ALBERTA SECURITIES COMMISSION

DECISION

Citation: Stan, Re, 2013 ABASC 148 **Date: 20130410**

Robert Henry Stan, Anita Louise Roncin, Eugene Hiroshi Nagai, Timothy Peter Riordon, Kevin Ronald Wade and Kathryn Paula Stan

Panel:	Glenda A. Campbell, QC Glen D. Roane Fred R.N. Snell, FCA
Appearing:	Don Young and Liam Oddie for Commission Staff Daniel J. McDonald, QC, Jeffrey E. Sharpe and Andrew F. Sunter for Robert Henry Stan, Timothy Peter Riordon, Eugene Hiroshi Nagai and Kevin Ronald Wade Tristram Mallett and Tara Kyluik for Anita Louise Roncin James B. Rooney, QC for Kathryn Paula Stan
Dates of Hearing:	27-31 August, 4-7, 13-14, and 17-18 September and 20 December 2012
Date of Decision:	10 April 2013

I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **Commission**) alleged that six individuals, Robert Henry Stan (**Robert Stan**), Anita Louise Roncin (**Roncin**), Eugene Hiroshi Nagai (**Nagai**), Timothy Peter Riordon (**Riordon**), Kevin Ronald Wade (**Wade**) and Kathryn Paula Stan (**Kathryn Stan**; together with Robert Stan, the **Stans**) (the six individuals together are the **Respondents**), contravened the *Securities Act*, R.S.A. 2000, c. S-4 (the **Act**) and acted contrary to the public interest.

[2] This proceeding involves allegations that insiders (and the wife of an insider) of a publicly-traded coal company – Grande Cache Coal Corporation (**Grande Cache**) – illegally sold or illegally informed or recommended or encouraged another to sell, Grande Cache shares (**GC Shares** or **Shares**) because at the time they had knowledge of information about Grande Cache which, if generally disclosed, would reasonably be expected to have had a significant negative effect on the GC Share price.

[3] Staff alleged in a notice of hearing (**NOH**) issued on 5 December 2011 that Grande Cache's failure to meet its first quarter (1 April to 30 June) (**Q1**) of its 2009 financial year – 1 April 2008 to 31 March 2009 (**F2009**) – sales volumes forecast and the magnitude of its reduced Q1 F2009 production from its coal mines were material facts with respect to Grande Cache (the **Alleged Material Facts**), that the Respondents knew of the Alleged Material Facts by 26 May 2008, and that these Alleged Material Facts were not generally disclosed (or, in these reasons, also referred to as **non-public**) until 14 August 2008. As a result, Staff alleged that Roncin, Nagai, Riordon, Wade and Kathryn Stan engaged in illegal insider trading when they sold GC Shares, contrary to section 147(2) of the Act; that Robert Stan illegally informed Kathryn Stan of non-public Alleged Material Facts contrary to section 147(3) or illegally recommended or encouraged her to sell GC Shares, contrary to section 147(3.1); and that all the Respondents engaged in conduct that was contrary to the public interest. Staff conceded that the exercise of options by Robert Stan, Roncin, Nagai, Riordon and Wade were not contraventions of section 147(2) but alleged those actions were contrary to the public interest.

[4] Staff's allegations were the subject of a 14-day hearing (the **Hearing**) in August, September and December 2012. We heard testimony from two Staff investigators, each of the Respondents, Riordon's investment advisor, Grande Cache's corporate secretary and external counsel, two investment advisors for the Stans, Roncin's investment advisor, and three expert witnesses. We also received documentary evidence, along with written and oral submissions from all parties.

[5] For the reasons that follow, and having heard and carefully considered and weighed all of the evidence, we cannot conclude that the Alleged Material Facts were material facts within the meaning of Alberta securities laws, not generally disclosed. Thus, the Respondents' impugned activities did not contravene Alberta securities laws and was not contrary to the public interest. In the result, the allegations against all Respondents are dismissed.

II. FACTUAL BACKGROUND

A. The Respondents and Other Parties

1. Grande Cache

[6] Grande Cache was an Alberta-based metallurgical coal mining and production company. Grande Cache became a reporting issuer in Alberta following an initial public offering (**IPO**) of

GC Shares pursuant to a prospectus dated 29 April 2004 that was filed with and receipted by the Commission. Grande Cache continued to be a reporting issuer in Alberta in 2008. The GC Shares were traded on the Toronto Stock Exchange (**TSX**) under the symbol "GCE". Grande Cache's financial year of 1 April to 31 March was the same financial period as the global coal year (the **Coal Year**) – the Coal Year was the 12-month period for which coking coal prices were agreed on between major coking coal companies (producers) and steel companies (customers). A Coal Year price would typically remain in effect for the entire 12-month period. (Unlike a financial year, which is identified by the year in which it ends, a Coal Year is identified by the year in which it begins – therefore, the 2008 Coal Year equates to Grande Cache's F2009.)

[7] According to Grande Cache documents in evidence, Grande Cache's officers in Q1 F2009 included Robert Stan, Roncin, Nagai, Riordon, Wade, Lloyd Metz (**Metz**) (Vice President, Operations) and Frederick Davidson (**Davidson**) (Corporate Secretary). During Q1 F2009 Grande Cache had over 300 full-time employees organized into five departments: a marketing group; a regulatory approvals and environmental group; a finance, accounting and administration group; an IT group; and an operations group.

[8] The coalfield that Grande Cache mined during its life is called the Smoky River Coalfield (the **Coalfield**). The Coalfield is located on the eastern slopes of the Rocky Mountains in west-central Alberta. Coal has been produced at the Coalfield since at least 1970.

[9] In October 2000 Grande Cache acquired the Coalfield after its prior owner, Smoky River Coal Limited (**SRCL**), became insolvent.

[10] At the time of its IPO, Grande Cache had a stock option plan (the **Option Plan**) for its directors, officers and employees. Under the Option Plan, Grande Cache share options (**GC Options**) could be granted annually to existing employees and to new hires.

[11] On 2 March 2012 the sale of all outstanding GC Shares to a consortium of investors was completed.

2. Robert Stan

[12] Robert Stan was president, chief executive officer (**CEO**) and a director of Grande Cache for several years before the relevant time until he left Grande Cache in May 2012, a short time after it was sold. He was, according to Roncin, "responsible for the overall direction of the company", and all Grande Cache employees reported to him. In 2008 Robert Stan was a member of Grande Cache's disclosure committee (the **Disclosure Committee**). At the time of the Hearing, Robert Stan had been involved in the Canadian coal industry for 32 years.

[13] Robert Stan had worked for SRCL under its president, Barry Davies (**Davies**) until it went into receivership. Robert Stan and Davies incorporated Westpine Inc. (**Westpine**), with themselves as the two initial shareholders, and worked with SRCL's receiver through Westpine. In July 2000 Robert Stan, Davies and several other investors incorporated Grande Cache for the purpose of acquiring SRCL's mining assets and reactivating mining in the Coalfield. Through Westpine, Robert Stan and Davies became shareholders in Grande Cache. In 2004, as part of the IPO, Grande Cache's shares at the time were converted to GC Shares, leaving Robert Stan with 295 148 GC Shares after the conversion.

3. Roncin

[14] Roncin is a Chartered Accountant and a Certified Public Accountant. She was employed at Grande Cache from 1 July 2004 to 30 September 2008. In 2008 Roncin was a member of the Disclosure Committee.

[15] Roncin joined Grande Cache as its controller and was promoted to chief financial officer (**CFO**) and Vice President, Finance effective 1 October 2005. In late 2006 she also took on the role of director of investor relations, in which position she was "the primary contact for analysts and investors" and, together with Robert Stan, "would give various presentations to those groups, as well". Prior to joining Grande Cache, Roncin had been employed by another major Canadian metallurgical coal producer.

4. Nagai

[16] Nagai, a marketing and transportation professional, had worked for approximately 35 years in various businesses, most of which involved coke, sulphur, potash, chloralkali chemicals, and refined petroleum marketing and transportation. On 11 December 2006 he joined Grande Cache as Vice President, Marketing and Transportation, a position he held at the time of the Hearing.

[17] At Grande Cache, Nagai was responsible for coal sales contracts, including negotiation and issues with customers. He described his duties as being "accountable at the company for all sales functions, selling both to the domestic and international markets" and "renegotiating any freight contracts, terminal agreements, any contracts with our service suppliers, like inspection companies at the ports and so on".

5. Riordon

[18] Riordon was General Manager of Grande Cache operations from 1 November 2006 until 1 January 2010, when he was promoted to Vice President, Mining. He remained in that position until retiring in June 2010.

[19] Riordon's educational background included mining technical school, an engineering degree and a professional engineering designation. Riordon was responsible for ensuring Grande Cache's open-pit mine, underground mine and plant ran smoothly, including safety issues and the transportation of coal from the mines to the plant. In 2008 he reported to Metz at the times relevant to Staff's allegations. Prior to joining Grande Cache, Riordon had worked with several mining companies over several decades, including as a manager of underground and surface mines. Riordon testified he was not involved with coal after it left the mine site, with sales or investor relations, or with drafting financial reports or news releases.

6. Wade

[20] Wade, a Certified General Accountant, joined Grande Cache in December 2005 as a manager of accounting. He was promoted to controller in December 2006. In May 2012 Wade was promoted to Vice President, Finance, a position he held at the time of the Hearing.

[21] As controller of Grande Cache, Wade was responsible for overseeing the accounting department, including internal and external financial reports. In 2008 he reported to Roncin at the times relevant to Staff's allegations. Prior to joining Grande Cache, Wade had worked as a senior financial accountant at another Canadian metallurgical coal producer.

7. Kathryn Stan

[22] Kathryn Stan is the wife of Robert Stan and a retired school teacher. She has some securities-related background, having completed the course work for the Canadian Securities Course some years earlier.

[23] As part of the IPO in 2004, Grande Cache's shares at the time were converted to GC Shares, leaving Kathryn Stan with 264 353 GC Shares after the conversion.

[24] In 2008 Kathryn Stan held GC Shares in two personal securities trading accounts: a securities trading account with Salman Partners Inc. (**Salman**) in Vancouver, British Columbia (the **Kathryn Stan Salman Account**) and a securities trading account with Peters & Co. Limited (**Peters**) in Calgary (the **Kathryn Stan Peters Account).**

8. Spruce Bluff

[25] Spruce Bluff Resources Limited (**Spruce Bluff**), incorporated in 2003, was a small investment holding company with Robert Stan and Kathryn Stan the sole directors, each holding 50% of the voting shares. In 2008 Kathryn Stan was apparently Spruce Bluff's president and a director.

[26] Between March 2003 and February 2006 Robert Stan and Kathryn Stan made shareholder loans totalling $228 260 to Spruce Bluff, evidenced in part by promissory notes issued by Spruce Bluff to Robert Stan and Kathryn Stan, respectively, in the amount of $100 000 each.

[27] On 20 July 2006 Spruce Bluff opened a securities trading account with Salman (the **Spruce Bluff Salman Account**), with Robert Stan and Kathryn Stan each having trading authority over the account. On 27 July 2006 the Spruce Bluff Salman Account held 165 378 GC Shares, transferred into the account from Westpine when the latter was restructured. On 9 July 2008 Spruce Bluff opened a securities trading account with Peters (the **Spruce Bluff Peters Account**). Kathryn Stan and Robert Stan testified that at the time of the impugned activity she was the only person who had ever traded on behalf of Spruce Bluff.

9. Westpine

[28] Westpine was initially formed by Robert Stan and Davies. Their wives later became directors and shareholders as well. Westpine invested in Grande Cache through rights offerings. Westpine distributed on an even basis to its four shareholders Grande Cache Class A voting common shares acquired from those rights offerings.

[29] As at 31 March 2003, the Stans had lent Westpine a total of $166 000, some of which is shown by promissory notes in evidence. Money provided to Westpine came out of a joint banking account held in the name of the Stans – with money sourced from Kathryn Stan's salary and from the Stans' line of credit. Later loans to or investments in Westpine by the Stans were made through Spruce Bluff.

10. Davidson

[30] Davidson has been a practising securities lawyer for almost 20 years, with most of that time spent in Calgary.

[31] Davidson was Corporate secretary and primary external counsel for Grande Cache from 2004 to 2012. In those roles he attended at, participated in and took minutes of meetings of Grande Cache's board of directors (the **Board**) and its committees, and "handled all corporate securities matters" for Grande Cache. Around the time of Grande Cache's 2004 IPO, Davidson advised Grande Cache's senior management and Board regarding their roles and responsibilities in a public company, including continuous disclosure obligations by public companies and the related insider trading and tipping prohibitions.

B. The Coal Industry and Pricing

1. General

[32] To provide background, we briefly describe the coal industry and the coal market in Canada and globally as it existed in 2008.

[33] There are two broad categories of coal: steam or thermal coal; and coking or metallurgical coal. The former is used primarily for generating heat or extracting thermal energy; the latter is used primarily in the production of iron for making steel.

[34] The largest three metallurgical coal producing countries are Australia, the United States (the **US**) and Canada. Internationally-traded coal that moves by ocean is referred to as seaborne coal.

[35] The panel accepted Gerard McCloskey (**McCloskey**) as "an expert in international coal markets and pricing", thus "qualified to give opinion evidence on the factors affecting supply, demand and pricing of coking coal in and around 2008 and the expectations regarding supply, demand and pricing in the spring of 2008".

[36] Coking coal is the coal used in a coke oven as part of the steel-producing process. McCloskey described what he termed "the international seaborne metallurgical coal market", with hard coking coal (**HCC**) "the most expensive and highly valued of the coking [or metallurgical] coals". The international market price for HCC always settled first, with the prices for lesser coal qualities flowing from that initial price.

[37] It is clear that the price for steel is a critical factor in setting the price for HCC. McCloskey explained that until April 2010 HCC prices – benchmark prices – were largely agreed to and set annually – by "Coal Year" (equating "to an April-March financial year") – by "major coking coal producers and their steel company customers":

> Up until April 2010, metallurgical coals were priced by reference to annual benchmark [freight-on-board] prices set by leading coking coal producers and steel industry buyers for the following coal year. Since April 2010, benchmark prices have been set on a quarterly basis. The way annual benchmarking worked was that one major supplier, such as BHP Billiton or Anglo American in Australia or Teck in Canada, would take the lead in agreeing to prices for coking coal with one of its major buyers. Thereafter, other suppliers and buyers would follow on with their own deals, generally at around the same price level.

[38] According to McCloskey, these annually-agreed prices were used by all Australian and Canadian coking coal producers, "sometimes with slight adjustments depending on the coking qualities in their coals"; and the US coking coal producers shadowed these prices but did not use them in the same way. McCloskey set out the prices for HCC as: US$125/tonne in 2005 to

2006; US$116/tonne in 2006 to 2007; and US$98/tonne in 2007 to 2008. In 2007 the high demand for steel by the construction, automotive and manufacturing sectors led to record steel prices, resulting in increased global demand for HCC.

[39] This and various other events led to a US$300/tonne price set in Australia and Canada for HCC for 1 April 2008 to 31 March 2009. August 2008 saw the highest US price ever, at US$375, with October 2008 US settlements for 2009 at US$336 to US$361. McCloskey wrote: "This reflected the perception in September 2008 of both the US coking coal producers and their US steel industry customers of the robustness of the market throughout 2009." McCloskey explained that the strong market indicators continued until September and October 2008, with "profound problems" not evident until November, and a clear "free fall" by December. By the end of the 2008 to 2009 contract year (that is, in early 2009), customers were pulling back from the market and not taking HCC they had contracted for at US$300/tonne.

[40] McCloskey concluded:

> From my examination of the events and dynamics of 2008 in so far as they affected the coal, coke and steel markets, there was nothing happening during the period in which the share sales identified took place between May 29 and July 14 [2008] which gave any indication that the markets would collapse in the last months of 2009 [in context, the end of the 1 April 2008 to 31 March 2009 contract year].

2. Grande Cache's (and Other Coal Companies') Share Prices and Trends

[41] The panel accepted Bradley Heys (**Heys**) as "an expert in economics, finance and the valuation of securities" and thus "qualified to give opinion evidence from an economic perspective on whether disclosure of the magnitude of Grande Cache's reduced first quarter 2009 sales would have reasonably been expected to have a significant effect on the market price or value of [GC Shares] during the period 27 May to 14 July 2008" (with this panel, of course, making the ultimate determination on materiality).

[42] Heys provided data illustrating that the historic GC Share trading price tended to rise and fall on market expectations about future HCC prices. In particular, as demonstrated in the following table, the increase in the market price of GC Shares during the first half of 2008 reflected growing expectations that the price for HCC was on the increase because of a number of global events, namely increasing global demand for steel and significant supply shortages caused by disruptions in coal production in Australia, China and South Africa. However, in the second half of 2008 there was a decrease in the market price of GC Shares reflective of the reversal of market expectation for increased prices for HCC. This reversal was caused by Australian HCC production coming back faster than expected (more supply of HCC) and the global financial crisis which affected many sectors of the economy, but in particular the automobile industry, which in response cut its steel usage by October 2008 (less demand for HCC) – both leading to lower pricing forecasts for HCC.

[43] The following table (compiled from TSX trading data) sets out selected dates and the closing price for GC Shares on each of those dates. We have selected the first trading day of each month for several months before and after the impugned events, the peak day for the GC Share closing price (18 June 2008) and dates immediately before and after Grande Cache's news releases on 21 April 2008 (the **21 April News Release**), 27 May 2008 (the **27 May News**

Release), 30 June 2008 (the **30 June News Release**) and 14 August 2008 (the **14 August News Release**):

Date	**Closing Price per GC Share**	**Date**	**Closing Price per GC Share**
3 December 2007	$0.95	18 June 2008	$10.47
2 January 2008	$1.15	23 June 2008	$9.48
1 February 2008	$1.74	24 June 2008	$9.09
3 March 2008	$3.34	25 June 2008	$8.47
1 April 2008	$4.70	26 June 2008	$8.39
14 April 2008	$5.40	27 June 2008	$7.77
15 April 2008	$5.68	30 June 2008	$8.57
16 April 2008	$5.74	2 July 2008	$7.21
17 April 2008	$5.44	3 July 2008	$7.38
18 April 2008	$5.59	4 July 2008	$7.29
21 April 2008	$6.20	7 July 2008	$6.73
22 April 2008	$6.50	8 July 2008	$6.94
23 April 2008	$6.07	1 August 2008	$7.89
24 April 2008	$5.88	7 August 2008	$7.44
25 April 2008	$6.04	8 August 2008	$7.01
28 April 2008	$5.95	11 August 2008	$6.32
1 May 2008	$5.32	12 August 2008	$6.01
20 May 2008	$6.75	13 August 2008	$6.20
21 May 2008	$7.06	14 August 2008	$5.45
22 May 2008	$7.65	15 August 2008	$5.08
23 May 2008	$8.21	18 August 2008	$5.11
26 May 2008	$8.30	19 August 2008	$5.02
27 May 2008	$8.12	20 August 2008	$5.16
28 May 2008	$8.40	21 August 2008	$5.90
29 May 2008	$8.50	2 September 2008	$4.88
30 May 2008	$9.19	1 October 2008	$2.75
2 June 2008	$9.52	3 November 2008	$1.67
3 June 2008	$9.40	1 December 2008	$0.75
13 June 2008	$9.40		

[44] Another example of the GC Share price being influenced by coal prices was in July 2008 when there was a decrease in a coal market spot sale. This appears to have had an effect on the share prices of Grande Cache and other Canadian coal companies – examples were given of prices falling 13% to 17% for some companies. The GC Share price dropped from $8.57 on 30 June 2008 to $7.21 on 2 July 2008 – approximately 16%.

