BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: PreveCeutical, 2024 BCSECCOM 199 Date: 20240502

PreveCeutical Medical Inc. and Stephen Van Deventer

Panel	Gordon Johnson	Vice Chair
	Jason Milne	Commissioner
	Marion Shaw	Commissioner
Hearing dates	October 16, 17, 18 and 20, 2023	
Submissions completed	November 17, 2023	
Date of findings	May 2, 2024	

Appearing

Derek Chapman Aneka Jiwaji	For the Executive Director
R. Barry Fraser Seva Batkin	For PreveCeutical Medical Inc. and Stephen Van Deventer

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, 1996, c. 418 (Act).

[2] In an amended notice of hearing issued February 28, 2023 (2023 BCSECCOM 96), the executive director alleged, among other things, that:

(a) By news release dated June 29, 2018, PreveCeutical Medical Inc. (PreveCeutical) announced that it had closed a private placement for gross proceeds of $6,539,987.50. PreveCeutical did not disclose that it would only retain $3,342,090.11, about 51% of the amount raised, because it:

i. had already spent $2,924,406.14 of the funds on consulting fees, and

ii. owed $273,491.25 of the funds in additional consulting fees.

(b) By announcing the proceeds from the private placement but failing to disclose that it would retain about 51%, PreveCeutical made a statement to investors that it knew, or ought reasonably to have known, was a misrepresentation contrary to section 50(1)(d) of the Act.

(c) PreveCeutical filed a material change report containing the same misrepresentation. In doing so, it made a statement or provided information in a record filed under the Act that in a material respect was false or misleading, contrary to section 168.1(1)(b) of the Act, and

(d) While he was a director and officer of PreveCeutical, Stephen Van Deventer (Van Deventer) authorized, permitted or acquiesced in PreveCeutical's contravention of section 50(1)(d) and section 168.1(1)(b) and therefore, by operation of section 168.2 of the Act, he also contravened those provisions.

[3] During the hearing, the executive director called one witness, a commission investigator. Counsel for the respondents cross-examined the investigator and called four witnesses, the respondent Van Deventer, two experts and a former employee and chief financial officer of PreveCeutical, Ms. R. Counsel for the executive director cross-examined the respondents' four witnesses.

[4] The liability hearing was followed by written and oral submissions.

II. Factual Background

[5] At all relevant times PreveCeutical was a Vancouver-based venture company listed on the Canadian Securities Exchange (CSE). PreveCeutical was a bio-pharma company that was developing proprietary technologies primarily related to scorpion venom. Because scorpion venom is a naturally occurring substance and is not easily the subject of patents or other forms of intellectual property protection, PreveCeutical sought to develop synthetic equivalents over which it could hold proprietary rights. PreveCeutical has also pursued the development and commercialization of other health-related products.

[6] PreveCeutical was recognized on July 31, 2017, as a British Columbia company following an amalgamation. PreveCeutical has been a reporting issuer under the Act since before the date of its amalgamation.

[7] On July 10, 2017, PreveCeutical announced the closing of a non-brokered private placement in the gross aggregate amount of $2.038 million, as well as the closing of a previously announced reverse take-over transaction. PreveCeutical announced that the net proceeds of the private placement would be used by the company for general working capital and operations, to cover the expenses related to the transaction, and to fund research and development projects relating to Caribbean Blue Scorpion venom-derived peptides and nose-to-brain delivery of cannabinoids.

[8] PreveCeutical announced at the same time that the closing of the transaction also resulted in changes to the company's management team. Van Deventer became the chairman of the board and Chief Executive Officer (CEO). The news release noted that over the prior 25 years, Van Deventer had specialized in international corporate relations and business development focused on launching small-to medium-sized companies into the public markets in Canada, the United States and Europe, had owned and operated many private companies, and was currently co-owner of Cornerstone Global Partners Inc.

[9] On August 11, 2017, PreveCeutical announced encouraging results from the research and development project consisting of isolating and identifying peptides and proteins from Caribbean Blue Scorpion venom.

[10] On August 14, 2017, PreveCeutical announced it was acquiring four new key instruments to assist in expediting its current pipeline of innovative research and development programs.

[11] On September 17, 2017, PreveCeutical announced the engagement of Susan Blond Group Inc. to provide publicity services, and the appointment of Susan Blond as the company's director of publicity. The fees payable to the Susan Blond Group during the first term of the agreement consisted of monthly cash payments of USD $13,000 and the issuance of common shares of the company having an aggregate value of USD $7,000, with other payments to follow in subsequent years.

[12] On September 21, 2017, PreveCeutical announced it had entered into a strategic research and development supply agreement with a licensed producer of medical cannabis.

[13] On November 1, 2017, PreveCeutical announced that it had received approval from the Queensland Government in Australia to acquire, store and use cannabis oil and dried cannabis plant extracts. The approval was a component of its research and development program for the commercialization of soluble gels.

[14] On November 22, 2017, PreveCeutical announced a fully-subscribed non-brokered private placement at a price of $0.75 per unit to raise gross proceeds of $3.28 million. According to the news release, the proceeds of the financing were intended to be used to fund the company's research and development programs and for general working capital purposes.

[15] Van Deventer testified that the private placement announced on November 22, 2017, related to two individuals who fully subscribed for $3.28 million, but never provided the funds; accordingly, the transaction terminated.

[16] On January 3, 2018, PreveCeutical announced it had amended the terms of the previously announced non-brokered private placement by changing the price to $0.50 per unit. The intended use of the proceeds were again identified as funding the company's research and development programs and for general working capital.

[17] Van Deventer testified that once the price was lowered, there was no interest in the private placement. He said that people were more interested in cannabis at that time. As a result, the private placement collapsed.

[18] On January 30, 2018, PreveCeutical announced that it was entering into a research and option agreement with UniQuest Pty Limited (UniQuest) to conduct a research program.

[19] On March 13, 2018, Aurora Cannabis Inc. and PreveCeutical announced the grant of three permits by the Australian government for the importation of cannabis into Australia for research purposes.

[20] On April 9, 2018, PreveCeutical announced a non-brokered private placement of $4 million.

[21] On April 27, 2018, PreveCeutical announced that it had entered into a $700,000 credit facility with its former president and director, Kimberly Van Deventer, and amended and increased an earlier credit facility agreement with her and Van Deventer.

[22] On May 7, 2018, PreveCeutical announced the execution of a non-disclosure agreement (NDA) with a globally-recognized drug delivery device manufacturer. The NDA allowed the company to enter into discussions with the manufacturer for the supply of spray devices for use in its soluble gel drug delivery research program.

[23] On May 23, 2018, PreveCeutical announced a forward stock split of the company's issued and outstanding common shares on the basis of five new shares for each one existing share, and that the company's shares had commenced trading that day on the CSE on an "ex-distribution" basis.

[24] On June 5, 2018, PreveCeutical announced that it had entered into an agreement with Stadnyk & Partners to provide PreveCeutical with strategic advisory and market awareness services. In exchange, PreveCeutical would grant Stadnyk & Partners five million stock options exercisable for $0.08 per share for a period for 24 months.

[25] On June 25, 2018, PreveCeutical announced that based on subscriptions received to that date, the company expected that its $4 million non-brokered private placement announced on April 9, 2018, would be oversubscribed due to higher than expected investor interest. The company stated it expected that the offering would be increased to $8 million in gross subscription proceeds.

[26] In his testimony before us, Van Deventer gave some context regarding the business of PreveCeutical and the background for its public disclosure. Some of his evidence was fairly summarized in submissions by the respondents' counsel as follows:

(a) it had a single product to sell – CellB9 – which was generating gross annual revenue of $10,000 – 25,000;

(b) PreveCeutical had about $6 million in annual expenses;

(c) R&D being done for PreveCeutical by the University of Queensland on its sol-gel project was getting more detailed and complex, and its costs were increasing. If PreveCeutical became unable to pay the University's invoices, the research contracts would be cancelled, and it would lose the value of all research done to date;

(d) another R&D project, the dual gene therapy project, was 63% of the way of getting to human clinical trials, which would cost as much as $85 million, and the length of time for these trials could not be estimated;

(e) for yet another R&D project, a non-analgesic therapy, which was significantly less complex than the dual gene therapy, human trials would take 7 to10 years; and

(f) people that were interested in PreveCeutical's projects, of which Mr. Van Deventer had talked to thousands, knew that the time for PreveCeutical to get any product to market was 10 to 15 years.

[27] On June 29, 2018, PreveCeutical issued the news release which is the subject of this proceeding. The news release reads as follows:

> **PreveCeutical Announces the Closing of Oversubscribed Non-Brokered Private Placement**
> Vancouver, British Columbia--(Newsfile Corp. - June 29, 2018) - PreveCeutical Medical Inc. (CSE: PREV) (OTCQB: PRVCF) (FSE: 18H) (the "Company" or "PreveCeutical") announces the closing of its oversubscribed non-brokered private placement financing previously announced April 9, 2018 (the "Financing").

A total of 130,799,750 units (the "Units") were issued under the Financing at a price of $0.05 per Unit for gross proceeds of $6,539,987.50. Each Unit consists of one common share in the capital of the Company (each, a "Share") and one common share purchase warrant, with each warrant (each, a "Warrant") entitling the holder to acquire one additional Share at a price of $0.10 per Share for a period of up to two years, expiring on June 29, 2020. In the event that the closing price of the Shares on the Canadian Securities Exchange (the "CSE") is at least $0.20 per Share for a period of 10 consecutive trading days commencing four months and one day after the closing of the Financing, the Company may accelerate the expiry date of the Warrants by providing notice to the shareholders thereof and, in such case, the Warrants will expire on the 30th day after the date on which such notice is given by the Company.

Securities issued by the Company pursuant to the Financing will have a four month and one day hold period in Canada ending on October 30, 2018, as applicable.

In connection with the Financing, the Company paid aggregate finder's fees consisting of $156,760 in cash, 1,600,000 Shares (each, a "Finder's Share") and 4,783,200 non-transferrable finder's warrants (each, a "Finder's Warrant"). Each Finder's Warrant entitles the holder thereof to purchase one Share at a price of $0.10 per Share for a period of 24 months from the issue date. Mackie Research Capital Corporation received finder's fees consisting of $75,920 cash and 1,518,400 Finder's Warrants; Haywood Securities Inc. received finder's fees consisting of $38,800 cash and 776,000 Finder's Warrants; Canaccord Genuity Corp. received finder's fees consisting of $42,040 cash and 888,800 Finder's Warrants; and Peter Haukedal received finder's fees consisting of 1,600,000 Finder's Shares and 1,600,000 Finder's Warrants.

