed a material change report with the ASC dated March 1, appending the First Release. As previously planned, at SJCI's request IIROC halted trading of SJCI shares before market open on February 28, and resumed trading approximately an hour and a half later once the First Release was disseminated. Before the First Release, SJCI shares traded on the TSXV for most of January and February 2017 at a price between $0.06 and $0.07, with daily trading volumes rarely exceeding two million shares. Most days' trading volume was less than a million shares. On February 28, almost 63 million SJCI shares traded, closing at $0.185. Trading price and volume further increased the next day, closing at $0.295 with around 79.5 million shares traded.

E. TSXV Communications

[79] On March 1, TSXV compliance staff (AL) emailed SJCI about the First Release, asking for a copy of the agreement with Panasonic and details of the source of graphite to be supplied to

Panasonic. Ogilvie replied to AL that day with a copy of the Panasonic purchase order and a draft offtake agreement he said "we are working from". He also wrote that small orders would come from the company's Québec properties, and that in the short term larger orders would come from overseas. However, they expected them eventually to come from Québec in the long term.

[80] On March 2, AL emailed Ogilvie telling him that the TSXV would require SJCI to issue a clarifying news release, disclosing that: (i) the order was for a nominal amount and value; (ii) the offtake agreement had not yet been executed; and (iii) the source origin of the graphite and that the company's properties were not in production. AL also asked for disclosure clarifying the First Release statement about the first order being shipped within 90 days, given the date of the purchase order and the unexecuted offtake agreement. The same day, Ogilvie sent AL a draft news release, but AL asked for another version once SJCI's counsel had reviewed it. During the course of the day, Ogilvie, AL, and SJCI's counsel exchanged emails, drafts of the requested news release, and comments, culminating in a final version of the Second Release to be disseminated on March 3.

[81] IIROC halted trading in SJCI's shares the morning of March 2, pending news.

F. March 3, 2017 News Release

[82] The Second Release was disseminated March 3, and IIROC removed the trading halt shortly after market open that day. Again, we reproduce all of the pertinent text of that release verbatim because Staff alleged that various words and phrases therein were misleading or untrue:

> **March 3rd 2017, Oakville, Ontario, Canada** – Saint Jean Carbon Inc. ("Saint Jean" or the "Company") (TSX-V: SJL) (OTCQB: TOR VF), a carbon science company engaged in the design and build of green energy storage, green energy creation and green re-creation through the use of carbon materials. The Company is pleased to clarify certain information in the press release dated February 28th, 2017 at the request, and pursuant to the guidance, of the TSX Venture Exchange.
>
> The Company has received a purchase order from Panasonic Corporation to supply graphite anode material to their manufacturing facility. While the size and value of the order is nominal, both on its own and in comparison to the anticipated monthly orders under the provisions of the proposed formal offtake agreement, the order is significant as it marks the first order for material that has been re-engineered by the Company. Although the offtake agreement has not been signed at this time, the supply of the re-engineered material pursuant to the order is based upon the procedures and timelines contained in the proposed offtake agreement. The first order is anticipated to be delivered within 90 days from February 24th the date of the purchase order. The raw material is being re-engineered by the Company prior to its delivery; however, the supply is being out sourced as the Company's properties are not currently in production. The Company confirms that it has both the financial resources and access to the raw materials necessary to complete the first order. Both companies are working to finalize the proposed offtake agreement as soon as possible.
>
> The Company has received numerous requests for information related to amount of material per month, per year, how many years, how much the material is going to sell for, etc. At this time, that information is confidential. If at some point the Company receives authorization to release the information from the customer, the company will share the details.
>
> . . .

[83] After trading in SJCI shares resumed March 3, the price declined from the March 2 close of $0.255 to close at $0.15, an approximate 41% decrease in share price.

G. ASC, Panasonic, and Ogilvie Communications

[84] An ASC investigator (MM) testified that the First Release came to his attention in the course of monitoring the public disclosure of a number of issuers for signs of market manipulation. He was struck by the First Release's headline making reference to Panasonic and the content of the release, which he described as very positive. MM had some discussion with AL at the TSXV and obtained copies of the emails exchanged among Ogilvie, AL, and SJCI's counsel. MM found contact details for Panasonic's legal counsel in the United States (**US**) and emailed him on March 4, asking for Panasonic's comment on the veracity and accuracy of quoted passages from the First Release and the Second Release. That enquiry was redirected to Panasonic's legal personnel at its headquarters.

[85] At about the same time, Ogilvie emailed PNC at Panasonic on March 5, attaching a new version of the draft offtake agreement that Ogilvie had signed. Ogilvie urged PNC to sign and return the agreement "right away" as this would assure material supply requested "today and in the future". The most notable difference in the attached offtake agreement from earlier drafts was the provision governing mutual approval of each party's news releases. The earlier drafts had reciprocal provisions requiring prior written consent of the news releases of the other party "related to this Agreement or the amount of graphite sold", whereas the new version allowed SJCI much more latitude for its news releases without the need for Panasonic's approval. The new clause governing SJCI's obligations provided:

> [SJCI] has the right to news releases [sic] certain information related to this Agreement such as monthly tonnage and term. However no information abot, [sic] cost, destination or material spec[i]fications must be approved in advance in writing by [Panasonic].

[86] As mentioned, we disbelieved Ogilvie's evidence that he was not responsible for this change in the draft agreement. Ogilvie acknowledged that he had not sought Panasonic's prior approval for the First Release, because "[w]e didn't think it was, like, a big, earth-shattering press release". Similarly, SJCI did not ask for Panasonic's approval of the Second Release. Ogilvie ignored the advice of SJCI's investor relations advisor to get Panasonic's comment, and had no explanation for why Panasonic's consent was not obtained when SJCI was publicly asserting that the company and Panasonic were operating under the terms of the proposed offtake agreement. In our view, a far more plausible explanation for the change in the draft offtake agreement was that Ogilvie realized that he had not abided by its terms, having disseminated the First Release and Second Release without Panasonic's consent, and the agreement therefore needed to accommodate those actions.

