ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Ogilvie, 2023 ABASC 33 **Date: 20230321**

Paul Anthony Ogilvie

Panel:	Tom Cotter Trudy Curran James Oosterbaan
Representation:	Sakeb Nazim for Commission Staff Paul Anthony Ogilvie for himself
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I. INTRODUCTION

[1] Following a contested hearing, we determined that Paul Anthony Ogilvie (**Ogilvie**) contravened s. 92(4.1) of the *Securities Act* (Alberta) (the **Act**) by making statements in two news releases that he knew or reasonably ought to have known were misleading or untrue and would reasonably be expected to have a significant effect on the market price or value of the securities of Saint Jean Carbon Inc. (**SJCI**). Upon the issuance of written reasons for our decision (the **Merits Decision**, cited as *Re Ogilvie*, 2022 ABASC 106) on August 3, 2022, this proceeding advanced to the second phase to determine what sanction or cost-recovery orders, if any, should be made against Ogilvie pursuant to ss. 198, 199 and 202 of the Act.

[2] After providing the parties an opportunity to be heard and having received and considered their written submissions, we have concluded that the public interest warrants an order restricting Ogilvie from acting as an officer or director of any issuer for a three-year period and that he pay an administrative penalty of $60,000. We are also ordering that Ogilvie pay costs related to the investigation and hearing of $30,000. Reasons for these orders follow.

II. BACKGROUND

A. Summary of Facts and Findings from the Merits Decision

[3] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) issued a notice of hearing on June 19, 2020 alleging that SJCI and Ogilvie contravened s. 92(4.1) of the Act by making certain misrepresentations in two SJCI news releases dated February 28 and March 3, 2017.

[4] The allegations against SJCI, a public issuer whose common shares traded on the TSX Venture Exchange (the **TSXV**) at the time, were resolved by way of settlement dated December 1, 2020 (the **Settlement**, cited as *Re Saint Jean Carbon Inc.*, 2020 ABASC 184). In the Settlement, SJCI agreed to pay a "monetary settlement" of $50,000, plus costs of $12,500.

[5] The allegations against Ogilvie proceeded to a hearing, which culminated in our findings that Ogilvie made certain misrepresentations as alleged. The factual background for these findings is set out in more detail in the Merits Decision, which should be read in conjunction with this decision. We summarize the important facts here for the purpose of providing context to our analysis of sanction and cost-recovery orders against Ogilvie.

[6] After several years of intermittent communications between Ogilvie (on behalf of SJCI and other companies he was previously affiliated with) and employees of a Panasonic Corporation subsidiary (**Panasonic**), SJCI agreed to provide Panasonic with a test sample of graphite materials to assess their suitability for Panasonic's battery manufacturing.

[7] Ogilvie – at the time, the Chief Executive Officer (**CEO**), Chairman and a director of SJCI – drafted, and obtained SJCI's approval to issue, a news release dated February 28, 2017 (the **First Release**), in which SJCI announced that it had received its first order from Panasonic to supply graphite anode material to their "manufacturing facility". Ogilvie was quoted in the First Release as stating (on behalf of SJCI) that the purchase order was "part of an offtake agreement to supply multiple tonnes of anode material monthly for a number of years" and "we could not be more pleased than to finally ship finished material to our customer".

[8] In the Merits Decision, we found that the First Release contained various misleading or untrue statements, including:

- the statement that the purchase order was part of an offtake agreement to supply multiple tonnes of graphite material on a monthly basis for a number of years was patently untrue in light of evidence that no offtake agreement had been executed by Panasonic at the time, that Panasonic would not consent to any formal supply arrangement until satisfied that SJCI could supply product that met its standards, and that the testing process was expected to take several months;
- the representations indicating that the "order" was part of an offtake agreement and that Panasonic was a "customer" were misleading in context, as these terms objectively conveyed the impression that SJCI had an ongoing commercial relationship with Panasonic pursuant to a finalized agreement but failed to convey that the purchase order was effectively a free sample of SJCI's graphite material meant for Panasonic to test its quality and that a satisfactory test result was a condition precedent to any potential supply contract; and
- the statement about the material being sent to Panasonic's "manufacturing facility" was also misleading, based on evidence that the sample was sent to a Panasonic testing facility.