[45] Heys compared the market prices for the GC Shares with those of its peer group – Cline Mining Corporation, Hillsborough Resources Limited, Northern Energy and Mining Inc. and Western Canadian Coal Corp. That comparison showed considerable correlation in the movement of market prices for Grande Cache and those peers, indicating the strong effect of market expectations about coal pricing on such share prices.

[46] Also in evidence was a graph of daily closing prices for Grande Cache and five peer companies from 2 January 2004 through 31 December 2009. That graph showed an

unquestionable correlation among the share prices for all those companies, reinforcing as reasonably likely the Respondents' contention that the decrease in the GC Share price from approximately mid-June 2008 "was an industry-wide, rather than company-specific, phenomenon caused by rapidly changing industry expectations regarding the price of coking coal (and, on a broader level, the global demand for steel and the strength of the global economy)".

[47] In our view, all of this evidence also supported the Respondents' contention that the share prices of Grande Cache and its peers were "directly tied" to HCC pricing and to future HCC price expectations.

[48] The evidence made clear that, at the time of the 27 May News Release, share prices for Grande Cache and its peers were on an upward trend. However, the period from approximately mid-June to early July 2008 marked a reversal of the escalating trading price trend that had taken hold in early 2008 for coal producers. Share prices for Grande Cache and its peers embarked on a downward (and volatile) trend from that point. By the time of the 14 August News Release, the share prices for Grande Cache and its peers were on a definite downward trend.

[49] Robert Stan stated that towards the end of July and into August 2008:

> . . . the volatility continues, but there is a trending downward. There is, by this time in the marketplace -- not specifically from our company, but from other companies followed by the news that the thermal coal price was falling -- there was starting to be a feeling that metallurgical coal prices would fall as well.
>
> So perhaps there wasn't quite the buoyancy that there was before. We see a downward trend through that period, which is also mirrored by our peers. It's a general market sentiment for our commodity and for what we're doing. . . .

[50] A newspaper article in evidence noted that, despite those share price declines in early July 2008, some coal producers' shares had increased several hundred per cent during the year to that point, that increase credited to record-high metallurgical coal prices.

[51] An 11 September 2008 newspaper article in evidence suggested that optimism still reigned even at that date for the prices of metallurgical coal companies, with a prediction that the share price of Western Canadian Coal Corp. (a peer of Grande Cache) would recover despite being "clobbered in the last couple of months", as with "all other small mining companies". The Salman "Metals Morning Note" of the same date also thought the "sell-off in coal equities" over the previous two months (which was the period during which Grande Cache released its Q1 F2009 results) has "been overdone", and predicted that "global demand for both thermal and metallurgical coal [is] forecast to stay strong and supply [is] expected to remain constrained for some time yet", leading "coal producers [to] benefit from continued pricing strength well into 2009 and possibly beyond". Accordingly, Salman considered Grande Cache, among other coal equity companies, to "present particularly favourable buying opportunities" and set a target price of $10.40, well above the Grande Cache trading price of $3.59. Salman cited Grande Cache's "resumption of depillaring in the underground mine at the end of June" as favourable and that it "should bring volumes back in line and reduce per-tonne costs".

[52] When we consider this evidence, it is clear that in Q1 F2009 neither Grande Cache nor the market could have contemplated the unexpected collapse of the global economy in the

second half of 2008 and the reversal of the expectation that high demand and prices for HCC would continue into 2009.

C. Grande Cache's Operations

1. Mining Operations

[53] Once established and financed through its IPO and earlier financing, Grande Cache began operating the Coalfield, with both surface and underground mining taking place there. The Coalfield underground mine operated by Grande Cache was the only underground coking coal mine in Canada.

[54] Included in Grande Cache's Coalfield mining operations in 2008 were a surface mine (the No. 12 South B2 Surface Mine, the **Surface Mine**) and an underground mine (the No. 7 Underground Mine, the **Underground Mine**).

[55] At the Surface Mine, Grande Cache employed a "standard truck/shovel operation". This, as Heys explained, involved the loading of coal (after removal of waste material overlying the coal) by shovel onto trucks, which then transported the coal to a stockpile at Grande Cache's onsite coal processing plant (the **Plant**). The most important, but a time and labour intensive operation, was the removal of the overburden of rock, which required blasting, digging, loading and hauling. Several tonnes of waste rock had to be removed for every tonne of coal mined. This was called the "stripping ratio". The stripping ratio at the Surface Mine ranged from 4.5:1 to 12:1 over its life.

[56] At the Underground Mine, Grande Cache employed a "room-and-pillar" method of mining. According to Heys, this involved the construction of underground roadways to access a coal deposit, leaving pillars of coal between the roads – referred to as the "development" phase. When the roadways reached the end of the coal deposit, these pillars of coal were systematically extracted as operations retreated – referred to as the "depillaring" phase. Given the nature of these phases, more raw coal – coal before its refinement to remove impurities at the Plant – is extracted in the depillaring phase than the development phase, leading Heys to describe the depillaring state as the "much more productive" phase. Riordon testified that the depillaring stage produced three to four times more raw coal than did the development stage.

[57] Grande Cache transported its raw coal to the Plant, where it was refined. The coal that remained after processing was called "the clean coal at the plant" (**Clean Coal**). Production was considered to be Clean Coal – raw coal, such as coal left in the mine pit to be taken out at a later time, would not be considered production. (Some raw coal did not need processing and became Clean Coal by virtue of bypassing the Plant.)

[58] All Clean Coal produced by Grande Cache, including all HCC, was transported by train to the Westshore terminals in British Columbia (**Westshore**) or terminals in Ontario. (The majority of the coal Grande Cache produced was transported to Westshore.) Virtually all of Grande Cache's coal was then transported by ship to steel producers globally.

[59] In 2008 Metz, as Vice-President, Operations, was responsible for Grande Cache's mining operations. Riordon, who reported to Metz, was the onsite manager at the Coalfield with mining operations personnel reporting to him.

2. Marketing and Sale of Coal

[60] Grande Cache, like its other peer coal producers, sold its coal under annual contracts with fixed quantities at a fixed price, the price based on the benchmark price for the applicable Coal Year. Since most HCC was sold pursuant to contractually fixed annual prices, there was little spot market for HCC. Thus, the expectation was that there would be little change in prices paid by a customer for HCC during a Coal Year. In the result, according to Robert Stan, from a financial perspective (especially early in the financial year), coal producers were not particularly concerned about any potential pricing risk caused by the timing of a sale of HCC during a given financial year because the purchase price was expected to be substantially the same.

[61] Although Grande Cache's annual contracts were binding and enforceable, there were occasions when a customer would not purchase all of the contracted coal amounts for a given year. These customers remained contractually required to purchase the coal on the terms set out in the contracts and so their obligation to purchase coal carried over to the next Coal Year and financial year. These sales were called carry over sales. Carry over sales could be detrimental. If coal prices were expected to fall in the next Coal Year, customers could delay their contracted shipments significantly into the next Coal Year, live off their inventories, then attempt to renegotiate a lower price for their carry over purchases. However, the evidence did not indicate that such renegotiation had been common. Grande Cache's budgeting and anticipated financial year pricing accounted for carry over sales.

[62] Consistent with this evidence, Nagai explained Grande Cache's sales "contracts were for annual evergreen terms", which meant that Grande Cache's major customers "had pretty much an annual commitment" for the volumes they would take from Grande Cache.

[63] To some degree, Grande Cache sales of coal were controlled by the customer. Grande Cache's customers scheduled the vessels to pick up the coal at the terminals. There was always a risk that a vessel would not arrive on schedule or a customer would delay sending a vessel. Grande Cache would typically receive approximately 30 days' notice from a customer that a ship was coming for a coal shipment. Grande Cache sometimes incurred demurrage costs associated with late loading of coal onto a customer's vessel; it contemplated that possibility when preparing its budgets. Because Grande Cache recognized a coal sale upon loading the coal onto the customer's vessel, sales revenue would be delayed if a vessel were delayed or if there were a delay in loading coal onto the vessel.

[64] The evidence demonstrated that it was not uncommon for Grande Cache to experience variations in sales volumes from quarter to quarter. Examples were given such as in the first quarter of its 2006 financial year, Grande Cache sold 100 000 tonnes and in the next quarter sold approximately 400 000 tonnes. Likewise in the fourth quarter of its 2007 financial year, Grande Cache sold approximately 180 000 tonnes of coal, followed by sales of approximately 430 000 tonnes in the first quarter of 2008. We heard testimony that variations in sales volumes from quarter to quarter were not unusual or a cause for concern in the context in which Grande Cache operated. First, because Grande Cache sold its Clean Coal under annual sales contracts, Grande Cache would typically receive the same price for its coal that was not sold in the expected quarter. Second, the timing of Grande Cache's sales was dictated by the customer's sending of a vessel to pick up coal, so that if a vessel arrived late, the sale might not get recorded until into the next quarter. As Stan explained, "if you have an obligation to sell it, whether you sell it in the first quarter or you sell it in the last quarter, that obligation to sell at that price is immaterial

when you sell it timing-wise". Thus, Grande Cache management considered sales not completed within the expected quarter to be delayed sales, not lost sales.

3. Disclosure Policies and Practices

[65] In evidence is Grande Cache's Disclosure, Confidentiality and Trading Policy (the **Disclosure Policy**), a lengthy document with a stated purpose of documenting Grande Cache's disclosure policies and practices and promoting to Grande Cache's directors, officers and employees "an understanding of the legal requirements". The Disclosure Policy was intended to ensure that trading of Grande Cache securities by Grande Cache's directors, officers and employees complied with securities laws. The Disclosure Policy provided for prescribed quarterly trading blackouts that commenced 15 days following the end of a financial period and ended at the end of the first business day following the issuance of a news release disclosing quarterly financial results (the **Quarterly Blackout Period**). It also advised of the requirement to file insider trading reports with securities regulators.

[66] Robert Stan referred to the Disclosure Policy and the explanations of it given to Grande Cache team members by Davidson. Robert Stan also referred to Grande Cache's Code of Business Conduct and Ethics. He emphasized that the Board wanted to ensure that Grande Cache operated "with a high degree of integrity and accountability". Grande Cache's Disclosure Committee members in 2008 and 2009 were Robert Stan, Roncin and Metz.

[67] Robert Stan testified that he understood he was prohibited under all circumstances from having any discussions with anyone outside Grande Cache about undisclosed material information regarding Grande Cache. He also understood that his prohibition extended to his wife, Kathryn Stan. As a result, in 2004 Robert Stan informed Kathryn Stan "that under no circumstances was I able or would I engage in any conversations with her about undisclosed material information related to the company". Kathryn Stan testified that she had an understanding of Grande Cache's Disclosure Policy, including its Quarterly Blackout Periods. Kathryn Stan said that she knew she was not an insider, but "because I was responsible for Spruce Bluff and trading on that account, then I felt that it would be appropriate that I would be part of the blackout as well".

[68] All of the Respondents who worked for Grande Cache were aware of and understood the restrictions on buying or selling GC Shares while in possession of material non-public information about Grande Cache. All Respondents filed the appropriate reports and none of the impugned activities occurred during a Quarterly Blackout Period.

4. Reporting Practices

[69] In addition to Grande Cache's annual budget preparation, the finance group (in particular, Wade) prepared monthly financial reports (the **Monthly Financial Reports**) that were generally distributed to senior management between the 15th and 25th of the following month. As CFO, Roncin would receive the Monthly Financial Reports when they were generated. Robert Stan and Roncin each referred to the Monthly Financial Reports as providing a "snapshot" of various areas in the company at the end of each month. Roncin described the process for preparing the Monthly Financial Reports:

> Mr. Wade would distribute each month a schedule, and the mine site operations would first be responsible for gathering up their information. The mining -- at the mining operation there was an

> accounting staff that recorded all of the costs at the mine, as well as the payroll, and those numbers were all compiled and reported. The marketing group in head office would pass to the head office accounting group the invoices for revenue and distribution charges, everything was compiled, and then towards the end an inventory evaluation would be done and financials completed.

[70] The operations group provided production and onsite inventory information on a daily basis. Weekly operational reports were compiled from the mine site, but those were not typically used as a head office management tool. Nagai testified that he had input into the "sales numbers, sales forecast and market outlook" portions of news releases.

[71] Grande Cache released an internal quarterly news publication called "Grande Cache Coal's Notes" (the **Newsletter**) that contained updates on various aspects of the company's operations and activities.

[72] All information disseminated to the public had to be approved by Grande Cache's disclosure committee, with the Board approving all written disclosure materials, including guidance, news releases and management's discussion and analysis (**MD&A**). Davidson would review all relevant materials before they were circulated to the Board or committees. Davidson considered that management "continually sought my advice [on materiality] through my review and comment on their continuous disclosure documents", but could not recall any "specific conversation about a materiality question".

[73] Grande Cache held management meetings every Tuesday morning – Robert Stan, Roncin, Nagai and Metz regularly attended in person, with Riordon participating by telephone. Production and sales were among the topics discussed at those meetings. Nagai's group prepared and distributed monthly sales reports, typically within a few days of month's end. Monthly spreadsheets with operational information – production, sales, inventory and shipments – were on Grande Cache's computer system and available to management and certain other employees.

D. F 2009 Chronology of Events

1. April to 26 May 2008

Public Disclosures

[74] On 1 April 2008 Grande Cache began F2009.

[75] In all the circumstances, Grande Cache expected its total sales volumes for F2009 (the 2008 Coal Year) would be in the range of 1.8 to 2.0 million tonnes. The evidence established that Grande Cache had contractual commitments for the majority of this volume. The average price per tonne was to be US$245 to US$255. Grande Cache's average price was lower than the US$300 benchmark HCC price because the former included the carry over sales Grande Cache had from the prior year. Coal customers apparently had the right to purchase additional coal at the same contracted price per tonne. Because of the expectation at the time that global demand for HCC was increasing, Grande Cache anticipated that most of their customers would purchase additional coal at the expected-to-be-lower 2008 Coal Year contract price.

[76] On 21 April 2008 Grande Cache issued the 21 April News Release in which Grande Cache "provided an update on operations", including the following:

- Grande Cache sold 1.65 million tonnes of coking coal from 1 April 2007 to 31 March 2008 (**F2008**), including 0.42 million tonnes in the fourth quarter;

- Grande Cache anticipated sales volumes of 1.8 to 2.0 million tonnes in F2009 (the **F2009 Annual Sales Projection**); and

- sales volumes in the Q1 F2009 were projected to be 0.4 million tonnes (the **Q1 Sales Projection**).

[77] The April 21 News Release included a "Forward-looking Statement Advisory" warning that forward-looking statements in the news release were not guarantees of future results and that undue reliance should not be placed on them. It also identified specific risks associated with Grande Cache's operations that might cause Grande Cache's actual performance and financial results to differ materially from any projections of future performance or results.

[78] Nagai described the F2009 Annual Sales Projection as a number arrived at from an "interactive process between the two functions" of marketing and operations groups. According to Nagai, the F2009 Annual Sales Projection was based on actual contracts Grande Cache had signed and what had been negotiated as possible increases (the options described earlier) resulting from anticipated significant market demand for HCC because of worldwide shortages and increasing demand for steel and from what the operations group believed they could produce from the Coalfield. Robert Stan similarly described the F2009 Annual Sales Projection as based on the sales that it could achieve after consultation with the marketing and operations groups, stating that "we felt confident that the sales would be achievable".

[79] The evidence was unclear as to exactly how the Q1 Sales Projection was determined. Robert Stan testified that the Q1 Sales Projection was the sales volumes number expectation for Q1 and was less than one-quarter of the F2009 Annual Sales Projection "because of the sequence" Grande Cache was in. He said that the purpose for including the Q1 Sales Projection in the 21 April News Release was to inform the market that Grande Cache's sales would not be flat but would be "back-end loaded". Nagai testified that the Q1 Sales Projection took into account slower production because of Surface Mine problems but that production was expected to "ramp" up throughout the year. Roncin testified that the Q1 Sales Projection was determined by the operations group based on their mine plan and results to date. She said that management expected that Q1 F2009 production would be slow and that there would be a "ramp-up" of production following the quarter and this was reflected in the Q1 Sales Projection. Roncin also explained that she did not consider the Q1 Sales Projection number to be quarterly guidance but that it was intended to be taken in the context of the F2009 Annual Sales Projection.

[80] In 2008, three analysts followed Grande Cache: Salman, Canaccord Adams (**Canaccord**) and GMP Securities L.P. (**GMP**). Reports released by two of those following the 21 April News Release were in evidence. (Emphasis in all analyst reports – bolding, italics and title case – has been removed from the excerpts reproduced in this decision.)

[81] On 22 April 2008 Salman released its "Metals Morning Note" that discussed the 21 April News Release. Salman noted both the F2009 Annual Sales Projection and the Q1 Sales Projection, stating that the Q1 Sales Projection was consistent with Salman's Q1 F2009 sales

volume estimate. Salman noted that its "current sales volume forecast of 1.79 [tonnes] remains slightly more conservative than the company's expectations", describing it as "a very achievable figure, provided there are no material production or shipment delays". Salman maintained its "buy" recommendation on anticipation of a substantial improvement in Grande Cache's bottom line in fiscal 2009".