[87] On March 7, Panasonic counsel emailed MM advising that he had consulted with the Panasonic division about the transaction with SJCI and had received the following advice:

> Panasonic Procurement Asia Pacific (PPAP) had recently placed a minimal sample order only for the purpose to test the material to be used for consumer type Alkaline dry cell batteries. In exchange, Saint Jean Carbon Inc. had proposed to PPAP's parent company, Panasonic Corporation, to enter into an offtake agreement.
>
> Since Panasonic has no intention to enter into the proposed offtake agreement, Panasonic Procurement Asia Pacific is currently considering to cancel such purchase order.

[88] On March 10, the same Panasonic counsel sent another email to MM, forwarding an email from Ogilvie in which he apologized "for any disruption that the last few days have caused". He explained that SJCI had issued a "small" news release about the order, resulting in inexplicably large trading volumes for SJCI shares, which volume persisted despite a clarifying news release. Ogilvie further explained that all of this attracted attention from the TSXV and the ASC, hence the reason why Panasonic had been contacted by the ASC. Ogilvie said he hoped that Panasonic did not cancel the order, and then addressed the subject of the offtake agreement:

> . . .
>
> We also understand that you now have no intention of signing the off-take agreement. We wish you would reconsider this; the off-take was originally proposed to your company a number of years ago, as point in negotiations we were having to supply material to a different department. Every [sic] since then we have always worked off the bases [sic] of an off take and felt that it was very advantageous to you. We hope you will review the off-take and allow us an open discussion on the many benefits the agreement has for your company. We feel you may see the reason for the agreement and hope you feel the same.
>
> . . .

[89] In the meantime, on March 8, MM wrote to Ogilvie stating that the ASC had received information from Panasonic that appeared on its face to be inconsistent with SJCI's statements in its public disclosure and to ASC staff. MM urged SJCI to "consider issuing a news release that is compliant with the principals [sic] of full, true and plain disclosure ". SJCI's shares were halted again on March 9 and did not resume trading until March 21.

[90] On March 13, 2017, Ogilvie emailed PNC to advise that the sample should be ready for shipping within two weeks and asked for confirmation of Panasonic's delivery address in Japan. PNC's supervisor, SLP, replied the same day thanking Ogilvie for the update, but advising that "we're not allowed to sign your proposed off-take agreement". More emails were exchanged that day, with Ogilvie assuring them not to worry about the offtake agreement and that it was his fault that there was a misunderstanding that such an agreement would be necessary for the sample material. On March 16, SLP emailed Ogilvie asking that the sample be sent to the address given earlier, and stated:

> But, I have to make it clear again that we won't sign on your off-take agreement. In case of mass purchase, Panasonic will provide our standard purchasing agreement to you.

H. March 20, 2017 News Release

[91] SJCI disseminated a further clarifying news release on March 20. It referred to statements made in the First Release and the Second Release, and then provided the following "update":

> . . .
>
> At the time of the March 3 Press Release, the Company was proceeding on the basis that Panasonic and Saint Jean were working together to finalize the proposed offtake agreement. The Company was informed by regulatory authorities on March 8, 2017 that Panasonic had advised them that it was considering cancelling the Order and that Panasonic did not intend to enter into the Company's proposed offtake agreement. This information was inconsistent with the Company's understanding of the business relationship with Panasonic at the time. The trading of Saint Jean's stock was

> promptly halted and the Company took steps to seek clarification from Panasonic with respect to its intentions in this regard. On or about March 15, 2017, Panasonic confirmed the Order, requesting that the Company provide a 5 kg (approximately 11 lbs) sample of Anode Material for testing of its suitability for use in batteries. The Company has already sourced the raw carbon material from a third party supplier, has completed the necessary milling and refining of the raw carbon material to make the Anode Material, and is in the process of completing the certification and analysis of the Anode Material required to meet Panasonic's specifications under the Order. The Company anticipates that the Anode Material will be shipped to Panasonic on or about April 17, 2017.
>
> On or about March 13, 2017, Panasonic advised the Company that it will not sign the Company's proposed form of offtake agreement. When Panasonic reconfirmed its Order by email dated March 15, 2017, it also confirmed that in case of mass purchase of Anode Material from Saint Jean, Panasonic will do so under its own form of standard purchasing agreement. Even though Panasonic is proceeding with the Order, there can be no assurance that Panasonic will proceed with a large purchase of Anode Material from the Company, nor that Panasonic will enter into any other type of commercial agreement or arrangement with Saint Jean.
>
> . . .

[92] SJCI shares had closed at $0.17 on March 8 before the March 9 IIROC halt, and had been trading in the days preceding the halt at higher than historical average volumes. Following the March 20 news release, trading resumed the next day and closed at $0.095, a 44% decline from the previous close. The trading price and volumes quickly settled into a pattern consistent with trading before the First Release.

[93] Ogilvie testified that the graphite sample was eventually shipped to Panasonic in June 2017, following which Panasonic advised that while certain qualities of the material were satisfactory, "there was some deficiency in discharge". Ogilvie tried for several months to get an explanation from Panasonic on what the discharge issue was, but got no response. There were no further communications with Panasonic after that, which Ogilvie attributed to the relationship having been harmed.

VI. ANALYSIS

A. Law

[94] During the relevant period, s. 92(4.1) of the Act stated:

> 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 . . . .

[95] Staff must prove three elements to establish a misrepresentation in relation to a security (*Arbour* at para. 753):

> (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 . . .