[9] Following the First Release, SJCI's share price and trading volumes increased significantly. After the TSXV discovered that SJCI was working from a draft offtake agreement, it advised Ogilvie that SJCI must issue a clarifying news release. Trading in SJCI's shares was halted on March 2, 2017.

[10] SJCI issued another news release (the **Second Release**) on March 3, 2017, for which Ogilvie was principally responsible. The Second Release announced that the size and value of the Panasonic order was nominal and that Panasonic had not signed the proposed offtake agreement but the parties were working to finalize it "as soon as possible".

[11] We found that the statement in the Second Release that the offtake agreement was in the process of being finalized was untrue, as Panasonic had not indicated any intent to enter into a long-term agreement and any decision first required successful completion of the testing process, which was expected to take at least several months.

[12] Trading of SJCI shares resumed following the issuance of the Second Release, and the share price decreased by approximately 41% from the previous close.

[13] After the Second Release, an ASC Staff investigator made certain enquiries of Panasonic and was told by Panasonic's counsel that the company had no intention of entering into the proposed offtake agreement and that Panasonic was considering canceling the purchase order with SJCI. Staff contacted Ogilvie about the apparent contradiction between SJCI's public disclosure and Panasonic's characterization of its relationship with SJCI, and suggested that SJCI should consider issuing another news release that was compliant with the principle of full, true and plain disclosure.

[14] Trading of SJCI's shares was again halted on March 9, 2017. On March 20, SJCI issued a third news release (the **Third Release**) to further clarify the statements in the First Release and the Second Release. Once trading of SJCI's shares resumed on March 21, the share price closed 44% lower than the previous close, and trading prices and volumes settled into a pattern consistent with trading before the First Release.

[15] In the Merits Decision, we found that the misleading and untrue statements in the First Release and the Second Release contravened s. 92(4.1) of the Act. Ogilvie, a senior SJCI officer, was primarily responsible for making the impugned statements in the First Release and the Second Release, in part based on his significant involvement in drafting the releases and that the statements were largely attributed to him. Ogilvie was SJCI's sole negotiating contact with Panasonic and he knew that a long-term commercial arrangement with Panasonic would be a significant development for SJCI, but that Panasonic would not agree to a supply agreement without first testing SJCI's graphite. Accordingly, we found that Ogilvie knew or reasonably ought to have known that the impugned statements in the First Release and the Second Release were misleading or untrue in a material respect at the time they were made, and that they would reasonably be expected to have a significant effect on the market price or value of SJCI's securities.

B. Subsequent Developments

[16] After the issuance of the Merits Decision, the request by Ogilvie's counsel for leave to withdraw was granted. After having an opportunity to obtain new counsel, the proceeding continued and Ogilvie represented himself.

[17] Both Staff and Ogilvie indicated that additional evidence was unnecessary to address potential sanction or cost-recovery orders, and that the matter could be decided based on the parties' written submissions.

III. ORDERS SOUGHT BY STAFF

[18] Staff argued that the public interest warranted a three-year director-and-officer ban and an administrative penalty of $75,000. Staff also sought a cost-recovery order of $40,000.

[19] Ogilvie's position was that he posed no threat to the investing public. Much of his submissions took issue with findings in the Merits Decision, referenced irrelevant matters and relied on factual assertions that were unsupported by the evidence. We inferred from his submissions that he did not believe that any sanction or cost-recovery orders were appropriate.

