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

Citation: Re PreveCeutical Medical Inc., 2023 BCSECCOM 22 Date: 20230111

PreveCeutical Medical Inc. and Stephen Van Deventer

Panel	Gordon Johnson	Vice Chair
	Jason Milne	Commissioner
	Marion Shaw	Commissioner
Submissions completed	December 21, 2022	
Date of Ruling	January 11, 2023	

Counsel

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

Ruling

I. Introduction

[1] On December 12, 2022, PreveCeutical Medical Inc. (PreveCeutical) and Stephen Van Deventer (together Respondents) applied to the Commission for an order that the executive director provide information and particulars regarding allegations made by the executive director in the notice of hearing (Notice of Hearing) issued on February 14, 2022 (2022 BSECCOM 45).

[2] The specific order sought by the Respondents relates to a provision of the Securities Act (Act) which was allegedly breached, section 50(1)(d), and certain definitions which apply to that section. The Respondents seek the following orders:

(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 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 a 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.

[3] The Respondents and the executive director both provided submissions and affidavits. This application proceeded in writing.

[4] The issue of when and whether a notice of hearing lacks sufficient detail to allow a respondent to fairly respond should be considered in light of the specific context which exists in that proceeding. One relevant aspect of the context is the nature of the securities law issue which is engaged. Another relevant aspect is the degree of material disclosure which is already available to the respondent. Another relevant aspect is the history of the proceeding and the stage at which the application is brought. Each of these aspects is discussed briefly below.

II. Background

A. Context Within the Securities Regulatory Regime

[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.

[8] There can be many other factors relevant to the expectations of public markets and many of those factors might exist completely independently of any step taken by an issuer. However, to the extent that information disclosed by an issuer is relevant to the expectations of public markets the issuer should be aware of that information because the issuer will have been responsible for material public disclosure.

B. Context Regarding procedure for enforcement proceedings

[9] The Commission's hearing procedures are guided by BC Policy 15-601. That policy addresses the general requirement for fairness, it addresses the ability of the Commission's panels to control their own process in a flexible manner and it sets expectations that proceedings commenced by notice of hearing will move through a set date hearing, a hearing management meeting and possibly through preliminary applications before a hearing commences. The "hearing" will usually have two phases: the liability portion of the hearing and, if necessary, the sanction portion. During both phases, all parties have the opportunity to adduce evidence as well as make arguments and submissions to the panel.

[10] BC Policy 15-601 specifically addresses the obligation of the executive director to make general disclosure to all respondents as well as the obligation of all parties to make disclosure of evidence which is intended to be introduced at a hearing:

> 3.6 Disclosure
> ***(a) General principle*** – Full and timely disclosure promotes fairness and efficiency in hearings. The Commission expects each party who intends to produce evidence in a hearing to disclose that evidence to the other parties long enough before the hearing to give them reasonable time to prepare. This includes identifying evidence to be relied on, the identity of the witnesses the party intends to call, and what they expect the witness will say.
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> …
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> ***(b) Enforcement hearings*** – In an enforcement hearing, the executive director must disclose to each respondent all relevant information that is not privileged. The executive director must also provide each respondent a reliance list, identifying the records the executive director intends to rely on at the hearing.

[11] By the time of a hearing all respondents should have received both a general disclosure documents list and a reliance list which identifies the documents which the executive director hopes to introduce into the evidentiary record at the hearing on the merits of the Notice of Hearing. When supplemented by standard will say statements this disclosure will, in most cases, provide all respondents with a clear picture of the case which they must meet.

[12] It is not unheard of that during a hearing one of the parties, sometimes the executive director, will ask to introduce evidence which was not disclosed in advance. Relevant evidence can be admitted even if it was not disclosed in advance. However, in some circumstances late-tendered

evidence might be excluded. In addition, when one party is permitted to admit evidence which was not disclosed in advance, other parties are often offered accommodations in terms of adjournments or opportunities to obtain and adduce responsive evidence. The panel at any hearing has a discretion to take measures to prevent unfairness when previously undisclosed evidence is introduced.