[96] In *Arbour*, the panel noted that "[c]ommon-sense inferences about materiality may suffice in certain cases" (at para. 764, citing *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 58 and 61). The panel in *Aitkens* stated (at paras. 137-138):

> . . . While investors' evidence with respect to the impact the information may have had on their investment decisions may be considered (see, for example, *Aurora* at para. 146), neither that evidence nor expert evidence on market price or value is required to meet the legal test (*Arbour* at paras. 763-66; see also *R. v. Zelitt*, 2003 ABPC 2 at paras. 32-34, distinguishing, *inter alia*, *R. v. Coglon*, [1998] B.C.J. No. 2573 (British Columbia Supreme Court)). That is because an ASC panel is itself an expert tribunal with the specialized knowledge and experience necessary to "draw inferences as to the objective view of a reasonable investor" (*Arbour* at para. 765).
>
> A hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. Stated another way, the determination is "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" (*Arbour* at para. 765, citing *Sharbern* at para. 61).

[97] The context in which an impugned statement was made is an important consideration when assessing the materiality of information, including information about contingent events (*Aitkens* at para. 136).

B. February 28, 2017 News Release

1. Misleading or Untrue Statement

[98] Staff alleged five particulars of misleading or untrue statements in the First Release: (i) the reference to an "order"; (ii) that the material was to be supplied to a manufacturing facility; (iii) that the order was part of an offtake agreement; (iv) the reference to Panasonic as a customer; and (v) that the order was part of an offtake agreement "to supply multiple tonnes of anode material monthly for a number of years". In argument, the third and fifth particular were essentially combined as one particular, and we will address it as such here.

[99] Ogilvie argued that he did not make any of the impugned statements (which we understood applied to both the First Release and Second Release), but that SJCI made them. He conceded that he, with others in management, "discussed, drafted, edited and reviewed the content of the impugned press releases", but maintained that he did not make the statements in his capacity as officer, director, or personally. We have discussed the conflict in the evidence on the respective

roles of management in the preparation of the First Release: Ogilvie testified that it was a collaborative effort with substantive contributions from all of management, whereas Pearson testified that Ogilvie was principally responsible for the releases with only minor editing provided by Pearson and Pfaffenberger.

[100] We earlier noted that the account given by Pearson was more probable, but that nothing turned on the different accounts. The reason we are somewhat indifferent to which version is true is that we do not construe s. 92(4.1) as requiring that the respondent be the sole author of a material misstatement before he can be found to be in contravention of that provision of the Act. Such an interpretation would lead to obviously absurd results, and would render the provision effectively nugatory.

[101] We have already noted that companies can only act through individuals, and in the case of the First Release all but one of the impugned statements were contained in a quote attributed to Ogilvie as CEO of SJCI. Ogilvie unquestionably was a significant contributor to the drafting of the First Release and the Second Release, and his contributions were made in his capacity as a senior officer of SJCI. In those circumstances we have no hesitation in finding that Ogilvie did "make" the impugned statements within the meaning of s. 92(4.1). We later consider the allegation that Ogilvie authorized, permitted, or acquiesced in SJCI making the same statements, within the meaning of s. 198(1.2) of the Act.

Order

[102] As mentioned, Staff argued that using the term "order" was misleading because it omitted necessary context. The NOH alleged that the material supplied was a "minimal sample order" of five kilograms for testing purposes, for which Panasonic did not pay and that was valued for customs purposes at US$6.64. Ogilvie pointed out that Panasonic had sent SJCI a purchase order, and the reference price should be understood symbolically as nothing more than a reflection of the previously agreed price of $1,328 per tonne. Moreover, we should take into account the actual cost of preparing the sample, which Pearson, Pfaffenberger, and Ogilvie respectively estimated at $30,000, $35,000 and between $70,000 and $85,000. Ogilvie maintained that referring to the symbolic value of US$6.64 would have been misleading when viewed in light of the cost of producing the material.

[103] When read in isolation, reference to the term "order" was accurate – there was unquestionably a purchase order from Panasonic to SJCI. However, when read in context we are of the view that the term was misleading and did not state facts that were necessary to make the statement not misleading. The impugned statement was made in the context of the order being part of an offtake agreement to regularly supply a significant quantity of material over a number of years, and that it was being delivered to Panasonic's manufacturing facility. A reasonable person reading that statement in context would naturally conclude that the order represented the beginning of regular shipments of significant quantities of graphite to Panasonic, not that it was tantamount to a free sample for Panasonic to evaluate whether the material met its manufacturing requirements.

[104] Even if we accepted Ogilvie's characterization of the order's purpose as a "production trial" and its attendant significance in the evolution of SJCI's relationship with Panasonic, that

characterization remains very different from what was portrayed in the First Release. There was nothing contingent in the context within which the term "order" was used. The only reasonable interpretation of the First Release was that the order was part of and pursuant to a concluded agreement, and that there was no remaining conditionality to SJCI's commercial relationship with Panasonic. At the very least, there should have been an explanation of the order's purpose so that the statement was not misleading. We therefore find that the reference to an "order" was misleading.

Manufacturing Facility

[105] Both the First Release and the Second Release included a statement that SJCI had received an order from Panasonic to supply graphite anode material to "their manufacturing facility". Staff alleged as one of the particulars of misrepresentation in the First Release that reference to Panasonic's manufacturing facility was misleading, but that same allegation was not made in relation to the Second Release.

[106] Staff argued that the statement was misleading because the material was being shipped to a testing facility, not a manufacturing facility, and the statement implied that the graphite already met Panasonic's requirements and that it was going into production to make batteries. The evidence on this point was somewhat ambiguous. Staff did not refer us to any documentary evidence that identified the shipment's destination as a testing facility. The emails between Ogilvie and Panasonic procurement personnel certainly identified the purpose of the order as testing, but did not give any information about the scope of Panasonic's operations at the address designated in the purchase order.

[107] Ogilvie testified that he was originally under the impression that SJCI was sending the material to a Panasonic battery manufacturing factory in California, but when SJCI got the purchase order the shipment was "going to Japan to -- to one of their facilities, testing facilities or something". Ogilvie also testified that he did not recognize or put any thought into the accuracy of the statement, and he might have thought that SJCI was shipping the material to Japan and that Panasonic would then ship it to California.