IV. SANCTION

A. Sanctioning Principles

[20] Sections 198 and 199 of the Act authorize an ASC panel to order an array of sanctions in the public interest, the objective of which is to protect investors and foster a fair and efficient capital market (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45, *Re Homerun International Inc.*, 2016 ABASC 95 at para. 12). Sanction orders are not to punish a respondent or remediate their past misconduct but are preventive in nature and prospective in orientation. They must also be reasonable and proportionate, while taking into account both general deterrence (deterring future misconduct by others) and specific deterrence (deterring future misconduct by a particular

respondent) (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; *Homerun* at para. 13-15; *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154).

[21] Section 198 of the Act authorizes certain orders that restrict a respondent's participation in the capital market, and may be subject to terms and conditions. As noted in *Re Fauth*, 2019 ABASC 102 (at para. 68):

> Different bans addressing different types of activity in the Alberta capital market are available under s. 198(1). They may be temporary or permanent, and subject to exceptions (the aforementioned "carve-outs") or not. Such orders prohibit those who contravene Alberta securities laws from future participation in the market, and make it apparent to others that they risk losing the privilege of participation if they undertake similar misconduct (see *Planned Legacies* at para. 63 and *Mandyland* at para. 51).

[22] An ASC panel may order a respondent to pay an administrative penalty of up to $1 million for each contravention or failure to comply with Alberta securities laws (s. 199(1) of the Act). This is an important sanctioning measure for both specific and general deterrence (*Re Workum and Hennig*, 2008 ABASC 719 at para. 135, affirmed on other grounds *sub nom. Alberta (Securities Commission) v. Workum*, 2010 ABCA 405). As observed by the Alberta Court of Appeal, an administrative penalty should be significant enough so that it is not viewed as merely another cost of doing business (*Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54), and should not ". . . communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence", otherwise "the opposite to deterrence may result" (*Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 21). As with any other sanction, an administrative penalty must be "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156).

[23] Past ASC decision have identified certain factors – namely the seriousness of the respondent's misconduct, the respondent's characteristics and history, any benefits sought or obtained by the respondent, and any other relevant mitigating or aggravating considerations – to guide the sanctioning analysis (*Homerun* at paras. 20-22). Consideration should also be given to prior decisions and settlements to ensure that sanction orders are proportionate and reasonable (*Homerun* at para. 16).

1. Seriousness of the Misconduct

[24] Serious capital market misconduct is usually indicative of a heightened risk of future harm and a commensurate measure of deterrence (*Homerun* at para. 26). Assessing the seriousness of a respondent's misconduct takes into account the nature of the misconduct, the respondent's intent (i.e., whether the misconduct was deliberate, reckless, or inadvertent), and whether identifiable investors or the capital market generally were exposed to potential harm (*Homerun* at para. 22; *Re Aitkens*, 2019 ABASC 151 at para. 21).

[25] Staff submitted that Ogilvie's misrepresentations were serious, evidenced by the notable effect on the secondary market for SJCI's shares. Staff pointed to the significant increase in trading volumes and share price immediately following the First Release, followed by a dramatic price drop after correcting news releases were issued. Staff argued that we could infer that investors who acquired SJCI shares after the First Release bought at the height of the price increase and likely lost money.

[26] Ogilvie did not specifically address the seriousness of his misconduct, and instead insisted that neither the First Release nor the Second Release contained any misleading statements. He asserted that "every line in the press release was in fact true", that "the statements contained in the press release(s) were not false rather open to interpretation", and that the information had been "restated in a timely manner". In light of our findings in the Merits Decision, these submissions were not helpful.

[27] Ogilvie also pointed to the involvement of others in SJCI's preparation of the subject news releases, arguing that he was but one member of the team and that others should bear some responsibility for SJCI's misleading statements. He contended that he should not be singled out when other officers, directors and consultants knew about the details in the news releases and participated in their development. In the Merits Decision, we found that Ogilvie was the sole source of information about SJCI's communications with Panasonic and he was principally responsible for drafting and approving the news releases.