C. Context Arising from Procedural History

[13] The Notice of Hearing was issued on February 14, 2022. Some of the key allegations in the Notice of Hearing are:

> 8. On June 29, 2018, PreveCeutical announced that it had closed the private placement for gross proceeds of $6,539,987.50. PreveCeutical did not disclose that it would only retain $3,252,090.11, or less than 50% of the amount raised, because it:
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> - had already spent $2,924,406.14 of the funds on consulting fees, and
> - owed $363,491.25 of the funds in additional consulting fees.
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> 9. By announcing the proceeds from the private placement but failing to disclose that it would retain less than 50%, 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.
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> 10. 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 this Act that in a material respect was false or misleading, contrary to section 168.1(1)(b) of the Act.

[14] On April 11, 2022, the Respondents delivered a written demand for particulars regarding the allegations in the Notice of Hearing. Counsel for the executive director provided some information regarding the nature of the allegations in a subsequent telephone discussion with counsel for the Respondents prior to the set date hearing held on April 14, 2022.

[15] At the set date hearing counsel for the executive director provided some further comments regarding the nature of the allegations in the Notice of Hearing. Also at that hearing counsel for the Respondents identified the potential that there might be an application brought to intervene in a proceeding which raised issues similar to this one and identified the possibility that the Respondents would tender opinion evidence in the proceeding it hoped to intervene in or in this proceeding.

[16] On May 5, 2022, the Respondents made a further written request to the executive director for clarification of the case against them. On May 13, 2022, the Respondents applied to intervene in a related proceeding which raised many of the same issues that exist in the current proceeding.

[17] During submissions in the course of the May 13, 2022 application to intervene counsel for the executive director addressed an argument which was, in substance, that this proceeding and related proceedings were intended to create a new rule related to private placement disclosure which set a limit on the proportion of funds raised in a private placement that could be spent on

consultants. Counsel for the executive director disagreed with that argument, distinguishing the other proceedings involving Bam Resources Inc. from the matter before us, stating:

> The panel will be asked to determine whether Bam Resources Inc. (Bam Resources) made misrepresentations by omission in two news releases announcing the closing of private placements. That will require assessments of materiality based on Bam Resources' public disclosure and investors' perception about Bam Bam [sic] Resources during the relevant period. None of the panel's findings in that regard will directly impact the applicants or their ability to defend the allegations against them at the PreveCeutical hearing. Further, the applicants will not bring a unique and different perspective from what the respondents themselves could bring to assist the panel in the resolution of the issues.

[18] Later, the Respondents renewed their demands for particulars and the executive director provided an explanation of the Notice of Hearing which can be paraphrased as follows: the central issues in this proceeding are whether the announcement by PreveCeutical that it had raised an amount by private placement without disclosing that it was retaining less than half of the funds due to undisclosed consultant fees was misleading and material.

[19] The Respondents then brought this application.

III. Position of the Parties

[20] The Respondents express their primary argument most clearly in their reply:

> The Respondents have to prepare a defence to the Executive Director's allegations and they cannot do so without knowing what the Executive Director alleges they did wrong with reference to the specific elements of the statutory provisions in issue and the Executive Director's legal reasoning.

[21] The Respondents assert that the particulars they seek have the legitimate purposes of informing them of the case they have to meet (as opposed to the mode in which that case is to be proved), preventing them from being surprised at the hearing and tying the hands of the executive director so that the executive director cannot, without leave, go into any matters not included in any response.

[22] The Respondents have provided a detailed breakdown of the elements of the section of the Act which are relevant. They have emphasized some uncertainties regarding how the Act might apply or not apply depending on how the provisions in question are interpreted.

[23] The Respondents assert that the responses they are seeking are needed for them to properly prepare their defence at the February 23, 2023 hearing. They submit they particularly need the particulars to assist them in obtaining the opinion evidence which they might tender at the hearing. They assert that they will not receive a fair hearing if they are forced to proceed without the responses which they are seeking from the executive director.