[108] In cross-examination, Ogilvie was referred to an early draft of the First Release in which he had written that SJCI was supplying the material to Panasonic's "manufacturing facilities in Taiwan". He agreed that one of the recipients of the draft made only one correction by deleting "in Taiwan".

[109] Ogilvie did not specifically address the truth or falsity of this impugned statement in argument. He did acknowledge in his testimony that the material was being shipped to one of Panasonic's testing facilities in Japan. His explanation for stating the destination as a manufacturing facility was nonsensical and inconsistent with other evidence. He acknowledged that the subject statement was edited in a later version of the draft First Release, which belies his assertion that no one at SJCI turned his mind to it. The evidence was also clear that the material was being sent to Panasonic for the purpose of testing, not battery manufacturing. Although it is conceivable that the specified Panasonic location in Japan housed both manufacturing and testing facilities, the preponderance of the evidence was that it was the testing facility where the shipment

was destined. We thus find that the statement in the First Release that the material was being supplied to a "manufacturing facility" was misleading.

Customer

[110] Both the First Release and the Second Release described Panasonic as SJCI's "customer". Staff alleged that this was misleading in the First Release, because Panasonic had done nothing more than order a free sample of material to test. Staff cited a standard dictionary definition of "customer" as "a person who buys goods or services from a shop or business" (Catherine Soanes & Angus Stevenson, *Concise Oxford English Dictionary*, 11th ed. (New York: Oxford English Press, 2004) at 354), and argued that this did not fit Panasonic's relationship with SJCI. SJCI asked Panasonic for a purchase order of "no dollar value", which Staff analogized to a household receiving a shampoo sample in the mail. Even though the shampoo manufacturer has spent considerable amounts developing the product, the household is merely a potential customer at that point.

[111] As mentioned, Ogilvie argued that Panasonic had become his customer, and thereby a customer of SJCI, relying on the course of written communications over several years between Ogilvie and Panasonic preceding the February 2017 purchase order. Among those communications, Ogilvie referred to a November 2010 email from DK to Ogilvie in which DK used the term "customer" in distinguishing the cautious approach that Japanese customers take before contracting with a new supplier, compared to that which Ogilvie might have experienced with his US and European customers. Ogilvie also referred to similar emails from that early stage of his communications with Panasonic and argued that because those communications continued and his relationship with Panasonic progressed, he "considered that Panasonic had become his customer and that he was Panasonic's potential supplier".

[112] In giving meaning to the impugned statement, again it is important that it be read in context and not in isolation. The term was used to describe Panasonic as a party to an offtake agreement ordering material from SJCI for delivery to Panasonic's manufacturing facility. We would reiterate that an ordinary reader would not infer anything contingent or potential about the parties' contractual relationship, from which we consider that the term "customer" would naturally be given its ordinary meaning as one buying a product or service at an agreed price. In the absence of an established mercantile relationship, for a "potential supplier" to describe the recipient of a sample product for testing as a "customer" would strain the meaning of the word beyond reason. By itself, the long chain of communications did not amount to a customer-supplier relationship, particularly as Panasonic personnel had made it abundantly clear to Ogilvie many times that it would not agree to any form of supply contract before it had completed a testing or trial process lasting up to one year.

[113] We therefore find that the statement in the First Release referring to Panasonic as a "customer" was misleading.

Offtake Agreement

[114] The crux of Staff's case centred on the statement in the First Release that the "order is part of an offtake agreement to supply multiple tonnes of anode material monthly for a number of years". Staff argued that there was no such agreement, whereas Ogilvie maintained that there was.

[115] Staff pointed to Panasonic emails where the company made it clear that it would not accept Ogilvie's assurances that his company could supply whatever material Panasonic wanted. When Ogilvie sent Panasonic draft offtake agreements, they were simply ignored. Staff described Ogilvie's perception of his relationship with Panasonic as being at odds with reality – what he described as a strong relationship was belied by a "comedic" exchange between Ogilvie and Panasonic from which it became apparent to Panasonic that it was "dealing with a dabbler".

[116] Staff also argued that the events surrounding the revisions made to the draft offtake agreement between the March 2016 and March 2017 versions demonstrated Ogilvie's "inclination towards deception". As mentioned, we disbelieved Ogilvie when he denied making the revisions to the draft offtake agreement, but Staff also pointed to a March 6, 2017 email from Ogilvie to SJCI's lawyer advising that the only difference in the two versions was "quantity and price point" and that he omitted mentioning the change to the provision governing mutual approval of news releases. More significant was Ogilvie's statement in that email that the March 2017 draft agreement was "out for signing".

[117] Staff argued that the hearsay evidence (an email from Panasonic legal personnel in Japan) that the company had no intention of entering into SJCI's proposed offtake agreement was reliable and consistent with other evidence. They asserted that Ogilvie knew that before it would commit to a long-term supply agreement, Panasonic needed first to be satisfied that the sample material would meet its performance standards after conducting an extensive and rigorous testing process. Staff also referred to SJCI's statement in the Second Release that it was working to finalize the proposed offtake agreement as soon as possible – this was tantamount to an admission that there was no agreement. Lastly, Staff urged us to consider the Settlement in which Pfaffenberger on behalf of SJCI admitted that the company knew that statements made in the First Release and Second Release were misleading or untrue, and would reasonably be expected to have a significant effect on the market price or value of SJCI's securities. However, the admitted particulars were those alleged in respect of the First Release, not the particular that remained in respect of the Second Release.

[118] As mentioned, Ogilvie's main contention was that his relationship with Panasonic had progressed to a point where the parties had agreed to all of the essential terms of a long-term supply agreement. Ogilvie maintained that from the outset Panasonic was receptive to the idea of entering into a long-term contract with Ogilvie's company. Ogilvie stressed that he was not corresponding with a "low-level clerk" but that he was dealing with someone with authority to contract, specifically SLP, who was held out as DK's general manager.