[28] Previous ASC decisions have frequently commented on the seriousness of s. 92(4.1) contraventions when misleading the market (*Homerun* at para. 23). That misconduct is fundamentally incompatible with a properly functioning capital market, as it interferes with the provision of accurate and timely information and impedes the ability of investors to make informed investment decisions (*Re Campbell*, 2015 ABASC 750 at para. 24; *Re Hav-Loc Private Wealth Partners Inc.*, 2010 ABASC 43 at para. 42). As discussed by an ASC panel in *Re Anderson*, 2009 ABASC 87 (at para. 43):

> Truthful public disclosure of material information by reporting issuers is important – indeed, essential – to the fair and efficient operation of the Alberta capital market. The dissemination of misleading or untrue information that would reasonably be expected to affect significantly the price of publicly traded securities is inconsistent with a fair and efficient capital market. It puts actual and prospective investors at risk, because investment decisions may be made on the basis of flawed information. Foreseeable consequences can include losses to investors, of both money and confidence. A loss of investor confidence can, in turn, impair the ability of responsible businesses to raise capital economically.

[29] Ogilvie drafted the First and Second Release, both of which contained statements that were objectively misleading and untrue. Ogilvie's contraventions of securities laws, in providing materially misleading information to the market, was serious.

[30] Staff acknowledged there was no evidence of identified investors who were harmed by Ogilvie's misconduct but argued that the significant market reaction following the First Release likely caused investors who purchased then to end up losing money. Even though there was not direct evidence of investor harm, Ogilvie's misconduct clearly increased the risk that investors would suffer losses. Moreover, dissemination of misinformation about a reporting issuer undermines public confidence in the integrity of the market.

[31] While the nature of the misconduct was serious and increased risk of harm to market participants, we do not believe that Ogilvie maliciously intended to mislead the market. As noted in the Merits Decision, Ogilvie was seemingly confident that Panasonic would sign an offtake agreement, even though his perception reflected "wishful thinking, over-confidence, or hubris".

That he may not have deliberately misled the market does not excuse his misconduct, but gives context to our assessment of the risk Ogilvie poses to the public interest and the degree of deterrence required.

2. Ogilvie's Characteristics and History

[32] A respondent's characteristics and history (including their background and experience in the capital market, and any relevant disciplinary history) can provide additional insight into the risk of future harm posed by a respondent, both to investors and the capital market. This may inform the requisite measure of deterrence and the proportionality of any sanction orders (*Homerun* at para. 27).

[33] Staff acknowledged that there was no evidence that Ogilvie was previously sanctioned by the ASC or any other Canadian securities regulator, but submitted that he was an experienced corporate officer and should have known of his obligations and the legal ramifications of his actions. Ogilvie argued that his competence as an officer or director of public companies has never been questioned, and that he acted as SJCI's CEO and Chairman without incident for nearly four years after the conduct in issue.

[34] As is frequently observed by ASC panels, extensive capital market experience is not necessary to know that making misleading or untrue statements in continuous disclosure to the market is wrong (*Homerun* at para. 31). Experienced directors and senior executives of public companies are particularly well-positioned to ensure that appropriate disclosure standards are met. This point was made by an ASC panel in *Re Ironside*, 2007 ABASC 824 (at para. 117), aff'd (*sub nom Ironside v. Alberta (Securities Commission)*) 2009 ABCA 134:

> A sound and reliable disclosure system is fundamental to the operation, integrity and strength of the capital market. High disclosure standards for public issuers foster investor confidence and thereby contribute to a fair and efficient market. Disclosure also assists the market in valuing accurately a public issuer's share price. However, the disclosure standards will provide inadequate protection if investors are unable to trust in and rely on the integrity and honesty of those who are appointed to serve as directors or occupy senior management positions within a public issuer. The public rightly depend on directors and senior executives to comply with regulatory requirements and to be honest and truthful in the public disclosure they make. It is serious when an officer or director of a public issuer causes it to fail consistently in complying with disclosure requirements.

[35] Although Ogilvie has not previously been sanctioned, his position with SJCI at the time of his misconduct argues for a meaningful deterrent message that senior executives are expected to follow high standards when providing continuous disclosure to the market.