[24] The executive director argues that the Notice of Hearing is succinct and the allegations are straightforward. He submits that sufficient notice has been provided for the Respondents, who are represented by senior counsel, to appreciate the case to be met.

[25] The executive director refers to the Court of Appeal decision in *McCabe v. British Columbia (Securities Commission)*, 2015 BCCA 176 in support of the proposition that the Commission is the master of its own procedure, and that procedural fairness requires that sufficient notice be given to respondents to appreciate the case to be met. The executive director submits that the Respondents are not seeking information to appreciate the case to be met, they are instead seeking to compel the executive director to disclose how the executive director plans to prove his case.

[26] The executive director makes some reference to civil law decisions regarding particulars, although the executive director submits that this proceeding is regulatory and not judicial and, as noted in *McCabe*, the Commission must proceed fairly but must also be given scope to perform its public-interest functions efficiently and effectively.

[27] The executive director submits that the application should be dismissed.

IV. Analysis

[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 misrepresentation. 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.

[33] Turning to the six specific orders sought, we conclude that given the context that applies orders (a)(i), (b)(i) and (b)(ii) are obviously answered already. For example, proposed order (a)(i) would require disclosure by the executive director of what "significant effect" the disclosure of the consulting fees would have had. It is simply not credible that, in order to prepare their defence, the Respondents need to receive confirmation the executive director is not alleging that full disclosure regarding the private placement proceeds, as opposed to partial disclosure, would have been perceived by the market as materially positive news. It is also obvious that although the executive director has alleged that non-disclosure was material, it is up to the panel to assess materiality based on all of the circumstances. It is not helpful for the executive director to provide a position in advance of legal arguments on exactly what degree of impact qualifies as a "significant effect".

[34] The orders sought which are numbered (a)(ii) and (b)(iii) would, in effect, compel the executive director to quantify the threshold of undisclosed consultant spending at which the representations in question became misleading. However, the existence of such a specific threshold is explicitly not part of the executive director's case. Implicitly a hypothetical line could be drawn somewhere, but the executive director is not submitting there is a line of general application. Each situation would have to be assessed against all of the circumstances and, the Notice of Hearing alleges, the undisclosed consultant spending in this case was too much.

[35] The order sought which is identified as (c) would require the executive director to disclose the evidence and legal basis upon which the executive director intends to establish each of the details of its allegations referenced by the Respondents. As we have already concluded, the legal basis for the allegations has already been explained in a manner which is clear and easy to understand. The request that all evidence be broken out and tracked to each element of the alleged breach is overly broad. The Respondents have access to the evidence in advance of the hearing and are able to prepare for the hearing. The evidentiary record might be quite extensive and it might include considerable elements that are nuanced. Explaining each element of the evidence as the Respondents request would be a major undertaking which would require the dedication of significant resources by the executive director. The delivery of such a work product is not necessary to achieve fairness.

[36] In addition, we note that once all of the evidence is received it will be the duty of the panel to assess each element of that evidence in light of the whole, after hearing submissions and argument from the parties advocating how the panel should do so. The public interest requires us to come to our own conclusions about how the evidence fits together. We will, at the correct time, welcome the submissions of all parties on how to perform our duties.

[37] Finally, we emphasize that the context in which the pending hearing will proceed includes options other than the delivery of particulars to ensure that the Respondents have a fair hearing and particularly that they are not surprised by unexpected evidence or arguments. The Respondents are represented by experienced and skilled counsel. If counsel for the executive director changes the nature of the legal arguments in a material way from what the Respondents have been told to expect or if the executive director seeks to introduce evidence which was not properly disclosed in advance, the Respondents are free to apply to exclude evidence or at least for an opportunity to adjust the hearing process to allow a fair response.

[38] We conclude that the Respondents have not shown that fairness requires that we make the order sought.

V. Ruling

[39] The application is dismissed.

January 11, 2023

For the Commission

Gordon Johnson
Vice Chair

Jason Milne
Commissioner

Marion Shaw
Commissioner