[119] After sending draft offtake agreements, Ogilvie interpreted Panasonic's unresponsiveness favourably because silence was Panasonic's usual response if it was satisfied with information from Ogilvie. Ogilvie also pointed out that Panasonic continued to make enquiries of him about the supply of graphite for alkaline batteries after it had received the March 2016 draft offtake agreement. He attributed each party's unresponsiveness to the other's requests for specifications in various emails to language barriers and a resistance to disclose intellectual property. SJCI's resources and expertise made him confident that he could insist that Panasonic give SJCI its specifications.

[120] Ogilvie argued that we should take no account of the Settlement, in large part because Pfaffenberger may have had personal motives to cause SJCI to settle, including his spouse's alleged insider trading of SJCI shares. Ogilvie also suggested that we draw an adverse interest because Staff did not call Pfaffenberger as a witness, though he gave no explanation of why he did not call Pfaffenberger as a witness himself.

[121] We agree with Ogilvie that the Panasonic purchase order was an important milestone in SJCI's development as a graphite mining company. He spent a considerable amount of time and effort cultivating a relationship with Panasonic, even though at times it proceeded by fits and starts. We accept that Panasonic intended to use the subject graphite sample for trial battery production, and that this process was the next stage after Panasonic was satisfied that SJCI's graphite met some rudimentary standards. Ogilvie was justifiably pleased that Panasonic had agreed to undertake that process, and this warranted a relatively significant expenditure on SJCI's part to produce and process the material, with no certainty of recouping that investment.

[122] Ogilvie testified that SJCI management had agreed that the company had "moved . . . all the way along" in its relationship with Panasonic, and that they had met all of the requirements "in what would be a great contract". Ogilvie also testified that the management team was "very confident that we had completed all the obligations necessary to now have a contract and to now . . . make . . . the contract". He believed that Panasonic considered SJCI to be its new supplier. When asked why he used the language that he did in the First Release and the Second Release concerning the offtake agreement when there was only a draft sent with his signature, Ogilvie answered that SJCI had always made it clear that they would only proceed with Panasonic with an offtake agreement. He gave some reasons why an offtake agreement was so important for SJCI and what was at stake for the company, how he was dealing with someone with authority at Panasonic, and that there was never any discussion that Panasonic would not enter into an offtake agreement.

[123] We have little doubt that Ogilvie desperately wanted Panasonic to enter into an offtake agreement – he had raised the subject numerous times over the years in his correspondence with Panasonic. He said that he interpreted Panasonic's silence as assent. However, Panasonic was not silent. Instead, Panasonic was insistent that it must first conduct a rigorous and lengthy testing or trial process before it would commit to a supply agreement with SJCI. Panasonic made its position very clear several times, and it never wavered from that position. Ogilvie's own testimony referred to the existence of a completed offtake agreement prospectively, not as something that had been concluded. In argument, Ogilvie conceded that the next step in the process of completing a formal written agreement was the completion of the production trial.

[124] It is indisputable that Panasonic never signed an offtake agreement, did not comment on any of the terms in the drafts that Ogilvie sent, and did not give any indication that it was willing to modify, much less abandon, its previously stated position that it would not enter a supply agreement until it was satisfied that SJCI's product met Panasonic's battery manufacturing standards. No amount of wishful thinking could alter that reality. The statement in the First Release that the order was part of an offtake agreement to supply multiple tonnes of anode material was patently untrue.

2. Materiality

[125] In the NOH, Staff alleged that the misrepresentations in the First Release would reasonably be expected to have a significant effect on the market price or value of SJCI's securities. The NOH pled the market trading price and volume before and after the First Release, and that SJCI filed a material change report on March 1, 2017 summarizing the First Release. In argument, Staff asserted that materiality was not in issue in these proceedings, and referred to the March 1 material change report. They also pointed to the market trading data before and after the First Release and that data following the Third Release.

[126] Ogilvie conceded that the news releases were material, but he framed the issue as whether the verbiage used in the news releases "said 'enough without saying too much' in conveying that material information". He argued that the correct approach to analyzing whether s. 92(4.1) of the Act had been contravened is to assess only those portions of the news releases that were alleged to be "over the line", not the whole of the statements made. Ogilvie asserted that SJCI management was surprised by the market reaction to the First Release, referring to evidence of meeting notes and emails where they discussed their expectation that SJCI shares would trade around $0.14 - $0.15 after the First Release. He also suggested that the share price increase was influenced by insider trading.

[127] We agree with Ogilvie that market trading activity following a news release is not the appropriate measure by which we are to determine whether the impugned statements would reasonably be expected to have the effect that they did. Other ASC panels have observed that we should not use hindsight in our assessment of materiality, but that the test for materiality is what, beforehand, would reasonably have been expected to be the effect of the misstatement on the market price or value of the issuer's securities (*Re Kapusta*, 2011 ABASC 322 at para. 255; *Re Stan*, 2013 ABASC 148 at para. 224). After-occurring events, including market trading, are not determinative of materiality, but can be corroborative of earlier expected outcomes.

[128] We also agree with Ogilvie that management did not expect the magnitude of the market reaction that followed the First Release, although the evidence satisfies us that management did expect that the First Release would have a significant effect on the market price of SJCI's shares. Ogilvie sent emails to his management colleagues describing the anticipated order from Panasonic as "big [n]ews", and though acknowledging the order was small, it was the "making of a big press release". As mentioned, Pfaffenberger predicted that the share price would double or triple on the news. By any measure, this expectation of the First Release's effect on the market price was significant.