Stephen Van Deventer, Chairman, CEO and President commented, "I am very pleased to announce this oversubscribed placement due to investor demand in our financing and see this as a strong endorsement of the quality of our research programs and management team. In keeping with our vision of becoming a global preventive health care company, PreveCeutical is continuing to meet key milestones with our portfolio of research and development programs that will boost shareholder value."

The net proceeds from the Financing are intended to fund the Company's research and development programs and for general working capital purposes.

About PreveCeutical
PreveCeutical Medical Inc. is a health sciences company that develops innovative preventive therapies utilizing organic and nature identical products.

PreveCeutical aims to be a leader in preventive health sciences and currently has five research and development programs, including: dual gene therapy for curative and prevention therapies for diabetes and obesity; a Sol-gel platform for nose to brain delivery of medical compounds including cannabinoids; Nature Identical™ peptides for treatment of various ailments; non- addictive analgesic peptides as a replacement to highly addictive analgesics such as morphine, fentanyl and oxycodone; and a therapeutic product for treating athletes who suffer from concussions (mild traumatic brain injury).

PreveCeutical sells CELLB9®, an Immune System Booster. CELLB9 is an oral solution containing polarized and potentiated essential minerals extracted from a novel peptide obtained from Caribbean Blue Scorpion venom.
For more information about PreveCeutical, please visit www.PreveCeutical.com, follow us on Twitter: http://twitter.com/PreveCeuticals and Facebook: www.facebook.com/PreveCeutical.

On Behalf of the Board of Directors
"Stephen Van Deventer"
Chairman, President & CEO

For further information, please contact:
Deanna Kress
Director of Corporate Communications & Investor Relations

[28] The events which led to the funding of the significant majority of the private placement proceeds announced in the June 29, 2018, news release were described by Van Deventer in his testimony. Van Deventer testified that he was approached by Mr. M, who advised that he was part of an investment group (BridgeMark Group) who wanted to invest $4 million through the private placement:

> Q. It was a package deal. We'll invest $4 million but you have to pay us 4 million in consulting fees at the same time?
> A. That was what was offered originally.
> Q. The original offer?
> A. Yes.
> Q. From the company's perspective the company gets nothing out of that deal?
> A. That is why we didn't do that deal.

[29] Van Deventer testified that he was able to negotiate Mr. M down so that PreveCeutical would retain some of the BridgeMark Group's investment after deducting the consulting fees:

> Q. Anyway, the end result who was you initially said absolutely not, we are not going to that deal but you negotiated him down where ultimately PreveCeutical would at least get $1.3 million net of that transaction?
> A. Approximately, yes.

[30] Van Deventer recommended the transaction to the board as the company would get "an extra $1.3 million that we desperately needed".

[31] The following members of the BridgeMark Group invested a total of $4 million in PreveCeutical's private placement by June 26, 2018:

(a) NW Marketing and Management Inc. - $1.5 million

(b) Jarman Capital Inc. - $500,000

(c) Detona Capital Corp. - $1 million

(d) Cam Paddock Enterprises Inc. - $1 million.

[32] On June 26, 2018, PreveCeutical issued 12 certified cheques totaling $2,886,250 including applicable taxes to 12 consultants for consulting fees relating to services to be provided under consulting agreements dated June 1, 2018. Van Deventer and Ms. R signed the 12 cheques issued to the BridgeMark Group consultants.

[33] PreveCeutical paid a total of $2,924,406.14 to Aktiencheck.de AG and the BridgeMark Group consultants as of June 26, 2018.

[34] PreveCeutical also owed the following consultants a total of $273,491.25 as of June 29, 2018:

(a) Stockhouse Publishing Inc. - $78,776.25.

(b) Transcend Capital Inc. - $131,250.

(c) Dig Media Inc. - $51,765.

(d) Hybrid Financial Ltd. - $11,700.

[35] PreveCeutical issued a treasury order to the TSX Trust Company authorizing and directing it to issue a total of 130,599,750 common shares in favour of the holders listed in Schedules "A" and "B" to the treasury order. In contrast to the rest of the shares to be issued pursuant to the treasury order, the 80 million shares issued to the four members of the BridgeMark Group did not bear a legend restricting them from being traded before October 30, 2018.

[36] Van Deventer and Ms. R signed the treasury order.

[37] On June 29, 2018, PreveCeutical issued a Form 51-102F3 material change report. The material change report attached and referenced PreveCeutical's June 29, 2018 news release.

[38] PreveCeutical issued financial statements and MD&A periodically throughout the period leading up to the issuance of the June 29, 2018 news release. Some of the key extracts from those financial statements and MD&A are as follows:

(a) On November 29, 2017, PreveCeutical issued its interim financial statements for the three and nine months ending September 30, 2017. They showed that for the three months ending September 30, 2017, the company:
- suffered a net loss of $1,089,511 on revenues of $13,046.
- paid consulting and contract fees of $28,861.
- paid marketing and promotion fees of $65,530.
- held assets that included prepaid and deposits of $599,131 that included:
  - $168,750 for Market One Media from October 2017 to June 2018; and
  - $53,948 for Susan Blond Group from October to November 2017.

(b) For the nine months ending September 30, 2017, PreveCeutical had a net loss of $4,537,070 on revenues of $34,394. The company had a deficit that was being funded by debt and the issuance of equity. The company stated it was dependent on its ability to raise further capital through equity financing to meet its commitments and fund its ongoing operations.

(c) On April 23, 2018, PreveCeutical issued its Management Discussion and Analysis (April 2018 MD&A) for the year ended December 31, 2017. According to its April 2018 MD&A, as PreveCeutical's revenue income was minimal at the time, the operations and commitments were financed by funding from equity and debt. To ensure that the company had funding to continue its operations, management took a number of steps outlined under the Liquidity and Capital Resources section, which stated:

> The company anticipates that it will continue to incur more costs, including research and development costs, than revenue into next year.

Management continues to take steps to ensure that the company has funds to pay for its obligations and continue its operation. These include:

1. Securing investment in the company by way of private placements. With the completion of the transaction, the company has broader access to equity financing. PreveCeutical is currently working on a private placement for up to 16,000,000 units described under subsequent events.

(d) PreveCeutical's April 2018 MD&A also included the following financial information:

Year ended December 31,	**2017**	**2016**
Revenues	$22,234	$31,054
Net loss	$7,231,885	$3,127,217

(e) According to PreveCeutical's consolidated financial statements for the years ended December 31, 2017 and 2016, its expenses included the following:

Year ended December 31,	**2017**	**2016**
Consulting fees	$120,518	$264,801
Marketing and promotion	$154,508	$84,391
Total	$275,026	$349,192

(f) PreveCeutical's consolidated financial statements included the following going-concern note:

Several conditions exist that cast significant doubt about the ability of the company to continue as a going concern. The company does not have significant revenue to date and has incurred operating losses since inception. As at December 31, 2017, the company had a deficit which is being funded by debt and issuance of equity. Management anticipates that the company will meet its obligations and maintain its operations to support its payments to creditors and realize profits from future business activities. The company is dependent on its ability to raise further capital through equity financing to meet its commitments and fund its ongoing operations.

(g) On May 29, 2018, PreveCeutical issued its Management Discussion and Analysis (May 2018 MD&A) for the first quarter of 2018.

(h) According to the May 2018 MD&A, PreveCeutical continued to focus on business development and its research programs. These programs continued to be funded by equity and debt. As the company's revenue income was minimal at that time, the cost of operations and meeting of commitments was being financed by funding from equity and debt.

(i) The May 2018 MD&A also stated that PreveCeutical anticipated that it would continue to incur more costs, including research and development costs, than revenue into the following year. Management continued to take steps to ensure that the company had funds to pay for its obligations and continue its operations, including securing investment in the company by way of private placements. PreveCeutical noted that it was currently working on a private placement for up to 80,000,000 units, being the $4 million private placement announced in April 2018.

(j) PreveCeutical's May 2018 MD&A included the following financial information:

Three months ended	**March 31, 2018**	**March 31, 2017**
Consulting fees	$79,420	$5,565
Marketing and promotion	$58,979	$33,077
Total	$138,399	$38,642

(k) PreveCeutical's interim financial statements for that period also noted that several conditions existed that cast significant doubt about the ability of the company to continue as a going concern.

[39] PreveCeutical's management information circular for a shareholders' meeting in May of 2018 included a table describing all shareholders who were known to own or control shares representing over 10% of voting control. Van Deventer, his wife and a company which they controlled were listed as owning or controlling almost exactly 50% of the common shares of PreveCeutical.

III. Procedural History

[40] The Notice of Hearing was issued on February 14, 2022 (2022 BCSECCOM 45). An amended Notice of Hearing was issued on February 28, 2023 (2023 BCSECCOM 96). Some of the events which followed are summarized in the respondents' submissions on liability as follows:

> 18. On April 11, 2022, counsel for the Respondents sought the following clarifications of the misconduct alleged in the Notice of Hearing:
>
> > It is not clear how the omission that PreveCeutical would retain less than 50% of the proceeds of the private placement rendered any particular statement in the News Release and therefore the Material Change Report, a misrepresentation. Our clients are entitled to know which statement or

statements in these documents was rendered false or misleading in the circumstances in which it was made.

…

There is also the matter of the allegation of a breach of s. 168.1(1)(d). There are, as you know, very few decisions concerning this section of the 2018 Act.

…

Our clients are entitled to know what the Executive Director is alleging in the following respects:

(a) what statement or information in the Material Change Report is in issue;

(b) how the statement or information, at the time the statement was made, in light of the circumstances in which it was made, is false or misleading, or was made false or misleading as a result of the omission of facts; and

(c) whether it is alleged that the statement or information was false or misleading?

19. In a follow-up telephone call, counsel for the Executive Director advised that the Executive Director had not established any rule or standard to the effect that if a certain percentage of funds raised in a private placement has been spent on consultants, this fact must be disclosed. Counsel for the Executive Director was asked to consider and advise how the alleged omission rendered anything in the material change report materially false in violation of s. 168.1(1)(b).

20. On April 14, 2022, at the set-date hearing, counsel for the Executive Director advised that the allegations against the Respondents have "nothing to do with the veracity of the arrangements entered into with the consultants" and no impropriety was alleged with respect to the fees paid or payable to the consultants or the services to be provided pursuant to the agreements with the consultants.