[82] On 29 April 2008 Canaccord released a "Daily Letter" on Grande Cache. Canaccord noted both the F2009 Annual Sales Projection and the Q1 Sales Projection, but assumed 0.45 million tonnes for Q1 F2009 (0.4 million tonnes of that being higher-value HCC) and 1.9 million tonnes for F2009 (1.7 million tonnes of that being higher-value HCC). Canaccord advised it was maintaining its "buy" recommendation but lowering its target price to $7.15 per Share (from $7.50). Canaccord noted that it reduced its average coal price assumption from C$287 per tonne to C$263 per tonne to account for an assumed 150 000 tonnes of carry over pricing and an assumed average HCC price of US$280 per tonne for new contracts in the Coal Year starting 1 April 2009. Canaccord noted that its valuation was sensitive to HCC prices for the years starting 1 April 2009 and 1 April 2010 – if the 2009 benchmark price for HCC were US$300 per tonne, Canaccord would set its target price for GC Shares at $11.16; if the 2009 benchmark price were only US$125 per tonne, Canaccord would set its target price for GC Shares at $4.49.

[83] The price of GC Shares did change significantly following the 21 April News Release. On 18 April, the preceding trading day, GC Shares closed at $5.59. On 22 April GC Shares closed at $6.50 but within days the GC Share price returned closer to pre-21 April News Release prices. On 30 April GC Shares closed at $5.47.

[84] Also announced in the 21 April News Release was a new presentation posted on Grande Cache's website; Robert Stan and Roncin used that presentation on a "road show" they conducted in April 2008 (the **April Presentation**). The April Presentation provided investors with a breakdown of Grande Cache's previous eight quarters under the title, "Summary of Quarterly Results". The April Presentation did not reference the Q1 Sales Projection but did discuss the F2009 Annual Sales Projection. Both Robert Stan and Roncin testified that the coal investment community was generally focused on annual numbers and estimates rather than quarterly ones, although they did not dispute that quarterly projections and results have some relevance.

[85] A Grande Cache Board member, Donald James Douglas (**Douglas**) was asked in an investigative interview conducted by Staff whether in his experience analysts focused on quarterly numbers as well as yearly numbers. He replied "No", explaining:

> I think they are focussed on us being able to achieve our annual production and profitability. I think the big issue is how much money are you going [to] make this year, you know, and can you take advantage of opportunities when they are apparent in a commodity world, no different than the oil business. You know, when the price is running, can you -- do you have product to produce? Can you make the profits? I think that's the primary exposure, and I suspect that's why we're as volatile as we are because that commodity price keeps flopping up and down so doggone far. Until you figure out how to stabilize that, you could do a better job, but the reality is we're price takers.

[86] GMP issued a 12 May 2008 "At the Opening" report referring to higher HCC pricing expected for 2009 and the consequent material impact on its valuations for junior coal producers. GMP changed its recommendation on Grande Cache from "hold" to "buy" and raised its target

price per Share from $5.95 to $9.25. GMP included estimates for Grande Cache's annual sales volumes for the Coalfield in F2009 but did not reference quarterly results or projections.

Production and Sales

[87] Grande Cache's coal production was lower than expected in April 2008. In late April the Underground Mine unexpectedly entered into a development rather than depillaring phase, which meant temporarily lower production. Grande Cache had expected part of the Underground Mine to be in development but the rest to be depillaring. Instead, virtually all of the Underground Mine was in development as a result of discovering larger accessible coal deposits than anticipated. The Respondents suggested that this was positive overall – it did not signify less coal to produce or some underlying operational or mineralization issue but only that production (of more coal) would be slower.

[88] Not only did it make economic sense to Grande Cache to develop the newly-discovered coal in the Underground Mine, but also Grande Cache was apparently required to. Robert Stan testified that Grande Cache's license obliged the company "to extract all the coal that's economic in an area" (Riordon confirmed this), so that Grande Cache had to be in development for longer than it expected and was not able to start depillaring as initially planned.

[89] Management had anticipated that the Surface Mine would be able to make up for the lower production from the Underground Mine, as it had started to spend the $50 million in capital budgeted (including for additional trucks to increase Grande Cache's ability to produce coal) for F2009. However, due to issues with deployment of equipment (primarily reassembling the additional trucks) and people, the Surface Mine was also producing less than expected at that time. Grande Cache's April 2008 Monthly Financial Report showed a considerable lag in the amount of waste material moved in April 2008 (380 210 banked cubic metres (**bcm**) moved instead of the budgeted 632 790 bcm). However, the raw coal amount moved of 98 044 tonnes was closer to the budgeted 117 769 tonnes. Raw coal mined in April 2008 from the Underground Mine was 39 424 tonnes, compared to the budgeted amount of 105 000 tonnes.

[90] As a result of this temporary production slowdown, Grande Cache produced only 95 975 tonnes of Clean Coal, less than the 167 077 tonnes targeted for April 2008. Grande Cache's sales volumes for April were 115 823 tonnes, which was below the 133 000 tonnes (approximately one-third of the Q1 Sales Forecast) required to meet the Q1 Sales Forecast. Grande Cache had 41 366 tonnes of Clean Coal stockpiled at the end of April that could be sold in May.

[91] Grande Cache's production difficulties continued into May 2008.

[92] Although the numbers in evidence were for the end of May 2008 rather than at 26 May 2008, Robert Stan acknowledged that the production numbers available as at 26 May would have been "probably a very good indication" of the numbers for the end of that month – this appeared to be an appropriate assumption for the other Monthly Financial Report numbers as well.

[93] In the Underground Mine, there was no depillaring as development continued in the areas where new coal had been discovered.

[94] In the Surface Mine, production had not improved. Throughout May, the state of the trucks was "[s]till not good", according to Robert Stan – waste moved (by the end of May 2008,

thus after 26 May) was down to 386 898 bcm from the budgeted 653 883 bcm; raw coal moved was down to 76 519 tonnes from the budgeted 121 830 tonnes.

[95] Grande Cache's May 2008 Monthly Financial Report (clearly prepared after 26 May 2008) shows raw coal mined in May in the Underground Mine as 42 961 tonnes, compared to the budgeted amount of 105 000 tonnes, making the totals for the first two months of the quarter 82 385 tonnes mined from the Underground Mine, compared to the budgeted 210 000 tonnes.

[96] Total production for May of 91 226 tonnes was again below that budgeted. Sales volumes for the month were 102 833 tonnes, below the budgeted 177 500 tonnes. By the end of May Grande Cache had sold 218 656 of its budgeted 310 500 tonnes of coal for those two months of Q1 F2009.

[97] By the end of May 2008, raw coal inventory was slightly below budget – forecast to be 20 000 tonnes, with actual volumes at 17 556 tonnes – and Clean Coal inventory (available to be sold in June) was 32 043 tonnes instead of the budgeted 88 699 tonnes. The majority of the shortfall in Clean Coal inventory was the 125 tonnes at Westshore instead of the budgeted 55 500 tonnes (the Ontario terminals actually had Clean Coal of twice the budgeted amount). The Respondents noted that at the end of May, Grande Cache was essentially one vessel behind its expected sales for Q1 F2009.

Grande Cache's Confidence Regarding Production and Sales

[98] As at the end of May 2008 – specifically at the time of the 27 May News Release – Grande Cache's management members who testified were not concerned about Grande Cache's production and sales results in April and May 2008 because it was confident that Grande Cache would still meet its F2009 production and sales targets (the former internal; the latter external).

[99] At the end of May 2008, contrary to Staff's suggestion, Grande Cache management did not view the extended development period in the Underground Mine as a serious problem. Rather, while the extended development in the Underground Mine would mean lower coal production in the short-term, it also meant more good quality coal available longer-term, which was a positive development given the high HCC prices expected to continue throughout F2009.

[100] Robert Stan explained it this way:

> [T]he upside was, from the company's perspective it was good news. We were finding a lot of extra coal very close to the portals. Very close to getting out of the mine. It was very good quality coal. And it was more than we had expected in that area.
>
> The downside for us was it was going to take us longer to get to depillaring. So we knew we were getting extra coal. It's just we weren't going to be able to depillar as quickly as we wanted. Therefore, we knew we were going to be somewhat behind. But as of May 23rd, 2008, we still didn't know the extent of what the depillaring -- of what the development was going to be.

[101] When asked if he was worried about Grande Cache's production or sales at the end of May 2008, Robert Stan responded:

> You know, we're six or eight weeks into the -- into the new [financial] year. We have been spending an awful lot of capital to get our equipment put together. We know we're finding a lot

> more coal underground that's in close proximity to the portals. So we recognize and we have always said that it's an annual business that we're in, and so we're looking forward, are still very confident that we will meet our annual guidance at this stage.

[102] Riordon's evidence was similarly positive regarding the extended development in the Underground Mine:

> . . . So we were in that situation where we were getting good coal, close to the portals, and it was a very exciting time for us because we were making more coal for the company, and that was one of my priorities. It always is in an underground situation where you can get more ore or more coal underground, you reduce your development unit cost.
>
> . . .
>
> The depillaring, as everyone probably knows, produces coal that [is] at probably three to four times the rate of the coal you'd get from development. . . .
>
> So we are saying . . . we know we're going to get less production during that time period, but we're willing to take the hit because of the huge benefits that we're going to get out of that.

[103] Nagai, the marketing and transportation professional, was confident that sales would not be a problem for the F2009 year. As he explained:

> I wouldn't have any concern at that point in time. It's only about a month-and-a-half into the year. We've -- past history tells me that in this business that a month or two doesn't make a year, so I was pretty comfortable.

[104] When asked about his confidence level near the end of May 2008 regarding Grande Cache's annual production and sales, Robert Stan replied:

> We were still at this stage very, very confident. The coal markets were very strong. We could sell every tonne of coal we could produce. We had found additional volumes of underground coal in close proximity to the portals, high quality. We knew that we would be adding additional equipment and people as the year went by on the surface mine. We had, in a previous year, established a record with the investment community of specifying what our guidance would be for the year, and then we exceeded that guidance.
>
> Because of all the factors and our experience in running the operation, we at that point in time gave very little consideration to the quarterly situation, being that we were seven or eight weeks into the new year, and we were very confident that the annual guidance [was] still valid.

[105] As noted elsewhere in these reasons, this view was also held by the analysts covering Grande Cache as late as August and September 2008, and was also held (in a general sense, not specifically regarding Grande Cache) by McCloskey.

26 May 2008 Audit Committee Meeting and Board Meeting

[106] On 26 May 2008, Grande Cache's audit committee (**Audit Committee**) and Board met (respectively, the **26 May 2008 Audit Committee Meeting** and the **26 May 2008 Board Meeting**).

[107] Douglas chaired the 26 May 2008 Audit Committee Meeting. Robert Stan, Roncin and Wade were among others present by invitation. After discussion, the Audit Committee approved

Grande Cache's financial statements for the three months and twelve months ended 31 March 2008 (**F2008 Financial Statements**), MD&A dated as of 26 May 2008 (**May MD&A**) and the 27 May News Release to be issued the next day, announcing Grande Cache's fourth quarter (**Q4**) F2008 financial results (ending 31 March 2008) (the **Q4 F2008 Financial Results**), along with "Guidance for fiscal 2009". The May MD&A was attached to – and referred to in – the 27 May News Release (together, the **May Disclosure**). While reviewing the draft of the May MD&A, the Audit Committee asked "a variety of questions which were responded to by Mr. Wade and Ms. Roncin". The Audit Committee approved what became the 27 May News Release (described below) after reviewing and commenting on it.

[108] The 26 May 2008 Board Meeting was then held with Robert Stan among those present, and Roncin and Wade present by invitation. All three were present "for a portion of the Meeting". Douglas was present, and Davidson was present as Corporate Secretary. After the Board approved Grande Cache's F2008 Financial Statements and the May MD&A, "[Robert] Stan led the Meeting through a discussion regarding an update of the Corporation's operations", including "an underground mine and surface mine update". Robert Stan testified that he recalled little of that discussion but would have informed the Board of the extended development phase in the Underground Mine and the issues with the Surface Mine. Minutes of the meeting indicated that the "Board and management discussed the guidance contained in the news release announcing the fourth quarter fiscal 2008 financial and operating results". Roncin testified that the Board was informed that Grande Cache would not meet its production plan for Q1 F2009, and that the Board requested management to prepare an updated budget, with the new F2009 contract pricing.

[109] Davidson, who was present at the 26 May 2008 Board Meeting, recalled Robert Stan informing the Board of the extended development in the Underground Mine and the issues with the Surface Mine and described his own reaction to the information as follows:

> It was positive news in that the corporation was finding additional coal reserves outside its mine plan. The very near term impact was that the coal release in the underground mine would be diminished; however, it was especially good news and -- that we were finding additional reserves especially in light of the then metallurgical coal price, which was, at the time, near record highs.
>
> . . .
>
> My recollection was that there were issues with the deployment of people and personnel on the surface mine, which was typical of the surface operation. It was a constant – a constant struggle.

[110] Davidson testified that he had not concluded that this production update information was material, saying "It did not occur to me. Had it occurred to me, I would have brought it to the attention of the full board."

[111] Douglas had a similar recollection and reaction:

> Q Okay. And at the May 26th board meeting, did the board discuss the issues with the surface and underground mines and lower first quarter of production, did they discuss whether that was significant to the company?
>
> A I don't recall it exactly as you put it. I can recall having discussion about our capacity to achieve 1.8 to 2 million tons for the year, and we did have discussion that we were

> comfortable that we could achieve that, and that I think, as I recall -- and I'm going on recollection -- that there was some discussion about the fact that if we were having trouble mobilizing, we were certain that that could be resolved, and we could, in fact, achieve our annualized production. Most of what we were being questioned on at the time in terms of -- as I recall, from investment dealers and what have you was over what our annual production was going to be, and we were certain that we could ramp this up. So that was our focus. I mean our focus was achieving a minimum of 1.8 million tons for that year and that was -- there would have been discussion around that, and we would have -- in order to put it back in here, we would have been assured that we could do that.

[112] The May Disclosure was prepared by Grande Cache's disclosure group, with Wade primarily responsible for at least an early draft of the 27 May News Release. The May Disclosure incorporated information provided by the marketing and operations groups. Robert Stan, Roncin and Davidson also reviewed the contents of the 27 May News Release before it was presented to the Audit Committee and Board. Management confirmed that suggested changes from the Board would be made to the draft 27 May News Release before its dissemination.

2. 27 May 2008 to 31 May 2008

Public Disclosures

[113] On 27 May 2008 the May Disclosure was issued.

[114] The May Disclosure presented the Q4 F2008 Financial Results as positive relative to the previous fourth quarter results in its 2007 financial year – sales increased 65% over the previous year; losses decreased; cost per tonne of coal decreased; and quarterly cost of sales remained the same as the previous quarter, but annual costs decreased from the previous year.

[115] Robert Stan is quoted in the 27 May News Release:

> During the quarter we were able to ship more coal than anticipated and take advantage of some higher price opportunities. . . . Our results were positive compared to last fiscal year in that we successfully reduced our operating costs. Unfortunately the strengthening of the Canadian dollar negated a large portion of the accomplishments we achieved and was a major contributor to our loss.
>
> We expect substantially better financial results in the coming fiscal year . . . . Significant coal price increases will enable us to invest in capital projects designed to improve productivities and efficiencies in existing mining operations as well as develop mining areas for the future.

[116] Following those comments was a section on "Guidance for fiscal 2009":

> Guidance for fiscal 2009:
>
> - Grande Cache Coal has completed contract negotiations for fiscal 2009. Coal sales volumes are projected to be 1.8 to 2.0 million tonnes contingent upon adequate rail service and shipping. The average sales price for fiscal 2009 is anticipated to be in the range of U.S.$245 to U.S.$255 per tonne and includes carryover shipments from the prior coal year, contract sales negotiated on a calendar year basis and [HCC] and PCI contract sales for the new coal year, commencing on April 1, 2008. The expected average coal price is comprised of a range of prices from U.S.$81 per tonne for carry over shipments to U.S.$300 per tonne for contracts settled in the new coal year. The Corporation negotiated an average price of approximately U.S.$290 per tonne for roughly 70% of the projected sales volume for fiscal 2009.

- Several cost reduction initiatives have been realized and while it is expected that the average cost of sales will vary from quarter to quarter, the average cost of sales for fiscal 2009 is anticipated to be in the range of $85 to $88 per tonne. There has been a significant rise in industry wide mining input costs recently, most notably diesel fuel. A continued escalation of these costs would have a negative impact on the anticipated cost of sales.

- Capital expenditures are expected to total approximately $50 million.

For additional information on fiscal 2009 guidance please refer to the Outlook section of [sic] following Management's Discussion and Analysis.

[117] Under the heading "Operations" in the "Outlook" section of the May MD&A was stated:

> Coal production in the first quarter of fiscal 2009 thus far has been below plan due to the underground mine being in a development stage, which temporarily reduces coal production, and issues with the deployment of equipment and people in the surface mine. Depillaring activities in the underground mine are expected to resume early in the second quarter of fiscal 2009 and result in increased coal production. The Corporation is adding equipment and skilled personnel in the surface mine to increase production volume over the remainder of the fiscal year. As a result of the reduced production volume, the Corporation expects that the cost of sales in the first quarter of fiscal 2009 will be higher than the average cost of sales projected for the fiscal year.

[118] The May Disclosure repeated the F2009 Annual Sales Projection but made no reference to the Q1 Sales Projection or that Grande Cache's Q1 sales volumes were below that projected. There was no disclosure of Grande Cache's production budget or plan.

Market Analysts' Responses

[119] On 27 May 2008, GMP issued a "Mid-day Comment" about Grande Cache. After noting the Q4 F2008 Financial Results were "as expected", GMP stated:

> More significantly, management has provided new coal pricing guidance US$245 to US$255 per tonne for fiscal 2009. This range was below our estimate of US$277 per tonne which has a negative impact to our NAV, lowering it to $7.47 per share from $7.72 per share. This has resulted in us lowering our 12 month target to $9.00 per share from $9.25 per share and reducing our recommendation to hold from buy.
>
> . . .
>
> . . . For coal sales volumes, the company maintained its previous sales guidance for fiscal 2009 of 1.8 – 2.0 mm tonnes. To remain conservative, we have adjusted our estimates to the middle of the guidance range to 1.9 mm tonnes, down slightly from 2.05 mm tonnes previously.
>
> . . .
>
> We . . . made the following adjustments to our model based on the fiscal year-end results and new guidance provided by management:
>
> - Lowered production slightly at both the No. 12 surface and No. 7 underground mines, as summarized in the table below – we are now using the mid-point of management's guidance of 1.8 – 2.0 mm tonnes. . . .