[129] Our analysis of materiality does not depend on the subjective expectations of SJCI senior management. Instead we must assess the question of materiality on the objective standard of whether the misleading or untrue statements would influence a reasonable investor's decision to purchase the security and the price that investor would be prepared to pay (*Arbour* at para. 765). However, subjective expectations are relevant to a determination of whether Ogilvie knew or reasonably ought to have known that the statements would have a significant effect on the market price or value of SJCI's shares.

[130] In making that assessment, we consider both the context of the disclosure in which the misstatements were made, and the issuer's business and financial condition. In the case of the First Release, the misstatements that we have found were not incidental to other subjects covered in the news release, but were pivotal. The impugned statements elucidated the meaning and significance of the news release headline – "Saint Jean Carbon Receives Order from Panasonic" – by adding that the order was part of an offtake agreement to supply a significant quantity of material monthly for a number of years, to a customer at its manufacturing facility. Read together, those statements would leave a reasonable investor with an understanding that SJCI was transitioning from the exploration stage to meaningful production and sales based on a concluded agreement with a large multinational conglomerate. Read in that light, this announcement was arguably the most important event in SJCI's history.

[131] We agree with Ogilvie that SJCI seemingly had no difficulty raising funds from private placements to fund the company's working capital. However, there is a vast difference between the financial condition of a company with no revenue (or *de minimis* revenue) covering working capital from equity financings and that of a company that has sales revenues. The essence of the First Release was that by virtue of the offtake agreement with Panasonic, SJCI was moving from the former condition to the latter.

[132] In our view, the market reaction to the First Release was merely corroborative of what one would reasonably expect from an announcement of this nature. The same is true of Ogilvie's and Pfaffenberger's expectations – given their positions with the company and their experience with previous news releases and consequent market reactions, they had some measure of insight into the probable outcome of the impugned statements in the First Release. Their insight is not determinative of the issue, but it has some probative value in assessing the reasonably foreseeable impact of the subject misstatements.

[133] We did not give any weight to the evidence, such as it was, that insider trading might have influenced SJCI's share price following the First Release. There was no evidence of when that trading may have occurred, nor what volumes of SJCI shares were bought and sold. Typically, one would expect that improper insider trading would involve buying shares ahead of a public announcement of positive news, and then selling into the resulting demand. That selling would ordinarily put downward pressure on the share price, not the reverse. The trading price and volumes prior to the First Release did not support Ogilvie's accusations of insider trading, at least not to a degree that would influence SJCI's share price.

[134] We were persuaded on a balance of probabilities that the cumulative effect of the misleading or untrue statements made in the First Release would reasonably be expected to have a significant effect on the market price or value of SJCI's securities.

3. Knowledge

[135] Staff argued that despite Ogilvie's repeated assertions that he sincerely believed SJCI had an agreement finalized with Panasonic, he knew that thorough testing of the sample would first have to be done before Panasonic would order any more material. Staff maintained that Ogilvie knew that Panasonic would only place a commercial-sized order if the sample material met Panasonic's requirements, and thus his insistence that he thought SJCI had a contract with

Panasonic was ill-founded. Staff also pointed to the Settlement wherein SJCI admitted that it knew that the impugned statements in the First Release were misleading and would be expected to have a significant effect on the market price or value of SJCI's securities.

[136] As mentioned, Ogilvie addressed the Settlement by suggesting that Pfaffenberger had various motives to sign the document on behalf of SJCI, and that if he had remained as CEO of SJCI he would not have agreed that SJCI had the "knowledge of guilt" as set out in the Settlement. He argued that the evidence did not suggest that Pfaffenberger believed that SJCI was guilty as alleged and admitted. Ogilvie maintained that he had an honest belief that the subject news releases were not misleading. The reason given for that belief was his confidence that SJCI could produce the desired materials for Panasonic, coupled with their expertise and experience.

[137] Ogilvie conceded that the draft offtake agreement had not been signed, but argued that it had not been rejected. The unsigned document did not mean that the two companies did not have an agreement, and Ogilvie honestly believed that they did have an agreement. Ogilvie argued that the key terms of the agreement had been met and that the next step was completion of the production trial in order to complete a formal written agreement.

[138] On the issue of Ogilvie's knowledge of the effect that the impugned statements would have on the market price or value of SJCI's shares, he argued that he did not have actual or implied guilty knowledge that they would have a significant effect. Ogilvie pointed to what he said were contingent events disclosed in the news releases and the forward-looking information disclaimers, and that the market reaction did not undermine the accuracy or completeness of the statements made. He also urged us to consider his documented surprise at the magnitude of the market reaction, and his testimony that he suggested a trading halt that was ignored by his management colleagues.

[139] We do not accept that confidence in a contingent future outcome can be equated with an honest belief that the outcome has already transpired. We have little doubt that Ogilvie was supremely confident that the sample material would meet Panasonic's requirements and this would culminate in a signed agreement. However, as we have already discussed, Ogilvie was well aware that the commercial relationship between SJCI and Panasonic would proceed according to a sequence of events dictated (and reiterated several times) by Panasonic – i.e., that the test material must first be thoroughly evaluated over an extended period of time before Panasonic would agree to a long-term supply contract.

[140] Ogilvie testified that the testing procedure he described as a production trial was part of the agreement to supply multiple tonnes of graphite monthly for years, and that the completion of the order was to be determined by the outcome of the trial and any necessary adjustments to the material specifications. That was entirely at odds with the history of correspondence between Ogilvie and Panasonic personnel, and with the terms of the draft offtake agreement. The correspondence has been discussed extensively, but we repeat that Panasonic made it clear that the satisfactory testing of the material was a condition precedent to the creation of an agreement, not a term of an existing agreement. The draft offtake agreement did not include a term governing a testing or trial production procedure, either explicitly or implicitly.