21. Counsel for the Executive Director described the alleged misconduct as a narrow legal issue:

> It's very, from our perspective, a narrow legal issue of, you know, you, have, you have issued a news release, and based on your prior disclosure before that, and the investor's sentiment, we allege that it's a misrepresentation and that's, you know, that's the issue. It's a narrow legal issue.

22. This did not assist in clarifying for the Respondents how the alleged omission resulted in a misrepresentation in the June 29 News Release or a materially false statement in the June 29 MCR. The Respondents were left in the position that the Executive Director would be making the submission that the Respondents breached ss. 50(1)(d) and 168.1(1)(b) on the basis of "prior disclosure" and "investor's sentiment", neither of which was explained or defined.

[41] At some point the respondents became aware of proceedings before the Commission related to Bam Bam Resources Corp., formerly known as New Point Exploration Corp. The respondents applied to intervene in that proceeding. In the course of resisting that application, the executive director delivered written submissions which included the following paragraphs:

Materiality is highly fact-specific to the issuer

6. The central issues in this case are whether Bam Bam Resources' failure to disclose how much of the funds raised in two private placements had already been spent or owed were omissions to state a material fact and therefore misrepresentations, contrary to section 50(1)(d) of the Act.

…

9. Materiality is therefore highly fact-specific to the issuer.

…

12. In considering the market impact test at this hearing, the panel will have to consider:

- What was the investor perception of Bam Bam Resources' business and prospects during the relevant period?

- Would the information that was not disclosed in the news releases reasonably be expected to change that perception?

- If so, would the information reasonably be expected to change the perception to an extent sufficient to significantly affect Bam Bam Resources' market price?

13. None of the panel's answers to these questions at this hearing will have any applicability to the panel's answers to the same questions at the PreveCeutical hearing.

[42] The panel in the *New Point* proceeding, discussed at length below, dismissed the respondents' application for intervenor status, stating in part:

> [14] In this case, it is fair characterization that the reason for the proposed intervention was to assist this panel in correctly interpreting the Act and in correctly interpreting the evidence. The applicants also expressed concern that any precedent set in this proceeding would be binding, or at least influential, in its subsequent hearing, perhaps to the applicant's prejudice. We do not find those arguments persuasive.
>
> …
>
> [16] Although all panels, including this panel, will look to the Commission's own precedents for guidance, all panels must also consider alternative legal arguments raised in other proceedings and reach what they consider to be correct legal conclusions in light of Vavilov. As a result, the applicants will be in a position to fairly advance their own arguments and will not be prejudiced if they can only advance those arguments within their own proceedings.
>
> [17] In addition, we agree with the executive director that, although the general fact patterns between this proceeding and the PreveCeutical proceeding have many similarities, the factual conclusions in each case must be decided on a detailed analysis of the individual facts of each proceeding. As a result, the application [sic] will not be prejudiced if their evidentiary input is confined to their own proceedings.

[43] On November 29, 2022, counsel for the respondents wrote to counsel for the executive director seeking further clarification of the Notice of Hearing. Counsel for the executive director replied primarily by referring to paragraphs 8 through 10 of the Notice of Hearing and stating that the central issues for the panel to decide are whether PreveCeutical's announcement of the proceeds of the financing, but "failure to disclose that it would retain less than 50% of that amount due to the undisclosed consulting fees…" was material.

[44] At a hearing management meeting, counsel for the respondents asserted that the respondents did not know the case they were required to meet. As a result, the hearing panel chair directed the executive director to provide a further letter addressing the concerns raised by the respondents. The executive director then wrote to counsel for the respondents stating, in part:

> In your letter you advise that your clients are entitled to know which statement or statements in the news release and material change report dated June 29, 2018 was rendered false or misleading in the circumstances in which it was made.
>
> The alleged misleading statement was made in section 4 of the material change report dated June 29, 2018. It was also made in section 5, which attached the June 29, 2018 news release.
>
> **EXECUTIVE DIRECTOR'S THEORY OF THE CASE**
> ***Section 50(1) (d) allegation***
> PreveCeutical's failure to disclose in the news release that it would retain less than 50% of the funds raised (above $3.25 million) was an omission to state a material fact that was necessary to prevent a statement that was made – that it raised about $6.54 million - from being misleading in the circumstances in which it was made.
>
> ***Section 168.1(1)(b) allegation***
> PreveCeutical stated that it raised about $6.54 million in the material change report, but failed to disclose that it would retain less than 50% of the funds raised (about $3.25 million). That was a statement in a record required to be filed under the Act that in a material respect omitted facts necessary to make the statement not misleading. It was material as it was a half-truth and therefore a significant departure from the truth. It was also highly significant information for investors.
>
> [emphasis added]

[45] On December 12, 2022, the respondents delivered a notice of application for particulars seeking the following orders:

> 14. With respect to the alleged breach of s. 50(1)(d), the respondents seek an order the Executive Director provide the following information and explanations in order for the respondents to be able to meet the Executive Directors' case alleged against them:
>
> (a) with reference to paragraph (a) of the definition of "material fact" in s. 1(1);
>
> (i) what is the "significant effect" that the Executive Director alleges the disclosure of the Consulting Fees "would reasonably be expected to have ... on the market price or value of" PreveCeutical's shares. Without a "significant effect", there cannot be a "misrepresentation" of a "material fact";
>
> (ii) what is the threshold, expressed as an amount or as percentage of funds raised by PreveCeutical in the Private Placement, above which the

Executive Director asserts that disclosure of the Consulting Fees in the June 29 News Release would reasonably be expected to have a significant effect on the market price or value of PreveCeutical's shares;

(b) with reference to paragraph (b)(ii) of the definition of "misrepresentation" in s. 1(1):

(i) what are the "circumstances in which" the News Release Gross Proceeds Statement "was made" that made the disclosure of the Consulting Fees "necessary to prevent [the News Release Gross Proceeds Statement] from being misleading";

(ii) in what way was the disclosure of the Consulting Fees "necessary to prevent [the News Release Gross Proceeds Statement] from being misleading in the circumstances in which it was made"; and

(iii) what is the threshold, expressed as an amount or as percentage of funds raised by PreveCeutical in the Financing, above which the Executive Director asserts that disclosure of the Consulting Fees in the June 29 News Release was "necessary to prevent [the News Release Gross Proceeds Statement] from being misleading in the circumstances in which it was made"; and

(c) what is the evidence and legal basis upon which the Executive Director intends to establish each of the details of its allegations in paragraphs (a) and (b) above.

15. As the alleged breach is without precedent, the respondents need to known [sic] what about the "circumstances" of PreveCeutical, which made the further disclosure necessary. For example, if the Executive Director going to argue there was something particular to PreveCeutical's financial condition, the respondents are entitled to know what that is so they can prepare their defence. There is nothing obvious about the "circumstances" which would eliminate the need for the requested order. Similarly, the respondents are also entitled to know, at what point, the failure to disclose consulting fees becomes a misrepresentation.

16. With respect to the alleged breach of s. 168.1(1)(b), the respondents seek an order the Executive Director provide the following relevant information and explanation in order for the respondents to be able to meet the Executive Directors' case alleged against them:

(a) which statement is the Executive Director alleging is the basis for the breach of s. 168.1(1)(b): is it the MCR Gross Proceeds Statement, the News Release Gross Proceeds Statement, or both. Although the statements are similar, they are not the same;

(b) with reference to the wording of s. 168.1(1)(b):

(i) what are the "time and circumstances under which the statement or statements were made" in which the disclosure of the Consulting Fees in the Material Change Report was "necessary to make the statement or statements not... misleading";

(ii) what is the "material respect" in which the disclosure of the Consulting Fees in the Material Change Report was "necessary to make the statement or statements not... misleading"; and

(iii) what is the threshold, expressed as an amount or as percentage of funds raised by PreveCeutical in the Private Placement, above which the Executive Director asserts that disclosure of the Consulting Fees in the Material Change Report was "necessary to make the statement or statements not ... misleading";

(c) with reference to the December 2, 2022 letter, what is the threshold, expressed as an amount or as percentage of funds raised by PreveCeutical in the Private Placement, above which the Executive Director asserts that disclosure of the Consulting Fees in the Material Change Report was necessary to prevent the statement or statements from being "a half truth and therefor a significant departure from the truth"; and

(d) what is the evidence and legal basis upon which the Executive Director intends to establish each of the details of its allegations in paragraphs (b) and (c) above.

[46] The core of the executive director's response to the application can be found in the following paragraphs of the executive director's written response:

13. In the notice of hearing, the executive director alleges the respondents contravened two sections of the Act. The executive director alleges that PreveCeutical made a misrepresentation in a news release and material change report dated June 29, 2018.

14. The executive director alleges that PreveCeutical announced that it closed a private placement for gross proceeds of about $6.54 million, but failed to disclose that it would only retain about $3.25 million, or less than 50% of the amount raised, due to amounts it had already spent or owed on consulting fees. In doing so, he alleges that PreveCeutical made a misrepresentation contrary to section 50(1)(d) of the Act.

15. The executive director alleges that PreveCeutival [sic] filed a material change report containing the same representation. In doing so, he alleges that PreveCeutical contravened section 168.1(1)(b).

16. The executive director provided the respondents with further particulars of the allegations in a letter dated February 14, 2022. This included the names of each of the consultants and the amounts PreveCeutical paid or owed each of them.

17. In a letter to the respondents' counsel dated December 2, 2022, the executive director provided further clarification of the allegations against PreveCeutical. He also set out his theory of the case for both alleged contraventions of the Act.

18. In the circumstances, the respondents are well aware of the case to be met at the hearing and have retained senior counsel to defend the allegations.

19. The respondents' application purports to seek "information and particulars" of the allegations in the notice of hearing. In fact, the respondents are seeking to be *shown the way in which the issues will be proven*. That is not a proper use of particulars.