[120] On 28 May 2008, Salman commented on Grande Cache, among other companies. Salman stated it was "raising [its] target on continued strength in metallurgical coal markets" –

from $7.00 per share to $10.00 per share – and highlighted the Q4 F2008 results. Salman continued:

> Fiscal Q1 production expected to be weak. Coal production in the current quarter is falling short of plan, due in part to some labour and equipment issues. The resumption of depillaring in the underground mine in fiscal Q2 and the addition of new skilled trades workers are expected to bring the production volumes back up again for Q2. However, the costs for fiscal Q1 are expected to be higher than the full year guidance range as a result.
>
> . . .
>
> . . . We have raised our multiple [in determining a target share price] to reflect both our increased confidence in our fiscal 2009 numbers (now that management has provided its own guidance) and the sustained momentum in coal equities." . . .

[121] In its 28 May 2008 "Daily Letter", with the title "Boom Times for Coking Coal", Canaccord increased "the target prices of the coal companies in our coverage universe" and maintained a "buy" rating on six companies, including Grande Cache – its target price was increased from $7.15 to $11.50. Canaccord's target was apparently based on strong HCC prices.

[122] Canaccord's Daily Letter of the same date prepared specifically on Grande Cache referred to the strong price forecast for the coking coal industry, and referred to Grande Cache's "forecast sales volumes of 1.8-2.0 million tonnes of clean coal in" F2009. It stated:

> Coal production in Q1/F09 [the first quarter of fiscal 2009] "has been below plan", with the underground mine in a development stage, and due to a general lack of equipment and skilled personnel in the surface mine. Depillaring underground will resume early in Q2/F09. We are assuming Q1/F09 sales of 0.36 million tonnes, only just below the metallurgical coal sales guidance of 0.4 million tonnes provided on April 21st.
>
> . . . We are assuming 1.9 million tonnes [of sales for F2009.]

GC Share Price

[123] Grande Cache had a Quarterly Blackout Period from 15 April to the market opening on 29 May 2008.

[124] During the Quarterly Blackout Period the GC Share trading price increased significantly from a close of $5.40 on 14 April to $8.40 on 28 May 2008. On the day of the May Disclosure, the GC Share trading price declined to close at $8.12 from a closing price the day before – 26 May – of $8.30. On 28 May the GC Share price rallied to close at $8.40 and continued to increase into June 2008.

3. June 2008

20 June 2008 Draft Fiscal 2009 Forecast

[125] In mid-June Grande Cache's management team prepared an internal updated forecast for the remainder of F2009, with the last version "Fiscal 2009 Forecast June Draft v3" (the **June Internal Forecast**) dated 20 June 2008. The June Internal Forecast was prepared by Wade from the finance group with information from the marketing and operations groups. The June Internal Forecast updated the F2009 budget and was prepared to reflect higher coal prices and to ensure that Grande Cache remained positioned to meet its annual targets. According to Roncin this was not an unusual update.

[126] The June Internal Forecast estimated:

- 287 201 tonnes of coal would be produced and 250 656 tonnes of coal would be sold during Q1 F2009 (based on April and May actual sales and estimated June sales of 32 000 tonnes)

- Annual sales volumes would be 1 888 656 tonnes;

- Annual coal production would be 1 850 932 tonnes; and

- There would be inventories of 100 038 tonnes of Clean Coal and 17 556 tonnes of raw coal at the end of June 2008.

[127] Around the time of the June Internal Forecast, Riordon recalculated Grande Cache's estimated F2009 production and concluded that Grande Cache would be able to produce a minimum of 1.8 million tonnes of Clean Coal for the year even though it was behind budget at that time. Riordon's calculations were based on improvements occurring at the Surface Mine in particular; the tonnage of waste rock coming out was dramatically increasing.

[128] Nagai was referred to the June Internal Forecast, for which he contributed the sales information. He noted that June 2008 sales were lower because of a vessel scheduled for late June for which loading had to be deferred until July 2008 because there was insufficient Clean Coal inventory at Westshore in late June. Grande Cache incurred demurrage charges for the vessel that was waiting for coal to be loaded.

[129] In the June Internal Forecast, the annual projected sales were 1 888 656 tonnes and the sales volumes required for the remainder of the year to meet that target were approximately 1 638 000 tonnes or 180 000 tonnes monthly. These required sales volumes were in line with monthly sales results achieved by Grande Cache in the past (for example, Grande Cache sold 237 336 tonnes of coal in July 2007; 184 104 tonnes in August 2007; 197 685 tonnes in November 2007; and 227 296 tonnes in February 2008). As at the date of the June Internal Forecast, Nagai said he was not concerned with meeting that forecast:

> . . . I had a lot of faith in our team and our production department that they were going to do what they say they could do [produce enough coal to meet the F2009 Annual Sales Projection]. So I had to rely on their forecasts. And on the sales side, as mentioned previously, we had all the contracts in place.
>
> . . .
>
> . . . Typically I'm pretty conservative in my outlooks. However, I would say I was 95 percent confident in the numbers we proposed.

Underground Mine and Surface Mine

[130] There was little change in the Underground Mine from May to June 2008.

[131] Robert Stan testified that there was no depillaring in the Underground Mine in June 2008. Riordon agreed, stating that he thought depillaring began in July, which the evidence established it did, as discussed below.

[132] There was considerable change in the Surface Mine. The evidence at first appeared somewhat inconsistent regarding progress with the Surface Mine.

[133] Robert Stan stated that the difficulty with availability of people and equipment continued in June for the Surface Mine. However, Robert Stan did refer to "progress" and "positive signs", although he said that progress was slower than they would have preferred.

[134] Riordon testified that in June 2008 the Surface Mine had "started to get its trucks on line" and "the open pit was in full swing" by mid-June. Riordon said that by early June 2008 Grande Cache had adequate trucks to achieve the production it was looking for.

[135] Riordon, who was more directly involved with production than Robert Stan, testified that by the second half of June "I was producing at a rate that I wanted to be at, followed by July, where I was at a rate far higher than I wanted to be at". Riordon's evidence is supported by the Surface Mine data, which indicated that the June waste and raw coal amounts moved were closer to the budgeted amounts than they had been in May, while the July waste and raw coal amounts moved exceeded the budgeted amounts – the waste moved increased from 386 898 bcm in May 2008 to 464 185 bcm in June 2008 and to 685 411 bcm in July, and the raw coal moved increased from 76 519 tonnes in May to 110 184 tonnes in June and to 166 653 tonnes in July. Most of the June increase took place in the second half of the month after the truck issues had been mostly resolved.

[136] Robert Stan referred to the influence of stripping capacity and plant capacity:

> So whenever you ask me and discuss about the confidence level, we knew we were increasing our stripping capacity. We knew we were getting much, much stronger with our ability to move rock. And we also knew that we had 50 percent more plant time. Should we be in a situation to have large inventories of raw coal, we could have run overtime shifts and produced much, much more coal with the same people with the same time because the plant was only running 50 percent of the time, ...

[137] Riordon also noted the under-utilized Plant capacity to which Robert Stan referred – four days on and four days off to allow for easier maintenance and upgrading, but with knowledge that an overtime shift could be added to increase capacity through the plant. In addition, Riordon elaborated on the concept of a "stripping ratio". He stated that he used, in mid-June calculations (once the Surface Mine production had started to improve), a "conservative stripping ratio of 4.5 to 1" in concluding that 1.8 million tonnes was a minimum production level for F2009, despite being behind at that point. Riordon explained that a stripping ratio is the amount of waste (measured in bcm) needed to get one tonne of coal – therefore, a 4.5 to 1 stripping ratio means Grande Cache would need to move 4.5 bcm of waste to get one tonne of coal. He went through the June production report and pointed out that the actual stripping ratio was closer to 4:1, meaning that less waste was required to obtain each tonne of coal. Those stripping ratios gave Riordon a high degree of confidence that Grande Cache would be able to make the 1.8 to 2 million tonnage.

[138] In summarizing his view, Riordon stated:

> In other words, I had the equipment to do 2 million tonnes, provided I could do the job right, and particularly get that equipment going. And as everyone knows, the equipment didn't get going for at least the first two-and-a-half months of that quarter. So we were a bit behind the 8[-]ball, but I also knew I had extra capacity to get ahead of budget.

[139] We conclude that the testimony, financial documents and other evidence confirm that production from the Surface Mine began increasing in June 2008.

Sales and Production

[140] In June 2008, Grande Cache produced 86 240 tonnes of coal, compared to a budgeted volume of 166 373 tonnes. Actual sales were 30 447 tonnes for June 2008, compared to budgeted 175 000 tonnes. These results left Grande Cache with 273 441 tonnes of production in Q1 F2009 compared to budgeted 503 573 tonnes and with 249 103 tonnes (referred to by all parties as 250 000 tonnes; **Q1 Actual Sales**) sold compared to budgeted 485 500 tonnes for the same period (the internal budget for Q1 F2009 apparently being higher than the Q1 Sales Projection of 400 000 tonnes).

Inventory

[141] By the end of June 2008, raw coal and Clean Coal inventories were both ahead of budget (35 578 tonnes actual compared to 1000 tonnes budgeted for the former and 87 252 tonnes actual compared to 80 072 budgeted for the latter) for a total of 122 830 tonnes. However, only 15 126 tonnes of Clean Coal were at Westshore and, as Nagai explained, the vessel that was scheduled to depart at the end of June with 70 000 tonnes was not loaded until July, resulting in that coal sale not being recorded until after the end of Q1 F2009. Nagai said that had more inventory been located at Westshore and had that vessel been loaded, the Q1 actual sales volumes would have been about 320 000 tonnes.

Grande Cache's Confidence Regarding Production and Sales

[142] Robert Stan's response to counsel during redirect testimony set out Robert Stan's perspective – which naturally would also be a view of Grande Cache's perspective – as to why he was "so confident" of still meeting the F2009 annual targets:

> Well, I think, Mr. McDonald, as we sit here some 48 or 50 months after the event, I think that we have to look back and remember at that point in time, there were specific world events that we -- that were very positive for us.
>
> We had seen the perfect storm on the side of -- with the Australian hurricane, the flooding, the decrease in supply out of Australia. We had seen rapid increase in the [HCC] price as a result of that. We'd seen a very severe Chinese winter, and we'd seen decreased production out of South Africa.
>
> So from that standpoint, we had very robust steel demand worldwide. We had very -- we had the highest price for coking coal that we'd ever had, and the predictions moving forward at that point in time were very, very optimistic for the continuation of a very strong market for our commodity.
>
> On our side of the business, yes, we had moved in our mining operations. We had acquired equipment. We had made capital investments in the previous year that were now starting to pay off. We were starting to see some very positive signs on the -- on our surface mine. We'd had some issues in the assembly of the equipment, but these were being resolved and worked on.

> In the underground mine, as we discussed at length earlier, while we were not in depillaring as quickly as we would have liked, we're finding a lot more coal underground. We're finding it very close to the portals. We're finding it -- it's very high quality coal, and we know that we will be able to, at some point, move in and depillar that, which is a very highly productive way of doing it. We're very confident that that's moving forward. We know that the -- our work force -- even though we have training issues going forward, our work force is getting better. The projections going forward are very positive.
>
> The issues we're facing are all temporary. They're all short term. We had no catastrophic events. We didn't burn up our wash plant. We didn't lose a lease with a major amount of coal in it. We had -- we hadn't had anything that was long-term problems; and as we looked forward, the future was very bright; and we were increasing our production. We were getting better. So we were very, very optimistic at that point in time.
>
> And I know it's difficult today to look back and recreate that . . . almost euphoria in our industry at the time with $300 [per tonne] coking coal and demand far exceeding everybody's ability to supply. So, you know, that's, I guess, part of why we were very optimistic at that time.

[143] Other Grande Cache personnel held similar views. For example, through the mid-June to early July time period, Wade did not have any concerns regarding the Q1 F2009 production:

> [T]he delays that were happening were expected just to be temporary. The operations group felt confident that they would be through those delays and that they would be able to ramp up and achieve their annual targets. So I was more concerned with where we were going to be from an annual perspective, given our annual guidance was out, and that was more what I was concerned with. But the operations group seemed very confident that they would achieve those numbers.

[144] During the same period, Wade was also not concerned about the Q1 F2009 actual sales:

> [W]e had some sales that were delayed [the vessel not loaded until July 2008] but the sale still did occur. And, again, the marketing department was very confident they would achieve their sales targets, the demand for coal [was] so high at the time.

[145] Similar optimism was held by Riordon at the end of Q1 F2009 when he noted in the Newsletter he authored in early July 2008 "we are now moving into our second quarter with more confidence than ever before".

27 June 2008 Audit Committee Meeting and Board Meeting

[146] On 27 June 2008, the Audit Committee met, with Robert Stan, Roncin and Wade among those present for a portion of the meeting by invitation. Management presented to the Audit Committee the audited financial statements for the year ended 31 March 2008 (**F2008 Audited Financial Statements**), accompanying MD&A prepared using information current as of 26 June 2008 (**June MD&A**) and annual information form (**AIF**), all of which were approved by the Audit Committee, subject to certain June MD&A changes.

[147] At the immediately following Board Meeting (with Robert Stan among those present and Davidson and Roncin present by invitation), the Board approved the F2008 Audited Financial Statements, the accompanying June MD&A and AIF and the 30 June News Release announcing Grande Cache's release of its F2008 financial results. Robert Stan also provided an operational update and the June Internal Forecast to the Board.

[148] Davidson testified that the Board received the June Internal Forecast in advance of the 27 June 2008 Board meeting, likely approximately five business days before the meeting as was the typical process. Regarding the Board's discussion of the June Internal Forecast, Davidson stated:

> My recollection of the discussion, which was some time ago, is that the emphasis of the discussion was on ascertaining that the company would be able to meet its fiscal 2009 sales guidance, notwithstanding that the company had produced 250,000 or sold 250,000 tonnes in the first quarter.

[149] Davidson responded to counsel that his "take away" from learning of the 250 000 Q1 Actual Sales was that Grande Cache "notwithstanding the sales of 250,000 tonnes in the first quarter . . . was in a position to meet its sales guidance for fiscal 2009." He did not consider anything in management's June Internal Forecast to be material because Grande Cache "was still on track" to meet its F2009 Annual Sales Projection. Had he thought there was material information, he stated he would have "advised the board that such material information should be disclosed to the public via news release".

[150] Douglas shared a similar recollection:

> Q Was there any discussion about sales falling off in June?
>
> A You know, I can't recall specifically if there was. I think I can tell you that we would have had a lot of discussion -- I'm just looking farther along the line, on the 1.838 gross tons for the year and that we could, in fact, achieve a million eight, and I think our discussion would likely have been far more focussed on were we going to achieve 1.8 million tons of production that year than -- than specifically the first quarter number.
>
> Q And getting back to the drop in the June production, was there any discussion by the board as to whether this was significant to Grande Cache?
>
> A No. I don't recall that that was the case. I think I would say that the board's real concern was achieving its year production. That was our focus.
>
> Q So at the time, June 27th, this board meeting, was it the board's conclusion that they could make their yearly forecast of sales so there wasn't really a significant change?
>
> A Yeah. And I'm assuming this was -- was there a press release come out right after this. Must have been that -- if we had that guidance, yeah. I would say yes to that. I think the discussion was -- would have been largely, were we able to achieve what we were putting out in guidance on the annual production. . . .

30 June News Release

[151] On 30 June 2008, Grande Cache issued the 30 June News Release informing the market of the release of its F2008 Audited Financial Statements, June MD&A and AIF.

[152] In the June MD&A, Grande Cache reiterated its F2009 Annual Sales Projection of 1.8 to 2.0 million tonnes, and noted that the average sales price was expected to be US$245 to US$255 per tonne, taking into account carry over prices of US$81 per tonne and prices for the Coal Year ending 31 March 2009 of US$300 per tonne. Grande Cache also commented that the demand for metallurgical coal was "expected to remain strong over the medium term as worldwide markets have tightened as production and infrastructure issues in parts of the world continue to constrain

supply". Grande Cache again disclosed its production issues and that, as a result, its production volumes continued to be below plan and the cost of sales for Q1 F2009 would be higher than that projected cost figure projected in F2009 as a whole:

> Coal production in the first quarter of fiscal 2009 thus far has been below plan due to the underground mine being in a development stage, which temporarily reduces coal production, and issues with the deployment of equipment and people in the surface mine. Depillaring activities in the underground mine are expected to resume early in the second quarter of fiscal 2009 which will result in increased coal production. The Corporation is adding equipment and skilled personnel in the surface mine to increase production volume over the remainder of the fiscal year. As a result of the lower production volume, the Corporation expects that the cost of sales in the first quarter of fiscal 2009 will be higher than the average cost of sales projected for the fiscal year.

Market Analyst Response

[153] On 16 June 2008 in its "Commodity Price Update", Salman raised its short- and medium-term price forecasts for HCC, causing an increase in its target prices for most of the coal companies it covered. Its forecast for Grande Cache increased from $10.00 per share to $11.90 per share. Salman further commented on Grande Cache:

> Grande Cache remains well positioned to take advantage of the higher coal prices this year and next. Its restarted surface mine is now running close to full capacity and its balance sheet is in good shape, with limited debt. Operationally, we feel the biggest risk to our forecast is in the transportation of its coal to market, as any interruptions in its rail service could have a material impact on the company's volumes in any given quarter. We have assumed an average selling price for Grande Cache in fiscal 2010 of $243/t, with some slight cost improvement to $86/t, on sales volume of just under 2Mt. . . .

4. July to September 2008

Underground and Surface Mines

[154] Robert Stan stated in November 2008 that the Underground Mine had "a brief period of depillaring" during the second quarter (July through September 2008), then returned to development "due to the detection of additional coal". This was consistent with Robert Stan's testimony and with the increased production from the Underground Mine in July and August 2008. The evidence satisfies us that, as anticipated, some depillaring in the Underground Mine commenced in July, lasting for approximately two months before the mine went back into development.

[155] According to Riordon's testimony and the July 2008 Grande Cache internal newsletter (for which Riordon was responsible), three new trucks and two old trucks were operating by July, leading to "noticeable improvements" at the Surface Mine. This was, according to Riordon, the number of trucks needed for accelerated production in the Surface Mine for the remainder of F2009.

[156] In July 2008, Riordon recalculated his annual production estimate to take into account the improved operational results he saw occurring. He concluded that Grande Cache would produce more than 2 million tonnes of Clean Coal during F2009, a volume higher than the top end of the F2009 Annual Sales Projection. Grande Cache moved 685 411 tonnes of waste rock and 166 653 of raw coal in July, both increased volumes over the previous three months.