[141] However one characterizes Ogilvie's professed perception of what occurred – wishful thinking, over-confidence, or hubris – it was clear to us that his testimony was unmoored from reality. We are satisfied on a balance of probabilities that Ogilvie knew or reasonably ought to have known that the impugned statements were misleading or untrue when they were made in the First Release. The forward-looking statement disclaimer in the First Release does not provide a defence, as the misstatements did not concern anticipated or contingent events. The misstatements were all about SJCI performing an extant contract.

[142] Similarly, we are satisfied that Ogilvie knew or reasonably ought to have known that the impugned statements would have a significant effect on the market price or value of SJCI's securities. Ogilvie's emails on the eve of the First Release were revealing – he described the news as "big", and repeated that characterization when he later received the purchase order for the five kilograms of material that he acknowledged was "small". At the same time Pfaffenberger was predicting a significant market price increase of between 100% and 200%. After the First Release was disseminated, Ogilvie wrote that he was expecting SJCI's shares to "sit back at 14 to 15", which would represent a 100% price increase.

[143] The preponderance of the evidence was that Ogilvie knew that the First Release, in which the misstatements we found were central, would have a significant effect on SJCI's share price.

4. Conclusion

[144] We find as a result that Ogilvie knew that the subject statements made in the First Release were misleading or untrue in a material respect, and that they would reasonably be expected to have a significant effect on the market price or value of SJCI's shares.

C. March 3, 2017 News Release

1. Parties' Positions

(a) Staff

[145] Staff withdrew three of the four particulars alleging that statements in the Second Release were misleading or untrue. Referring to *Aitkens*, Staff acknowledged that a defence of reliance on legal advice may be considered when assessing a respondent's knowledge or intention, and that the requisite elements of that defence were present for the three withdrawn particulars because the Second Release was drafted with the advice of SJCI's counsel and vetted by the TSXV. However, Staff maintained that the statement in the Second Release that "[b]oth companies are working to finalize the proposed offtake agreement as soon as possible" was untrue and that Ogilvie had misled SJCI's counsel and the TSXV about the status of negotiations with Panasonic. Staff asserted that Ogilvie knew that this was untrue, as evidenced by him sending another amended draft offtake agreement to Panasonic on March 5, 2017 and asking that it be signed and sent back "right away". This was an effort to "bootstrap" the Second Release – attempting to make the facts fit Ogilvie's narrative by trying to revive discussions with Panasonic about the offtake agreement.

[146] Staff argued that Ogilvie's testimony and the documentary evidence confirmed that he knew that the testing process was going to take up to a year, and that Panasonic would not consider entering into an agreement before that testing was satisfactorily completed. In sending the draft offtake agreement to SJCI's counsel advising that the only change to the prior version was quantity and price, Staff contended that Ogilvie misled the lawyer by neglecting to mention the amended

provision governing consent to news releases and the true status of the negotiations with Panasonic. Thus the defence of legal advice was not available, because SJCI's counsel was not apprised nor understood all the facts on which the advice was based. Staff asserted that neither SJCI's counsel nor the TSXV would have approved the impugned statement in the Second Release had they known those facts.

[147] Staff also pointed to the March 16, 2017 Panasonic email advising that "[i]n case of mass purchase, Panasonic will provide our standard purchasing agreement to you". It was to be expected that Panasonic would take the lead on the terms and timing of the relationship, not SJCI. Staff argued that it was not until the Third Release when the facts about the relationship with Panasonic became known that SJCI's shares returned to the former trading price of around $0.07. Staff appeared to rely on the Settlement as evidence that statements made in both the First Release and the Second Release were untrue in a material respect, but the particulars admitted did not include the one surviving allegation made in respect of the Second Release.

(b) Ogilvie

[148] Most of Ogilvie's submissions did not distinguish the First Release from the Second Release, and therefore his arguments common to both releases will not be repeated. Ogilvie's principal contention was that after being pressed by the TSXV for a news release to correct the First Release and reluctantly agreeing to do so, he handed the process over to the TSXV and SJCI's counsel. He maintained that he fully cooperated by providing all information requested, and that he would have answered any other questions about the relationship between Panasonic and SJCI. Ogilvie contended that he was not given an opportunity to explain the emails and attachments he provided, and that the TSXV came to its own conclusions as to what information was required for the Second Release.

[149] Ogilvie asserted that the "corrections" in the Second Release were based on information from him and SJCI and that he considers the Second Release "to be almost as accurate as the first". He enumerated the Second Release's clarifying facts requested by the TSXV, and noted that SJCI emphasized the forward-looking nature of the release and cautioned the public about the associated risks.

[150] Ogilvie argued that the ASC's intervention after the Second Release changed the relationship between Ogilvie and Panasonic, and we should give little weight to "information acquired in hindsight". He characterized the March 7, 2017 email from Panasonic's legal personnel as a self-serving statement of innocence, and that it was inconsistent with later communications between Ogilvie and Panasonic's procurement personnel confirming the sample order. Ogilvie argued that the inference available was that the ASC's intervention caused Panasonic to take the position that it would only use its own form of agreement if it were to proceed with a large order, and that until then Panasonic had never rejected the concept of using Ogilvie's version of an agreement. He argued that the emails following the Second Release are important in assessing Ogilvie's actual or constructive knowledge, because Panasonic was still considering a "mass purchase" after a production trial that Ogilvie was confident would be successful.

2. Misleading or Untrue Statement

[151] We agree with Staff that the statement in the Second Release that Panasonic and SJCI were "working to finalize the proposed offtake agreement as soon as possible" was untrue. The Second Release contained repeated references to the proposed offtake agreement, which provided the context for the impugned statement to be understood to mean that the agreement would be concluded imminently. For the same reasons that we found untrue the statement in the First Release that there was in effect a concluded agreement, we similarly find that the impugned statement in the Second Release was also untrue. The overwhelming evidence was that Panasonic would only entertain a formal agreement once its testing process was complete, which it had estimated would take between six and twelve months. Thus, there was nothing imminent about an offtake agreement between the parties.