[47] The hearing panel dismissed the application for further particulars in a written decision dated January 11, 2023 (2023 BCSECCOM 22). Some of the conclusions expressed by the hearing panel are the following:

> [5] The Notice of Hearing focuses on representations made by PreveCeutical which, the Notice of Hearing alleges, were misleading because they omitted certain information which was necessary to prevent the representations from being misleading in the circumstances in which they were made. For reasons which are discussed below, it is clear that two highly relevant "circumstances" in this proceeding are the expectations of the market regarding the business in which PreveCeutical was engaged and the uses to which PreveCeutical would likely be expected to put any funds raised.
>
> [6] The expectations of the market are shaped to a large degree by an issuer's disclosure in relation to any offering document filed as well as all disclosure made by the issuer to fulfil continuous disclosure obligations.
>
> [7] The expectations of the market will in turn influence whether an announcement that an issuer has raised funds through a private placement will be perceived as good news for the issuer or bad news or neutral news for the issuer. For example, a private placement might be seen as bad news if the private placement results in share ownership dilution and if the likely use for the funds raised is not perceived as beneficial. In contrast, if there is a perception that the issuer is likely to put the funds raised to a productive use that might be seen as good news. To provide another example, a private placement might be seen as neutral if there is a perception that the issuer requires some funds to meet existing obligations and the private placement achieves that need and allows the issuer to carry on as before.
>
> …
>
> [28] In this proceeding the onus is on the executive director to prove a breach of the Act as alleged in the Notice of Hearing.
>
> [29] Fairness requires that the allegations be sufficiently clear that the Respondents can understand the allegations and prepare a defence.
>
> [30] The analysis of what is fair to the Respondents can proceed from a very practical perspective. Although the opportunity to provide submissions during the liability portion of the hearing is relatively distant, the evidentiary aspect of the liability portion is near. The Respondents must now make tactical decisions including what cross-examination questions to ask and what evidence, if any, they wish to prepare and present. They require a degree of clarity about the executive director's case which is sufficient to take those steps.
>
> [31] The executive director suggests that the allegations are straightforward and easy to understand. Based on the submissions made to us so far, and putting the concepts into our own words, the executive director seeks to prove that when PreveCeutical announced it had raised significant funds the market would likely have assumed, based on PreveCeutical's own disclosure, that those funds would be used for certain purposes. As a result, PreveCeutical's failure to disclose at the same time that a significant proportion of those funds were being used for a different purpose was materially misleading, as that concept is used in the Act.

> There might be many alternative ways to express the allegations, but we find that the concepts are clear and easy to understand.
>
> [32] We do not know what evidence will be presented by the executive director in an effort to prove the allegations. We can infer that much of the evidence will consist of prior disclosures made by PreveCeutical which relates to the business of PreveCeutical and how it was spending its funds up to the dates of the alleged misrepresentations. We know that the initial disclosure list has been provided to the Respondents and that by this stage a reliance list has been or will soon be disclosed to the Respondents. That level of disclosure will usually be sufficient to provide respondents with enough information to respond to the case against them in a fair way. The onus is on a respondent to establish otherwise, and not merely by asserting that fairness requires that the executive director provide more than a clear description of the nature of the allegations made and the delivery of all evidence in support of the allegations. If a respondent asserts that fairness requires more, the onus is on the respondent to establish why and how that is the case.

[48] The hearing panel stated in its decision dismissing the application for further particulars that if the executive director's actual case diverged from what had been disclosed to the respondents, the respondents could apply for a remedy, including for leave to introduce further evidence to address any potential unfairness.

[49] The evidentiary hearing commenced on October 16, 2023. After the evidentiary hearing, the Commission's decision in the proceeding relating to New Point Exploration Corp. was issued in *Re New Point Exploration*, 2023 BCSECCOM 170 (*New Point*). During submissions in this case counsel for the respondents objected to what he characterized as a dramatic "post New Point" reframing of the allegations by the executive director. The respondents sought a stay of proceedings as a result of the purported reframing and a ruling limiting the scope of the Notice of Hearing. After hearing from the parties regarding the procedural objections, the panel asked the parties to provide precedents regarding the nature of particulars in an administrative proceeding such as this one.

[50] The executive director's response focused on the Court of Appeal's decision in *McCabe v. British Columbia (Securities Commission)*, 2015 BCCA 176, regarding circumstances in which a respondent should be held to have sufficient information regarding the case to be met. The respondents provided more detailed submissions than they had been asked to provide, with emphasis on the right of a respondent to know enough about the allegations to make a full answer as well as the need to confine the scope of a proceeding to the substance of the notice of hearing.

[51] Our conclusions are that there is a limited scope for particulars in an administrative proceeding of the nature of these section 161 hearings under the Act. Particulars should be provided by the executive director, and can be ordered by a panel, when particulars are important to help a respondent understand the nature of the case to be met and what evidence to call or what cross-examination questions to ask. As demonstrated in our earlier ruling in this proceeding, we conclude there is no need for the executive director to provide particulars to detail the connection between individual items of evidence and what inferences the executive director will eventually submit should be drawn from such evidence or to provide in advance details of legal arguments. Section 161 proceedings are structured with documentary disclosure before the evidentiary hearing, with all evidence from the executive director submitted before the respondent must call its own evidence and with the executive director's detailed submissions

delivered before a respondent is called upon to provide a legal argument. At the time of an evidentiary hearing a respondent might not know the nuance of the legal arguments which the executive director will make in submissions at the end of the hearing, but the very structure of our proceedings allows a respondent to receive sufficient detail to anticipate what evidence will be helpful for that respondent to call and what cross-examination questions to ask. As we have noted, in some cases it can be appropriate to order the delivery of particulars before the evidentiary hearing.

[52] Circumstances may arise where after an evidentiary hearing, a respondent establishes that upon seeing the executive director's legal argument the respondent realizes that further evidence should have been called which the respondent could not have anticipated in light of whatever particulars had been delivered. Where such circumstances are established, the panel will have to exercise its discretion to provide an appropriate remedy. Sometimes the remedy might be the one which we identified to the respondents in our ruling of January 11, 2023 regarding the respondents' application for particulars. The respondents had the option of applying to re-open the evidentiary hearing to supplement the record and eliminate any potential prejudice. If any remedy was appropriate in this proceeding, that was the one. The respondents elected not to pursue that remedy.

[53] We would add that we agree with the reply submission of the executive director that the respondents did in fact call evidence responsive to the allegations in question. Counsel for the respondents asserts that if he had known in advance of the current position of the executive director, he would have called evidence from Van Deventer regarding the reasons why the news release did address the use of proceeds, evidence from others regarding the intended use of proceeds and evidence from witnesses regarding the characterization of the expenses disclosed in PreveCeutical's financial statements. In answer, the executive director fairly points out the following in paragraphs 12 through 15 of his submissions:

> 12. When Mr. Van Deventer was questioned about the June 29, 2018 news release in his direct evidence, he was only asked about the use of proceeds section:
>
> Q. The news release dated June 29th, 2018 is PreveCeutical 53, please. This is the news release dated June 29, 2018 at issue in these proceedings. Announces the closing of the private placement describes the number of units, price of the units, the gross proceeds raised of $6,539,987.50. Goes on to provide other information about the warrants the hold period. In the fourth paragraph there is a reference to finders fees and if we could scroll down a little bit. You have a statement about your being pleased with the oversubscribed private placement. And then scroll down just a little further, the same statement that appeared in the June 25th, news release appears at this one at the top of page 2 says:
>
> "The proceeds are intended to fund the company's research and development programs and for general working capital purposes."
>
> A. That's correct.
> Q. No reference to the amounts spent on the consultants. What is the explanation for that?
> A. I didn't believe that was supposed to be disclosed.
>
> 13. The respondents also called two experts at the hearing who gave opinions related to PreveCeutical's use of the proceeds of the private placement on consulting fees.

14. Mr. Boyce was asked to give an opinion that went beyond a narrow reading of paragraph 9 of the [Notice of Hearing]. He summarized the opinion counsel for the respondents asked him to give as follows:

> In summary, the question before me is whether there is any indication in the trading in PreveCeutical shares around the time of the press releases and material change reports **that the failure to disclose the consulting contracts and the costs thereof would be considered by market participants to have been material** [emphasis added].

15. Mr. Maranda was also asked to give an opinion that went beyond a narrow reading of paragraph 9 of the [Notice of Hearing]. He summarized the opinion counsel for the respondents asked him to give as follows:

> I have been asked to conduct research into the standard practice and prevalence of disclosure in News Releases/Press releases by small cap firms announcing a financing, **particularly as it pertains to the disclosure of any costs incurred prior to the Release and to the disclosure of any consulting fees** [emphasis added].

[54] We would also add, regarding the question of whether evidence could have been led by PreveCeutical regarding the proper characterization of the categories of expenses disclosed in PreveCeutical's financial statements, that the real issue is not how any particular manager of PreveCeutical interpreted the descriptions of expenses as divided between headings such as "consultants", "business development and investor relations" or "marketing and promotions". The real issue is how a reasonable investor would have interpreted those terms as they were used in the financial statements of PreveCeutical. We do not agree that the presentation of opinions on that question would have been helpful.

[55] In summary, although we agree that the only allegations which the respondents must answer are those contained in the Notice of Hearing, fairly interpreted, there is no basis for any further limitation on the scope of the proceeding and there is certainly no basis for a stay. We do not find any legitimate basis to criticize the way the executive director has conducted this proceeding.

IV. Applicable Statutory Provisions

Section 50(1)(d)

[56] During the relevant period, section 50(1)(d) of the Act stated, in part:

> A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:
>
> (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation

Defined Terms

[57] Section 1 of the Act has the following definitions:

> "**investor relations activities**" means:
> any activities or oral or written communications, by or on behalf of an issuer or security

holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer, but does not include

(a) the dissemination of information provided, or records prepared, in the ordinary course of the business of the issuer
    (i) to promote the sale of products or services of the issuer, or
    (ii) to raise public awareness of the issuer,
    that cannot reasonably be considered to promote the purchase or sale of securities of the issuer,
(b) activities or communications necessary to comply with the requirements of
    (i) this Act or the regulations, or
    (ii) the bylaws, rules or other regulatory instruments of a self regulatory body, exchange or quotation and trade reporting system,
(c) communications by a publisher of, or writer for, a newspaper, news magazine or business or financial publication, that is of general and regular paid circulation, distributed only to subscribers to it for value or to purchasers of it, if
    (i) the communication is only through the newspaper, magazine or publication, and
    (ii) the publisher or writer receives no commission or other consideration other than for acting in the capacity of publisher or writer, or
(d) activities or communications that may be prescribed for the purpose of this definition;

"**misrepresentation**" means

(a) an untrue statement of a material fact, or
(b) an omission to state a material fact that is
    (i) required to be stated, or
    (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made;

"**material fact**" means,

(a) when used in relation to a security issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the security.