Sales and Production

[157] During July 2008, actual production and sales were both closer to the forecasted volumes – 114 415 tonnes actual production (166 373 tonnes budgeted) and 106 129 tonnes sales (115 000 tonnes budgeted).

[158] Total raw coal and Clean Coal inventories continued to climb overall through July and August 2008, with the Westshore actual volume exceeding the budgeted volume by 37 454 tonnes by the end of August 2008. Robert Stan noted that total Clean Coal inventory increased from approximately 61 200 tonnes as at 1 April 2008 to 172 261 tonnes as at 30 September 2008, showing that "we're certainly ramping up our production, and we're ramping up our ability to produce. We're rebuilding inventories, and we now have sufficient coal available through the system to meet customer demand all the way along." High inventory was not always desirable, however, because Grande Cache "like[d] to convert as much inventory as [it could] to cash".

Market Analyst Response

[159] Canaccord issued another "Daily Letter" on 11 July 2008, maintaining its target price and "buy" recommendation for Grande Cache and stating that Grande Cache provided "cheap exposure to the still-strong metallurgical coal market". Canaccord stated:

> We expect Grande Cache Coal to report its Q1/F09 earnings in early August. We are forecasting an EPS of C$0.32, based on total sales of 360,000 tonnes of coal, at average revenue of C$193/t and average cost of sales of C$93/t.

GC Share Price

[160] On 14 July 2008 the GC Share price closing price was $7.35. Grande Cache's scheduled Quarterly Blackout Period went into effect the next day. The GC Share price dropped during this blackout and experienced some volatility. By 24 July the GC Share price had declined to $5.61, a 23.7% decline from 14 July. The GC Share price closed at $8.15 on 30 July.

5. August to September 2008

August Exercise of Warrants

[161] On 11 August 2008, Grande Cache issued over 7 million GC Shares from treasury as a result of the exercise of previously-issued warrants (**Warrants**). This represented an approximately 8% dilution in the GC Share issuances.

[162] The Respondents estimated that it would have been about 14 August 2008 (the same day Grande Cache released its Q1 F2009 results) that the 7 million GC Shares would have been delivered to the transfer agent and been available for trading. Due to the $1.60 conversion price and the then-market price of GC Shares of approximately $5.50 to $6.00, the Respondents posited that a large number of these new shares were sold into the market on 14 and 15 August, thus accounting for at least a significant portion of the increase in Grande Cache's trading volume on those days.

14 August News Release

[163] On 14 August 2008 Grande Cache announced its Q1 F2009 financial and operational results in the 14 August News Release with attached MD&A current as of 13 August 2008 (**August MD&A**). The 14 August News Release stated, in part:

- During the quarter, the Corporation had lower than planned coal production due to the underground mine being in an extended development stage which temporarily reduced the volume of coal released, issues with the deployment of equipment and people in the surface mine and a lower plant yield. This, in combination with increasing mining input costs, resulted in a clean coal production cost of $100 per tonne.

- The low production resulted in sales volume of 0.25 million tonnes, however sales for the fiscal year are still expected to be in the range of 1.8 to 2.0 million tonnes.

. . .

"Although we had a slow start to the year, we foresee substantially better results over the remainder of the fiscal year," said Robert Stan, President and Chief Executive Officer. "During the second quarter we commenced depillaring activities in the underground mine which has increased raw coal production. We are also seeing better availability of surface mine equipment allowing us to move more material. There has certainly been a high demand for our product so we are doing everything we can to increase production in order to meet our customer[s'] needs."

[164] In the August MD&A, Grande Cache commented:

First quarter revenue was $41.3 million on sales of 0.25 million tonnes compared to revenue of $38.2 million on sales of 0.43 million tonnes in the same period of fiscal 2008. Sales volumes were lower than the comparable quarter due to low coal production volumes.

. . .

The Corporation's clean coal production cost was $100 per tonne compared to $55 per tonne in the same period last fiscal year. During the current quarter, the Corporation had lower than planned coal production due to the underground mine being in an extended development stage which temporarily reduced the volume of coal released, issues with the deployment of equipment and people in the surface mine and a lower plant yield. This, in combination with increasing mining input costs, resulted in a clean coal production cost that was higher than the comparable period.

. . .

The Company continues to estimate that its coal sales volumes for fiscal 2009 will be in the range of 1.8 to 2.0 million tonnes contingent upon adequate rail service and shipping. . . .

. . .

The Corporation is continuing to focus on productivity improvements and cost control measures in the surface mine, underground mine and process plant. While it is expected that the average cost of sales will vary from quarter to quarter, the average cost of sales for fiscal 2009 is still anticipated to be in the range of $85 to $88 per tonne. . . .

Market Analysts' Responses

[165] GMP released its "Mid-day Comment" on Grande Cache on 14 August 2008, indicating that the $.04 earnings per Share was "substantially below our $0.28/sh estimate on lower production and higher costs due to development work at No. 7 mine". GMP elaborated:

. . . Overall, this quarter's results were much lower than our expectations due to lower production and sales volumes as the company focused on extended development work at its No. 7 underground mine. This resulted in both lower revenues and higher costs. . . .

> As a result of the company's Q1 performance we are revising our F09 production and realized price assumptions lower while increasing our production costs. Although management has left its prior sales and cost guidance unchanged, we have adjusted our estimates lower [to 1.7 million tonnes] as a conservative measure due to the increased risk of GCE not meeting this guidance. . . .

[166] GMP lowered its target price for GC Shares from $10.00 per share to $8.20 per share, but maintained its "buy" recommendation. GMP forecast continuing strong HCC prices in the next Coal Year.

[167] On 15 August 2008, Salman's "Metals Morning Note" reduced Salman's target price for Grande Cache from $11.90 to $10.40 "on weaker than expected fiscal Q1 results", but maintained its "buy" recommendation. Salman also decreased its F2009 sales estimate to approximately 1.7 million tonnes.

[168] Noting that net earnings for the quarter were $0.04 per share, "well short" of Salman's forecast $0.26 per share, Salman commented:

> Volumes get off to a slow start but should improve. Consistent with management's previous indication that Q1 production was falling short of plan, due to a combination of development work in the underground mine and some labour and equipment issues, the 270Kt of clean coal production in the quarter was not far off our estimate of 300Kt. However, the sales volumes of just 249Kt was well below the 350Kt that we had expected and resulted in much higher per-tonne costs for the quarter. The resumption of depillaring in the underground mine in late June and the addition of new skilled trades workers are expected to bring the production volumes back up again for Q2. The company expects to regain the volumes later in the year and still maintains its full-year F2009 sales guidance of 1.8 to 2.0Mt.
>
> . . .
>
> . . . While we were disappointed by the slow start to the year, we remain optimistic that management will be able to get things back on track again over the balance of the year. We maintain our buy recommendation and expect a substantial improvement in the company's earnings and cash flows over the next few quarters.

[169] Canaccord's 15 August 2008 "Daily Letter" reported "very weak volumes" by Grande Cache, although Grande Cache still maintained "full year guidance" of 1.8 to 2.0 million tonnes of sales. Canaccord decreased its target price from $11.50 to $10.75 (but setting out circumstances under which that could be as high as $14.27); as did the other analysts, Canaccord maintained its "buy" recommendation for Grande Cache. Canaccord also decreased its sales volume assumption to 1.8 million tonnes (down from 1.9), which was the lower end of Grande Cache's F2009 Annual Sales Projection.

[170] Canaccord pointed to "[k]ey components" of Grande Cache's results:

> - Production of 0.27 million tonnes was below our forecast of 0.38 million tonnes. The company had flagged that Q1 production would be weak due to development work underground, and issues with people and equipment availability in the surface mine. However, we are surprised by the extent of the weakness.
>
> - Sales of 0.25 million tonnes [were] below our forecast of 0.36 million tonnes.

- The company has maintained its FY2009 full year sales guidance of 1.8 to 2.0 million tonnes, with de-pillaring re-commenced underground and better availability of surface mining equipment now allowing for better movement of coal and waste. We note that de-pillaring is about 60% more productive than development work underground. The company has noted that already this quarter, more raw coal has already been processed or is already exposed in the surface mine than was produced in all of Q1. We have decreased our FY09 sales forecast from 1.9 to 1.8 million tonnes, still reflecting a substantial ramp during the rest of FY09. We note that Grande Cache Coal's sales guidance for FY08, which ended in March 2008, was consistently 1.4-1.6 million tonnes from May 2007. Sales ultimately reached 1.65 million tonnes, above the top end of the guidance range.

GC Share Price

[171] On 13 August 2008, the day before the 14 August News Release, the GC Share trading price closed at $6.20. On 14 August the GC Share trading price opened at $5.50 per Share, reaching an intra-day high of $5.73 before closing at $5.45 per Share, a decline of 12% from the previous day's close. The trading volume that day was almost 2.5 times that of the previous day; the next day was even higher. With the exception of one day, these were the highest single-day volumes between mid-February and the end of December 2008. On 15 August the GC Share price closed at $5.08 per Share, a further decline of approximately 7% and a total decline of 18% from the closing price two days earlier. On 18 August (16 to 17 August being a weekend) the GC Share price closed at $5.11 after an intra-day high of $5.25 per Share.

[172] On 21 August the GC Share trading price closed at $5.90 and on 22 August the GC Share trading price closed at $5.90 but had reached an intra-day trading high of $6.30 per Share.

[173] All three analysts anticipated Grande Cache would receive high prices per tonne of HCC in its 2010 financial year (1 April 2009 to 31 March 2010) – ranging from $243 to $300 per tonne.

Production and Sales

[174] The August 2008 production volumes were closer again to the budgeted volumes (130 659 tonnes actual compared to 166 373 tonnes budgeted), although the sales volumes declined considerably (45 752 tonnes actual compared to 177 500 tonnes budgeted).

[175] The September 2008 production and sales volumes both exceeded the budgeted volumes (actual production was 187 308 tonnes compared to budgeted 163 327 tonnes; actual sales were 192 169 tonnes compared to budgeted 175 000 tonnes). Therefore, at the end of the six months ending 30 September 2008 (the end of **Q2 F2009**), actual production was 705 823 tonnes compared to budgeted 999 645 tonnes, and actual sales were 593 153 tonnes compared to budgeted 953 000.

6. October 2008 to June 2009

[176] At 31 December 2008 (the end of **Q3 F2009**), actual production for the year-to-date was 1 054 342 tonnes compared to 1 492 671 tonnes budgeted, and actual sales for that period were 955 262 tonnes compared to 1 490 500 tonnes budgeted. Grande Cache ended F2009 on 31 March 2009 with 1 315 198 tonnes of production (compared to 2 000 002 tonnes budgeted) and 1 061 551 tonnes sales (compared to 1 905 000 tonnes budgeted).

[177] Riordon testified that he probably realized Grande Cache was not going to make its production target when he was told sales were dropping and he noticed that inventories were building up, eventually resulting in layoffs in February 2009 – "we had no idea the world would sort of collapse financially at that time".

Underground Mine and Surface Mine

[178] Depillaring was occurring in the northern section of the Underground Mine, but there was still much development to be done, such that production was "still not at the level that we would expect for when we're in full depillaring mode". Robert Stan noted that the Surface Mine had "finally turned the corner . . . on physical availability of equipment" by September and October 2008, after showing steady increases in "rock movement and total material movement" leading up to that point. This led to "a fairly robust surface mining operation".

5 November News Release

[179] Grande Cache released its results for Q2 F2009 in a 5 November 2008 news release (the **5 November News Release**). As part of that news release, Grande Cache reported its record net income for Q2 F2009 and noted the increased Q2 F2009 Clean Coal production, "primarily as a result of improvement in the surface mine". It was also mentioned that 70 000 tonnes of sales were moved to Q3 F2009 because of a delayed vessel. Grande Cache also provided updated F2009 guidance:

> Coal production was less than expected during the second quarter due to the underground mine being in an extended period of development, which temporarily reduces the volume of coal released. The underground mine continues to be in development which is expected to last until mid-November. As a result, the Corporation is revising its fiscal 2009 coal sales volume guidance to a projected range of 1.5 to 1.65 million tonnes, down from the previous guidance range of 1.8 to 2.0 million tonnes. The revised coal sales projection is contingent upon depillaring commencing in the underground mine as expected, sufficient rail service and timely shipping schedules.

[180] Robert Stan is quoted in the 5 November News Release:

> . . . After a brief period of depillaring, the underground mine went back into a development stage of production due to the detection of additional coal. Although this temporarily reduces our coal production in the current year, it has a positive long term impact as more coal is available for recovery from the underground mine. We saw improvements in the surface mine and raw coal production increased significantly over the previous quarter. We will continue to take necessary steps to improve production in the current year, while making decisions that maximize overall cost recovery.

January 2009 News Release

[181] In an 8 January 2009 news release, Grande Cache "provided an update on the impact of current market conditions on its operations". Grande Cache noted the decline in global steel production caused by the worldwide economic slowdown, stating that steel producers were therefore "uncertain about the level of demand they will experience in 2009 and beyond. This in turn has affected the demand for metallurgical coal." Certain customers deferred coal shipments into financial year 2010 (**F2010**), causing Grande Cache to reduce its coal sales guidance for F2009 to 1.1 to 1.3 million tonnes as "the result of the uncertainty in the level of demand in the steel market".

May 2009 News Release

[182] In a 20 May 2009 news release, Grande Cache noted the continuing weakness in global steel production and the effect on the demand and pricing for metallurgical coal. That document quoted Robert Stan:

> . . . The outlook for global steel production in 2009 continues to be bleak . . . This has resulted in reduced demand and lower prices for metallurgical coal which are being reflected in contract settlements for fiscal 2010. We continue to have a strong balance sheet and a focused operational plan and believe our company is well positioned to be successful in the current economic climate. While there is a lot of uncertainty in the metallurgical coal industry today, we believe that demand and pricing will stabilize and we continue to permit new areas, increase productivities and expand our customer base to position our company for future growth when market conditions improve.

June 2009 News Release

[183] On 17 June 2009, Grande Cache announced its F2009 results (the **June 2009 News Release**). Sales volumes ended up at 1.06 million tonnes at an average price of $234 per tonne, with revenue increasing 70% over F2008 revenue because of higher coal prices. The June 2009 News Release stated:

> . . . Sales volumes were lower than last fiscal year mainly because of a decrease in the demand for steel brought on by the worldwide economic slowdown, which resulted in a reduced demand for metallurgical coal, primarily in the latter part of the year. The higher coal price realized in fiscal 2009 was due to contractual agreements negotiated at the beginning of the fiscal year when there was a high demand for metallurgical coal due to supply constraints and a strong global economy.

[184] Robert Stan was quoted in the June 2009 News Release:

> Fiscal 2009 was a very challenging year for us as we encountered production issues in the early part of the year and then saw an extreme downturn in the worldwide economy during the latter portion of the year. . . . Even with the decrease in sales volumes we were able to generate substantial earnings because of high coal prices that were negotiated for the coal year. . . .
>
> . . . We have recently seen some increased demand for our product, as a result we have cancelled any further production curtailments that were previously announced and are revising our projected fiscal 2010 sales volumes to a range of 1.2 to 1.4 million tonnes. . . .

[185] The June 2009 News Release continued:

> . . . due to production issues during the first part of fiscal 2009, the Corporation had lower than expected clean coal production which led to lower than planned sales volumes. Production was improving as the fiscal year progressed however the economy slowed dramatically during the third quarter and lower sales volumes forced the Corporation to reduce production. . . .
>
> . . . The decline in sales volumes was primarily caused by a slowdown in the global economy during the second half of the fiscal year which caused a decrease in the demand for steel, and subsequently a reduced demand for metallurgical coal. Also contributing to the lower sales volumes was lower than planned production during the first part of the fiscal year due to an extended period of development in the underground mine and issues with the deployment of people and equipment in the surface mine. The lower than planned production resulted in a decrease in sales during this period as there was a temporary shortage of available coal.

E. The Respondent's Securities Activities

[186] There is no dispute and the evidence was clear that from May through July 2008 the Respondents engaged in certain Grande Cache securities transactions – most exercised GC Options and sold GC Shares, while Robert Stan only exercised GC Options and Kathryn Stan only sold GC Shares. We set out that activity, along with a brief explanation of the Respondents' stated reasons for their actions.

The Stans

[187] Robert Stan exercised 425 000 GC Options on 18 June 2008, for which he paid approximately $430 000 (Grande Cache's option plan did not provide for a "cashless" exercise). Robert Stan testified that he intended to sell some of the GC Shares from this option exercise, but ultimately decided not to because of Kathryn Stan's sale of GC Shares at approximately the same time (set out below). Robert Stan did not sell any of the GC Shares obtained through the option exercise until he tendered them to the take-over of Grande Cache in 2012.

[188] As discussed above, both of the Stans testified that they were aware Robert Stan could not discuss non-public material information regarding Grande Cache with Kathryn Stan. Kathryn Stan testified about the increase from early 2008 in the price of HCC and the accompanying increase in the price of GC Shares. Because of the large number of GC Shares she held (and their increasing value giving them a greater weight in her portfolio), her investment advisers advised her to diversify by selling some GC Shares in the spring of 2008. Shortly after a discussion between the Stans in early May 2008 in which Kathryn Stan advised Robert Stan that she planned to sell GC Shares if the price increased to $9 or $10 per Share, Robert Stan deposited all of the Stan's physical share certificates, previously stored at their home, into their trading accounts at Salman.

[189] On 2 June 2008, Kathryn Stan instructed her adviser at Salman to sell 150 000 GC Shares at $9.25 per Share from the Kathryn Stan Salman Account; those Shares sold for $9.50 per Share. Both of the Stans denied that Robert Stan informed, recommended or encouraged Kathryn Stan in respect of that purchase. She also instructed on 18 June 2008 the sale of 200 000 GC Shares from the Spruce Bluff Salman Account; those Shares sold for $10.04 per Share. Again, both of the Stans denied that they discussed that sale or that he recommended or encouraged her to make such sale. We note that Kathryn Stan purchased GC Shares on 18 August 2008 in both the Kathryn Stan Peters Account (20 000 Shares) and the Spruce Bluff Peters Account (50 000 Shares).

[190] The Salman adviser testified that she dealt only with Kathryn Stan on the Spruce Bluff Salman Account, never with Robert Stan.

[191] After being advised by Kathryn Stan of the sale of GC Shares from the Spruce Bluff Salman Account, Robert Stan sought details of the sale that he needed to complete his insider reporting obligations:

> I understand that Lana has sold some [GC Shares] (200,000) for my wife from the [Spruce Bluff Salman Account]. As I am a part owner of Spruce Bluff and an insider with [Grande Cache], I need to file an insider trading report with the stock exchange. According to my advisor, I need to file the details of each transaction. . . .
>
> . . .