[152] We did not view the later communications between Ogilvie and Panasonic as having much probative value in determining the truth or falsity of the alleged misstatement. Panasonic's position about whose form of agreement would be used did not necessarily support or refute the accuracy of the statement. We agree with Ogilvie that these communications did not foreclose the possibility of a formal agreement being reached. Rather, all of the communications that preceded the Second Release unequivocally set out the expected timeline in which Panasonic would consider the negotiation of a formal agreement – i.e., six to twelve months after commencing the trial.

[153] We do not accept that responsibility for the untrue statement can be shifted from Ogilvie to either the TSXV or SJCI's counsel. Ogilvie admitted that he was the sole source of the information concerning the status of SJCI's negotiations with Panasonic. Nor was this a statement for which safe harbour can be found in the forward-looking disclaimer in the Second Release – the statement was made about the parties' ongoing endeavours to finalize an agreement, not just about future events. There was no mutuality in the effort to negotiate an agreement – Panasonic would not commit to a long-term arrangement until it had completed its testing process.

[154] Nor do we accept that the ASC's intervention had any bearing on Panasonic's position in that regard. Panasonic had made itself very clear about its position since the inception of its communications with Ogilvie.

[155] We do not agree with the inference that Ogilvie suggested we draw from Panasonic's later communications that it would only use its own form of agreement in the event it proceeded with a large order. Instead of attributing that position to the ASC's intervention, it seems more plausible that a multi-national corporation the size of Panasonic would insist on its own form of agreement because of its superior bargaining position and the commercial efficiency of avoiding the time and expense of negotiating all of the terms of customized contracts with each small supplier.

[156] We therefore find that the statement in the Second Release that the parties were "working to finalize the proposed offtake agreement as soon as possible" was untrue.

3. Materiality

[157] As mentioned, Staff did not directly address the materiality of the misstatement in the Second Release, other than repeating the NOH allegation in that regard. Nor did Ogilvie specifically argue materiality concerning the Second Release, other than a general denial that the

impugned language could reasonably have been expected to have a significant effect on the market price or value of SJCI's securities.

[158] A somewhat unique aspect of this case is that the Second Release was disseminated only three days after the First Release. The Second Release was supposed to correct material misstatements in the First Release, and though it accomplished that objective in some respects, it perpetuated a falsehood about the central theme of both releases. The primary message in both releases was that the Panasonic order was part of a newly established commercial relationship that would be transformative for SJCI's business. In the First Release the public were led to believe that this relationship had been consummated by an order made pursuant to a concluded offtake agreement, whereas the Second Release sought to modify that misapprehension minimally by telling the public that the parties were on the cusp of reaching that agreement and that the order was made in accordance with the terms thereof. In either scenario, SJCI had purportedly attained a significant objective.

[159] In assessing the reasonably expected effect of a misstatement on the market price or value of an issuer's securities, we are of the view that this must be done from the perspective of an undistorted base market price or value. Where, as in this case, the subject misstatement was made after material misinformation had already distorted the market price of the issuer's securities, we look at the reasonably expected effect of that misstatement on the market price or value of SJCI's shares without taking into account the distortion caused by the earlier misstatements.

[160] Viewed in that light, we arrive at the same conclusion and for the same reasons as we did for the First Release that the misstatement would reasonably be expected to have a significant effect on the market price or value of SJCI's securities. That SJCI's shares traded at about the same price and volume following the Third Release as they did before the First Release was merely corroborative of the evidence relevant to materiality considered prospectively.

4. Knowledge

[161] Similarly, we come to the same conclusion and for the same reasons as we did for the First Release that Ogilvie knew or reasonably ought to have known that the subject statement was untrue and that it would have a significant effect on the market price or value of SJCI's securities.

[162] Again, Ogilvie was the SJCI senior officer who had sole control over the communications between the company and Panasonic. He must have known when he sent another draft offtake agreement to Panasonic on March 5, 2017 that it would likely meet the same fate as his earlier attempts to cajole Panasonic into signing a long-term supply agreement. We agree with Staff that this was most likely an effort to fit the facts to the misinformation in the Second Release – an urgent request that the agreement be signed and returned conformed to the statement that the parties were working to finalize the agreement as soon as possible. It could not have come as any surprise to Ogilvie when Panasonic rejected his request, particularly as the sample graphite had not yet been shipped to Panasonic, let alone tested.

5. Conclusion

[163] We are therefore satisfied on a balance of probabilities that Ogilvie knew that the subject statement made in the Second Release was misleading or untrue in a material respect, and that it

would reasonably be expected to have a significant effect on the market price or value of SJCI's shares.

D. Authorizing, Permitting, or Acquiescing

[164] Staff in its written submissions asked that a finding be made that Ogilvie breached s. 92(4.1) by "authorizing" statements from SJCI in the First Release and Second Release that were materially misleading or untrue. As already noted, the NOH alleged that both SJCI and Ogilvie breached that section by "making" materially misleading or untrue statements. The NOH separately pleaded that Ogilvie was "responsible for, contributed content to or authorized, permitted or acquiesced in the making of news releases". We have found that Ogilvie did "make" the misstatements within the meaning of s. 92(4.1). We therefore do not consider it necessary to make a further finding that Ogilvie authorized, permitted, or acquiesced in SJCI making those misstatements pursuant to s. 198(1.2) of the Act. However, if it were necessary to do so, we would make that finding.

VII. CONCLUSION

[165] Having found that Ogilvie breached Alberta securities laws, this proceeding will now move into a second phase for the determination of what, if any, orders for sanction or cost-recovery ought to be made in light of our findings.

[166] Staff and Ogilvie are each directed to inform one another and the Registrar, in writing, not later than noon on Wednesday, August 31, 2022, of the following: (i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and (ii) their expected timing requirements and suggested dates. After the panel has received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of next steps in this proceeding.

August 3, 2022

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Trudy Curran

"original signed by"
James Oosterbaan