Material change reports

[58] Section 85 of the Act requires a reporting issuer to provide timely disclosure of a material change.

[59] Section 1 of the Act defines "material change" as:

(a) If used in relation to an issuer other than an investment fund,
    (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer, or
    (ii) a decision to implement a change referred to in subparagraph (i) made by
        (A) the directors of the issuer, or
        (B) senior management of the issuer who believe that confirmation of the decision by the directors is probable.

[60] Section 7.1 (1) of National Instrument 51-102, *Continuous Disclosure Obligations*, states:

(1) Subject to subsection (2), if a material change occurs in the affairs of a reporting issuer, the reporting issuer must

(a) immediately issue and file a news release authorized by an executive officer disclosing the nature and substance of the change; and
(b) as soon as practicable, and in any event within 10 days of the date on which the change occurs, file a Form 51-102F3 Material Change Report with respect to the material change.

Section 168.1(1)(b)

[61] During the relevant period, section 168(1)(b) of the Act stated:

> A person must not
> (b) make a statement or provide information in any record required to be filed, provided, delivered or sent under this Act that in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading

[62] Section 168.1(2) provides that a person does not contravene subsection (1) if the person:

> (a) did not know, and
> (b) in the exercise of reasonable diligence, could not have known
> that the statement or information was false or misleading.

Section 168.2(1)

[63] Section 168.2(1) of the Act states that:

> (1) If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision as the case may be.

CSE Policy 5 – Timely disclosure, trading halts and posting requirements

[64] Section 1.1 of CSE Policy 5, *Timely Disclosure, Trading Halts and Posting Requirements*, stated during the relevant period:

> 1.1 The Exchange believes that two of the fundamental requirements for a fair and efficient capital market that fosters confidence and protects investors from unfair, improper or fraudulent practices are: (a) high quality and timely continuous disclosure by Listed Issuers, and (b) comprehensive market regulation to ensure that high quality and timely continuous disclosure occurs. All investors must have equal and timely access to material information about a Listed Issuer, both to allow investors to make reasoned and informed investment decisions, and to participate in securities markets on an equal footing with other investors.

[65] Section 2.3 of CSE Policy 5 stated that "actual or proposed developments that require immediate disclosure include, but are not limited to, the following:

> (g) public or private sale of additional securities;
>
> …
>
> (j) entering into or loss of significant contracts.

[66] Sections 8.1 and 8.2 of CSE Policy 5 stated the following about the content of news releases:

> 8.1 Announcements of material information should be factual and balanced and unfavourable news must be disclosed just as promptly and completely as favourable news. News releases must contain sufficient detail to enable investors to assess the importance of the information to allow them to make informed investment decisions. Listed Issuers should communicate clearly and accurately the nature of the information, without including unnecessary details, exaggerated reports or editorial commentary.
>
> 8.2 All news releases must include the name of an officer or director of the Listed Issuer who is responsible for the announcement, together with the Issuer's telephone number. The Issuer may also include the name and telephone number of an additional contact person.

CSE Policy 7 – Significant transactions and developments

[67] Section 1.1 of CSE Policy 7, Significant transactions and developments, stated during the relevant period:

> 1.1 The Exchange defines the term “significant transaction” as any corporate transaction, not involving equity securities, that constitutes material information concerning the Listed Issuer. Significant transactions include, but are not limited to, material acquisitions, dispositions, option and joint venture agreements or license agreements entered into by the Listed Issuer. In addition, “significant transaction” includes
>
> …
>
> (d) entering into any oral or written contract for Investor Relations Activities relating to the Listed Issuer by the Listed Issuer or by any other person of which the Listed Issuer has knowledge.

[68] CSE Policy 7 stated that Listed Issuers must take the following steps relating to a significant transaction:

> 1.3 If the significant transaction constitutes material information concerning the Listed Issuer, the Issuer must disseminate a news release pursuant to Policy 5.
>
> 1.4 The Listed Issuer must include updated information relating to significant transactions and developments in its Monthly Progress Report and Quarterly Listing Statement.
>
> …
>
> 1.6 Listed Issuers involved in a significant transaction or development must immediately post notice of the proposed significant transaction or development (Form 10) concurrently or as soon as practicable following the issuance of a news release announcing the significant transaction or development (if the significant transaction constitutes material information concerning the Listed Issuer) or upon the Listed Issuer agreeing to the significant transaction (in all other cases).
>
> …
>
> 1.8 Forthwith upon closing of a significant transaction, the Listed Issuer must post:
>
> (a) a letter from the Listed Issuer confirming receipt of proceeds or payment of consideration provided for in the agreement(s) relating to the significant transaction (or describing the receipt or payment schedule);

[69] CSE Policy 7 also included the following restrictions on contracts for investor relations activities:

> 2.1 Compensation to any persons providing Investor Relations Activities for a Listed Issuer must be reasonable in proportion to the financial resources and level of operations of the Listed Issuer and should be based on the value of the services provided and not on the Listed Issuer's market performance. In particular, compensation to persons providing Investor Relations Activities may not be determined in whole or in part by the Listed Issuer's securities attaining certain price or trading volume thresholds. The total number of listed securities (either issued directly or issuable on exercise of options or convertible securities) provided as compensation to persons providing Investor Relations Activities cannot exceed 1% of the outstanding number of listed securities in any 12-month period.

V. Key Precedents

[70] Counsel for both the executive director and the respondents agreed that the leading precedent in this context is *New Point*. We agree, although we note that *New Point* itself relied upon other precedents and that since the arguments in this proceeding the Commission has issued its ruling in *Re BLOK Technologies Inc.,* 2024 BCSECCOM 55.

[71] The Respondents submit that *New Point* addressed a novel point of law regarding the level of spending on consultants by an issuer which triggers an obligation to disclose that spending when announcing the closing of a private placement. To some extent that characterization is accurate, but to some extent that characterization is a distraction. The core issue in *New Point* and here, is that the Act has provisions which in certain circumstances prohibit parties from making statements which are literally true but are misleading due to the absence of other information. When viewed in that manner, the *New Point* decision is not novel, but simply represents the application of established legal principles in a new context. The application of established principles in a new context does not constitute an extension of our disclosure laws. There are many contexts in which issuers and other parties have to make disclosure. The potential to mislead by omission arises in most, if not all of them. The Act does not identify each situation in which misleading statements of this type are prohibited. The prohibitions are instead more general and principled, which is appropriate and even essential given the range of potential scenarios in which a party might tell a misleading half-truth.

[72] The leading relevant precedent in British Columbia is *Tietz v. Cryptobloc Technologies Corp*., 2021 BCSC 2275. In *Tietz* Justice Wilkinson stated:

> [24] It is clear that the definition of misrepresentation encompasses “half-truths.” An issuer cannot escape liability by only stating facts that are, strictly speaking, true, but which become misleading when considered alongside the omitted information (*Kerr v. Danier Leather Inc.* (2005), 2005 CanLII 46630 (ON CA), 261 D.L.R. (4th) 400 at paras. 112-113 (Ont. C.A.):
>
> > [112] … By defining "an omission to state a material fact necessary to make a statement not misleading in the light of the circumstances in which it was made" as a misrepresentation, the Legislature intended to capture under the rubric of misrepresentation so-called "half-truths."
> >
> > [113] For example, if an issuer said in a prospectus, truthfully, that it had acquired a patent, but it omitted to say that it was engaged in litigation challenging the

validity of the patent, it may well be liable for prospectus misrepresentation. Or, if an issuer had said that over the past ten years its profits had averaged $4 million annually, without also disclosing that its profits were $40 million in the first year and zero in the next nine years, this half-truth would also likely amount to a misrepresentation. In each example, the second statement was necessary to make the first statement - "in the circumstances" - not misleading.

[73] Another important precedent in British Columbia is *Re Canaco Resources Inc*., 2013 BCSECCOM 310. In that case the issuer was a mining company conducting an active drilling program on a property. The issuer's earlier drilling results had been disclosed to the public, but many subsequent drilling results were not disclosed. The executive director issued a notice of hearing regarding Canaco's failure to make that disclosure. Canaco argued that because the new drilling results were part of an ongoing program of infill drilling and were generally consistent with what the company had announced previously, there was no duty to disclose. The hearing panel ruled, in part, as follows at paragraphs 84 and 92:

> [84] …These are the principles that follow from these cases:
>
> . . .
>
> 3. The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event?
>
> …
>
> [92] The definitions of material fact and material change measure the impact on the "market price or value" of the issuer's securities. The implication is that "market price" and "value" can be affected differently by a given fact or event.

[74] The hearing panel in *New Point* relied upon *Tietz* and *Canaco* and also reached the following conclusions:

> *Liability relating to news releases*
>
> (a) Section 50(1)(d) of the Act forbids a person engaged in investor relations activities from making misrepresentations.
>
> (b) "Misrepresentation" is defined in section 1 of the Act as an untrue statement of a material fact or an omission to state a material fact that is required to be stated or necessary to prevent a statement from being false or misleading. The court in Tietz stated that "half-truths" are also captured "under the rubric of misrepresentation".
>
> (c) "Material fact" is defined in section 1 of the Act as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities." The test for materiality is the objective market impact test, defined in Canaco as "would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event".
>
> (d) "Investor relations activities" are defined in section 1 of the Act. The panel in *Re Brookmount Explorations Inc*., 2012 BCSECCOM 250, stated that it includes "any… written communications, by or on behalf of an issuer…that promote or reasonably could be expected to promote the purchase or sale of securities of

the issuer", including press releases.

(e) "Investor relations activities" do not include "activities or communications necessary to comply with the requirements of… this Act or its regulations, or… (an) exchange." This can be interpreted broadly or narrowly.

(f) A broad interpretation would mean that, if an issuer was required to announce something, then that issuer could include false statements or improper omissions and escape liability.

(g) A narrow interpretation would mean that only the parts of a communication that are mandatory are excluded from the definition of investor relations activities. All other parts are not excluded. Any facts included or omitted in a news release that are not legally compulsory may be investor relations activities.

(h) A narrow interpretation was preferred in order to align the definition with the textual, contextual and purposive analysis of the Act as a whole and to prevent "an absurdity that contradicts the purpose of the Act".

(i) New Point was engaging in investor relations activities when it issued the two news releases at issue and could not rely on any exclusions to escape liability.