3. Benefits Sought and Obtained by Ogilvie

[36] The risk of future harm may also be informed by the extent to which a respondent sought to benefit from their misconduct, which may reflect a greater need for deterrence (*Homerun* at para. 35).

[37] Staff acknowledged that there was no evidence that Ogilvie received a direct financial benefit from his misconduct. Indeed, Staff's investigator testified that Ogilvie was not connected to any brokerage accounts through which SJCI shares were traded at the time of the subject news releases. Ogilvie submitted that he did not seek to personally gain from the news releases nor did

he orchestrate a "pump" of the stock price, and he pointed to the alleged insider trading activity of other officers and directors who "got away with their financial gains".

[38] We accept that Ogilvie did not seek to personally benefit, directly or indirectly, from his misconduct. He did not trade SJCI shares at the time, and there was no suggestion that the news releases were issued in contemplation of a financing. Whether others may have sought an advantage from the increased share price following the First Release has no bearing on our sanction assessment, other than what we have already taken into account in relation to the risk of investor harm within the context of the seriousness of the misconduct. In the circumstances, we considered Ogilvie's lack of motive to personally benefit from his misconduct as a neutral factor.

4. Mitigating and Aggravating Considerations

[39] A proper assessment of the potential future risk to investors and the capital market, as well as the proportionality of any sanction orders, requires consideration of any other relevant circumstance, whether mitigating or aggravating (*Homerun* at para. 39). Mitigating considerations may include "a genuine acceptance of responsibility" or other "[p]ersuasive indications that a respondent appreciates the wrong done, and its seriousness", whereas a "belligerent contempt for either the victims of the misconduct or the law" may be considered aggravating and indicate a particular risk of future misconduct (*Homerun* at paras. 40-46).

[40] Staff submitted that there were no mitigating circumstances and seemed to suggest that it was aggravating that Ogilvie provided ongoing misinformation to the market, that he disregarded advice to first obtain comment from Panasonic before issuing the First Release, and that the statements were not only misleading but also untrue. While it was unclear whether Staff was arguing that these circumstances should be treated as aggravating, we did not consider them as such, largely because they were generally subsumed within our earlier analysis of the seriousness of Ogilvie's misconduct.

[41] Ogilvie did not expressly address Staff's suggestion that certain circumstances might be considered aggravating, nor did he seem to offer any other circumstances relevant to our sanctioning analysis. Although he suggested that he has paid in other ways – including that he was forced to bear the costs of his own defence after SJCI terminated his indemnity – we received no evidence in support of his assertions, nor did we receive evidence of Ogilvie's current financial circumstances (including his ability to pay an administrative penalty).

[42] Staff noted that Ogilvie's submissions demonstrated his ongoing failure to recognize the seriousness of his misconduct or take any responsibility for his actions, Staff did not suggest this was aggravating and we did not consider Ogilvie's disagreement with the Merits Decision or assignment of blame to others as mitigating or aggravating.

[43] We did not identify any other mitigating or aggravating facts or circumstances.

5. Conclusions on Sanctioning Factors

[44] Based on our assessment of the relevant sanctioning factors, we are of the view that Ogilvie presents a sufficient risk to the public interest warranting meaningful general and specific deterrence. His conduct as a senior executive with responsibility for disclosure to the capital market fell short of expected standards and constituted a serious contravention of Alberta securities

laws. The need for specific deterrence was mitigated somewhat by the relatively low degree of subjective intent to mislead the market and the absence of any motive to personally profit.

6. Outcomes in Other Proceedings

[45] Staff cited five ASC cases and submitted that they involved similar misconduct and reflected a reasonable and appropriate range of sanction orders, in terms of type and quantum. Some of these cases involved negotiated settlements or admissions that may be of limited assistance.