> I would appreciate if you could send me the details of the transaction when you have them available. . . .

[192] Robert Stan received the requested information and filed his insider trading report, disclosing the 18 June 2008 GC Share sale from the Spruce Bluff Salman Account on 26 June.

Roncin

[193] Roncin sold 221 700 GC Shares in 33 transactions between 18 June and 14 July 2008. Roncin exercised 250 000 GC Options on 30 May 2008 and 76 666 GC Options on 16 June.

[194] Roncin testified that she was seriously considering leaving Grande Cache in mid-2008 and that her GC Options would become worthless if not exercised before she resigned. She tendered her resignation in late June 2008 and worked at Grande Cache until the end of September.

[195] Roncin opened a trading account at Canaccord on 7 May 2008 to redistribute her personal wealth, which was at the time almost completely in GC Shares. Her adviser testified that he advised her to lower her portfolio risk by diversifying. Roncin and her adviser developed a plan for exercising some of her GC Options and selling some of her GC Shares between the end of the blackout period on 29 May 2008 and the start of the next blackout period on 15 July 2008. As the price of GC Shares started to decline in approximately mid-June 2008, Roncin and her adviser decreased her desired sale price for her GC Shares.

Nagai

[196] Nagai sold 197 366 GC Shares in 12 transactions between 2 June and 10 July 2008. Nagai had exercised 75 000 GC Options on 9 June 2008 and a further 116 666 GC Options on 17 June 2008.

[197] Nagai also purchased 10 000 GC Shares on 22 August 2008 for $6.00 per Share, and another 10 000 GC Shares on 27 August for $5.50 per Share.

[198] Nagai testified that he had purchased a new vehicle and home, and had certain debts he wanted to pay. He also wanted to set aside some money for the future. In all those circumstances, he thought "it was a prime time to crystallize my assets".

Riordon

[199] Riordon sold 266 666 GC Shares in eight transactions between 29 May and 23 June 2008. He had exercised 191 666 GC Options on 3 June 2008.

[200] Riordon had had the same investment adviser for over 25 years. In early 2008, the adviser suggested that Riordon, who was approaching retirement, move into "bells, banks, and bonds" so that he would have safe securities in blue-chip companies that paid dividends. As part of this, the adviser recommended that Riordon move away from junior mining companies and sell his entire holding of GC Shares. Although Riordon testified that he initially wanted to buy more GC Shares, he reluctantly agreed to start selling some instead. He began selling GC Shares on 7 April 2008 and began investing in blue-chip companies.

Wade

[201] Wade sold 35 000 GC Shares in 10 transactions between 17 June and 14 July 2008 (24 000 of those were sold on 17 June). Wade had exercised 25 000 GC Options on 3 April 2008 and a further 35 000 on 2 June.

[202] Wade noticed in late March 2008 that the GC Share price had been climbing and that his GC Options were now in the money. He and his wife decided that he would exercise some of his GC Options and sell the resulting GC Shares at $5.00 or above, so that they could pay off their mortgage and purchase a new vehicle. Because Wade had to pay the exercise price for the GC Options, he planned to exercise them in stages, using the sales proceeds from one tranche to help finance the exercise of the next tranche. After starting this process by exercising 25 000 GC Options on 3 April 2008 and selling most of the resulting GC Shares on 10 and 14 April, he entered a Quarterly Blackout Period until 29 May. During that time, the GC Share price continued to rise, to the point that he did not need to exercise as many GC Options to complete his financial plan. Wade also testified that he confirmed with Roncin on 14 July 2008 – the day before the 15 July 2008 start of the Quarterly Blackout Period – that he was still able to trade until the end of 14 July.

III. EVIDENTIARY AND OTHER LEGAL MATTERS

A. Standard of Proof

[203] Our task is to determine whether, on the evidence before us, Staff have proved, to the requisite evidentiary standard, their allegations against the Respondents. The standard of proof applied in Commission enforcement hearings is the balance-of-probabilities civil standard (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 36).

[204] The balance-of-probabilities civil standard requires the trier of fact to decide "whether it is more likely than not that an alleged event occurred" (*F.H. v. McDougall*, 2008 SCC 53 at para. 49). In *F.H.*, the Supreme Court of Canada stated (at paras. 40, 45-46):

> . . . I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. . . .
>
> . . .
>
> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> . . . evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. . . .

[205] Therefore, in applying the balance-of-probabilities civil standard, "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" (*Arbour* at para. 38).

B. Credibility and Conflicting Evidence

[206] We heard testimony from several witnesses, including all of the Respondents. While certain of the witnesses' recollections were imprecise, we attribute much of this imprecision to the lapse of time, and we do not find any such imprecision to be of import in reaching our conclusions herein. In short, in general we consider the Respondents' testimony, and that of all other witnesses, to be credible.

[207] Indeed, any inconsistencies in the evidence before us are, in our opinion, minor and inconsequential and thus have had no impact on our determination of the issues raised in this Hearing.

C. Hearsay Evidence

[208] Under sections 29(e) and (f) of the Act, relevant hearsay evidence is admissible in Commission enforcement hearings, provided the rules of natural justice and procedural fairness are observed. In determining the weight, if any, to accord any hearsay evidence admitted by us, we have examined the content of such evidence and taken into account any indicators of its reliability, such as its consistency with other evidence before us.

D. Expert Witnesses

[209] In the Hearing, on application by the Respondents, we qualified three individuals as expert witnesses, namely, McCloskey and Heys (as discussed above) and Kim Stewart (**Stewart**). We qualified Stewart "to give opinion evidence with respect to the analysis and interpretation of trading in securities".

[210] We have given weight to McCloskey's opinion evidence, which we note was consistent with or supported by other evidence before us, and we have found useful data that he provided relating to the international coal industry and markets.

[211] We have given weight to Heys's opinion evidence that expectations about future coal prices varied widely and were subject to significant uncertainty and differences of opinion, and that the GC Share price depended significantly on expectations about future HCC prices. This too, we note, was consistent with or supported by other evidence before us. We have also found useful data that Heys provided relating to the coal industry and markets and Grande Cache's operations therein. However, we have given no weight to Heys's opinion evidence on the ultimate issue of materiality, evidence which (we note) we admitted "erring on the side of caution".

[212] Finally, while we ultimately have given little weight to Stewart's opinion evidence, we have found useful data that she provided relating to the Respondents' trading in securities.

E. Consideration of All Arguments

[213] Although this decision and our reasons for it do not explicitly address every argument made by the parties, we have fully considered all arguments presented to us.

F. Law Pertaining to Illegal Insider Trading, Informing, and Recommending or Encouraging

[214] Staff alleged that Roncin, Nagai, Riordon, Wade and Kathryn Stan, while in a special relationship with Grande Cache and with knowledge of material facts – the Alleged Material

Facts – that had not been generally disclosed, sold GC Shares, contrary to section 147(2) of the Act. Staff also alleged that Robert Stan, while in a special relationship with Grande Cache, informed Kathryn Stan of the non-public Alleged Material Facts or, with knowledge of the non-public Alleged Material Facts, recommended or encouraged Kathryn Stan to sell GC Shares, contrary to section 147(3) or (3.1). (Although Staff made reference to "material change" in the NOH, they pursued their allegations on the basis of "material facts" alone. We therefore do not address the issue of "material change".)

1. Sections 147(2), (3) and (3.1) of the Act – Elements

[215] Sections 147(2), (3) and (3.1) of the Act state:

> (2) No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact . . . with respect to the reporting issuer that has not been generally disclosed.
>
> (3) No reporting issuer or person or company in a special relationship with a reporting issuer shall, other than when it is necessary in the course of business, inform another person or company of a material fact . . . with respect to the reporting issuer before the material fact . . . has been generally disclosed.
>
> (3.1) No reporting issuer or person or company in a special relationship with a reporting issuer with knowledge of a material fact . . . with respect to the reporting issuer that has not been generally disclosed shall recommend or encourage another person or company to
>
> (a) purchase or sell a security of the reporting issuer . . .

[216] To find that any or all of Roncin, Nagai, Riordon, Wade and Kathryn Stan breached section 147(2) of the Act as alleged, we must conclude from the evidence that:

- Grande Cache was a reporting issuer in Alberta at all relevant times;
- the respective Respondent was in a special relationship with Grande Cache at all relevant times;
- the respective Respondent sold GC Shares;
- the respective Respondent had knowledge of a material fact with respect to Grande Cache at the time or times he or she sold GC Shares; and
- the material fact was not generally disclosed at the time or times the respective Respondent sold GC Shares.

[217] To find that Robert Stan breached section 147(3) of the Act as alleged, we must conclude from the evidence that:

- Grande Cache was a reporting issuer in Alberta at all relevant times;
- Robert Stan was in a special relationship with Grande Cache at all relevant times;

- Robert Stan informed Kathryn Stan of a material fact with respect to Grande Cache; and
- the material fact was not generally disclosed at the time Robert Stan informed Kathryn Stan of the material fact.

[218] To find that Robert Stan breached section 147(3.1) of the Act as alleged, we must conclude from the evidence that:

- Grande Cache was a reporting issuer in Alberta at all relevant times;
- Robert Stan was in a special relationship with Grande Cache at all relevant times;
- Robert Stan recommended or encouraged Kathryn Stan to sell GC Shares;
- Robert Stan had knowledge of a material fact with respect to Grande Cache at the time he recommended or encouraged Kathryn Stan to sell GC Shares; and
- the material fact was not generally disclosed at the time Robert Stan recommended or encouraged Kathryn Stan to sell GC Shares.

2. Special Relationship

[219] A person in a special relationship with a reporting issuer includes:

- under section 9(c) of the Act, a director, officer or employee of a reporting issuer; and
- under section 9(e), a person who:
    - learns of a material fact with respect to the reporting issuer from any other person in a special relationship with the reporting issuer; and
    - knows or ought reasonably to know that the other person is in such special relationship.

3. Generally Disclosed

[220] The term "generally disclosed" is not defined in the Act. However, as this Commission ruled in *Re Kapusta*, 2011 ABASC 322 (at para. 235), the term "bears its ordinary meaning. . . . [T]his connotes information being disseminated so as to reach a general audience not limited to the particular reporting issuer and those in a special relationship with it, but including the market (if any) for the particular securities."

4. Materiality

Materiality Test and Its Application

[221] Section 1(gg) of the Act defines a "material fact" as "a fact that would reasonably be expected to have a significant effect on the market price or value of" particular securities.

[222] Materiality under the Act is a market-focused concept (*Re Keith*, 2012 ABASC 382 at para. 56). Materiality is to be determined objectively, from the perspective of a reasonable investor (*Kapusta* at para. 240; and *Arbour* at para. 765). The court in *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at para. 47, endorsed the approach of the Ontario Securities Commission (**OSC**) to materiality in *Re YBM Magnex International Inc.* (2003), 26 OSCB 5285, stating "that materiality should be assessed objectively from the perspective of an investor and prospectively through the lens of expected market impact".

[223] Decisions about materiality need not be premised on investor and expert evidence. In certain cases, such as this proceeding, common-sense inferences about materiality – made by a tribunal with specialized expertise – may suffice. As this Commission stated in *Arbour* (at paras. 764-66):

> . . . Common-sense inferences about materiality may suffice in certain cases (*Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 58, 61), such as this proceeding.
>
> Indeed, as an expert tribunal with specialized knowledge of the Alberta capital market and securities regulation, we are well positioned and able to draw inferences as to the objective view of a reasonable investor. This includes a determination as to whether . . . facts would reasonably be expected to have a significant effect on the market price or value placed on securities by reasonable investors . . . . The OSC recently described its role as a specialized tribunal capable of making determinations of what is a material fact without the aid of experts or investor witnesses (*Re Coventree Inc.* (2011), 34 OSCB 10209 [affirmed 2013 ONSC 1310] at paras. 157-58):
>
>> The materiality standard applicable in this case is an objective test based on reasonable expectation. Determining questions such as whether a fact is a material fact, whether a material change has occurred, the effect of events or developments on the market price or value of securities and the adequacy of disclosure made, are matters squarely within our expertise as a specialized tribunal. While the evidence of experts, shareholders or investors may be relevant or useful, we do not need such evidence in order to make these decisions (see *Re Donnini* (2002), 25 OSCB 6225 at para. 123, [*Rex Diamond Mining Corp. v. Ontario Securities Commission*, 2010 ONSC 3926 (Div. Ct.)] at para. 3 and [*Re Biovail Corporation* (2010), 33 OSCB 8914] at para. 80). No evidence of experts or of Coventree public shareholders was introduced. We did hear evidence from a number of individuals involved in the purchase of ABCP [asset-backed commercial paper] by investors.
>>
>> In *Rex Diamond* [at para. 3], the Court recognized the [OSC's] expertise when it stated that "whether a material change occurred is a matter that is central to the expertise of the [OSC]". The same principle applies to the [OSC's] determination of whether a fact constitutes a "material fact".
>
> Our role is similar; we adopt the OSC's reasoning on this point.

[224] We must be, and have been, careful not to use hindsight in our assessment of materiality. A materiality assessment, given the definition of "material fact" in the Act, is directed not at what eventually transpired but rather at what would reasonably have been expected to transpire. That said, an after-occurring event, in no way determinative of the issue of materiality, could be corroborative of a materiality decision.

[225] Furthermore, a materiality assessment is a contextual assessment – an assessment to be made in light of all relevant circumstances. National Policy 51-201 *Disclosure Standards* (**NI 51-201**), at section 4.2(1), states:

> In making materiality judgements, it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors. An event that is "significant" or "major" for a smaller company may not be material to a larger company. Companies should avoid taking an overly technical approach to determining materiality. Under volatile market conditions, apparently insignificant variances between earnings projections and actual results can have a significant impact on share price once released. . . .

[226] In addressing contextual assessments, the OSC ruled in *Coventree* (at paras. 151, 156):

> In general, the concept of materiality in the Act is a broad one that varies with the characteristics of the reporting issuer and the particular circumstances involved. . . .
>
> . . .
>
> . . . the assessment of the materiality of an event or development is a question of mixed fact and law that requires a contextual determination that takes into account all of the relevant circumstances, including the size and nature of the issuer and its business, the nature of the event or development and the consequences to the issuer's business, operations or capital. . . . In assessing whether a fact is a "material fact" . . ., one must take into account both quantitative and qualitative considerations or factors.

[227] As for quantitative and qualitative considerations, "probability and magnitude are both germane to materiality, and therefore both are considered in determining whether something is material"; however, "[t]his does not mean that a material fact . . ., once established by analysis, can then cease to be such by reason of a further assessment or reassessment of its probability or magnitude" (*Kapusta* at para. 251).

[228] Moreover, as the OSC commented in *YBM* at para. 90: "Assessments of materiality are not to be judged against the standard of perfection . . . . It is not a science and involves the exercise of judgement and common sense".

Business Judgment Rule

[229] The business judgment rule "accords deference to a business decision, so long as it lies within a range of reasonable alternatives", reflecting "the reality that directors . . . are often better suited to determine what is in the best interests of the corporation" (*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 40). However, this rule provides no assistance to the Respondents, and our materiality assessment is neither determined nor constrained by decisions that were or may have been made by Grande Cache's directors or management. In this regard, we adopt the reasoning set out in *Kapusta* (at paras. 396-97):

> Stated simply, the allegations involve not challenges to business decisions made in the operation of a business, but rather breaches of the law governing a regulated sector, by individuals . . . acting as investors rather than in a managerial or directorial capacity. As such, even had this been (it is not) an inquiry into [the company's] compliance with its disclosure obligations under securities

laws, the business judgment rule would have been inapplicable: as stated in *Kerr v. Danier Leather Inc.*, 2007 SCC 44 (at paras. 54-55):

> . . . disclosure is a matter of legal obligation. The Business Judgment Rule is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure. . . .
>
> . . . the disclosure requirements under the Act are not to be subordinated to the exercise of business judgment. . . . It is for the legislature and the courts, not business management, to set the legal disclosure requirements. [Emphasis in original.]

It is all the more clear that the Act's prohibitions of capital-market trading misconduct – specifically, here, its ban on the misuse of certain information in trading by individuals in a privileged relationship with a company – cannot be subordinated to the materiality assessments and disclosure decisions made by the company's directors or management. It is for the legislature and adjudicators, not a company's directors or managers, to give meaning to the elements of prohibited insider trading, including the meaning to be accorded "material fact" . . . in that context and the adequacy of any purported disclosure of such. While evidence of what a company's directors or managers did, or of experts as to the reasonableness of those actions, may be relevant and useful in giving such meaning, it is not determinative. The materiality assessments and disclosure decisions of . . . directors and management cannot override the dictates of section 147 of the Act.

IV. THE ISSUES

[230] It was not disputed, and the evidence clearly established, that:

- Grande Cache was a reporting issuer in Alberta at all relevant times.
- As a director, officer or employee (or more than one of those) of Grande Cache, Robert Stan, Roncin, Nagai, Riordon and Wade were in a special relationship with Grande Cache at all relevant times.
- The GC Shares and the GC Options were securities.
- Each of the Respondents sold GC Shares or exercised GC Options, or both, at the times, in the amounts and for the prices set out above.

[231] Staff alleged not only that the Respondents variously engaged in illegal insider trading, informing, and recommending and encouraging but also that this and the exercise of GC Options by Robert Stan, Roncin, Nagai, Riordon and Wade in May through July 2008 constituted conduct contrary to the public interest. Thus, the issues we must determine in this Hearing are:

(a) Were the Alleged Material Facts material facts within the meaning of section 1(gg) of the Act or not generally disclosed at the times of the impugned activities by the Respondents here? If the Alleged Material Facts either were not material facts or had been generally disclosed, then the prohibitions in sections 147(2), (3) and (3.1) are inapplicable and the related allegations will fail.

(b) If the Alleged Material Facts were non-public material facts, did Robert Stan inform Kathryn Stan of the non-public Alleged Material Facts, contrary to section

147(3) of the Act? If so, did Kathryn Stan thereby become a person in a special relationship with Grande Cache pursuant to section 9(e)?

(c) If the Alleged Material Facts were non-public material facts, did Robert Stan, with knowledge of the non-public Alleged Material Facts, recommend or encourage Kathryn Stan to sell GC Shares, contrary to section 147(3.1) of the Act?