(j) An issuer's continuous disclosure obligations require transparency that is sufficient for investors to make informed decisions based on that disclosure.

(k) New Point's news releases were misleading because when they announced that they had raised a significant amount of capital, they failed to disclose that most of the funds raised were not being spent on the company's resource exploration and exploitation commitments that had been previously disclosed. Instead, the majority of the funds raised were being spent on commitments that had not been disclosed to investors.

(l) New Point ought to have known that the news releases were misleading because the company had set market expectations through prior disclosures and financial statements and made a conscious choice to not disclose the information that would have prevented the news releases from being misleading.

(m) The non-disclosed information was material because, objectively, if it was disclosed, it would reasonably be expected to have a significant effect on the market price or value of New Point's securities (the market impact test). A reasonable investor would not have expected such a divergence between the expected use of funds and the actual use of those funds.

(n) All of the elements for a misrepresentation under section 50(1)(d) of the Act had been proven on a balance of probabilities by the executive director.

Liability relating to material change reports

(o) The news releases were included in material change reports.

(p) A person who files any record under the Act is prohibited from providing false or misleading statements or information or omitting to provide facts that are necessary to make records not false or misleading.

(q) Because New Point's material change reports failed to include the consultant payments which were already found to be material, those reports were misleading and contravened section 168.1(1)(b) of the Act.

Gardener-Evans' personal liability

(r) Gardener-Evans was, at all material times, New Point's decision-maker as CEO, president, and director. As such, he authorized, permitted or acquiesced in New Point's contraventions of the Act and therefore also contravened those sections under section 168.2 of the Act.

[75] In *BLOK Technologies*, BLOK was a venture company which was focused on blockchain technologies, with a particular focus on using the blockchain in cannabis supply chain management applications. In the 10 months leading up to a news release issued June 8, 2018, BLOK issued over a dozen news releases about its business. Many of those news releases included descriptions of business opportunities BLOK was pursuing and many of those business opportunities would be expected to require the allocation of funds by BLOK.

[76] The financial statements and MD&A which BLOK issued in the months leading up to the June 8, 2018 news release were consistent with BLOK being a company which was spending significant funds to develop its technology and would continue to do so well into the future. BLOK had never generated profits and BLOK had clearly disclosed that its ability to continue operating would require further financings.

[77] BLOK's June 8, 2018 news release announced that it had closed the second tranche of a financing and raised proceeds of $4,875,500. BLOK did not disclose that of the funds raised, $4,450,000 was already committed by BLOK to pay consultants. The panel in *BLOK Technologies* found that BLOK had not created expectations in the market that a significant amount would be spent on consulting fees. The panel said "In fact, previous communications relating to amounts spent on consultants and marketing created expectations that BLOK might spend in the few hundreds of thousands, not millions."

[78] The panel in *BLOK Technologies* found that BLOK had "created an expectation among investors that if it raised significant funds, a large part would go to the development of emerging blockchain technology and investments in strategic opportunities…". Given the "significant undisclosed divergence in the actual use of proceeds from that which was previously disclosed" the panel in BLOK found it was misleading for BLOK to disclose the amount of funds raised without also disclosing the amount paid or payable to consultants.

[79] The panel in *BLOK Technologies* also found:

> [134] We find that the undisclosed consulting fees were material. We conclude that reasonable investors who had been following communications from BLOK, would have seen BLOK as a company very much engaged in developing blockchain technology and investing in companies with that technology in various sectors in order to become a profitable enterprise. Reasonable investors would have expected that BLOK might use some of the monies raised to improve its financial position and pay expenses. But those reasonable investors would not have expected that BLOK would retain only about 18% of the monies raised to execute its business model and pay expenses.

VI. Positions of the Parties

A. Position of the executive director

[80] The executive director characterizes the facts in this case as being very similar to those in *New Point* and submits that the outcome should also be the same.

[81] The executive director submits that the first element of a misrepresentation under section 50(1)(d) of the Act is that when PreveCeutical issued the June 29, 2018 news release, PreveCeutical was engaging in investor relations activities. The executive director emphasizes the following quote from *New Point* at para. 153:

> …it must be shown that the news releases described New Point's business in terms which could reasonably be expected to promote the purchase or sale of securities of New Point. Further, any communications contained within the news releases which New Point was mandated to release for compliance reasons, particularly the fact of the private placement, would be excluded from the definition of investor relations activity.

[82] Turning to the present proceeding, the executive director argued as follows:

> The title and first paragraph of the June 29, 2018 news release were largely promotional. Both the title and first paragraph stated that the private placement was "oversubscribed", rather than simply referencing the gross proceeds of the private placement. This was promotional as it suggested stronger than expected investor demand for PreveCeutical's securities. This should be read in context with PreveCeutical's news release four days earlier, on June 25, 2018, where the company announced that it expected that its $4 million private placement would be oversubscribed "due to higher than expected investor interest".
>
> The second, third and fourth paragraphs of the June 29, 2018 news release disclose details of the securities issued and the proceeds raised. Applying the reasoning of the panel in Re New Point Exploration, these paragraphs may be excluded from investor relations activities if PreveCeutical had to disclose that particular information to comply with its continuous disclosure obligations under section 85 of the Act and with CSE policies.
>
> The fifth paragraph is highly promotional. Van Deventer is quoted as making the following positive comments about the company:
>
> - "I am very pleased to announce this oversubscribed placement due to investor demand in our financing…".
> - "…[I] see this as a strong endorsement of the quality of our research programs and management team."
> - "In keeping with our vision of becoming a global preventive health care company, PreveCeutical is continuing to meet key milestones with our portfolio of research and development programs that would boost shareholder value."
>
> The sixth paragraph stated that the net proceeds from the financing were "intended to fund the Company's research and development programs and for general working capital purposes". This could also be characterized as promotional as PreveCeutical consistently referenced its ongoing research and development projects in prior news releases.

[83] The executive director submitted that the June 29, 2018 news release was misleading. The executive director referenced the statements in *New Point* to the effect that the misleading nature of a communication would be established primarily by a review of the nature and degree of divergence between what should fairly be characterized as the pre-existing expectation of investors and the reality which was kept from investors. The executive director submitted that the market would have expected that if PreveCeutical raised a material amount of new capital:

(a) a large majority of the new capital would be spent on funding its research and development projects and, given PreveCeutical's recent losses totaling $500,000 per month, to pay for ongoing operations; and

(b) PreveCeutical would likely spend in the order of 10% of the new capital on consulting fees or marketing and promotion fees and would disclose the retainer of third-party consultants in a news release.

[84] The executive director submits that the market expectations which he says existed are established by the following evidence:

(a) PreveCeutical issued news releases to disclose the prior two consultants it had retained, the Susan Blond Group and Standyk & Partners, even though the cost to retain those consultants was much lower than the cost to retain the consultants who were retained at the time of the June 29, 2018 news release, and after the June 29, 2018 news release PreveCeutical resumed disclosing that it had retained consultants;

(b) According to its May 2018 MD&A, PreveCeutical continued to focus on business development and its research programs and they continued to be funded by equity and debt. A large majority of its public disclosure in the year prior to the June 29, 2018 news release focused on the research and development projects it was advancing;

(c) CSE Policy 5 required PreveCeutical to immediately disclose entering into significant contracts and CSE Policy 7 required PreveCeutical to immediately disclose entering into significant transactions constituting material information; and

(d) according to its financial statements, in 2016 PreveCeutical spent $350,000 on consulting fees and marketing and promotion, which represented about 13% of all expenses during the year, and in 2017 PreveCeutical spent about $275,000 on consulting fees and marketing and consulting, which represented about 6% of all expenses during the year.

[85] According to the calculations of the executive director, the total raised by PreveCeutical in the financing was $6.5 million and of that, $3.2 million, or 49%, was spent or committed to payment of consulting fees which were not promptly disclosed.

[86] The executive director submits that PreveCeutical must have known the statements it made were misleading because PreveCeutical created the market expectations which existed and PreveCeutical deliberately chose not to disclose in the June 29, 2018 news release the extent to which the funds raised were already committed to paying consultants.

[87] The executive director submits that the omissions were material. Consistent with *New Point* and other authorities, the executive director, submitted that the market impact test is applicable. The executive director quoted the following paragraphs (paragraphs 162 and 163) from *New Point*:

> This panel finds that the misrepresentations contained in the News Releases were material. We consider it obvious that reasonable investors who were aware of New Point would have seen New Point as an issuer which believed it had obtained rights to promising mineral properties and needed to advance exploration and development on those properties, and to cover ongoing acquisition expenses, in order to succeed as a business.

> Any reasonable investor would have been aware that venture companies such as New Point had ongoing overhead costs and would need to devote funds to operational uses. Any reasonable investor would have been aware that issuers sometimes retain consultants. But we conclude that the degree of divergence between the actual and expected use of funds which we have described above would have been material as that word is used in section 50(1)(d) of the Act.

[88] The executive director's concluding submissions regarding materiality were as follows:

> Applying this reasoning to the facts at issue in this case leads to the same conclusion: the misrepresentation in the June 29, 2018 news release was material. It was obvious that reasonably informed investors would have seen PreveCeutical as a health sciences company with several ongoing research and development programs that needed to be advanced and, as it had virtually no revenues, needed to fund those programs and its operations in order to succeed as a business. The company had lost almost $1.5 million in the first quarter of 2018 alone and its most recent financial statements had a going concern note.
>
> Any reasonable investor would have been aware that venture companies such as PreveCeutical had ongoing overhead costs and would need to devote funds to operational uses.

[89] The executive director submitted that we should place little or no weight on the opinion evidence of expert witnesses Maranda and Boyce regarding the question of materiality. Regarding the opinion of Mr. Maranda, the executive director referenced the significant number of examples shown to Mr. Maranda on cross-examination that contradicted his opinion that issuers do not typically disclose any prior costs in news releases announcing financings and do not typically announce consulting fees in news releases. In addition, the executive director submitted that the opinions expressed by Mr. Maranda have no bearing on the issue of materiality.

[90] Regarding the opinion of Mr. Boyce, the executive director submitted that that opinion, which relied on hindsight to assess materiality in the venture markets, is unworkable and not supported by the law.

[91] Regarding the material change report, the executive director submitted that although the legal questions to be answered regarding an alleged breach of section 168.1(1)(b) are somewhat distinct, those questions turn on the same factual conclusions as an analysis under section 50(1)(d). The executive director submits that liability has been established.