- *Re West High Yield (W.H.Y.) Resources Ltd.*, 2018 ABASC 187 – a corporate respondent admitted to a contravention of s. 92(4.1) for failing to disclose certain risks in a news release that a material transaction might not be completed. That led to the respondent's shares being halted while a further news release was issued containing additional information about the transaction. According to the settlement agreement, the company and its officers and directors did not intentionally make any misleading statements, did not receive or act with an intention to receive financial gain in connection with the news release, cooperated with Staff's investigation, and had not been previously sanctioned by the ASC. The respondent received partial credit for its cooperation, and agreed to pay $200,000 (including costs) and to provide its officers and directors with training in best practices for corporate governance and disclosure.
- *Re Russell*, 2012 ABASC 249 – the respondent (the issuer's President, CEO and director) was found to have breached s. 92(4.1) following a contested hearing in connection with nine news releases over a six-month period that contained disclosure about the company's testing and drilling results for its mining properties. The respondent was identified in most new releases as the company's "qualified person". A few days after the company completed a private placement, and in apparent response to ASC Staff's concerns, the company issued a clarifying news release that resulted in high trading volume of the company's shares at "sharply" lower prices (*Russell* at para. 11). The respondent's misconduct, characteristic of his "enduring inclination towards unbridled optimism" (*Russell* at para. 32), warranted a five-year director-and-officer ban, an administrative penalty of $150,000, and a cost-recovery order of $40,000.
- *Re Anderson*, 2009 ABASC 126 – the respondent was principally responsible for the issuance of six news releases over several months that materially overstated the reporting issuer's gas production. Near the end of that period, the issuer raised approximately $8.5 million through a private placement. The respondent admitted to having caused or permitted the company to make misleading or untrue statements, and despite the involvement of others in the issuer's disclosure process, he was found to have principal responsibility for the issuance of the news releases and was therefore liable for breaching s. 92(4.1) of the Act. Taking into account settlements with others involved in the same misrepresentations, the panel imposed a sanction comprised of a seven-year director-and-officer ban coupled with an administrative penalty of $100,000 (the respondent was also ordered to pay costs of $20,000).
- *Re Stevenson*, 2009 ABASC 73 – the respondent (a corporate officer involved in some of the same misrepresentations in *Anderson*) admitted to acquiescing to three

of the issuer's misleading or untrue news releases, and agreed to a four-year officer ban and payment of $50,000, plus a cost-recovery order of $7,500.

- *Re Hypower Fuel Inc.*, 2014 ABASC 80 – over several months, an Alberta reporting issuer issued various news releases that contained numerous misrepresentations (including that the company had signed a major development agreement when there was no such agreement). The company and certain individual respondents each admitted to having breached s. 92(4.1) of the Act. One of the individual respondents (who also admitted to making an untrue statement under oath to Staff investigators contrary to s. 221.1 of the Act) agreed to five-year market bans, payment of $30,000, plus a $10,000 cost-recovery order. The other individual respondent (who had previously been sanctioned) agreed to ten-year market bans, payment of $40,000, plus a $10,000 cost-recovery order.

[46] Staff argued that the misconduct in *Stevenson* and *Anderson* were most analogous to that of Ogilvie, based on the number and nature of the misleading news releases. Staff's request for a $75,000 administrative penalty was at the midpoint of the penalties in those cases. Ogilvie contended that none of Staff's cases were helpful because they generally involved numerous false news releases issued over several months.

[47] As a general observation, most of the cases cited by Staff involved settlement agreements, which often reflect more lenient sanctions resulting from negotiation. Although the *Anderson* case proceeded to a merits hearing, Staff in that case amended the allegations at the outset of the hearing and the respondent conceded liability in his testimony. We considered that the range of sanctions in the cases cited by Staff – which indicated that individual respondents sanctioned for multiple misrepresentations over several months typically received sanction orders consisting of market-access bans in the range of four to ten years and administrative penalties in the range of $30,000 to $150,000 – may be lower than would be the case if they had been sanctioned following a contested hearing.

[48] We are of the view that Ogilvie's misconduct warrants sanction orders that fall closer to the lower range of sanctions given the qualitative differences from the cited cases. In particular, the cited cases involved numerous misleading or untrue news releases issued over several months, often occurred at a time when the issuer was undertaking an equity private placement.