(d) If the Alleged Material Facts were non-public material facts, did each of Roncin, Nagai, Riordon, Wade and Kathryn Stan (if Kathryn Stan is found to be in a special relationship with Grande Cache) have knowledge of the non-public Alleged Material Facts at the times each respectively sold GC Shares?

(e) In all the circumstances, was the conduct of each of the Respondents contrary to the public interest?

V. ANALYSIS

A. Were the Alleged Material Facts Material Facts Not Generally Disclosed?

1. Background

(a) Staff's Submissions

[232] Staff contended that the magnitude of Grande Cache's reduced coal production – 46% below internal budgeted production for Q1 F2009 – and Grande Cache's failure to meet its Q1 Sales Projection by almost 40% were each a material fact in that, if generally disclosed, they would reasonably have been expected to have a significant effect on the GC Share price or value.

[233] In support of their contention that the Alleged Material Facts were material facts, Staff pointed to (among other things): the "serious production problems" at the Underground Mine and the Surface Mine; "critically low" Clean Coal inventory levels; negative impacts of decreased production and sales on Grande Cache's earnings and other economic measurements in Q1 F2009; responses of capital market analysts and of the market generally to the 14 August News Release; and Grande Cache's ultimate failure to meet its F2009 Annual Sales Projection during a "spectacular one-time windfall" for coking coal producers. Staff contended that investors are "undoubtedly concerned" with quarterly production and sales results and quarterly performance, "particularly if those results are extremely poor and differ significantly from the company's stated expectation". Further, Staff posited that fluctuations in quarterly production and sales may be material because, while poor first-quarter results may not guarantee lost sales, there is a significant risk of lost sales for the year because the future is uncertain and other intervening events could occur "that might negatively affect the company's future production and sales".

[234] Staff contended that the Alleged Material Facts were not generally disclosed until the 14 August News Release. Staff acknowledged that there was some disclosure of the Alleged Material Facts in the "Operations" section in the May MD&A accompanying the 27 May News Release, but they argued that this disclosure did not effect general disclosure. Concerning this disclosure, Staff cited no explicit reference to sales volume or the extent (almost 40%) that Q1 Actual Sales would be below the Q1 Sales Projection, no quantification of the amount "below plan" that production would be for the entire Q1 F2009 or "thus far", and no reference point as to what "below plan" meant as no actual "plan" had ever been disclosed. Staff also contended that

this disclosure was misleading as it failed to describe accurately and fairly the nature and severity of the production issues at the Coalfield and that these were far more than a temporary problem, with the timeline for resolution unknown at the time. Staff further emphasized that this disclosure was "buried" 10 pages into the May MD&A, when it should have been disclosed in the 27 May News Release. In Staff's contention, this resulted in investors being left with the impression that production problems "were trivial and expected to have only a minimal impact on Grande Cache's Q1 results".

[235] Staff also pointed to market analysts' reactions to the Q1 F2009 results released in the 14 August News Release – they were "surprised" about the "unexpected" results – as confirmatory that the mid-quarter decreases in Q1 F2009 production and sales volumes as of 27 May 2008 were material facts that had not earlier been generally disclosed. Staff commented that none of the market analysts following Grande Cache had an accurate understanding of the extent to which the mine production problems would affect Grande Cache's Q1 F2009 production and sales.

(b) The Respondents' Submissions

[236] The Respondents submitted that Staff failed to provide any clear, convincing and cogent evidence that the Alleged Material Facts had a market impact, that is, that they would reasonably be expected to have a significant effect on the market price of the GC Shares if disclosed at the time of the Respondents' sales of GC Shares. (The Respondents also contended that Grande Cache's disclosure was sufficient, as set out below.) The Respondents relied on the expert evidence of Heys that the Alleged Material Facts did not have a significant effect on either the value or market price of the GC Shares – he calculated the effect was only a marginal amount of 1.2% to 2.9% or 2.9% to 4.3%, depending on the assumptions used. The Respondents pointed to the GC Share prices over various periods in July through September 2008, which showed high volatility, as well as declines and increases following a pattern similar to that of Grande Cache's peers and the S&P/TSX Global Mining Index (the **Mining Index)** over the same periods. The Respondents noted that Staff failed to consider the impact on the GC Share price of the issuance of 7 million new GC Shares, through the exercise of previously-issued Warrants, which likely became freely tradeable on 14 August. The Respondents also disputed that market analysts' comments following the 14 August News Release were corroborative of the Alleged Material Facts being material facts, contending that the comments were too far removed in time and were likely based on factors other than the Alleged Material Facts. In any event, the Respondents submitted that no weight should be given to the comments, being hearsay evidence untested through cross-examination.

[237] The Respondents contended that Staff's portrayal of production, sales volumes and inventory levels was not always accurate and was generally confusing, misleading or inconsistent. The Respondents pointed out that, given the allegations in the NOH, the relevant production, sales and inventory numbers are those as at 26 May 2008, not 30 June 2008 – thus, for example, sales volumes to 31 May (as a proxy for 26 May) were 18% below the sales forecast to that date, not 40% as alleged by Staff.

[238] The Respondents disputed Staff's suggestion that Grande Cache experienced "serious production problems" at the Underground Mine and the Surface Mine in Q1 F2009 that would not be "resolved by the end of Q1, or realistically for many months". The Respondents contended that slower production in Q1 F2009 was unplanned but temporary, and that coal

production was expected to increase. The Respondents pointed out that slower production in the Underground Mine arose because of the unexpected discovery of additional coal reserves – positive news for investors – leading to more development activities, which are slower than depillaring. Depillaring was expected to resume in Q2 F2009 and result in increased coal production. There was also slower production from the Surface Mine arising from truck assembly difficulties and personnel shortages which led to lower than expected waste and raw coal movement in the open pit in April and May 2008. However, the Respondents contended that the Surface Mine issues were resolved before the end of Q1 F2009, leading to increased waste and raw coal haulage numbers in the Surface Mine. The Respondents emphasized that, once the "leg work" – developing roadways in the Underground Mine and moving waste rock in the Surface Mine – was completed, coal was removed (produced) easily and rapidly. The Respondents noted that this was why Grande Cache's coal production numbers varied so much from month to month and quarter to quarter – these numbers showed only part of the picture with only the fruits of production included, not the productive operational work.

[239] The Respondents disputed Staff's suggestion that, because Grande Cache was in "the business of making money", it was common sense that quarterly variances in production and sales would necessarily be material information. The Respondents argued that common sense required a contextual understanding of the annual nature of the coal business, which can see dramatic swings in sales volumes from quarter to quarter. There were, the Respondents contended, two main reasons for this volatility. First, coal contracts setting price and volumes sold were entered into annually so that sales not completed within the expected quarter were not lost but delayed, with Grande Cache receiving the same price for its coal regardless of when sales were actually completed during the financial year. Second, the timing of Grande Cache's coal sales was dependent on customers' decisions as to when they sent ships to pick up the coal. Thus, it was reasonable to conclude that lower production or sales during the first quarter of a financial year would have no impact on the amount of money earned by Grande Cache in that year. The Respondents further argued that the nature of coal mining meant volatile production over the course of a year – production increased and decreased as the Coalfield moved between development and depillaring in the Underground Mine, and as waste rock was removed to expose coal deposits in the Surface Mine. Finally, the Respondents argued that a key feature of the coal mining business is the ability to achieve significant production in a short period of time.

[240] The Respondents disputed Staff's suggestion that the Alleged Material Facts were material as evidenced by the impact Grande Cache's lower production and sales had on other economic measurements. The Respondents again emphasized that economic measurements in any given quarter would not be important to market participants provided annual targets for those measurements remained intact. The Respondents indicated that this point was made by Grande Cache in the May MD&A when it stated that, while "the average cost of sales will vary from quarter to quarter, the average cost of sales for fiscal 2009 is anticipated to be in the range of $85 to $88 per tonne". The Respondents also pointed to the significant improvements made in Grande Cache's economic measurements as its production and sales numbers increased in the second quarter.

[241] As for Staff's argument that Grande Cache's production and sales shortfalls in Q1 F2009 were material because they ultimately resulted in Grande Cache's failure to meet its F2009 Annual Sales Projection during a time of a "spectacular one-time windfall" for coking coal prices, the Respondents submitted that was misguided. The Respondents contended that Staff

relied on hindsight and on subsequent market events that could not have been reasonably foreseen by anyone in May 2008. The Respondents argued there was overwhelming evidence that during the relevant period prices for coking coal were expected to remain strong and continue into 2009 in the range of $300 per tonne.

[242] The Respondents disputed Staff's contention that the Alleged Material Facts – to the extent that they may have been material facts – were not generally disclosed in the 27 May News Release and were "buried" in the accompanying May MD&A. The Respondents posited that the crucial question on the adequacy of disclosure "is whether market participants ultimately had the ability to understand and appreciate the true substance of the information disclosed". The Respondents contended that Grande Cache disclosed to the market on 27 May 2008 "the heart of the matter" of what was happening with the company during the time: production was progressing more slowly than expected in the first two months of F2009 due to certain specifically described issues with the Coalfield; however, these temporary setbacks would not have an impact on its overall F2009 production or on the F2009 Annual Sales Projection. The Respondents contended that the disclosed information "was more than sufficient to effect" general disclosure of the Alleged Material Facts or of any potentially material information regarding Grande Cache at the time. The Respondents characterized as useful market analysts' comments at the time which perceived the disclosed information as conveying the substance and import of the information: lower production volumes, higher cost of sales and lower Q1 Actual Sales, but with results improving for the remainder of the F2009, thus leaving unchanged the F2009 Annual Sales Projection.

2. Relevant Factual Considerations

[243] There was no dispute that the benchmark price for HCC for the 2008 Coal Year was set at US$300 per tonne. The evidence was that this was the highest benchmark price on record and more than three times higher than the benchmark price of US$90 established for the 2007 Coal Year. These prices were at levels "which no coking coal salesman had ever dreamt of", making it (according to Robert Stan) "probably the most exciting time that any of us had ever seen in the international coking coal market". We accepted Heys's opinion that expectations about future coal prices varied widely and were subject to significant uncertainty and differences of opinion.

[244] We also accepted Heys's opinion that the GC Share price depended significantly on expectations about future HCC prices. The evidence established that the main drivers of Canadian coal producers' share prices in the first half of 2008 were the international price of coal, the anticipation of the new annual coal price, supply problems such as those caused by flooding in Australia, and the demand for steel globally. The evidence also was clear that strong market indicators for the price of HCC continued until September and October 2008. However, "profound problems" became evident in November, with the price for HCC in a "free fall" by December.

[245] The evidence was that Grande Cache's F2009 Annual Sales Projection was based on actual contracts Grande Cache had for the majority of that figure at an average price of US$245 to US$255 per tonne and on the amount of Clean Coal the operations group believed could be produced from the Coalfield.

[246] Confidence existed within Grande Cache management that the Coalfield production problems in Q1 F2009 were temporary and would be largely resolved in Q2 F2009, which would

shortly lead to increased production and increased sales volumes. Indeed, this confidence was such that Grande Cache management reaffirmed the F2009 Annual Sales Projection in the 27 May News Release. We find that this confidence was reasonable having regard to the evidence as a whole, including:

- Difficulties in assembling and making operational trucks for the Surface Mine were being resolved, with the result that trucks were being made operational faster. Riordon testified that by mid-June 2008 Grande Cache had the trucks needed to meet its annual budget for the Surface Mine's production. At the end of May three trucks were operational, and by July five trucks were operational.

- Expectations that depillaring of the north-east section of the Underground Mine would commence in April and May 2008 were delayed when it was discovered that the coal seam extended further than expected, meaning more coal to produce and development continuing until the end of the economic coal was reached. The evidence was that, once depillaring commenced, coal would be produced more quickly. As management expected, depillaring commenced in July albeit only for a short period, returning to development sometime in Q2 F2009 because even more coal had been unexpectedly discovered.

- In June 2008 the tonnages of waste rock coming out of the Surface Mine dramatically improved and better waste and raw coal haulage volumes provided indications of increasing production in the Surface Mine. In mid-June management calculated that Grande Cache would have inventories of 100 038 tonnes of Clean Coal and 17 556 tonnes of raw coal at the end of June. In April these inventories had been, respectively, 41 364 tonnes and 22 526 tonnes, and in May they had been, respectively, 32 038 tonnes and 17 556 tonnes.

[247] The evidence demonstrated that Grande Cache historically experienced variations in its sales volumes from quarter to quarter. Some of these variations resulted because a coal sale was not recognized until the coal was delivered to a customer's vessel, with the customer controlling when the vessel would arrive in port; however, because prices and volumes were set annually in the coal contracts, Grande Cache would get the same contract price for its coal regardless of when it was delivered during the Coal Year. Thus, sales not completed within the expected quarter were not considered lost sales but delayed sales.

[248] The magnitude of the Q1 F2009 decreased sales volumes that had not been disclosed varied depending on the assumptions used. For example, comparing the Q1 Sales Projection of 400 000 tonnes and the Q1 Actual Sales of 250 000 tonnes, the difference is a shortfall in sales volumes of 150 000 tonnes or 37.5%. However, comparing the actual sales volumes of 218 656 tonnes to the prorated Q1 Sales Projection of 266 667 tonnes for the two months ended 31 May, the difference is a shortfall in expected sales volumes of 48 344 tonnes or 18.1%. The Q1 Sales Projection of 400 000 tonnes was 21.1% of the F2009 Annual Sales Projection of 1.8 to 2.0 million tonnes, using the mid-point of 1.9 million tonnes. The Q1 Actual Sales were approximately 13.2% of the F2009 Annual Sales Projection. The 150 000 shortfall between the Q1 Sales Projection and Q1 Actual Sales was approximately 7.9% of the F2009 Annual Sales Projection if the midpoint of 1.9 million tonnes was used as the annual projected sales volumes.

At the end of Q1 F2009, only 50 000 tonnes needed to be made up for in each remaining quarter of F2009 – approximately 2.6% of the midpoint of the F2009 Annual Sales Projection.

[249] In mid-June 2008, Grande Cache calculated that it required sales volumes of approximately 1 550 000 tonnes or 172 000 tonnes monthly to meet the F2009 Annual Sales Projection. We accept as reasonable the confidence of Nagai, an experienced marketing and transportation professional and the individual responsible for coal marketing in June 2008, that in June 2008 Grande Cache could meet those sales volumes, especially in a market where demand for HCC was very strong. We also accept as reasonable the confidence of Riordon that Grande Cache could produce sufficient Clean Coal to meet the F2009 Annual Sales Projection.

3. Application of Law to Evidence

[250] As discussed above, whether a fact is material is assessed using the objective test of market impact, which "subsumes the perspective of the reasonable investor" (*Cornish* at para. 79). The determination of a material fact is a question of mixed fact and law, which requires ascertaining whether the fact or facts in question meet the legal test, which in turn will depend on the specific facts and circumstances involved. Thus, in determining whether the Alleged Material Facts were material facts not generally disclosed, we consider the total mix of information available to market participants at the end of May 2008, and we apply both common-sense inferences and our expertise as a specialized tribunal.

(a) Importance of Quarterly Results to Market Participants

[251] We do not doubt that a public company's quarterly results will generally be of interest to market participants. However, particular quarterly results less (or more) favourable than an associated forecast are not invariably material – that is, they would not reasonably be expected in all cases to have a significant impact on the company's share price or value. Context is all-important.

[252] On the crucial significance of the context of quarterly results, we concur with and adopt the view expressed in *R. v. Landen*, 2008 ONCJ 561 at para. 92, albeit expressed there in the context of a gold mining company – the market impact of a coal production company achieving its sales volume forecast within any given quarter may, as an isolated event, not be that significant. That is, sales volumes and production levels are each only one of many pieces of information provided by a company to the market; in and of themselves, those figures – and their relation to any forecasts made – may or may not be reasonably expected to have a significant impact on the company's share price or value. Further, sales volumes for any given quarter are but one component of the sales volumes projected for a given financial year. That Grande Cache was experiencing temporary production difficulties and would not meet its Q1 Sales Projection were facts whose significance had to be viewed in the context of all the circumstances.

(b) No Significant Effect on GC Share Price

[253] The question is: had Grande Cache also disclosed on 27 May 2008 that its lower production resulted in sales volumes for the two months ended May 2008 (with one month remaining in Q1 F2009) of 218 656 tonnes, compared to the original forecast of 400 000 tonnes for the entire three months of Q1 F2009, would that additional disclosure reasonably have been expected to have a significant effect on the market price or value of GC Shares. To answer that question, the circumstances surrounding Grande Cache's decreased production and sales, including the ultimate expected impact, if any, on Grande Cache's annual production and sales

must be considered. When we consider the totality of the evidence, we are not satisfied, for the reasons that follow, that there was clear, convincing and cogent evidence that a significant effect on the GC Share price would have been a likely consequence of Grande Cache quantifying its lower production and sales volumes for market participants.

(c) Reasons for Concluding No Significant Effect on GC Share Price

Coalfield Production Levels and Grande Cache's Sales Volumes

[254] At the end of May 2008 – only two months into F2009 – Grande Cache was experiencing production problems in both its Underground Mine and Surface Mine. Grande Cache's Clean Coal production from the Coalfield to 31 May was 187 201 tonnes which was approximately 44.5% below its internal budgeted production for those two months of 337 200 tonnes. When viewed in isolation, the magnitude of this information about Grande Cache's production could potentially be reasonably expected to have a significant effect on the GC Share price. As noted, however, such matters cannot be determined in isolation – we need to assess the other information known to market participants. The evidence is that as at 31 May 2008 and continuing for months thereafter, Grande Cache's long-term production was not expected to be an issue. Grande Cache disclosed its coal production problems in its May MD&A as temporary, with management's expectation that the Surface Mine production would increase over the remainder of F2009 and that the Underground Mine production would increase in early Q2 F2009. Lower Underground Mine production to that point in Q1 F2009 was also accompanied by a positive development – the unexpected discovery of additional coal.

[255] Given Grande Cache's disclosure in the May Disclosure that the Underground Mine's lower production was caused by temporary issues (essentially caused by finding more coal), we consider the market was reasonably informed that Grande Cache would shortly have more coal to produce and sell than it previously anticipated. Further, with resolution of the production problems at both the Underground Mine and Surface Mine expected in the near term, a reasonable market expectation would be that Grande Cache's coal production (unlike other industries such as manufacturing and retail) could result in large tonnages of coal being available for sale in upcoming quarters, sufficient enough for Grande Cache to maintain its expectation that sales for F2009 would still be projected to be 1.8 to 2.0 million tonnes.