[92] The executive director submitted that if liability is found against PreveCeutical, it follows that Van Deventer is also liable based on section 168.2 of the Act because Van Deventer, as the CEO, was responsible for all decisions which led to PreveCeutical's liability.

B. Position of the respondents

[93] The respondents summarized their key arguments as follows:

(a) its prior disclosures would not have given rise to a strong expectation that the funds raised on the June 29 private placement would have been spent in a very different manner;

(b) the Executive Director's focus on the amount spent by PreveCeutical on "consultants" and "marketing and investor relations", as those terms are found in the financial statements, is misconceived. PreveCeutical was a research and development ("R&D") company that depended for its survival on raising money through equity financings as well as debt funding from its founders, Mr. and Mrs. Van Deventer. Its financial statements and MD&A's show that it spent most of its funds on marketing, investor relations, business development, and associated expenses such as attending conferences, meals and travel, in the hope of attracting new investors, and only a small portion on R&D expenses. For example, in the year ending December 31, 2017, it spent only 11.5% of its funds on R&D;

(c) as the services provided by the consultants were mainly focused on raising investor awareness, marketing and business development, and to a lesser extent on providing corporate services, the panel should not look at just the "consultants" and "marketing and investor relations" categories of expense in PreveCeutical's financial statements, but the full amount that PreveCeutical was spending on promoting itself to investors, and contrast that to the amount being spent on R&D. If the respondents had been informed of the case they had to meet, this evidence would have been much better developed during the hearing; and

(d) as a result, if there were any expectations on the part of investors as to how PreveCeutical would spend the funds that it raised, which is unlikely, spending about $3 million on "consultants" for business development and profile raising activities, as well as a smaller amount for corporate and secretarial services and obtaining advice regarding acquisitions, would be in keeping with the investors' expectations.

[94] The respondents placed great emphasis on the evidence from Van Deventer about the cost and time which would be involved in turning its research into intellectual property which would generate material revenues. His estimates were that, with respect to PreveCeutical's dual gene therapy project, the cost could be as much as $85 million and the time involved as much as 10 years.

[95] The respondents also placed great emphasis on the evidence that at no time prior to the June 29, 2018 private placement did PreveCeutical publish any budget, timetable or assurance that a commercially viable product would result from any of its efforts.

[96] PreveCeutical submits that it is established through uncontradicted evidence that actual and potential investors in PreveCeutical would have understood the extraordinary costs, length of time required and risk associated with PreveCeutical's business. It was submitted that any reasonable investor would understand that PreveCeutical was not going to develop a viable business solely with the gross amount of funds announced in the June 29, 2018 news release.

[97] PreveCeutical relied heavily on the opinions of an expert who reviewed the history of PreveCeutical's news releases and the market's reaction to those. PreveCeutical submitted that no prior announcement by PreveCeutical had any impact on the market. PreveCeutical developed that submission further, arguing that the investors who were interested in PreveCeutical would have been speculating, hoping for a major event such as a takeover by a company in the cannabis field, and that otherwise no news which PreveCeutical could issue would be material, or even of much interest to investors.

VII. Analysis and Conclusions

A. Standard of Proof

[98] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), the Supreme Court of Canada held, at paragraph 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[99] The Court also held at paragraph 46 that the "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".

[100] The Court went on to say at paragraphs 47 and 48 that the evidence has to be weighed against the:

> …inherent improbability that an event occurred…Inherent improbability will always depend upon the circumstances.
>
> …There can be no rule as to when and to what extent inherent improbability must be taken into account … It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred… .

[101] The Alberta Court of Appeal in *Walton v. Alberta (Securities Commission),* 2014 ABCA 273, quoted the underlying Alberta Securities Commission decision regarding circumstantial evidence at paragraph 27:

> To summarize, when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one – one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences… .

B. Analysis and conclusions regarding whether the news release contained a misrepresentation

[102] There are several elements which the executive director must establish in order to prove that the respondents breached the Act as alleged in the Notice of Hearing. In order to prove that PreveCeutical breached section 50(1)(d) of the Act, the executive director has to prove that:

(a) in issuing its June 29, 2018 news release, PreveCeutical was engaged in investor relations activities;

(b) the omission to include the information that PreveCeutical would retain only approximately half of the proceeds of the private placement, since the remainder had been spent or would be spent on consulting agreements, made the statement of the gross proceeds in the news release false or misleading;

(c) the omitted information was a material fact; and

(d) PreveCeutical knew or ought reasonably to have known that the disclosure of the gross proceeds, without more, was a misrepresentation.

[103] The definition of investor relations activities in section 1 of the Act references “any activities or oral or written communications, by or on behalf of any issuer…that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer.”

[104] Other decisions of this Commission, including *Brookmount* and *New Point*, have established that news releases, especially those with a promotional flavour, fall within the definition of investor relations activities. Adopting that reasoning and noting the use of such phrases as "over-subscribed placement due to investor demand", “a strong endorsement of the quality of our research programs and management team” and “our vision of becoming a global preventive health care company”, we find that when PreveCeutical issued its June 29, 2018 news release, it was engaging in investor relations activities, in that the promotional language used in the disclosure could reasonably be expected to promote the purchase or sale of PreveCeutical’s securities.

[105] We next consider the portion of the definition of “investor relations activities” that excludes “communications necessary to comply with the requirements of…[an] exchange”. This issue is one which the respondents argue was not correctly decided in *New Point*. We have carefully reviewed *New Point* and the respondents’ arguments and we agree with the analysis in *New Point*, which we choose not to repeat here. We did not reach that conclusion because *New Point* was decided first.

[106] As noted above, CSE Policy 5 requires the immediate disclosure by news release of the issuance of securities and the entering into or loss of significant contracts. Adopting the narrow interpretation of the exclusion for mandatory disclosure outlined in *New Point*, we find that only the parts of the June 29, 2018 news release which were required to be disclosed are excluded from the definition of investor relations activities. We find that the second paragraph of the June 29 news release, insofar as it describes the securities sold and the gross proceeds realized, was required disclosure.

[107] As set out in *New Point*, at paragraphs 130 and 131:

> Under this narrow interpretation, companies are afforded the benefit of the exclusion with respect to elements of a communication which an issuer is required to disclose for compliance reasons, but other elements of the communication in the form of included facts or excluded facts, are not excluded from the definition of investor relations activities.
>
> As an example of how the narrow interpretation of the exclusion would apply, if an issuer completes a private placement and must disclose the issuance of shares, the exclusion would apply only to those details of the share issuance which were disclosed by compulsion of law. Any other communication added to the disclosure, including any which was false or misleading or which omitted facts necessary to avoid making the communication misleading, would not be within the scope of the exclusion.

[108] We find that the omission of the information with respect to the consulting contracts is not saved by the exclusion for mandatory disclosure.

[109] The next element we analyzed was whether the announcement by PreveCeutical that it had closed a private placement for gross proceeds of approximately $6.5 million, while omitting to state that it already paid or committed to pay a total of approximately $3.2 million to consultants, was false or misleading.

[110] In the *New Point* case there was a confluence of factors which the panel relied on to conclude that reasonable investors would have been misled by the news releases in question given the absence of contemporaneous disclosure of New Point's intended expenditures on consultants. The same confluence of factors led the panel to conclude that the misleading omission was material in that it would reasonably be expected to have a significant effect on the market price or value of New Point's securities.

[111] The key factual elements which were present in *New Point* were:

(a) New Point's prior disclosures had created a strong expectation in the market that if New Point raised material new funds those funds would, to a significant degree, be devoted to exploration on New Point's projects, especially on the Majuba Hill Copper Project;

(b) the news releases in question strongly reinforced the pre-existing expectations; and

(c) a very high proportion of the funds raised in the private placement were used in a manner which was inconsistent with the expectations that had been created.

[112] The conclusions reached by another panel in the *BLOK Technologies* case were supported by an equivalent confluence of factors.

[113] It is not necessarily true that all of the three key factors which were prominent in *New Point* and in *BLOK Technologies* must be present in order to support findings that a news release was misleading. Even in the absence of clear evidence of a relevant pre-existing expectation, the contents of a news release might create a sufficiently clear impression about an issuer's intentions that the issuer's omission of necessary qualifying language will render that disclosure misleading.

[114] In the following paragraphs we provide our analysis of the pre-existing expectations of reasonable investors, of how the June 29, 2018 news release related to those pre-existing expectations and of the degree of divergence between those expectations and PreveCeutical's actual intentions regarding how the funds raised would be spent.

[115] The respondents and the executive director have sharply different characterizations of the evidence which relates to what reasonable investors would have expected. The respondents emphasize the long road which PreveCeutical had in front of it in terms of the time and funding needs before any significant commercialization would occur. They emphasize that in recent periods PreveCeutical's financial statements showed that PreveCeutical had not been spending much more than about 10% of available funds on research and development. They submit that reasonable investors would expect that if PreveCeutical raised a material amount of new funding, much of that funding would be absorbed by categories of expense such as business development and seeking joint ventures and, most significantly, on initiatives which would assist in raising future rounds of financing, since obviously those future rounds would be needed. The respondents submit that reasonable investors would not expect that PreveCeutical would use employees to undertake those activities, since it is a common practice for venture issuers to use consultants to provide such services. The respondents submit that many of the services to be provided under the consulting contracts at issue were for purposes which would be expected by reasonable investors, and that the executive director has not alleged that the consulting contracts were improper or did not have the potential to be of value to PreveCeutical.

[116] The executive director emphasizes that PreveCeutical was desperate for funds, as was conceded by Van Deventer. PreveCeutical was spending cash at a rate of around $500,000 per month, and some of that cash was going to pay for the research program in Australia. Van Deventer testified that if PreveCeutical did not continue to fund that research, all of the funds invested to that point would be wasted. On this view, PreveCeutical would have funding in place for over a year of operations if all of the funds raised were used for expected purposes, but only for half that time if half the funds raised had already been spent at the time the financing was announced. As a result, reasonable investors would not expect that PreveCeutical would choose to spend the funds in a way which would return PreveCeutical to a cash-starved position only a few months after the financing announced in the June 29, 2018 news release.

[117] The executive director emphasizes the historical promotional activities of PreveCeutical, including how PreveCeutical consistently touted its research activities. The executive director's submission can be summarized as suggesting that PreveCeutical had communicated to the market that the research it was describing was the primary focus of the business. The executive director also emphasizes that historically PreveCeutical had spent in the order of 10% of expenses on consultants.