[49] We also took into account the Settlement, in which SJCI admitted that it breached s. 92(4.1) for the misrepresentations in the First Release and the Second Release and agreed to pay $50,000 and costs of $12,500. Ogilvie suggested that the Settlement was motivated by the desire of SJCI insiders to avoid liability for their improper trading, although we had little reliable evidence to support his contention. While settlement agreements of a co-respondent are not binding, they may be a relevant factor to the proportionality assessment if appropriate consideration is given to the relative culpability of the various respondents and any discount reflected by such settlements (*Cartaway* at paras. 68 - 69).

[50] We considered SJCI and Ogilvie's respective culpability as being similar, since the misconduct derived from the same misleading and untrue statements. The Settlement likely reflected a discount compared to what would otherwise have been ordered following a contested hearing. While it did not expressly reference the ASC's Policy 15-601 – *Credit for Exemplary*

Cooperation in Enforcement Matters or whether SJCI received credit for its admissions, the Settlement provided that SJCI cooperated with Staff during the investigation and that the admissions saved the time and expense associated with a contested hearing. In the circumstances, we considered the sanction agreed to by SCJI in the Settlement provided some guidance for the range of sanction that would be appropriate for Ogilvie.

B. Parties' Position on Sanction

[51] Staff sought a three-year director and officer ban, based on Ogilvie's principal responsibility for drafting and approving the First Release and the Second Release. Staff submitted that his repeated failure to clarify the misleading statements in the First Release demonstrated that he poses an ongoing risk, that both specific and general deterrence warrant such a ban and that it is consistent with sanction orders for analogous misconduct in other cases. Staff also observed that Ogilvie held a senior position with SJCI, had in-depth knowledge of the negotiations with Panasonic and approved the release of misleading and untrue information into the market knowing that it would affect SJCI's share value.

[52] Staff argued that a significant administrative penalty was also necessary, and that it must be substantial enough to prevent Ogilvie from considering the sanction as merely another cost of doing business while also dissuading others from engaging in similar misconduct. Staff contended that an administrative penalty of $75,000 fell within the range established by the case law for similar misconduct, and also accounted for the $50,000 administrative penalty agreed to by SJCI in the Settlement.

[53] As mentioned, Ogilvie did not suggest an alternative to the sanction orders sought by Staff, and seemed to be of the view that no sanction was warranted.

C. Analysis on Sanction Orders

[54] We conclude that it is in the public interest to order meaningful sanctions against Ogilvie, for both specific and general deterrence. Consistent with other cases, we are of the view that an appropriate sanction requires that Ogilvie be banned from serving as a director or officer of any reporting issuer and that he pay an administrative penalty.

[55] We find that a director-and-officer ban is appropriate, because Ogilvie's misconduct occurred while he acted as CEO and director of SJCI. We are satisfied that the necessary degree of deterrence does not warrant a permanent ban and that it will suffice to order a director-and-officer ban of three years, together with an appropriate administrative penalty.

[56] We are of the view that an administrative penalty of $60,000 is warranted and in the public interest, while also being proportionate to the nature of the misconduct and Ogilvie's personal circumstances. Such an amount is modestly higher than SJCI's Settlement that derived from the same facts, while also falling within the appropriate range of other cases presented by Staff.

V. COSTS

A. Cost-Recovery Principles

[57] The Notice of Hearing provided that an order under s. 202 of the Act may be made, which authorizes an ASC panel to order a person who has contravened Alberta securities laws to pay costs of, or related to, the hearing or the investigation that led to the hearing (or both).

[58] A cost-recovery order is distinct from a sanction, and requires a respondent to pay the investigation and hearing costs that "would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations" (*Homerun* at para. 48). While it is generally considered appropriate for a respondent to bear at least some portion of the relevant costs, the precise amount will depend to some extent on the parties' relative contributions to the efficient conduct and resolution of the proceeding. For that reason, a cost-recovery order provides "an effective means of promoting procedural efficiency in the conduct of enforcement proceedings" (*Re Bartel*, 2008 ABASC at para. 50).