[256] As at 31 May 2008 Grande Cache's actual sales volumes were 218 656 tonnes – 48 011 tonnes or 18% below 266 667 (a two-month pro rata amount of the Q1 Sales Projection) and 7.9% of the 1.9 million tonne midpoint of the F2009 Annual Sales Projection. The evidence is clear that at the end of May 2008 – indeed continuing until autumn of 2008 – market expectation was that the strong demand for steel and, in turn, strong demand for HCC, would support the pricing strength for HCC for the 2008 Coal Year (covering the same period as F2009). The very strong market for coal would have been suggestive of a reasonable expectation that Grande Cache would be able to sell every tonne of coal it produced, subject to transportation availability.

[257] We conclude that the understanding in the coal industry at that particular time, given all the circumstances – including that coal sales were governed by annual contracts which fixed prices and volumes for the entire Coal Year – was that sales missed in one quarter would be delayed, not lost. Such sales would be effected in a later quarter, with missed sales in Q1 or the next quarter of a financial year likely to be effected in a later quarter in the same financial year. We also conclude that such understanding would have been a reasonable expectation in the market. Therefore, the reasonable expectation in the market would have been that delayed

production and sales in Q1 F2009 should have no impact on Grande Cache's F2009 Annual Sales Projection and ultimately on Grande Cache's F2009 net earnings or indeed the GC Share price.

[258] We think it reasonable that market participants would have appreciated that historically Grande Cache's quarterly production and sales volumes results had varied significantly from month to month and quarter to quarter, and that this phenomenon was shared by many of Grande Cache's peer group of coal producers. The disclosed F2009 Annual Sales Projection was not predicated on each quarter of F2009's sales volumes being equally weighted, a fact we conclude was understood by market participants. In fact, Grande Cache's disclosed Q1 Sales Projection of 400 000 tonnes was less than one quarter of its disclosed F2009 Annual Sales Projection of 1.8 to 2.0 million tonnes, indicating that sales during Q1 F2009 were expected to be lower than in subsequent quarters, even without the temporary production issues that arose.

[259] Finally, as at the end of May 2008, Grande Cache's management had no apparent credibility issues in the market, having exceeded its annual sales projection in F2008. Grande Cache's reaffirmation of its F2009 Annual Sales Projection in the 27 May News Release thus signalled to the market that management was confident that the disclosed production problems (inextricably linked to sales) did not affect Grande Cache's F2009 Annual Sales Projection and other annual targets and guidance. We earlier found that management's confidence was reasonable at the time, given all the circumstances. We conclude that this would be an important factor in market participants' assessment of what import to attach to lower production results and lower than expected sales volumes in Q1 F2009 – in other words, an important factor in a reasonable investor's assessment of whether information would reasonably be expected to have a significant effect on the market price of GC Shares.

Disclosure of Q1 F2009 Lower Production and Higher Sales Costs

[260] As noted, the 27 May News Release announced Grande Cache's Q4 F2008 Financial Results and repeated Grande Cache's F2009 Annual Sales Projection, including the expectation that the average cost of sales would vary from quarter to quarter. Also as noted, the Outlook section of the May MD&A (attached and referred to in the 27 May News Release) disclosed that Grande Cache's production to that point in Q1 F2009 "has been below plan" due to temporary production problems in the Underground Mine and the Surface Mine but that increases in production were expected in Q2 F2009 and over the remainder of F2009. Readers were also informed that, as a result of lower production, "cost of sales in the first quarter of fiscal 2009 will be higher" than the F2009 projected average. We also note that the June MD&A repeated the disclosure in the May MD&A that Grande Cache's Q1 F2009 production was below plan, but reaffirmed management's expectation that Grande Cache would meet its F2009 Annual Sales Projection.

[261] The evidence was that Grande Cache's lower production and the likelihood of it not achieving the upper end of its F2009 Annual Sales Projection was discussed in market analysts' reports and, as such, was in the public discourse. GMP wrote on 27 May 2008 that it was lowering its estimated Grande Cache coal production for F2009 and as a result of this was lowering its sales volume estimate for the year from 2.05 million tonnes to 1.9 million tonnes. GMP lowered its recommendation from "buy" to "hold" for GC Shares and decreased its target price per Share to $9.00 from $9.25. On 28 May Canaccord noted that "[c]oal production in Q1/F09 'has been below plan', with the underground mine in a development stage, and due to a general lack of equipment and skilled personnel in the surface mine". As a result, Canaccord

concluded that Grande Cache would not meet its Q1 Sales Projection of 0.40 million tonnes, leading Canaccord to then predict quarterly sales of 0.36 million tonnes. Canaccord noted that Grande Cache was maintaining its F2009 Annual Sales Projection of 1.8 to 2.0 million tonnes and predicted sales volumes for F2009 of 1.9 million tonnes. Canaccord maintained its "buy" recommendation for GC Shares and increased its target price to $11.50 from $7.15.

[262] In the days following the release of the 27 May News Release the GC Share trading price did not change significantly. The closing price of GC Shares declined $0.18 from $8.30 on 26 May to $8.12 on 27 May but quickly recovered the next day – on 28 May – to $8.40 and to $9.19 by 30 May 2008.

[263] We do not consider Grande Cache's 27 May 2008 disclosure of its lower-than-expected coal production and sales to have been ideal. However, although no quantification of its lowered production was disclosed and no disclosure was made of its actual sales volumes to date or of a revised Q1 Sales Projection, we are satisfied that market participants would have appreciated that the disclosed reduction in production and corresponding increase in the cost of sales would necessarily mean a reduction in sales volumes in Q1 F2009. We are also satisfied that market participants would have reasonably concluded from the totality of this disclosure, given all the circumstances existing at the time, that, while coal production and sales would be temporarily lower, Grande Cache's expectation was that both production and sales would increase enough to meet the disclosed F2009 Annual Sales Projection of between 1.8 and 2.0 million tonnes. That is, lower anticipated production and corresponding lower volumes of sales for Q1 F2009 would be offset by the higher expected production and sales in subsequent quarters of F2009 – with those future sales at the average price of US$245 to US$255 per tonne as disclosed by Grande Cache (based on the benchmark price of US$300 per tonne and taking into account the lower price for carry over sales).

High Market Expectations and the Unanticipated Global Financial Crisis

[264] The evidence was clear that as at the end of May 2008 – indeed continuing into early September 2008 – the market in general was not anticipating the global financial crisis of autumn 2008 that devastated world economies and businesses. The evidence was also clear that, at those times, the coal industry was similarly not anticipating that crisis and its catastrophic effect on steel production, demand for HCC and HCC pricing – all of which ultimately led to Grande Cache missing its F2009 Annual Sales Projection and other annual targets and guidance in that financial year. The 2008 financial crisis was clearly an unforeseen event that would not have been reasonably contemplated by market participants in general at the end of May 2008, or indeed until autumn 2008.

[265] Market excitement and expectations that the high demand for HCC and strong prices for HCC would continue into 2009 and beyond were reflected in the GC Share price at the times relevant to Staff's allegations. Indeed, market analysts' comments following the 14 August News Release were still forecasting strong HCC prices for the 2009 Coal Year: these analysts estimated that Grande Cache would realize coal prices ranging from $243 to $300 per tonne in F2010. Therefore, even had Grande Cache not been able to effect in F2009 all sales delayed in F2009, it still anticipated effecting such sales at the same, or similar, prices in F2010. McCloskey's evidence also confirmed strong market expectations.

(d) Summary on Conclusion of No Significant Effect on GC Share Price

[266] We conclude that, in May 2008, there was not a probability (or indeed any reasonable expectation) that more specific disclosure of Grande Cache's missed Q1 Sales Projection would have a significant effect on the GC Share price, given all the circumstances. Our conclusion is based on the facts and conclusions discussed above, including:

- The probability that the Q1 F2009 production and sales volumes would not be reached at the end of that quarter was at the time insignificant compared to the probability that Grande Cache would still meet its F2009 Annual Sales Projection.

- Grande Cache disclosed lower production for Q1 F2009.

- Grande Cache disclosed that costs of sales would be higher in Q1 F2009, and market participants made the connection between this disclosure and Grande Cache's lower projected sales for Q1 F2009.

- Grande Cache disclosed the reasons for its lower production and explained the temporary duration, with production reasonably expected to increase shortly after the end of Q1 F2009.

- The discovery of additional coal that could be produced and sold – positive news – was one reason for the lower production.

- Grande Cache had sales contracts in place for much of its F2009 Annual Sales Projection.

- Grande Cache reaffirmed its F2009 Annual Sales Projection, which reaffirmation we believe on the evidence was reasonable, and thus justifiable, at the time of the 27 May News Release, 30 June News Release and, indeed, at the time of the 14 August News Release.

- The timing of sales during F2009 as a whole was more significant than the timing of sales in a particular quarter.

- HCC prices were contracted at a high level through the rest of F2009 and were expected to remain high into F2010.

- Grande Cache could not have been expected to predict or anticipate the global financial crisis that began in autumn 2008.

4. Corroboration

(a) GC Share Price Changes

[267] Staff contended that the decrease in the GC Share price on 14 and 15 August 2008, following the 14 August News Release, corroborated their contention that the Alleged Material Facts were not disclosed until 14 August 2008, at which point there was a significant impact on the GC Share price attributable to such disclosure. We do not agree.

[268] There were several intervening events between 27 May and 14 August 2008 that made it difficult to attribute the volume and price changes on 14 and 15 August to Grande Cache's disclosure of its Q1 Actual Sales and Clean Coal production.

[269] First, there was the trend of the GC Share price – the GC Share price increased from a close of $5.47 on 30 April 2008 to $8.40 on 28 May 2008. The GC Share price continued this upward trend until reaching its high (intra-day) trading price of $10.78 on 19 June 2008; thereafter the GC Share price started to decline along with the share prices of its peer group. From that point, the GC Share price (and its peer group share prices) continued to decline, with considerable volatility at times. The strong market gains of April, May and June were no longer available. This made the mid-August 2008 market environment considerably different than that existing in late May 2008.

[270] Second, by 22 August 2008 the GC Share price, which had a total decline in its closing price of 18% from 13 August ($6.20) to 15 August ($5.08), had an intra-day high of $6.30, thus showing some recovery to the pre-14 August News Release price.

[271] Third, the volatility of the GC Share price during the late spring and summer of 2008 meant that an 18% change to its price over a two-day period was not out of the ordinary: the GC Share price declined by almost 20% over a three-day period in July 2008 and increased by more than 26% over another three-day period that month; it declined on 5 August by over 17% from the previous day; and it declined by over 19% from the 7 August price to the 12 August price. These were days when there was no new company-specific disclosure.

[272] Fourth, the decline in the GC Share price on 14 and 15 August followed a similar declining pattern of the share prices of its peers and the Mining Index. The Mining Index showed a decline from a close of 104.41 on 13 August to 99.59 on 15 August. Significantly, the Mining Index followed a similar pattern as the GC Share price by recovering from this decline within one week.

[273] Finally, pursuant to the exercise of the Warrants, over 7 million new GC Shares were issued on 11 August 2008. Given how low the conversion price was relative to the current GC Share trading price – and the fact that reasonable investors would be aware of the downward trend of share prices for Grande Cache and its peers since mid-June – it is reasonable and logical that a large number of the converted GC Shares were sold into the market on 14 and 15 August, likely contributing to the decline in the GC Share price and increased trading volumes on those days.

[274] In light of these facts, we cannot conclude that the two-day price change for GC Shares corroborated that the Alleged Material Facts were material facts left undisclosed until 14 August 2008.

(b) Market Analysts' Comments

[275] Staff contended that the market analysts' comments following the 14 August News Release corroborated Staff's contention that the Alleged Material Facts were not disclosed until 14 August 2008. We do not agree.

[276] First, the evidence of market analyst commentary made months after the 27 May News Release is of little assistance given that there would be "too many unknown events foreseeably arising in such an interval" (*Kapusta* at para. 256). Some such factors here included: the far different economic environment in mid-August 2008 than at 27 May; the decline through that period of the share prices of Grande Cache and its peers (and of the Mining Index); the conversion of the Warrants; and other unknown factors that might have been considered by the analysts in making the comments they did.

[277] Second, the three market analysts who covered Grande Cache all set out what can best be described as "mixed reactions" to the 14 August News Release. While all three analysts noted Grande Cache's sales volumes were much lower than expected, they offset that disappointing result by noting that Grande Cache was maintaining its F2009 Annual Sales Projection and previous unit cost guidance. Two of the analysts noted that Grande Cache had previously flagged that Q1 production would be weaker than forecast. All three analysts lowered their estimates with respect to Grande Cache's F2009 Annual Sales Projection: each of GMP and Salman reduced its estimate to 1.7 million tonnes; Canaccord anticipated that Grande Cache would still meet the lower end of its F2009 Annual Sales Projection, namely 1.8 million tonnes. Canaccord pointed out that Grande Cache ultimately exceeded the top end of its F2008 annual sales projection. All three analysts maintained their "buy" recommendations, although they lowered their 12-month target prices for GC Shares: GMP from $10.00 to $8.20; Salman from $11.90 to $10.40; and Canaccord from $11.50 to $10.75 (while noting a potential price as high as $14.27, depending on certain assumptions). All of these GC Share target prices were significantly higher than the GC Share trading price at that time, which closed at $5.45 on 14 August 2008. That these three analysts expressed continued confidence in Grande Cache to meet its F2009 Annual Sales Projection and other targets was best expressed by Salman: "While we were disappointed by the slow start to the year, we remain optimistic that management will be able to get things back on track again over the balance of the year. We maintain our buy recommendation and expect a substantial improvement in the company's earnings and cash flows over the next few quarters".

[278] In light of these facts, we cannot conclude that market analysts' reactions to the 14 August News Release corroborated that the Alleged Material Facts were material facts left undisclosed until 14 August 2008. To the contrary, these reactions suggest that the market was well aware of Grande Cache's Q1 production and sales issues and, although surprised at the "very weak volumes", appeared to focus instead on the temporary nature of the production issues, the expected increased production and sales in subsequent quarters of F2009, and management's confidence in maintaining the F2009 Annual Sales Projection. With their knowledge at the time, the analysts maintained their recommendations to "buy" GC Shares, with price targets for GC Shares remaining well above the then-trading GC Share price.

(c) F2009 Performance

[279] Staff contended that Grande Cache's failure ultimately to meet its F2009 Annual Sales Projection and other annual performance targets corroborated Staff's contention that the Alleged Material Facts were not disclosed until 14 August 2008, at which point there was a significant impact on the GC Share price attributable to such disclosure. We do not agree.

[280] In discussing its annual financial and operational results for F2009, Grande Cache stated in the 17 June 2009 News Release that the "decline in sales volumes was *primarily* caused by a

slowdown in the global economy during the second half of the fiscal year" (emphasis added). Grande Cache further stated therein that also contributing to its sales for F2009 being lower than the F2009 Annual Sales Projection (which by then had been revised downward due to the world economic situation) was that its lower-than-planned production in the first part of F2009 led to lower-than-planned sales during that time. These remarks, which involve hindsight and the impact of unforeseen subsequent events, are not useful in determining "what, beforehand, would reasonably have been expected to transpire" as we "must not confuse outcome with expectation" in determining the materiality of the Alleged Material Facts (*Kapusta* at para. 255). The evidence was clear that the capital markets in general and the coal industry in particular were not anticipating the global financial crisis of autumn 2008. Therefore, it could not have been reasonably predicted during Q1 F2009 (or even by August 2008) that the lower Q1 F2009 production would lead not to "delayed" sales but to "lost" sales, a concept at the time apparently foreign to coal industry history and predictions. Further, had the extreme downturn in the global economy not taken place and had Grande Cache not consequently and prudently curtailed its production in response to certain of its customers deferring sales into F2010, a very different picture may have been painted for Grande Cache's F2009 actual production and sales.

[281] In light of these facts, we cannot conclude that Grande Cache's actual financial and operational results for F2009 corroborated that the Alleged Material Facts were material facts left undisclosed until 14 August 2008.

5. Conclusion

[282] For the reasons set out above and in all the circumstances, we are not satisfied that Staff have established with clear, convincing and cogent evidence that it is more likely than not the Alleged Material Facts were material facts left undisclosed within the meaning of the Act until 14 August 2008. We so find.

B. Alleged Breaches of Sections 147(2), (3) and (3.1) of the Act

[283] Given our finding that the Alleged Material Facts were not material facts left undisclosed at the times of the Respondents' impugned activities, the prohibitions in sections 147(2), (3) and (3.1) of the Act are inapplicable thereto. Accordingly, the various allegations of breaches of these sections made against the Respondents in the NOH must fail and are dismissed.

C. Conduct Contrary to the Public Interest

[284] Staff's allegations of conduct contrary to the public interest were, for the most part, linked to their allegations of breaches of sections 147(2), (3) and (3.1) of the Act by the Respondents. However, Staff also contended that the exercise of GC Options by certain of the Respondents "while possessed of undisclosed material information" was conduct contrary to the public interest, even in the absence of a contravention of Alberta securities laws.

[285] Given our finding that the Alleged Material Facts were not material facts left undisclosed at the times of the impugned activities of the Respondents, including the exercise of GC Options by certain of them, we do not find any conduct contrary to the public interest by any of the Respondents.

[286] Thus, the allegations that the Respondents each acted contrary to the public interest must fail and are dismissed.

VI. CONCLUSION

[287] We found that Staff have not proved their allegations against the Respondents, and so we have dismissed all allegations made against the Respondents.

[288] This case involved an assessment of serious allegations of illegal insider trading, which to a large extent turned on an examination of a reporting issuer's public disclosure record and, in particular, whether certain facts were material facts that had not been generally disclosed. While this was not an inquiry into either the quality of Grande Cache's public disclosure or its compliance with reporting issuer disclosure obligations, the Respondents, because they sold securities of a reporting issuer when and under the circumstances in which they did, became the subjects of an investigation and public allegations, with costly ramifications.

[289] We take this opportunity to remind all market participants of the care and scrutiny that must be undertaken by those closely associated with a reporting issuer to ensure that all material information has been generally disclosed before they either purchase or sell that issuer's securities. Making materiality assessments of facts, especially when they do not also constitute material changes in the business, operations or capital of a reporting issuer, can be a difficult exercise. In that regard, NI 51-201, at section 4.2(2), might be helpful. It states: "As a guiding principle, if there is any doubt about whether particular information is material, we encourage companies to err on the side of materiality and release information publicly."

[290] This proceeding is concluded.

10 April 2013

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Glen D. Roane

"original signed by"
Fred R.N. Snell, FCA