[118] In our view, the totality of the evidence mostly supports the submissions of the executive director. However, the picture is not one-sided, and some elements of the respondents' position are, on balance, reasonable. We conclude that reasonable investors looking at the information available to PreveCeutical before June 29, 2018 would have been aware that PreveCeutical had a multi-year road ahead of it to move forward with its various research and development projects, and would have needed to raise further funds to continue its activities over that time. In addition, reasonable investors would expect that, if PreveCeutical raised material amounts of new funds, PreveCeutical might allocate some proportion of those funds towards finding contacts and positioning itself for future funding rounds, and PreveCeutical might use consultants to support some of those efforts.

[119] Those expectations are not inconsistent with the conclusion we have reached that reasonable investors would have expected that if PreveCeutical raised a material amount of new funds, it would have devoted a significant proportion of those funds to its research and development efforts and to cover its overhead for many months to come. Our conclusion differs from the position advocated for by the executive director only in one important detail: the executive director argues that in the above sentence we should use the words "a large majority" instead of "a significant proportion of" new funds raised.

[120] Regarding the fact that PreveCeutical had historically spent around 10% of its total expenses on consultants, we conclude that reasonable investors would expect that although the actual figure might fluctuate somewhat in the future, there would not be a radical departure from the historical pattern unless there was a change in circumstances to justify such a departure, but the receipt of a significant amount of new funds would justify some changes in spending patterns from the recent past.

[121] We turn to the June 29, 2018 news release itself. That document is reproduced in full above and we have also quoted from the executive director's submissions analyzing the words used in that document. We will not repeat any extensive quotations.

[122] Looking at the June 29, 2018 news release, we find that through such language as "strong endorsement of the quality of our research programs" and "PreveCeutical is continuing to meet key milestones with our portfolio of research and development programs that would boost

shareholder value", PreveCeutical was reinforcing the message reflecting the pre-existing expectations of reasonable investors as we have described them above.

[123] We now turn to the degree to which the proportion of the funds spent by PreveCeutical on consultants was inconsistent with the reasonable expectations of investors that we have concluded were present.

[124] According to the executive director, PreveCeutical announced that it had raised gross proceeds of $6,539,987.50 but did not disclose that it would only retain about 51% of that amount, with the rest going to consultants. According to PreveCeutical, the 51% figure is not a fair characterization because the amount paid or payable to consultants included over $134,000 in GST or HST, all of which was recoverable by PreveCeutical and all of which was in fact recovered by PreveCeutical in accordance with its past practice. We agree with PreveCeutical's analysis in that regard. We conclude that when we add the taxes recovered, exceeding $134,000, over 53% of the funds PreveCeutical raised was available for purposes which would, without dispute, be consistent with what reasonable investors would have expected.

[125] Van Deventer testified that he recommended the private placement transaction to his board of directors because it would give PreveCeutical "$1.3 million that [it] desperately needed." It is not apparent if any other benefit was expected to flow to PreveCeutical from the transaction. However, since the executive director has not argued that the consulting agreements provided no value to PreveCeutical or were otherwise improper, it is not open to us to conclude that the approximately 47% of funds raised and immediately spent on consultants should be treated as wasted money.

[126] It is correct, as the executive director submits, that none of the funds spent on consulting contracts was spent on research and development. It is also correct that those funds were unavailable to PreveCeutical to cover its operating costs for a period of more than a few months into the future. On the other hand, we find that given the significant funds raised, PreveCeutical's ongoing need for financing and the small size of the management team, a reasonable investor with knowledge of the omitted information would not have found it surprising if PreveCeutical were to increase somewhat the percentage of funds it spent on efforts to position itself for success in future financing rounds, and to make use of outside consultants for that purpose.

[127] We recognize that, although it is our duty to undertake the exercise of assessing the context in which facts were communicated to the market or withheld from the market by PreveCeutical, the exercise is an assessment, not a mathematical calculation. At all times the onus of proof is on the executive director to prove his case on a balance of probabilities. As a result, any significant uncertainty must favour the respondents.

[128] As we look at the degree of divergence between the 10% which PreveCeutical historically spent on consultants and the approximately 47% which it committed to consultants in this case without disclosing that fact to investors, we conclude that this degree of divergence is not nearly as large as existed in *New Point* and *BLOK Technologies*. We also conclude that a reasonable investor would not expect that PreveCeutical's historical record of spending 10% on consultants would create what might be called a hard cap on that type of expenditure.

[129] The degree of divergence between the historical spending pattern of PreveCeutical and the intended spending pattern at the time of the June 29, 2018 news release would not have made it necessary for PreveCeutical to disclose further facts in the absence of both the pre-existing

expectations which we have described above and the reinforcement to those expectations in that news release. When we view the evidence as a whole, and in context, we conclude that the executive director has proven that the news release was misleading. To put the situation in the most simple terms possible, it was misleading for PreveCeutical to announce that it had raised $6,539,987.50 in a private placement and to supplement that announcement with language describing how PreveCeutical "is continuing to meet key milestones in our portfolio of research and development programs…" without also disclosing the facts about how much money had already been spent or committed to the consultants. The omission of that information made the disclosure a half-truth.

[130] We emphasize here that full, fair and timely disclosure is the cornerstone of fair and efficient capital markets. The private placement and the contracts with the consultants constituted one transaction. It was a package deal. The decision of the respondents to resort to a half-truth in the news release by withholding that information falls far short of the standard of conduct expected of participants in the capital markets.

[131] We turn next to the element which is, in this case, the most challenging for the executive director to prove. That is the issue of whether the information omitted from the June 29, 2018 news release was material. In order to conclude that it was, we would have to find that the omitted information, if known, "would reasonably be expected to have a significant effect on the market price…" of PreveCeutical's shares.

[132] As was established in *Canaco* and other cases which have followed it, the market impact test is assessed from the point of view of the reasonable investor, based on what was known at the relevant moment, in this case at the time of publication of the news release.

[133] The respondents asked us to rely on opinion evidence, but for a number of reasons we found the opinion evidence before us to be of very limited value, and most of that limited value came from the fact evidence that was adduced through the expert witnesses rather than through their opinions. The primary reasons why the opinion evidence was of such limited value were:

(a) a significant proportion of the opinion evidence was to the effect that investors in PreveCeutical are distinct from normal investors and do not respond to news in the way one would expect for investors in non-venture issuers. Although the trading records provided in support of that opinion documented moments when what might be seen as good news did not result in changes in PreveCeutical's share price, there were moments when its share price did respond to news. No statistical analysis was provided to us to put those differing responses of investors into context, and no effort, other than a reference to the investor focus on cannabis stocks at the time, was made to analyze what other events were occurring in the market to explain unexpected reactions of PreveCeutical investors. More importantly, the Act specifies that we are to base our analysis on what would be expected of reasonable investors. We decline to assess the situation from the point of view of investors who do not care about good news.

(b) The other most relevant opinion provided to us was that an industry practice exists for issuers not to disclose the existence of consulting agreements when announcing new financings. It was demonstrated in cross-examination that in many cases, including in cases before the summer of 2018, issuers did accompany disclosure of new funding with disclosure of significant consulting contracts. This demonstrates, at a minimum, that if there was an industry practice it was one with a reasonable number of exceptions. More

importantly, the opinion provided did not extend to the existence of an industry practice not to disclose consulting agreements even when the cost of those agreements was out of character to the degree present in this case and even when, as here, further disclosure would have been necessary to avoid misleading investors through the limited disclosure which was provided by the issuer.

[134] Even if we had found the opinion evidence tendered here to be more than marginally helpful it would have fallen to us to exercise our own judgement in assessing whether the facts which PreveCeutical omitted to disclose would reasonably be expected to have a significant effect on the market price of PreveCeutical's shares. We are able to reach conclusions on that issue without relying on opinion evidence.

[135] Our analysis of materiality using the market impact test is, as it must be, highly contextual and fact-specific. In some respects the analysis turns on most of the same facts as the analysis of whether investors were misled by the non-disclosure which occurred here. In both cases it is essential to understand the expectations of investors at the time of the news release. However, the materiality analysis goes beyond the questions of what investors expected and whether facts not disclosed were necessary to avoid misleading investors. The market impact test turns on whether a significant effect on the price of a security, here PreveCeutical's stock, would reasonably be expected. The executive director must prove on a balance of probabilities not simply that investors were misled, but also that the impact would have been sufficiently serious from the point of view of reasonable investors that the effect on market price would have been significant.

[136] Our analysis under the market impact test brings us back to the conclusions that we express above regarding investor expectations. We have concluded that investors would have been surprised at the time of the June 29, 2018 news release to learn the extent to which PreveCeutical intended to spend funds on consultants. We have also concluded that investors would have expected PreveCeutical to be devoting resources to positioning PreveCeutical for future rounds of financing, and those efforts might include retaining consultants and there might be some reasonable degree of change in PreveCeutical's historical spending patterns when PreveCeutical raised a significant amount of new funding. Reasonable investors in these very specific circumstances would have felt that they were not given all of the facts necessary to have an accurate picture of what funds would be available to PreveCeutical, but it does not automatically follow that a "significant" effect on share prices would have resulted. In this case, given the degree to which PreveCeutical did keep funds available for expected uses and given the concurrent expectations which would have existed about the potential use of funds by PreveCeutical for services which might have been provided by consultants, we see it as an open question whether reasonable investors would have expected a significant effect on market price. In other words, although the executive director has come close, the evidence introduced before us has not established on a balance of probabilities that the omission which has been proven was material in the sense required by the relevant provisions of the Act.

[137] For the sake of clarity, we will restate our conclusions in deliberately over-simplified language. The executive director has proven that reasonable investors who learned what PreveCeutical had omitted from the June 29, 2018 news release would have thought "that is not what I thought based on the news release, I got the wrong impression because PreveCeutical withheld related information". However, it has not been established according to the required standard of proof that reasonable investors would have changed their behaviour, or expected other investors to

change their behaviour, in a manner which would have had a significant effect on the market price of PreveCeutical's shares.

[138] Materiality is also an element of the allegations against PreveCeutical under section 168.1(1)(b) of the Act. The absence of sufficient evidence to prove that the omitted information was material therefore disposes of the entire notice of hearing.

[139] In conclusion, this proceeding is dismissed.

May 2, 2024

For the Commission

Gordon Johnson
Vice Chair

Jason Milne
Commissioner

Marion Shaw
Commissioner