[59] Section 20 of the *Alberta Securities Commission Rules (General)* provides that a cost-recovery order under s. 202(1) of the Act may include reasonable costs of Staff involved in the investigation or hearing (based on the time expended at the applicable hourly rates), as well as amounts paid to witnesses or to any person or company engaged by Staff, so long as those amounts are reasonable in all the circumstances and relate to the investigation or hearing. The reasonableness of the imposed costs should consider the time spent by Staff on the matter while attempting to avoid or reduce any duplication or overlap of Staff's efforts (*Homerun* at para. 50).

B. Parties' Position on Cost-Recovery Order

[60] Staff sought a cost-recovery order of $40,000. Staff's Bill of Costs indicated that Staff's actual costs totaled approximately $100,000, consisting of more than $9,000 for Staff's investigation and nearly $70,000 in litigation costs, with the remaining costs attributable to disbursements and other expenses. Because Staff incurred approximately $50,000 after SJCI's Settlement, Staff suggested that this amount was solely attributable to Ogilvie whereas the other costs were attributable to both Ogilvie and SCJI. Staff proposed to discount the costs relating to having a second litigation counsel as well as SJCI's payment of $12,500 towards costs as part of the Settlement. In light of these discounts, Staff contended that a $40,000 cost-recovery order was reasonable, which they said represented approximately 60% of the balance of costs.

[61] Ogilvie contended that he "and others have significantly suffered financially enough over this issue . . ." and protested about having to bear any costs for the investigation and hearing, stating that he should not have to pay to exercise his right to a hearing when Staff's involvement was based on the "blatant" insider trading by certain officers and directors after the First Release.

C. Analysis and Conclusions on Cost-Recovery Order

[62] Staff did not raise any concerns about the efficiency of the investigation or hearing, and a Staff investigator testified that Ogilvie cooperated with the investigation and attended an investigative interview without delay. We also considered the hearing itself to have proceeded relatively efficiently, aside from Ogilvie's unsuccessful adjournment application shortly before the hearing.

[63] In our view, it is appropriate for Ogilvie to bear some of the costs of the investigation and hearing. Otherwise, the significant costs incurred by Staff to investigate and prosecute his serious misconduct would largely be borne by other market participants.

[64] In terms of the amount of the cost-recovery order, we determined that the circumstances warranted an amount lower than Staff requested. According to testimony of Staff's investigators,

Staff's investigation initially focussed on concerns relating to potential insider trading and market manipulation. Because these concerns did not relate to the allegations against Ogilvie, we considered it reasonable to modify Staff's claimed costs associated with investigating that potential misconduct, including Staff's work to apply for interim orders before the issuance of the Notice of Hearing. We do not criticize Staff for taking these steps, but in our view it would not be reasonable for Ogilvie to bear those costs when he did not trade SJCI shares.

[65] We also modified Staff's costs for steps taken by Staff's litigation counsel that apparently related to SJCI's Settlement, as such costs were not reasonably attributable to Ogilvie.

[66] With these modifications, and accepting Staff's reduction for second counsel fees and SJCI's payment of certain costs, we find that a cost-recovery order of $30,000 is appropriate. Accordingly, we order Ogilvie to pay costs of the investigation and hearing in an amount of $30,000.

VI. CONCLUSIONS AND ORDERS

[67] For the reasons given, we make the following orders against Ogilvie:

- under ss. 198(1)(d) and (e) of the Act, Ogilvie must resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), for three (3) years to and including March 21, 2026;

- under s. 199, he must pay an administrative penalty of $60,000; and

- under s. 202, he must pay $30,000 of the costs of the investigation and hearing.

[68] This proceeding is now concluded.

March 21, 2023

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Trudy Curran

"original signed by"
James Oosterbaan